

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: LIQUORLAND (AUSTRALIA) PTY LTD

OTHER PARTIES: COMMISSIONER OF POLICE (INTERVENOR)

PREMISES: LIQUORLAND MIDLAND

PREMISES ADDRESS: 274 GREAT EASTERN HIGHWAY, MIDLAND

APPLICATION ID: A000248290

MATTER: APPLICATION FOR CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

DECISION OF: PETER MINCHIN
DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 21 MAY 2018

Introduction

- 1 Liquorland (Australia) Pty Ltd (the applicant) seeks the conditional grant of a liquor store licence for premises to be located in the Midland Gate Shopping Centre, 274 Great Eastern Highway, Midland and known as Liquorland Midland. The application is made pursuant to ss 47 and 62 of the *Liquor Control Act 1988* (the Act).
- 2 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. There were no objections to the grant of the application, however, the Commissioner of Police (the Commissioner), in accordance with s 69 of the Act, lodged a notice of intervention.
- 3 The application will be determined on the written submissions of the parties as permitted under ss 13 and 16 of the Act. Further, this decision has been prepared and should be read, in the context of a high-volume liquor jurisdiction which is to act as speedily and with as little formality and technicality as is practicable.¹

A brief overview of the applicant's proposal

- 4 It was submitted that the Midland Gate Shopping Centre (the Centre) is a Strategic Metropolitan Activity Centre, which is the highest order of retail activity centre. Strategic Centres are intended to contain a full range of speciality shops, along with a full range of economic and community services necessary for the communities within their catchments. According to the applicant, the Centre is one of the most important regional retail centres in Western Australia and is undergoing a significant \$100 million expansion which will result in the Centre having 215 retail outlets. At present, there is only one liquor store located in the Centre, which is a BWS store.

¹ Refer s 16(7) of the Act.

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- 5 The applicant proposes to establish a moderately sized liquor store in the Centre, adjacent to a Coles supermarket. The proposed liquor store will be about 202m² in size, which incorporates a selling area of 153m². The proposed liquor store will be a typical Liquorland convenience browse outlet and will be constructed in accordance with Coles Liquor's new and improved Liquorland template which has been designed to ensure that the internal fit out maximises the benefit and convenience and service to customers.
- 6 The applicant lodged a Public Interest Assessment (PIA) to support its application. The PIA also included:
- a town planning report prepared by MGA Town Planners (the MGA report);
 - a survey of consumers undertaken by Data Analysis Australia (the DAA report); and
 - a social impact and amenity report prepared by Bodhi Alliance (the Bodhi report).
- 7 According to the applicant, the grant of the application will have the following positive benefits for the community:
- provide for one-stop shopping for consumers;
 - provide choice and competition for consumers using the Centre;
 - greatly contribute to the amenity of the area, particularly by providing a focal retail point;
 - enable residents to shop locally, preventing economic leakage; and
 - provide employment opportunities for local residents.

A brief overview of the intervention

- 8 The Commissioner intervened in the application to provide evidence relevant to the public interest considerations under the Act and to recommend, if the application is approved, various conditions for the licence to minimise the potential risks associated with the operation of a liquor store in this locality.
- 9 The Commissioner provided crime and harm data for the locality. According to the Commissioner:
- alcohol-related domestic assaults for the suburb of Midland for the 2016 calendar year, when calculated per 1,000 persons, were 3 times higher than the corresponding Midland sub-district rate;
 - the rate of alcohol-related domestic assaults for the suburb of Midland was 5 times higher than the metropolitan rate and 3 times higher than the State rate for 2016;
 - alcohol-related domestic violence for the suburb of Midland has risen by 77% from 2014 to 2016. By contrast, for the same period, the metropolitan region recorded a 7% increase and the State rate increased by 11%;
 - alcohol-related non-domestic assaults in the suburb of Midland for the 2016 calendar year were 4 times higher than the Midland sub-district rate, 4.5 times higher than the metropolitan rate and 3.5 times higher than the State rate.

- from January 2014 to December 2016, police received 1,095 calls for assistance for domestic related matters for the suburb of Midland, while there were a further 1,207 calls for the remainder of the locality;
 - calls for assistance with regard to domestic related incidents for the 2016 calendar year for the suburb of Midland, when calculated per 1,000 persons, was 3.7 times higher than the corresponding metropolitan rate and 3 times higher than the State rate;
 - there has been a 38% increase from 2014 to 2016 for call for assistance for domestic violence in the suburb of Midland and a 52% increase in the suburb of Midvale. The Midland/Midvale border is situated approximately 500 metres from the proposed liquor store; and
 - from 2014 to 2016, there was a 115% increase in drivers stopped and charged with drink driving in the suburb of Midland.
- 10 The Commissioner noted that most of the suburbs in the locality surrounding the proposed liquor store are socio-economically disadvantaged with the suburbs of Midland, Midvale, Middle Swan and Bellevue all recording SEIFA² deciles well below the State average, while the suburbs of Viveash and Woodbridge record above average SEIFA deciles.
- 11 The Commissioner referenced research which demonstrates a relationship between the increased availability of discount liquor and increase levels of alcohol-related harm and the most frequent place of purchase for alcohol consumed in a family violence incident was at a supermarket liquor store.
- 12 According to the Commissioner, there are currently six dedicated packaged liquor outlets in the area, together with a further five taverns, which also provide packaged liquor to the public. Dan Murphy's store and First Choice Liquor Super Store are both located less than 800 metres from the proposed premises and there is already a BWS liquor store located in the Centre.
- 13 It was therefore recommended by the Commissioner that if the application is granted, conditions relating to CCTV, security, advertising and the use of lockable glass cabinets be considered.

Determination

- 14 The applicant seeks to establish a convenience style liquor store adjacent to a Coles supermarket in the Midland Gate Shopping Centre. The Centre is undergoing a \$100 million redevelopment. It was submitted by the applicant that the grant of the application will have the following benefits for the community:
- provide for one-stop shopping for consumers;
 - provide choice and competition for consumers using the Centre;

² Socio-economic Index for Areas

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- greatly contribute to the amenity of the area, particularly by providing a focal retail point;
 - enable residents to shop locally, preventing economic leakage; and
 - provide employment opportunities for local residents.
- 15 The Commissioner intervened in the application and provided evidence on the existing crime and harm data for the area, with a view that if the application is granted, harm minimisation conditions should be imposed on the licence.
- 16 There is no presumption in favour of the grant of the application. An applicant for the grant of a liquor store licence must satisfy the licensing authority that the grant of the application is in the public interest.³ In determining whether the grant of the application is 'in the public interest', the factual matters which I am bound to consider are those relevant to the primary and secondary objects of the Act, as set out in s 5.⁴
- 17 The primary objects of the Act are:
- to regulate the sale, supply and consumption of liquor;
 - to minimise harm caused to people, or any group of people, due to the use of liquor; and
 - to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
- 18 The secondary objects of the Act are:
- to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State;
 - to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of the Act.
- 19 In response to the matters raised by the Commissioner in his intervention, the applicant submitted that:
- although there are a number of existing packaged liquor outlets in the area, the impact of increased outlet density should be assessed in light of consumer requirements and it is not uncommon to have multiple convenience style packaged liquor outlets in the same shopping centre;
 - it acknowledges that there is harm occasioned by alcohol in the area, however the applicant contends that the proposed liquor store, with its extensive and strict security measures will be unlikely to cause undue harm within the locality;

³ Refer s 38(2) of the Act.

⁴ *Woolworths v Director of Liquor Licensing* [2013] WASCA 227.

- the harm minimisation object of the Act does not contemplate the absolute prevention of harm;
- while Midland does experience more alcohol-related harm than the Greater Perth average, it is consistent with other hubs, including Fremantle, Perth and Mandurah;
- it is unlikely that the grant of the application will result in an increase in the rate of drink driving offences particularly in circumstances where packaged liquor is already available from other outlets in the locality;
- the SEIFA rating for the area when calculated by postcode or by local government area shows that the population is 'average' when compared to the State;
- the only at-risk group which is over-represented in the locality is indigenous people;
- the store will cater for one-stop-shopping for consumers at the new, redeveloped Centre and offer value to consumers for single purchase items, intended to be purchased in conjunction with a weekly grocery shop;
- it disputes that there is a significantly greater amount of alcohol-related crime and harm occurring in the locality or that it is at such a level where any increase, even small, would be unacceptable;
- the City of Swan has historically only suffered 0.83 times the State average of alcohol-related ill-health and hospitalisations;
- it has very stringent harm minimisation practices and RSA policies in place and therefore the grant of the application is unlikely to result in an undue increase in alcohol-related harm in the locality (or elsewhere). In acknowledging that its harm minimisation practices cannot directly prevent harm caused by the consumption of packaged liquor away from the premises, its practices and security measures are industry leading and designed to address site-specific concerns;
- the proposed manner of operation of the store, coupled with appropriate conditions, will sufficiently minimise the risk of an unacceptable increase in the existing level of harm; and
- the benefits to the community from the grant of the application outweigh the risks.

20 Buss J in *Woolworths v Director of Liquor Licensing*⁵ stated that it is a notorious fact that in contemporary Australian life one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and that this social fact is reflected in the development of district and regional shopping centres.

21 This 'notorious' fact, together with the survey evidence and other evidence submitted by the applicant supports a finding that the grant of the application would promote object 5(1)(c) of the Act, in that the grant of the application would be catering to the requirements of consumers for liquor and related services.

22 However, the application must also be considered with regard to the other objects of the Act, one of which is to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor. This is of relevance given the evidence provided by the Commissioner in his intervention.

⁵ [2013] WASCA 227

23 It is appropriate to make two observations at this point. First, the harm contemplated by the Act is not confined to consumers of alcohol and extends to harm caused to people other than the consumer of liquor.⁶ This will include harm caused to the health and well-being of individuals, families and communities, as well as social, cultural and economic harm. Secondly, the primary object of s 5(1)(b) is to “minimise” harm or ill-health, not to prevent harm or ill-health absolutely. The word “minimise” is consistent with the need to weigh and balance all relevant considerations.⁷

24 Allanson J in ***Carnegies Realty Pty Ltd v Director of Liquor Licensing***⁸ held that where object 5(1)(b) was relevant to the determination of an application there are four steps to be undertaken, namely:

- make findings that specifically identified the existing level of harm and ill-health in the relevant area due to the use of liquor;
- make findings about the likely degree of harm to result from the grant of the application;
- assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
- weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether the applicant has satisfied the licensing authority that it was in the public interest to grant the application.

24 In my view, the evidence presented in this case establishes that there is an existing high level of alcohol-related harm and ill-health in the locality surrounding the proposed liquor store. This is based upon consideration of the following evidence:

- alcohol-related domestic assaults for the suburb of Midland for the 2016 calendar year, when calculated per 1,000 persons, were 3 times higher than the corresponding Midland sub-district rate;
- the rate of alcohol-related domestic assaults for the suburb of Midland was 5 times higher than the metropolitan rate and 3 times higher than the State rate for 2016;
- alcohol-related domestic violence for the suburb of Midland has risen by 77% from 2014 to 2016 (increasing significantly from 2014 to 2015 and maintaining that level from 2015 to 2016). By contrast, for the same period, the metropolitan region recorded a 7% increase and the State rate increased by 11%;
- alcohol-related non-domestic assaults in the suburb of Midland for the 2016 calendar year were 4 times higher than the Midland sub-district rate, 4.5 times higher than the metropolitan rate and 3.5 times higher than the State rate.
- from January 2014 to December 2016, police received 1,095 calls for assistance for domestic related matters for the suburb of Midland, while there were a further 1,207 calls for the remainder of the locality;

⁶ ***Re Gull Liquor, Gingers' Roadhouse Upper Swan*** (1999) 20 SR (WA) 321, 340 (Greaves J);

⁷ ***Executive Director of Public Health v Lily Creek International Pty Ltd*** [2000] WASCA 258;

⁸ [2015] WASC 208.

- calls for assistance with regard to domestic related incidents for the 2016 calendar year for the suburb of Midland, when calculated per 1,000 persons, was 3.7 times higher than the corresponding metropolitan rate and 3 times higher than the State rate;
 - there has been a 38% increase from 2014 to 2016 for call for assistance for domestic violence in the suburb of Midland and a 52% increase in the suburb of Midvale. The Midland/Midvale border is situated approximately 500 metres from the proposed liquor store; and
 - From 2014 to 2016, there was a 115% increase in drivers stopped and charged with drink driving in the suburb of Midland.
- 25 Alcohol-related harm in the locality is significantly higher than the State rate and alcohol-related domestic violence in Midland has increased by 77% in recent years. I note that the Bodhi report provided data for the period 2007 to 2011 from the Drug and Alcohol Office Surveillance Report which indicates that the City of Swan local government area, of which the locality is a sub-set, recorded lower rates of alcohol-related hospitalisations (0.83 times) than the State rate. The City of Swan covers a large geographic area and this data (which is seven years old) does not change my finding that the locality surrounding the proposed liquor store presently experiences a high rate of alcohol-related harm.
- 26 The MGA report concluded that the locality population may be considered to feature average levels of socio-economic advantage/disadvantage and may be considered a moderate risk community. The MGA report considered the SEIFA index for the postcode of 6056, which has a decile of 5 nationally and 4 State wide. This postcode includes the suburbs immediately surrounding the Centre (Midland, Midvale, Viveash, Bellevue, Woodbridge and Middle Swan) together with a further 11 suburbs spread over a wide area and includes semi-rural populations.
- 27 However, the evidence from the Commissioner is that the suburbs in immediate proximity to the Centre are highly disadvantaged, with the suburbs of Midland and Midvale scoring a SEIFA decile of 1, while Middle Swan and Bellevue have a decile of 3. The only suburbs immediately surrounding the proposed liquor store with a positive socio-economic profile are Viveash (6) and Woodbridge (6).⁹ The Bodhi report also notes that the suburb of Midland, which takes in most of the residential population of the locality, is a disadvantaged community with a SEIFA decile of 1 when compared to other suburbs in WA, and a decile of 2 in comparison to all suburbs in Australia.
- 28 The proposed liquor store is a convenience style outlet which will increase the physical availability of liquor within the Centre and in the locality. Although the Centre has a wide catchment area, as evidenced from the intercept survey (only 10% of respondents coming from the suburb of Midland itself and another 9% from the other suburbs that comprise, wholly or partly, the locality) this does not mean that the residents of the locality do not use the Midland Gate Shopping Centre. As reported in the DAA report, 67% of those interviewed in the door-to-door survey stated they would use the Centre at least weekly

⁹ The SEIFA decile is on a scale of 1 to 10, with the lower the decile the greater the level of disadvantage.

once the redevelopment is finished, a result consistent with the high proportion who currently use at least the Coles or Woolworths stores at the Centre. Notwithstanding the wide catchment of the Centre, it will nonetheless be heavily used by residents of the locality, particularly those from Midland (as stated in the DAA report), who experience a high degree of social disadvantage and harm.

29 It was submitted by the applicant that the proposed store will provide choice and competition to the existing BWS store in the Centre. It is possible that this competition would put downward pressure on the price of alcohol in the area, or at least in the Centre. The DAA report stated that shoppers use both the Coles and Woolworths supermarkets to compare prices, and this is likely to extend to liquor if the application is approved. Respondents to the surveys thought that one of the benefits of the application was better cost competitiveness.

30 I find that the evidence presented in this case clearly establishes the following risk factors, which are relevant when assessing the vulnerability of the community to the likely adverse impacts of alcohol use:

- the suburb of Midland, which takes in most of the residential population of the locality, currently experiences high rates of alcohol-related harm;
- alcohol-related domestic violence in the suburb of Midland has increased significantly in recent years;
- the locality immediately surrounding the proposed liquor store experiences a high degree of social disadvantage, with:
 - significantly high unemployment rates (7.9% compared to Greater Perth 4.8%);
 - below average individual, household and family income levels;
 - significantly more lone person households (37.2% compared to Greater Perth 23.0%);
 - significantly more single parent families (25.9% compared to Greater Perth 14.5%); and
 - significantly more rented homes (48.0% compared to Greater Perth 26.7%);
- the proportion of indigenous persons on the locality is significantly higher (5.9% in the Bodhi report and 4.9% in the MGA report) than the Greater Perth area (1.6%) and the State (3.1%); and
- residents from the suburbs immediately surrounding the proposed liquor store are heavy users of the Centre.

31 Although 44% of respondents in the door-to-door survey and 46% in the intercept survey indicated that they saw benefits with the grant of the application (with the main benefit relating to convenience), there was also a reasonable percentage of respondents who expressed concern with the application (45%, or almost half, in the door-to-door survey, and 32% in the intercept survey). The primary concern related to it increasing or causing anti-social behaviour.

32 Assessing the likely harm to result from the grant of the application is, by necessity, a matter of prediction, however, in making such an assessment I am not required to find as

a fact that harm *will* occur because of the grant of the application, or to find a causal link. Ipp J in *Lily Creek*¹⁰ stated that:

“whether harm or ill-health will in fact be caused to people, or any group of people, due to the use of liquor is a matter for the future and, in the sense referred to at 516 in Malec v JC Hutton Pty Ltd, is essentially a matter of prediction. The Licensing Authority will only be able to determine the likelihood of harm or ill-health occurring by reference to a degree of probability.”

- 33 The applicant acknowledges, quite rightly in my view, that its harm minimisation practices cannot directly prevent harm caused by the consumption of packaged liquor away from the premises. The applicant submitted however that its practices and security measures are industry leading and designed to address site-specific concerns. It was further submitted that the proposed manner of operation of the store together with suitable harm minimisation conditions will sufficiently minimise the risk of an unacceptable increase in the existing level of harm.
- 34 When I consider the risk factors that have been outlined at [30] above, together with the research material referenced by the Commissioner which highlights the role of packaged liquor in domestic violence and increased outlet density increases the risk of harm, I find that it is highly likely, on the balance of probability, that over time the grant of this application will contribute to the high rate of alcohol-related harm that presently exists in the community. I do not accept the applicant’s submission that its practices; proposed manner of operation; and any reasonable conditions on the licence will sufficiently mitigate the potential risks to this community. The harm caused by packaged liquor occurs in circumstances and places beyond the control of the applicant.
- 35 Where conflict arises in promoting the objects of the Act, the licensing authority must weigh and balance the competing interests in each case.¹¹ However, it is a matter for the licensing authority to decide what weight to give to the competing interests and other relevant considerations.¹²
- 36 Overall, I find that the stated benefits to the community from the grant of the application to be marginal. The DAA report stated that both surveys indicated that many users of the Midland Gate Shopping Centre are likely to use both the Coles and Woolworths supermarket on the same trip and therefore, the existing BWS liquor store can provide for the one-stop shopping requirements of the public using the Centre. The surveys indicate that the most popular liquor stores in the area are the destination outlets of Dan Murphy’s and First Choice and respondents will not replace their use of the destination stores, but for a proportion of their purchases, typically small ones, the grant of the application will provide a level of convenience simply from being in the same shopping centre.¹³

¹⁰ *Supra*

¹¹ *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).

¹² *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASC 356.

¹³ Paragraph 71 of the DAA report.

37 In LC 18/2015, the Liquor Commission observed at [125] to [129] that:

“Convenience is just one factor to be considered when considering the requirement of consumers for liquor - under the current Act it must be considered having regard to the proper development of the liquor industry, the other objects of the Act and, of course, the public interest.

It is accepted in the community, as evidenced by the many and varied shopping centres and precincts, that there may be some level of inconvenience experienced in purchasing liquor.

Liquor is a product that may have negative consequences in the community and is subject to extensive regulation as to its sale, supply and consumption. These controls and restrictions exist for the benefit of the community and whilst some members of the community may express a desire for more convenience, the Commission is entrusted with the responsibility of making a determination on whether the public interest is served by any proposal to widen or extend the level of convenience currently enjoyed by the public by the extension or granting of certain licences.

Many shopping centres and precincts, for example, have independent liquor stores quite removed from the local supermarket, and, for that matter, removed from the bakery, post office, bank, butcher or other retail outlets or public utilities regularly frequented as part of a person’s or family’s weekly or regular shopping expedition. Some liquor stores are even located in relatively isolated areas separate from a shopping centre or precinct.

A liquor outlet at every corner delicatessen or beside every supermarket or regularly visited retail outlet to satisfy the convenience of some members of the public is not what the community would countenance or expect, and would not be, in the Commission’s view, in accordance with the provisions and intent of the Act.”

38 In ***Liquorland (Australia) Pty Ltd v Executive Director of Public Health***¹⁴ Edelman J stated:

‘In assessing the overall question of whether granting the application is in the public interest it is relevant to consider the baseline level of risk and, in that context, the effect of an increase in risk from the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated. Similarly, it is relevant that there are existing ‘at risk’ persons who might be further affected.’

¹⁴ [2013] WASC 51

- 39 Where there is already a high level of alcohol-related harm in the community, it may be that even the smallest risk of a further increase in harm is unacceptable.
- 40 In *McKinnon v Secretary, Department of Treasury*¹⁵ Tamberlin J said:
- “The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the publicand its content will depend on each particular set of circumstances.”*
- 41 Consequently, when I weigh balance the competing interests in this case, based upon the totality of the evidence presented, I find that the marginal benefits to consumers, if the application is granted, are outweighed by the likelihood of an increase in harm and ill-health due to the use of liquor in this already at-risk community. Given the profile of the locality, even a small risk of an increase in alcohol-related harm is unacceptable.
- 42 Therefore, I find that the applicant has failed to discharge its onus under s 38(2) of the Act and satisfy me that the grant of the application is in the public interest. Consequently, the application is refused.
- 43 Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
- 44 This matter has been determined by me under delegation pursuant to s 15 of the Act.



Peter Minchin
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

¹⁵ [2005] FCAFC 142