

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: HIGHCLERE PTY LTD

PREMISES: DONNYBROOK LIQUOR STORE

PREMISES ADDRESS: 38 SOUTH WESTERN HIGHWAY, DONNYBROOK

APPLICATION ID: A000188763

NATURE OF APPLICATION: CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

DATE OF DETERMINATION: 30 AUGUST 2016

Introduction

- 1 This is an application by Highclere Pty Ltd (the applicant) for the conditional grant of a liquor store licence for premises to be known as Donnybrook Liquor Store and located at 38 South West Highway, Donnybrook. 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. Objections to the grant of the application were lodged by:
 - Mark Stephen Manea;
 - P M Harrison;
 - The Ngalang Mia Aboriginal Corporation;
 - E M Ramsay;
 - Ryan & Durey Solicitors on behalf of 142 objectors.
- 3 As permitted under ss 13 and 16 of the Act, the application will be determined on the written material lodged by the parties.

Overview of the evidence and submissions of the parties

The applicant

- 4 The applicant seeks to establish a liquor store adjacent to the existing Donnybrook Fresh Supa IGA store at 38 South West Highway, Donnybrook. The IGA store is also operated by the applicant. It was submitted by the applicant that the grant of the application will provide the only one-stop shopping experience in Donnybrook.
- 5 The proposed liquor store will be approximately 300m² in size and carry stock to the value of about \$180,000 at any one time. The applicant proposes to offer the following services in conjunction with the operation of the liquor store:
 - trading hours will be Monday to Saturday from 8.30 a.m. to 7.30 p.m.

- specialise in locally produced wine, cider and beer varieties;
 - stock a significant range of well priced wine from leading South West producers which will be sold under the store's own label;
 - provide in-store tastings;
 - establish an on-line ordering system;
 - offer free home delivery within the Donnybrook area;
 - form a wine club;
 - host liquor appreciation sessions conducted by local producers and liquor industry experts;
 - sell a range of ancillary products such as eskies, chiller bags, chocolates and other local foodstuffs; and
 - provide a comprehensive range of standard liquor products.
- 6 According to the applicant, the only dedicated liquor store outlet in Donnybrook is located 300 metres south of the IGA supermarket and is a Cellarbrations branded liquor store. It was submitted that the Cellarbrations store is not within a reasonable walking distance, particularly for those people carrying goods after completing their weekly shopping at the IGA. There are also two hotels in town, however, the applicant submitted that these hotels only offer a very limited range of takeaway liquor products and do not have any dedicated display cabinets or browsing areas. All takeaway liquor must be purchased over the bar. Consequently, it was submitted by the applicant that there is a lack of quality and diversity in terms of packaged liquor outlets in the Donnybrook area.
- 7 The applicant submitted a Public Interest Assessment (PIA) to support its application. The PIA contained information on the applicant's proposed manner of trade; the socio-economic profile of the locality; the positive benefits to the community; addressed the matters set out in s 38(4) of the Act; and included various legal submissions. The applicant also submitted 83 witness questionnaires, survey data (original survey and a supplementary survey) and letters of support.

The objectors

- 8 Mr Manea regularly uses Cellarbrations Donnybrook, as well as outlets in Bunbury and on the internet, for his liquor supplies. He is concerned that Donnybrook is not large enough to support any more commercial packaged liquor outlets and the degree of retained wealth within the community through local ownership and control will diminish if another commercial packaged liquor outlet is approved. It was submitted by Mr Manea that there are three commercial packaged liquor outlets in Donnybrook, which has a population of 2532 and this equates to one outlet for each 844 in

population. If this application is approved, there will then be one outlet for each 633 in population which is far less than the ratio of outlets to population in Busselton and Bunbury. According to Mr Manea, if the application is approved, this would have a major impact on the viability of one or all of the current commercial packaged liquor outlets in Donnybrook.

- 9 The Chairperson of the Ngalang Mia Aboriginal Corporation submitted that there are enough liquor outlets in Donnybrook and while there are no significant problems with the current population, they do not want their shire to turn into the kind of towns in the northern part of the State.
- 10 Mrs Harrison submitted that the grant of the application may negatively impact on existing businesses in town. The existing businesses are run by local families who have resided and contributed as residents of Donnybrook to the local community. According to Mrs Harrison, the applicants do not reside in Donnybrook and only visit the town a few days per week, staying in Bunbury, and therefore they do not support the local accommodation providers. Mrs Harrison stated that Cellarbrations Donnybrook provides everything that a customer may want, including local wines and various specials. Parking and access to the Cellarbrations store is not a problem with customers being able to park out front of the store, across the road or in a nearby parking area.
- 11 According to E M Ramsay, Donnybrook is a small country town with a relaxed lifestyle. There are already a number of liquor outlets in town and the business community is, for the most part, in the hands of local residents who show a commitment to the community and provide a good service. Given the current population of the town and the proximity to Bunbury, there is no need for a further liquor outlet.
- 12 It was submitted by Ryan & Durey Solicitors that the evidence referenced in the applicant's PIA should not be given any significant weight as it is not substantiated, irrelevant and not objective. In respect of the applicant's Market Research, it was submitted that the survey and questionnaire, prepared and conducted by the applicant, does not reflect a representative sample of the community as they are already predisposed to shopping at the applicant's premises. It was further submitted that the applicant's PIA is focused on the supposed convenience of one-stop shopping, however:
 - the proposed application does not provide for one-transaction shopping;
 - the convenience of one-stop shopping is not enough to meet the public interest requirement of the Act; and
 - not everyone wants to buy their liquor at the same time as doing their grocery shopping.
- 13 Ryan & Durey Solicitors submitted that a distinction must be made between 'one-stop shopping' requirements of consumers in country towns as opposed to larger cities. The

convenience for one-stop shopping in smaller country towns is not as necessary when compared to cities, given that those living in regional towns often have to visit nearby larger towns for supplies and services. Whilst the applicant claimed that many residents of Donnybrook travel to Bunbury to purchase packaged liquor, the objectors submitted that residents of Donnybrook have numerous reasons to visit Bunbury, not just to purchase packaged liquor. Many residents live in Donnybrook but work in Bunbury and do their grocery shopping in Bunbury as there is only one supermarket in Donnybrook. Some residents prefer to shop at the larger supermarkets such as Coles and Woolworths due to the price difference.

- 14 In terms of the socio-economic indicators, the objectors submitted that the SEIFA Index, which is compiled by the Australian Bureau of Statistics, reveals that the local government area of Donnybrook sits mid range on the Index, indicating a level of disadvantage. It was also submitted that for the period January 2015 to October 2015 there were 27 assaults and 21 burglaries in Donnybrook. Manjimup, which has nearly double the population of Donnybrook, only recorded 17 assaults during the same period.
- 14 According to Ryan & Durey, the objectors conducted a survey of 129 respondents, seeking comments regarding Cellarbrations Donnybrook, which is the existing liquor store in the town. This survey indicated that respondents were very satisfied with the service and product range offered by the Cellarbrations store and did not support the grant of another liquor store licence. It was also pointed out that Cellarbrations Donnybrook has been given approval by the licensing authority to extend its licensed area, which will result in the store doubling in size.
- 15 In summary, the objectors asserted that the grant of the application was not in the public interest for two broad reasons. First, the existing liquor outlets are sufficient to meet the requirements of consumers for liquor and therefore a further liquor store is not required and secondly, Donnybrook already experiences alcohol-related harm and ill-health and the grant of the application will only worsen the existing problems. According to the objectors, the applicant's PIA is solely focused on the proposed liquor store providing a convenient one-stop shop and failed to properly assess the current level of alcohol-related harm being experienced in the community.

Legislative and legal framework

- 16 An applicant seeking the grant of a liquor store licence must satisfy the licensing authority that the grant of the application is in the public interest: s 38(2). There is a positive onus on an applicant to discharge this obligation (refer *Liquorland (Australia) Pty Ltd v Executive Director of Health* [2013] WASC 51; *Seoul Mart City Pty Ltd v Commissioner of Police* (LC27/2014)).
- 17 It is therefore incumbent upon an applicant to adduce sufficient information to make it possible for the licensing authority to satisfy itself that the application is in the public interest. An applicant cannot do so by expressing assertions or opinions about the

public interest; any assertion or opinion must be supported by appropriate evidence (refer *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC/2015); *Seoul Mart City Pty Ltd v Commissioner of Police* (LC 27/2014); *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17/2010).

- 18 In determining whether the grant of an application is 'in the public interest' I am required to exercise a discretionary value judgment confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).
- 19 The burden of establishing the validity of any objection lies on the objector: s 73(10).
- 20 The factual matters which I am bound to take into account when determining whether the grant of an application is 'in the public interest' are those relevant to the primary and secondary objects of the Act as set out in s 5 (refer *Woolworths v Director of Liquor Licensing* [2013] WASCA 227).
- 21 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.
- 22 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 this Act.
- 23 The licensing authority is also entitled (but not bound) to take into account the factual matters set out in s 38(4) of the Act as part of the public interest considerations.
- 24 Section 16 provides that the licensing authority is to act according to equity, good conscience and the substantial merits of the case. The licensing authority should also act without undue formality and is not bound by the rules of evidence.

- 25 in considering the public interest, tension may arise between the primary object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor, and other objects contained in s 5 of the Act. When such conflict arises, the licensing authority must undertake a weighing and balancing exercise. The decision will depend on the particular circumstances of the case (refer *Executive Director of Public Health v Lily Creek International Pty Ltd* [2000] WASCA 258).
- 26 It is significant that the primary object in 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 (refer *Lily Creek supra*). It is a matter for the licensing authority to decide what weight to give to the competing interest interests and other relevant considerations (refer *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356).
- 27 The harm contemplated by the Act is not confined to consumers of alcohol and extends to harm caused to the health and well-being of individuals, families and communities, as well as social, cultural and economic harm. This includes harm which may occur through an increase in anti-social or injurious behaviour due to the use of liquor and is not limited to physical harm (refer *Re Gull Liquor, Gingers' Roadhouse Upper Swan* (1999) 20 SR (WA) 321; *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207).
- 28 Whether harm or ill-health will, in fact, be caused to people, or any group of people, due to the use of liquor is essentially a matter of prediction. However, it is unnecessary to establish on the balance of probabilities that harm or ill-health will be caused to people, or any group of people, before the consideration can be taken into account (refer *Lily Creek supra*). The potential for harm or ill-health is to be taken into account by the licensing authority irrespective of whether the prospect is a possibility or a probability. It is a powerful public interest consideration (refer *Lily Creek supra*).
- 29 The question is whether, having regard to all the circumstances and the legislative intention, the grant of the application is justified. In answering this question, the licensing authority has a wide discretion. It is a matter for it to decide what weight to give to the competing interests and other relevant considerations (refer *Hermal supra*).
- 30 Section 33(1) provides that licensing authority has an absolute discretion to grant or refuse an application on any ground, or for any reason, that the licensing authority considers in the public interest. Further, s 33(2)(a) provides that an application may be refused, even if the applicant meets all the requirements of the Act. In *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384, EM Heenan J described the 'absolute discretion' provided for under s 33(1) in the following terms:

The 'absolute discretion' to grant or refuse an application of (sic) any ground or for any reason that the Commission considers in the public interest, s 33(1), is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be

determined by the express objects of the Act and the legislation read as a whole: Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA356 [6] - [7] (Wallwork J) and Palace Securities v Liquor Licensing(1992) 7 WAR 241, 249 - 250 (Malcolm CJ) and 263 (Wallwork J). Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest or make those objects the exclusive considerations nor the sole determinants of the public interest: Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 231; (2002) 25 WAR 511, [52] - [55]; O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210, 216 and Jericho Nominees Pty Ltd v Dileum Pty Ltd (1992) 6 WAR 380, 400.

Reasons for determination

- 31 Each party to these proceedings bears a separate and distinct onus under the Act.
- 32 By virtue of s 38(2) of the Act, the applicant must satisfy the licensing authority that the grant of the application is in the public interest. There is no presumption in favour of the grant of the application; rather the opposite applies where the applicant must adduce sufficient evidence to discharge its burden.
- 33 Similarly, s 73(10) provides that the burden of establishing the validity of any objection lies on the objector. It is not sufficient for an objector to merely critique an applicant's PIA; an objector must adduce sufficient evidence to make out its grounds of objection.
- 34 It is convenient to start with the objections.
- 35 Ultimately, the objections are based upon two broad contentions. First, there are sufficient liquor outlets in town to meet the requirements of consumers for liquor and therefore a further liquor store is not required, and secondly, the grant of the application is likely to worsen the existing level of alcohol-related harm and ill-health in the community.
- 36 In 2007, the Act was amended to remove what was colloquially referred to as 'the needs test'. One of the related grounds of objection, prior to the amendments, was that the grant of the application was not necessary in order to provide for the requirements of the public. This was often used by existing licensees as a means of trying to limit competition in the market place. The 2007 reforms to the Act were intended to abolish the anticompetitive public needs test and replace it with a broader public interest test, which put the interests of the public at the forefront of deciding whether to grant a licence or not. During the second reading of the *Liquor and Gaming Legislation Amendment Bill*, the then Minister for Racing and Gaming said that the Bill sought to:
 - put the interests of consumers at the forefront;

- promote innovation and diversity in the way liquor services are provided to consumers; and
 - add a higher emphasis on the needs of consumers.
- 37 It is not particularly germane to the determination of this application that some members of the community, as evidenced by the objectors' survey, are satisfied with the existing licensed premises in Donnybrook. Irrespective of the outcome of this application, those persons can continue to exercise freedom of market choice.
- 38 All that the objectors' evidence really establishes is that some people in the community do not support the application. One of the directors of the company that holds the licence for Cellarbrations Donnybrook is an objector to the application, and the licensee of Cellarbrations Donnybrook is funding the objection on behalf of the 142 objectors. It is difficult, under these circumstances, not to conclude that the motivation behind these objections is to protect the market share of the existing liquor store.
- 39 Although it was submitted by the objectors that the Donnybrook community has a high number of children, young people and families, a number of aboriginal people and falls within a low socio-economic area, the presence of at-risk groups in itself does not mean a new licence should not be granted. In terms of the socio-economic profile, the SEIFA index for Donnybrook is just marginally below the benchmark. However, the evidence indicates that the Shire of Donnybrook-Ballingup has consistently recorded significantly lower rates of alcohol-related deaths and hospitalisations than the State average. Although the objectors have provided some data on existing crime in the locality, there is no indication how much of this is alcohol-related.
- 40 Based upon the evidence submitted by the objectors, I cannot conclude that the grant of the application poses an unacceptable risk to the local community and will result in an increase in the existing level of harm and ill-health in Donnybrook above what is commonly accepted in the community. The harm minimisation object of the Act is not about preventing harm or ill-health absolutely. Similarly, there no evidence before me to conclude that the grant of the application with negatively impact on the amenity of the locality.
- 41 I therefore find that the objectors have failed to establish their grounds of objection as required under s 73(10).
- 42 I now turn to the applicant's evidence.
- 43 It was submitted by the applicant that the grant of the application will provide the only one-stop shopping experience in Donnybrook. Further, it was submitted that there is also a lack of quality and diversity in terms of packaged liquor outlets in Donnybrook, with the existing hotels offering a very limited range of takeaway liquor products, with all purchases being made over the bar. Therefore, there is really only one packaged liquor outlet for the public, being the existing Cellarbrations Donnybrook liquor store.

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- 44 In my view, the applicant has misconceived the concept of one-stop shopping as considered by Buss JA in *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227. In this decision, Buss JA 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. The applicant's supermarket does not equate to a large suburban shopping centre. As the Liquor Commission observed in LC 25/2015 (*Richmond Investments Pty Ltd v Commissioner of Police*), the argument of one-stop shopping is diminished in a rural context as the various retail outlets and other public utility outlets accessed by the public on a daily and weekly basis are generally more dispersed over a relatively small area comprising the town and not concentrated in a large single shopping centre. Having a liquor store adjacent to a grocery outlet does not constitute one-stop shopping.
- 45 Although the applicant's claims relating to one-stop shopping are not consistent with the views expressed by Buss JA in *Woolworths*, I accept that in a small country town there will be an element of convenience for members of the public because of the location of the proposed liquor store to the supermarket. However, as the Liquor Commission as stated in a number of decisions, convenience alone is not sufficient justification for the grant of a new licence (see for example *Springbok Foods Pty Ltd v Commissioner of Police* - LC 26/2014, *Liquorland (Australia) Pty Ltd v Commissioner of Police* - LC 18/2015 and *MYD Korea Pty Ltd v Director of Liquor Licensing* - LC 21/2015).
- 46 I also accept the applicant's submission that the grant of the application will add to the quality and diversity of packaged liquor outlets in Donnybrook. The two existing hotels in town provide a limited packaged liquor offering for the general public. Neither of the hotels have a dedicated packaged liquor facility, with sales occurring over the bar.
- 47 In my view, the benefits that might be said to be in the public interest and therefore weigh in favour of the grant of the application are:
- increased competition to the packaged liquor market in Donnybrook;
 - a larger range of products and diversity thereby giving the public more choice; and
 - added convenience for some members of the community.
- 48 It could also be argued that the grant of this application, and the approved alteration to the Cellarbrations Liquor Store, will promote better competition in town and encourage more people to shop locally for their packaged liquor requirements rather than travel to Bunbury.
- 49 I am required to consider the application in the context of the objects of the Act. In this regard, I am satisfied on the evidence submitted by the applicant that the grant of the application would be consistent with objects 5(1)(c) and 5(2)(a) of the Act. I have also noted that the local community does not experience high rates of alcohol-related harm

and there is insufficient evidence to conclude that the grant of the application would unacceptably add to the existing level of alcohol-related harm and ill-health in the area or negatively impact on the amenity of the locality.

- 50 The statutory policy of regulation, as captured under object 5(1)(a) of the Act, is consistent with need to take a measured approach to the granting of licences (refer *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 per Heenan J). In respect of small country towns, consideration should be given to the potential impact upon the overall provision of services to the community. In respect of this application, there is no evidence to suggest that the grant of the application will result in a diminution of services in the locality to the detriment of the community as a whole. This of course should not be confused with the competitive impact on existing licensees, which as I have already stated, is not a matter for consideration.
- 51 Consequently, on the balance of probabilities, I am of the view that the positive aspects of the application outweigh any potential negative outcomes.
- 52 In weighing and balancing the evidence presented by the applicant, I am satisfied the applicant has discharged its onus under s 38(2) and the grant of the application is in the public interest.
- 53 Consequently, I am satisfied the applicant has complied with all of the statutory requirements and conditions precedent to the application being granted, and a liquor store licence is conditionally granted to the applicant subject to the following:
- (a) a Certificate under s 39 of the Act being lodged before the operation of the licence;
 - (b) compliance with the *Local Government Act 1960*, *Health Act 1911* and any written law relating to the sewerage and drainage of these premise;
 - (c) all work being completed within 12 months in accordance with the plans and specifications dated 16 October 2015.
 - (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements being satisfactorily completed and the Director of Liquor Licensing being notified in writing at least 21 days prior to applicant wishing to trade under the licence;
 - (e) a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed; and
 - (f) the applicant seeking confirmation of the grant on or before 29 August 2017 pursuant to s 62(4)(c) of the Act.

Conditions to be imposed on the issue of the licence

Trading hours

The permitted trading hours are those prescribed in s 98D of the Act.

Trading

The licensee is authorised to sell and supply packaged liquor in accordance with the provisions of s 47 of the Act.

Tasting condition

Pursuant to s 47(2) of the Act, the licensee is authorised to supply liquor, by way of free sample, for consumption within the licensed premises, subject to the following conditions:

- (a) Tastings must be conducted under the full responsibility and supervision of the licensee or approved manager at all times.
- (b) Tastings cannot be supplied to juveniles.
- (c) Glasses to be used for tastings are to be washed in accordance with the provisions of the Standards of Licensed Premises Policy of the Director of Liquor Licensing unless single use disposable containers are used.
- (d) Compliance with the Food Act 2008 at all times.
- (e) Tastings per sample must not exceed the following measures:
 - (i) Wine – 50 mls
 - (ii) Beer – 100 mls
 - (iii) Spirits – 15 mls.
- (f) Free drinking water must be made available at all times that samples of liquor are available for tasting.

Compliance with harm minimisation policy

The licensee is to have a House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Harm Minimisation Policy. These documents must be retained on the licensed premises and produced to any Authorised Officer if required.

- 54 Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.
- 55 The applicant is reminded that trading **may not** commence without the prior written approval of the licensing authority.
- 56 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.

57 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

