

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

Applicant: Australian Leisure and Hospitality Group Pty Ltd
(represented by Mr Marcus Solomon, SC, instructed by Ms Shelley Davies of Squire Patton Boggs Lawyers)

Objectors: City of South Perth
(represented by Mr Darren Pratt, instructed by Ms Kelli Blatchford of Jackson McDonald Lawyers)

Wakefield Planning for Save Como Action Group
(represented by Hotchkin Hanley Lawyers and Mr Ashley Cranenburgh)

McCusker Centre for Action on Alcohol and Youth

Mr Steve Irons, MP

Mr John Edwin McGrath, MLA

Ms Lisa Baker, MLA

Ms Carol Joyce Roe

Mr Ashley Cranenburgh

Mr Andrew Cox

Mr Horacio Diaz

Mr Victor Charles Singleton

Ms Kelly McGuire

Mr Anthony Thurston and Ms Pauline Thurston

Mr Gregory Bruce Benjamin

Mr Philip Watson and Ms Tina Watson

Mr Callum Jepp

Mr Martyn King
Ms Sally Kong
Ms Catherine Jepp
Ms Lynette Grieve-Matthews
Ms Cecilia Mary Brooke
Mr Ronald Athol Doig
Mr Daniel Michael Fatovich
Ms Sharon Cunning
Mr Roger Kenneth Reynolds
Mr Gregory Brindle
Mr Anthony John Power
Ms Katie Kitchen
Mr Rodney Kitchen
Mr Kerol Rezic
Ms Wendy Jean Averis
Ms Caroline Elizabeth Doig
Ms Kymberley Alice Doig
Mr Peter Howat
Ms Linda Marie Jeffree
Mr Jing Fai Law
Ms Veronica Naughton
Mr Murray James Jennings
Ms Angela Menzies
Mr Brian Trenbath and Ms Suzanne Trenbath
Mr Pierre Raphael Sequeira
Mr Peter Darroll Jeffree
Revel Enterprises Pty Ltd

Con's Retail Pty Ltd
Con's Wholesale Pty Ltd
Landsdale Liquor Pty Ltd
Master Grocers Australia

Commission: Mr Seamus Rafferty (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Ms Emma Power (Member)

Matter: Application for alteration and redefinition of licensed premises referred under section 24 of the *Liquor Control Act 1988*.

Premises: Como Hotel
241 Canning Highway, Como

Date of Hearings: 27 October 2017 and 24 October 2018

Date of Determination: 9 October 2019

**Date of Reasons for
Determination:** 29 October 2019

Determination: The application is granted.

Background

1. By way of an application filed on 29 October 2015, Australian Leisure and Hospitality Group Pty Ltd (“the applicant”) applied for an alteration and redefinition of the existing unrestricted tavern licence at the Como Hotel pursuant to section 77 of the *Liquor Control Act 1988* (“the Act”). The nature of the application was described as an ‘upgrade and revitalisation of the Como Hotel and BWS liquor store. The renovation will involve internal upgrades to the Como Hotel and the conversion of the existing BWS bottle shop into a Dan Murphy’s liquor store.’
2. Following the advertisement of the application, 47 notices of objection were received by the Director of Liquor Licensing (“the Director”).
3. On 31 March 2017, the Director referred the application to the Liquor Commission of Western Australia for determination pursuant to section 24 of the Act.
4. A hearing was held on 27 October 2017 to determine the application. It became apparent during the course of the hearing that there were issues relating to traffic management that required further evidence and submissions. A further hearing was listed for 29 March 2018.
5. The determination of this matter was then delayed by issues relating to development approval, in which the applicant required an extension of time in which to substantially commence the approved development. On 16 July 2018, the State Administrative Tribunal (“SAT”) amended the development approval by extending the period within which development must be substantially commenced to two years from the date of the tribunal’s decision.¹
6. A further hearing was conducted by the Commission on 24 October 2018 to allow the parties to make submissions in respect to traffic management in the area surrounding the licensed premises and other amenity related issues.
7. It should be noted that Commissioner of Police and Director of Health did not intervene or object to the granting of the application. Such interventions and objections are common when there is a possibility that the granting of an application will have adverse impacts on public order within a locality or will adversely impact on the harm and ill-health of those who consume alcohol.

¹ [2018] WASAT 63

Statutory Framework for Consideration of Application

8. Section 38(2) of the Act requires an applicant to satisfy the licensing authority that the granting of the application is in the public interest.

9. In *Woolworths Ltd v Director of Liquor Licensing*² His Honour Buss JA set out the statutory framework for a determination of an application in which an applicant had to satisfy the Commission that the granting of an application was in the public interest in the following terms:
 - a) by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;

 - b) the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;³

 - c) the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act, as set out in section 5(2) of the Act;

 - d) the factual matters which the Commission is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act;

 - e) section 5(2) is mandatory whereas section 38(4) is permissive;

 - f) on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and

² [2013] WASCA 227

³ *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute.

- facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

10. The matters that the Commission can and cannot take into account in determining the public interest were recently considered in *Commissioner of Police v Australian Leisure & Hospitality Group Pty Ltd*⁴. In that case, the appellant submitted that sections 5 and 38(4) of the Act confined the meaning of the public interest and were the 'exclusive determinants of the public interest.'⁵ That interpretation was rejected by the Court. However, the Court determined that there are matters that cannot be considered on the basis that they are beyond the subject matter, scope and purpose of the Act.

11. Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:

- a) the grant of the application would not be in the public interest; or
- b) the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor; or
- c) that if the application were granted:
 - undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or
 - the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened;
- d) that the grant of the application would otherwise be contrary to the Act.

12. It should be noted that the relevant provisions of the Act, namely sections 5 and 38 were recently amended.⁶ These amendments came into effect after the date on which the application pursuant to section 77 of the Act was made. Accordingly, the

⁴ [2019] WASC 114

⁵ *Supra*, at [59]

⁶ See: *Liquor Control Amendment Act 2018* (WA); Gazette 17 August 2018, p.2893; Gazette 2 October 2018, p.3779.

determination of this application will be made on the basis of the legislation in force as at the date that the application was made.

13. Each application must be considered on its merits and determined on the balance of probabilities pursuant to section 16 of the Act. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests.⁷

Relevant Statutory Considerations

14. As already noted, the Commission must take into account the primary objects of the Act in determining this application. The first of those considerations is the minimising of harm and ill-health caused to people, or any group of people, due to the use of liquor. In considering this issue, the demographics of the locality in which the licensed premises will operate are a significant consideration. An assessment must be made as to the existing levels of harm or ill-health and whether the granting of an application has the potential of increasing such levels to a degree that would be considered to be unacceptable.
15. The Public Interest Assessment (“PIA”) prepared on behalf of the applicant notes the following relevant matters:
- a) the locality is an area of above average affluence based on the Australian Bureau of Statistics Socio-Economic Index for Areas;
 - b) the number of “at-risk” groups within the locality is relatively low;
 - c) the incidences of hospitalisation due to alcohol use and alcohol related criminal offending are lower than the State average.
16. There is nothing in the totality of the evidence that suggests that there are levels of harm and ill-health within the locality that are of such levels that the granting of the

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

application would cause an increase of harm or ill-health to unacceptable levels that would result in a determination that the granting of the application was not in the public interest.

17. The granting of the application would allow for the renovation of existing licensed premises and the construction of a liquor store that has previously been referred to as a destination type store. Such development would be consistent with the primary object set out in section 5(1)(c) of the Act, that being catering for the requirement 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. Arguably, it would also be consistent with the secondary object of the Act set out in section 5(2)(a) of the Act, that being 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.
18. Given the nature of the objections raised in this application, the primary statutory considerations in respect to this application are the permissive considerations set out in sections 38(4)(b) & (c) of the Act, they being whether granting an application may:
 - a) impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated;
 - b) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises.

Summary of Evidence

19. The Commission has been provided with a large amount of material from the parties to assist in the determination of the application. The fact that a particular piece of evidence has not been referred to in these reasons should not be construed as a failure by the Commission to consider that piece of evidence. All materials provided by the parties have been considered by the Commission in the determination of the application.
20. However, it should be noted that some of the materials put before the Commission on behalf of some of the parties are of no assistance in the determination of this

application. The Commission recognises that residential objectors or parties who are not legally represented do not always appreciate what evidence is relevant and what evidence is irrelevant in a matter of this nature. Any materials that are not based in fact or do nothing more than represent an emotional response have been entirely disregarded on the basis that such material lacks cogency or is irrelevant to the issues to be determined.

Applicant's Evidence

21. The primary evidence originally relied upon by the applicant was a PIA dated 29 October 2015 and attachments to that document. The PIA stated that the Como Hotel was built in 1939, with the addition of a drive-thru bottle shop in 1965. It is currently operated as a local suburban pub offering affordable meals, hosting live music and conducting quiz nights.
22. It is submitted that the proposed upgrade will improve existing facilities for customers and staff. It is contended that the facility is generally outdated and caters to a suburban market. The proposed changes will result in an appeal to a more universal market and become a destination operation as opposed to the suburban 'local' that currently operates.
23. It is also proposed that the existing BWS drive-thru will be demolished and replaced with a Dan Murphy's liquor store, significantly larger than the existing drive-thru operation. It is submitted that the proposed liquor store will offer a larger range of products for customers to choose from than that already available in the existing drive-thru premises. The proposed Dan Murphy's will result in a reduction of operating hours of one hour between Monday and Thursday, three hours on Friday and Saturday and one hour on Sunday.
24. It is submitted that, 'the upgrade to the Premises will ensure that the Como Hotel continues to provide a community facility to the residents of the locality and cater to changing consumer requirements. There is no other similar packaged liquor offering in the locality and the proposed Dan Murphy's will cater to the needs of consumers in the area which have outgrown the currently available packaged liquor offerings. The renovation and restoration of the Como Hotel building will showcase the Art

Deco characteristics of the building whilst creating a contemporary venue with improved access and amenity.⁸

25. The applicant has also provided the following materials that are submitted to be of relevance, they being:

- a) MGA Town Planners report which provided planning and demographic data for the locality;
- b) information from MicroPlan Dimasi in respect to the defining of the trade area for the proposed Dan Murphy's store;
- c) research and data analysis on alcohol related harm in the locality;
- d) review of other packaged liquor outlets currently operating in the locality.

26. The MGA Town Planners report reveals the following salient information:

- a) As at the 2011 Census, there were 28,948 people living within the South Perth locality.⁹
- b) The Australia Bureau of Statistics Socio-Economic Index for Areas ("SEIFA Rating") reveals the nature of the locality overall, which comprises the suburbs of South Perth, Kensington, Como and Manning, that being 'an area of above average affluence.'¹⁰
- c) There are no other destination liquor outlets within the locality, with the closest being First Choice Bentley, which operates 6.1km from the licensed premises and the nearest Dan Murphy's store operating at the Hyde Park Hotel, that being 8.1km from the licensed premises.¹¹
- d) There are seven other existing packaged liquor outlets operating in the locality, none of which operate on the scale proposed by the applicant.¹²

27. In relation to the absence of another destination liquor store in the locality, the applicant submits that, 'the proposed Dan Murphy's will provide a comprehensive range and expert service. The other packaged liquor outlets in the locality are

⁸ PIA dated 29 October 2015, p.8

⁹ MGA Report, p.11

¹⁰ *supra*, pp.17-18

¹¹ *supra*, p.27

¹² *supra*, pp.32-40

predominantly convenience stores designed to cater to the immediate needs of customers, rather than a comprehensive liquor offering.¹³

28. The PIA considered the factors which are relevant to an assessment of the levels of alcohol related harm in the locality, all of which indicate that the locality in which the licensed premises operate have lower than average levels of harm and ill-health occasioned by the use of alcohol.¹⁴ Further, reference is made to the extensive harm minimisation measures implemented in Dan Murphy's stores, which it is contended reduces the likelihood of any meaningful increase in harm and ill-health if the application were to be granted.
29. Overall, the applicant submits that it is in the public interest to grant the application on the basis that it will allow for the rejuvenation of a tired premises, will provide a destination liquor stores the likes of which do not currently exist in the locality or nearby, will not result in an increase of harm and ill-health to levels that would be considered to be inappropriate and which will not adversely impact on the amenity of the location.
30. Given that the central consideration of this application is the potential adverse impact on the amenity of the location, specifically relating to parking issues and traffic movement, the Commission has dealt with this as a discrete issue and has summarised the evidence separately.

Objectors Evidence

31. The bases upon which the various objectors have objected to the granting of the application is as follows:
 - a) there has already been significant local community opposition to the application as reflected by issues surrounding the obtaining of development approval;
 - b) the City of South Perth Amendment No. 50 prohibits approval of a large-scale liquor store;
 - c) there are an adequate number of liquor stores already operating in the locality;

¹³ PIA dated 29 October 2015, p.25

¹⁴ *supra*, pp.44-46

- d) problems associated with proliferation of liquor outlets;
- e) increased amount of alcohol within the community if the application is granted;
- f) problems associated with destination liquor stores in general;
- g) evidence of alcohol abuse within the community;
- h) the adverse impact on amenity, with regard to parking issues, access to the licensed premises by vehicles and the impact on traffic flow in the immediate vicinity of the licensed premises;
- i) plans by the applicant to “crush” its competitors;
- j) increase in harm and violence.

32. The City of South Perth provided a report prepared at its request by Planning Solutions in February 2016. The report provides a critique of the applicant’s PIA and reached the following conclusions:

- a) the proposed Dan Murphy’s has been assessed to have an undue impact on the visual amenity of residents of Norton Street by way of the building design which offers a poor interface and limited surveillance from inside the store.
- b) the proposed Dan Murphy’s has the potential to increase traffic and noise to an extent where it causes undue disruption or annoyance to surrounding residents.
- c) there are potential impacts on social amenity as a result of providing a large format liquor store in a predominantly suburban context, such as increased violence.
- d) the design of the proposed Dan Murphy’s offers poor surveillance along its northern (Norton Street) and western (rear) elevation. This results in perceived and actual feelings of unsafety and increases potential for crime, loitering and anti-social behaviour.

33. The Save Como Action Group provided a report from Wakefield Planning dated 8 July 2016. That document includes the following submissions:

- a) ‘While it is acknowledged that in the present circumstance neither the Department of Health nor the Commissioner of Police have intervened, we nevertheless maintain that in the circumstances of the case the points made in

previous interventions continue to be valid. In this regard we continue to submit that the high public prominence of the location will result in a very significant increase in exposure to alcohol advertising and submit that there is still a strong potential for increased consumption as a result of this proposal.¹⁵

- b) 'In our submission a significant intensification of use of the site and, in addition, a significant increase in heavy vehicle movements, without adequate noise attenuation measures, would represent a diminution in residential amenity for adjoining residents. Although the JDAP did not recommend the imposition of noise attenuation measures we submit that this is still a very real issue for the adjoining residents and the JDAPs failure to give it, in our opinion, sufficient weight does not mean that the impacts will not occur.'¹⁶
- c) There is 'an ample provision of liquor outlets within the locality to meet community needs and expectations.'¹⁷

34. A number of the residential objectors relied upon a document that outlines the same grounds of objection, containing the same or similar assertions in respect to each ground. There is absolutely nothing improper in this regard as it is clear that the objectors share the same concerns in respect to the nature of the application.

35. A number of the bases for objection are incapable of discharging the onus placed on an objector to the requisite degree for the following reasons:

- a) **Significant local community opposition as a basis for refusal.** Given the data relating to the population of the locality, it would be fair to assume that there are now in excess of 30,000 people residing in the locality. Of that number, there are 45 objectors to the granting of the application. In those circumstances, it could hardly be suggested that there is such an overwhelming groundswell of opposition to the granting of the application that it would not be in the public interest to allow for the redevelopment of the licensed premises. In any event, having regard to the statutory factors that the Commission must and may take into account, this of itself would be an insufficient basis upon which to refuse the application.

¹⁵ Wakefield Planning report dated 8 July 2016, p.2

¹⁶ *supra*, p.3

¹⁷ *supra*, p.4

- b) **The City of South Perth Amendment No. 50 does not allow for a development of the type proposed.** On 17 April 2015, the Metro Central Joint Development Assessment Panel granted development approval. On 16 July 2018, the SAT allowed an extension of time in which the applicant was to have substantially commenced the construction of the proposed new premises and alterations to the existing premises. Accordingly, the relevant development approval has been granted and the position of the City of South Perth in respect to Amendment No. 50 is entirely irrelevant to a determination of this application.
- c) **There are an adequate number of liquor stores already operating in the locality.** The basis upon which applications of this nature used to be determined, that being an application of the “needs test”, no longer has application. The Commission may take into account this factor by way of proliferation considerations but cannot refuse an application for the specific reason that there are already sufficient liquor stores operating in a locality and that there is no need for another store. It should also be noted that a number of the objectors referred to previous first instance decisions of the Commission in respect to Dan Murphy’s applications in Joondalup and Carine in support of this ground of objection. It should be noted that in both instances the original decision of the Commission was overturned by the Supreme Court on appeal and both applications were subsequently granted by the Commission.
- d) **Increased amount of alcohol within the community if the application is granted/Problems associated with destination liquor stores/Evidence of alcohol abuse within the community.** The material relied upon by the objectors in this regard is generic in nature and there is no actual evidence that the granting of this application would cause the harm and ill-health issues identified by the objectors.
- e) **Plans by the applicant to “crush” its competitors.** This was an issue raised by Ms Carol Roe in her objection. There is simply no direct or circumstantial evidence capable of making out this basis for objection.
- f) **Increase in harm and violence.** This was an issue raised by the City of South Perth in its objection. The Commission accepts that the use of liquor does contribute to levels of harm and violence within the community, however there is no evidence capable of establishing that the granting of this application would occasion such high levels of harm and ill-health that the granting of the

application would not be in the public interest. The Act requires harm minimisation, not complete eradication.

36. As is clear from the analysis of the bases for objection, the primary issue for consideration by the Commission in this application is whether the granting of the application will impact on the amenity, quiet and good order of the locality and/or whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises. Even if satisfied that there may be some adverse impact, the Commission is still required to give consideration to the primary objects of the Act and perform a weighing exercise in the determination of the application.

Consideration of Matters Set Out in Section 38(4)(b)&(c) of the Act

37. The licensed premises operates on a property that is bordered by South Terrace, Norton Street and Canning Highway. It is clear from the evidence that:

- a) Canning Highway is a major arterial route that carries a significant amount of traffic on a daily basis;
- b) South Terrace is also a busy roadway, that has a residential homes and units on either side;
- c) Norton Street is a residential street, that is much less busy than the other two roadways.

38. Given the issues raised by the objectors in respect to amenity and other associated matters, the Commission is required to consider the evidence submitted by all parties in this regard and where there is a divergence in the evidence or opinions provided on behalf of the parties, determine which evidence it prefers and is prepared to act upon in determining this application.

Summary of Evidence

39. The Commission has been provided with a large amount of evidence in respect to the potential impact on traffic movements in the vicinity of the licensed premises and

parking issues in the event that the application was granted. This material includes but is not limited to:

- a) Riley Consulting report of May 2014 prepared on behalf of the applicant.
- b) Cardno Traffic Assessment report dated 5 November 2014 prepared on behalf of the City of South Perth.
- c) Letters from Main Roads WA ("MRWA") dated 14 January 2015 and 1 April 2015.
- d) Riley Consulting Supplementary Traffic Technical Note dated 3 March 2015 stating that the access to the premises on South Terrace has been relocated further west in consultation with MRWA and the City of South Perth so as to alleviate potential traffic congestion at the intersection of South Terrace and Canning Highway.
- e) Cardno technical memorandum dated 9 March 2015.
- f) Wakefield Planning report dated 30 March 2015 prepared for the Save Como Action Group.
- g) Letter from MRWA dated 1 April 2015.
- h) Uloth & Associates report dated 7 April 2015 prepared on behalf of the Save Como Action Group.
- i) Witness statement of Benham Bordbar dated 4 April 2018.
- j) Transcore Report dated 7 August 2018 prepared on behalf of the applicant.
- k) Uloth & Associates report dated 7 September 2018.

40. The Commission also heard from residents who live in the immediate vicinity of the licensed premises who expressed their concerns as to what they believe would occur if the application were granted.

41. The relevant evidence relied upon by the City of South Perth and Save Como Action Group in the Cardno and Uloth reports can be summarised as follows:

- a) The granting of the licence will result in increased congestion and queuing at the Canning Highway and South Terrace intersection, there are unresolved traffic management issues in South Terrace, there are unresolved access to the licensed premises arrangements in Norton Street and there is a likely increase in accidents resulting from unsafe vehicle movements which all combine to confirm that the proposed Dan Murphy's development is inappropriate for the Como Hotel site.

b) If the development proceeds it will significantly reduce the amenity of local residents both immediately adjacent to the site and within the surrounding areas, while also creating increased congestion and unacceptable safety risk for all road users.

c) It is recommended that the application be refused.

42. MRWA stated that it would support the proposed development subject to the following conditions being imposed:

a) Norton Street and Canning Highway intersection is restricted to left in/left out only. This would be achieved by extension of the central median on Canning Highway past the intersection of Norton Street. This has now occurred and there is no right hand turn available from Canning Highway into Norton Street.

b) The crossover on Canning Highway is removed and the accesses to the development are limited to and from Norton Street and South Terrace.

c) No development or car parking other than landscaping shall be permitted on the land as shown as required for future road purposes on the enclosed drawing at Appendix A of the RAS (drawing 301012-01375 sheet 3).

d) The area required for future road purposes is not to be included in the specific car parking requirements for this development.

43. The Applicant submitted a separate traffic and access review prepared by Transcore Pty Ltd which incorporated a review of the following documents:

a) Riley Report;

b) Cardno Report;

c) Uloth and Associates materials;

d) MRWA letters;

e) City of South Perth Responsible Authority Report.

44. The Commission has considered all reports and submissions relating to traffic management and parking issues that may be associated with this development. It must firstly be recognised that the Commission is a specialist tribunal pertaining to liquor related matters, not complex traffic management issues. Accordingly, significant weight has been given to the decision of the SAT in *ALH Group Property Holdings Pty Ltd v Presiding Member of the Metro Central Joint Development*

Assessment Panel.¹⁸ The Commission cannot abrogate its responsibility to consider all matters relating to the issue of amenity, however the findings of a tribunal that specialises in town planning/development matters is highly persuasive but not determinative.

45. The following conclusions made by the SAT are of significance in determining which evidence we prefer in determining this application:

- a) Mr Benham Bordbar is a qualified traffic engineer and transport planner with over 30 years' experience.¹⁹
- b) Mr Bordbar's evidence was marked by its integrity and his opinions were considered.²⁰
- c) Mr Bordbar's evidence was preferred over that of the witness called by the Respondent on the basis that he, 'had significantly greater relevant qualifications and experience than Mr Zagorac in relation to the traffic considerations concerning the extension application.'²¹

46. Accordingly, the Commission has given significant weight to the Transcore Report prepared by Mr Bordbar which considered all of the traffic/parking issues identified in the earlier reports. It should be noted that Mr Bordbar is critical in a number of respects of the Riley Report which was obtained on behalf of the applicant, that being a factor that the Commission considers underscores the credibility of the witness. Where there is a discrepancy between evidence adduced on behalf of the objectors and the Transcore Report, including the supplementary material that sought to criticise the findings of the Transcore Report, the Commission has preferred the conclusions and opinions expressed in the Transcore Report. The relevant opinions include:

- a) The three consultants (Riley, Uloth and Cardno) involved traffic analysis which 'would overestimate the increase in traffic movements along Canning Highway in general, including through the South Terrace signalised intersection adjacent to the subject site.'²²

¹⁸ [2018] WASAT 63

¹⁹ *supra*, at [75]

²⁰ *supra*, at [98]

²¹ *supra*, at [77]

²² Transcore Report dated 7 August 2018, p.3, para.12

- b) 'It can therefore be concluded that the proposed development will not have a significant traffic impact on the operation of the Canning Highway/South Terrace intersection nor on the traffic operation of South Terrace in the vicinity of the relocated driveway crossover to the site.'²³
- c) The Cardno assessment prepared on behalf of the City of South Perth is the most recent and most impartial. Therefore, the conclusion that 'the proposed development on the surrounding road network is minimal' is significant.²⁴
- d) The City of South Perth's Manager Engineering Infrastructure agreed that the traffic impacts of the proposed development 'have been addressed and were shown to be both manageable and negligible.'²⁵
- e) There are not anticipated to be any significant adverse impacts on traffic conditions on the adjacent road network including on South Terrace as a result of the proposed development.²⁶

47. The Commission is prepared to act on the opinion of Mr Bordbar, he being an expert in the field of traffic related issues with over 30 years' experience and make the finding that the granting of the application will not result in significant traffic issues that will unduly impact on the amenity of the locality or the immediate vicinity in which the licenses premises operates. The Commission also places significant weight on the Cardno report obtained on behalf of the City of South Perth.

48. The assertion made on behalf of the Save Como Action Group that, 'the likely traffic impacts would result in such congestion and hazardous traffic conditions that it outweighs any benefits which the locality might otherwise experience from the provision of liquor at the subject site'²⁷ are rejected. That submission is inconsistent with the expert opinion of Mr Bordbar.

49. The Commission accepts the following submission made on behalf of the applicant:

'the traffic evidence indicates that the forecasted increase in traffic can be accommodated by the existing road capacity. Indeed, the evidence is that the existing reports overstate the increasing traffic volume (because they take no account of the trade generated by passing traffic). Even on the inflated volumes, the

²³ *supra*, p.10, para.43

²⁴ *supra*, p.11, para.47

²⁵ *supra*, p.11, para.48

²⁶ *supra*, p.11, para.51

²⁷ Written submissions dated 7 September 2018

increase is modest and will not create adverse impacts. In addition, evidence suggests that the impact of the median strip extension on Canning Highway is negligible in terms on the effect of the road network, if anything it improves the amenity by addressing the safety concerns of the MRD. In respect of South Terrace, the relocated driveway and the alteration of the southern curb line to ensure westbound traffic is not obstructed are sufficient to accommodate any concerns. There is no cogent evidence of any material adverse traffic impacts arising from the development.'

50. The Commission has also given significant consideration to the opinions expressed by residential objectors particularly those who live in close proximity to the licensed premises. Those opinions were genuinely held and expressed in an entirely appropriate manner. However, the expert evidence that the Commission is prepared to act upon does not result in a conclusion that the granting of the application will so adversely impact on the amenity of the location or result in offence, annoyance, disturbance, or inconvenience to such a level, that the granting of the application would not be in the public interest.

Other Issues Relating to Objectors

51. Objections were received from Sharon Cunning, Ashley Cranenburg, Gregory Brindle, Linda Jeffree, Peter Jeffree and Pierre Sequeira, they being parties who either operate licensed premises in the locality or are associated with persons who operate licensed premises in the locality.

52. There is absolutely nothing improper for such persons to lodge objections to applications in accordance with the relevant provisions of the Act. However, there is a clear inference open that such objections are motivated by the protection of financial interests, that being a factor that the Commission cannot take into account.

53. In the case of Messrs Cranenburg and Sequeira, the objections lodged by them are in the same format and the same bases as a number of residential objectors, they being the bases already addressed earlier in these reasons for decision. As to Ms Cunning, there is nothing in the materials she provided, that identified the fact that she is the PA to Mr Jeffree, that being a factor that should have been outlined in her objection. In any event, nothing in the materials provided by these parties adds to the objections lodged by other parties.

54. As to the objections of Mr and Mrs Jeffree, the basis for their objections are in similar terms to the other objectors, with the exception of the assertion that the granting of the application would be otherwise contrary to the Act. It is asserted that the granting of the application would be contrary to the Town Planning Scheme of the City of South Perth. As already noted, the relevant planning approval for the development has been granted by the relevant authority and this is not a matter upon which the application could be refused. It is also asserted that the development of a Dan Murphy's store on the site would require a separate application for a liquor store licence and that in the absence of such an application, the current application should be refused.
55. The submissions made by Mr Jeffree as to the need for a separate application are incorrect. Section 77 of the Act allows the applicant to make an application for the alteration/redefinition of existing licensed premises. Regardless of the fact that a new Dan Murphy's will be constructed to replace an existing drive-thru bottle shop, a new licence is not required by the applicant. The proposal of the applicant simply requires an application pursuant to section 77 of the Act and there is nothing within the legislation that would require a separate application to be made by the applicant. Applications of the same nature have been made and determined in the past by the Commission, such as the Carine Tavern decision and the Peninsula Inn decision pursuant to section 77 of the Act. In respect to the Carine Tavern decision, the original decision was appealed to the Supreme Court and overturned. There was nothing noted by the Court as to the need for a separate licence to be applied for in applications of this nature.
56. Notwithstanding the observations as to the potential basis upon which the objections have been lodged by other licensees or those associated with such people, those objections have been considered in good faith and in accordance with the relevant provisions of the Act.

Conclusion

57. This is an application for the alteration/redefinition of an existing licence in which the applicant wishes to upgrade existing facilities and to replace a BWS liquor store with a Dan Murphy's liquor store at a site on which the licensed premises has operated for eighty years with the addition of a drive-thru bottle shop in 1965. The operating purpose of the site is therefore well established. The Applicant has made the

business decision to replace the BWS drive-through with a larger Dan Murphy's liquor store, which is consistent with other developments conducted by the Applicant in a number of other locations.

58. The Commission cannot consider this application in a piecemeal manner, by simply considering the construction of a Dan Murphy's store, without considering the application as a whole, which will include the upgrade to the existing hotel site.
59. As already noted and for the reasons expressed, the Commission has concluded that the granting of the application will not result in traffic management and parking issues of such a nature that it could be concluded that the granting of the licence will impact on the amenity of the locality in which the licensed premises are situated or might cause offence, annoyance, disturbance or inconvenience to people who reside or work in the vicinity of the licensed premises to such a degree that it would not be in the public interest to grant the application.
60. Further, on balance, none of the other grounds of objection have been made out by the objectors and as such, the burden of establishing the validity of the objections has not been discharged in accordance with the requirement of section 73(10) of the Act.
61. In respect to the burden that the applicant must discharge pursuant to section 38(2) of the Act, the Commission is satisfied that this burden has been discharged and that the granting of the application is in the public interest for the following reasons:
 - a) The application involves the renovation of existing licensed premises which were originally built in 1939 and will provide a contemporary hotel experience for those who attend the licensed premises.
 - b) The application involves the demolition of a drive-thru bottle shop that was built 54 years ago and the development of a destination type liquor store, of which there is no other type in the locality or close to the locality.
 - c) The Dan Murphy's liquor store will increase the choice of products currently available at the licensed premises and provide a very different shopping experience for consumers of liquor and associated products from that which currently exists.
 - d) The levels of harm and ill-health due to the use of liquor in the locality is relatively low and there is no evidence to suggest that the proposed

development will increase harm and ill-health to levels that would make the granting of the application inappropriate.

- e) The applicant has a proven track-record of responsible service and the implementation of harm minimisation measures.
- f) The granting of the application will result in reduced trading hours for the packaged liquor side of the business, particularly on Friday's and Saturday's, thus reducing the likelihood of offence, annoyance, disturbance or inconvenience to those who reside or work in the immediate vicinity of the licensed premises. The current bottle shop can trade until midnight on those nights, whereas the Dan Murphy's store will close at 9.00pm on those nights, thus resulting in a reduction of trading hours by three hours.
- g) The evidence adduced by the applicant in respect to the impact on traffic management and parking issues in the immediate vicinity of the licensed premises, having been accepted by the Commission, does not lead to a conclusion that the granting of the application is not in the public interest.
- h) The granting of the application is consistent with the primary and secondary objects of the Act.

62. Accordingly, the application for an alteration/redefinition of the Como Hotel made by Australian Leisure and Hospitality Group Pty Ltd pursuant to section 77 of the Act is granted.



SEAMUS RAFFERTY
CHAIRPERSON