

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Woolworths Limited
(represented by Mr Gavin Crocket of G D Crocket & Co)

Intervener: Executive Director of Public Health
(represented by Mr David Leigh of State Solicitor's Office)

Objectors: City of Cockburn
(represented by Mr Andrew Websdane of Frichot & Frichot)
and as listed in the introduction to the determination para 3

Commission: Mr Jim Freemantle (Chairperson)
Ms Helen Cogan (Member)
Mr Greg Joyce (Member)

Date of Hearing: 10 August 2011

Date of Determination: 17 February 2012

Premises: Premises to be known as Dan Murphy's Cockburn situated at Cockburn Gateway Shopping Centre, corner of Beeliar Drive and Kwinana Freeway, Success

Matter: Application for the conditional grant of a liquor store licence referred under section 24 of the *Liquor Control Act 1988*

Determination: The Application is refused

Authorities referred to by the parties and considered in the Determination:

- *Liquorland (Australia) Pty Ltd v Hawkins* (1997) 16 WAR 325
 - *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd* (1999) 20 WAR 405
 - *Executive Director of Health v Lily Creek International Pty Ltd & Ors* (2000) WASCA 258; 22 WAR 510
 - *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175
 - *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241
 - *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
 - *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2001] WASCA 410
 - *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207
 - *Hay Properties Pty Ltd & Anor v Roshel Pty Ltd*, unreported; FCT SCT of WA; Library No 980496; 20 July 1998
 - *Vermouth Nominees Pty Ltd v Cabaret Owners Association of WA Inc & Ors* No. 2155 of 1989
 - *Busswater Pty Ltd v Mr KV House and Mrs L V Verhoog* (LC 17/2010) at [36]
 - *Element WA Pty Ltd v Director Liquor Licensing* (LC 32/200) at [23]
 - *Harold Thomas James Blakely v Director Liquor Licensing* (LC 44/2010) at [39]
 - *Shallcross Investments Pty Ltd v Director Liquor Licensing* (LC 26/2010) at [18]
 - *Ventorin Pty Ltd v Director of Liquor Licensing* (LC04/2009)
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Introduction

- 1 On 12 January 2010 an application was lodged by Woolworths Ltd (“the applicant”) for the conditional grant of a liquor store licence for premises to trade as Dan Murphy’s Cockburn at Gateway Shopping Centre, corner of Beeliar Drive and Kwinana Freeway, Success (“the premises”).
- 2 On 22 February 2010 a notice of objection to the application was lodged by the City of Cockburn. The submissions in this notice of objection were supported by submissions made in letters dated 11 May 2010 and 14 May 2010.
- 3 On various dates between 11 February 2010 and 22 February 2010 notices of objection to the application were lodged by the following:
 - Grace Liew
 - Terence Corkhill
 - Alan and Olivia Ong
 - Sister Ellen Moran
 - Sister Robin Burke
 - Patrick Bone
 - Liew Kee and Karen Ping
 - James Price
 - Success Residents Association Inc
 - Derek and Elizabeth Catling
 - Barry Jones
 - Wyndham and Gwen Matthews
 - Adrian Liew
 - Maureen Phillips
 - Fiona Johnson
 - Kathleen Brennan
 - Faye Whitfield
 - Christa Riegler
 - Cockburn Youth Services
 - Youth Reach South
 - Ann Atkinson
 - Robert and Jean Bruce
 - Peta Wooton

These will be referred to for convenience as “the residential objectors” although it is noted that not all of those objectors are actually residents in the commonly understood sense.

- 4 On 11 March 2010 a notice of intervention was lodged by the Delegate of the Executive Director of Public Health (“EDPH”) and the submissions in that notice of intervention were further supported by submissions made in letters dated 9 April 2010 and 18 October 2010.
- 5 On 31 March 2010 the Director of Liquor Licensing (“the Director”) advised the applicant’s solicitors that he was exercising his power under section 74(4) of the *Liquor Control Act 1988* (“the Act”) and would not be hearing and therefore, not considering the residential objections (save for that of Grace Liew and the City of Cockburn).
- 6 On 2 February 2011, pursuant to section 24 of the Act, the Director referred the application to the Liquor Commission (“the Commission”).
- 7 A hearing before the Commission was held on 10 August 2011.

Hearing

Preliminary Matters

- 8 The Commission dealt with a number of preliminary matters as follows:
 - 8.1 By way of interlocutory applications, certain orders were sought relating to the hearing of this matter and certain other matters including dates by which submissions were to be lodged.
 - 8.2 On 5 April 2011 the Commission made amended orders relevant to this matter as follows:
 - this application will be heard and determined separately from other applications made by the applicant;
 - the dates by which any additional submissions and evidence and responsive submissions are to be filed and served.
 - 8.3 Timely compliance by the parties with the dates for filing and service of relevant documents was not an issue raised at the hearing of this matter
 - 8.4 The applicant sought a declaratory order in relation to the residential objectors (save for the City of Cockburn and Grace Liew). The Commission on 5 July 2011 advised the applicant that:

“as the application has been referred to the Commission pursuant to section 24 of the Liquor Control Act 1988 the Commission is not bound by the decision of the Director of Liquor Licensing who initially struck out these objectors before deciding to refer the application to the Commission for determination.

The Commission considers the residential objectors to be valid parties to the proceedings and shall therefore not strike out the objectors as listed in your application for a declaratory order”.

The Commission also advised the applicant that all relevant material must be served on the solicitors representing the EDPH, the City of Cockburn, and Grace Liew respectively, but was not required to be served on the other residential objectors who could view the material at the offices of the Commission.

- 8.5 The applicant acknowledged that the EDPH was an intervener, not an objector but submitted that the EDPH’s submissions went further than appropriate as the matters were outside the definition of health issues. It was agreed that the applicant could address this issue in its submissions and the Commission would consider in its determination what weight could be given to the evidence.
- 8.6 The locality was identified as a 3 kilometre radius from the premises.
- 8.7 The applicant made submissions concerning the cut off date (2nd June 2011) for lodging of evidence as follows:
- 8.7.1 the EDPH had lodged under cover of his letter dated 27 July 2011 a number of items of additional material namely:
 - 8.7.1.1 an article dated 25 March 2011 entitled “Beer Today None Tomorrow as Brewer Takes on Big Chains”;
 - 8.7.1.2 Woolworths Annual Reports 2007-2010;
 - 8.7.1.3 ABS Statistics (2 Reports) as identified by the EDPH;
 - 8.7.1.4 Journal article entitled “Per Capita Alcohol Consumption in Australia Will the Real Trends Please Step Forward”;
 - 8.7.1.5 Western Australian Legislative Assembly education and health standing committee alcohol report entitled “Alcohol: Reducing Harm and Curbing the Culture of Excess”;
 - 8.7.1.6 a comparative audit done by the EDPH on Dan Murphy’s liquor store prices, in short a price survey.
- 8.8 The applicant’s submission was in effect that the EDPH’s submissions were not responsive submissions but new evidence.
- 8.9 Having heard submissions from counsel for the EDPH in relation to the applicant’s submissions in para 8.7 above, the Commission determined that save for the material contained in the further critique of the DAA report, which would

not be considered, the other material was not new material but reinforcement and evidence of things already in the knowledge of the Commission.

- 8.10 The applicant made submissions concerning the exclusion of further “new” material lodged by the objector Ms Grace Liew with her submissions as follows:
 - 8.10.1 Statement of evidence from Fiona Johnson;
 - 8.10.2 Report entitled “Crime in the Community”;
 - 8.10.3 Statement of evidence from Ludwig Easton; and
 - 8.10.4 Report entitled “Alcohol and Disorderly Conduct on Friday and Saturday Nights”
- 8.11 Having heard submissions from Ms Grace Liew and the applicant the Commission determined that the statement of Mr Ludwig Easton would be considered, and reserved its position on the statement of Fiona Johnston and the other material.
- 8.12 The applicant’s submissions concerning the “Petition Response” and the request for an order prohibiting the publication of documents in the applicant’s “Bundle of Documents” lodged in the proceedings would be considered in the course of the making of the Commission’s determination in these proceedings.
- 8.13 The applicant’s request for a site visit was refused.
- 8.14 The issue of the provision by the EDPH of the Data Analysis Australia Report to the authors of the study entitled “*Predicting Alcohol-Related Harms from Licensed Outlet Density, A Feasibility Study*” had been resolved prior to the hearing subject to the execution of a binding confidentiality agreement between the relevant parties (see Commission amended orders made on 5 April 2011).

Submissions on behalf of the applicant

- 9 The applicant seeks to open a Dan Murphy’s liquor store at Cockburn Gateway Shopping Centre, corner of Beeliar Drive and Kwinana Freeway, Success. The application is for a conditional licence, as the premises will be within a new, purpose built building and this will necessitate the grant of a building licence.
- 10 The applicant has made an application for approval of an arrangement with the landlord in respect of turnover rent pursuant to section 104 of the Act.
- 11 Relevant documentation including a Public Interest Assessment (“PIA”), expert reports – being the Town Planning Report by MGA Town Planners (“the MGA report”),

Environmental and Health Assessment by Mr Robert Caporn ("the Caporn Report"), Harm Minimisation Policy, Management Plan, Code of Conduct and House Management Policy were lodged.

12 In the PIA the applicant submitted that:

12.1 The MGA Report:

- 12.1.1 identified the locality for the application;
- 12.1.2 identified the characteristics of the locality;
- 12.1.3 made observations on the demographics of the locality and provided a socio-demographic profile;
- 12.1.4 reviewed, from a town planning perspective, the nature of the immediate surrounds for the premises and commented on the appropriateness of the premises in this location;
- 12.1.5 identified, reviewed and commented on each of the liquor licences able to sell packaged liquor within the locality and reviewed the services and amenity of each; and
- 12.1.6 considered the requirement of the public for the services to be offered at the premises.

12.2 The Caporn Report:

- 12.2.1 was completed after Mr Caporn made a site visit to the locality;
- 12.2.2 made comment on:
 - the health and environmental aspects relevant to the application, taking into account;
 - the demographics of the locality;
 - health and crime statistics for the locality;
 - location of the premises; and
 - services to be offered from the premises.
 - the nature of the locality; and
 - the services, facilities and amenities of the locality.

- 12.2.3 identified what, if any, "sensitive" or "at risk" groups or places may be located in the locality or within close proximity to the premises;
- 12.2.4 consulted with the-
- LGA; (term defined in the PIA)
 - the manager of the Centre; (term defined in the PIA)
 - the local police; and
 - Police liquor enforcement division.
- 12.2.5 visited the existing retail packaged liquor facilities in the locality and made observations on each;
- 12.2.6 considered the appropriateness of the premises.
- 13 All other formalities required in connection with the application including payment of fees, advertising requirements and other relevant matters had been complied with.
- 14 The premises will be a newly constructed, purpose built, stand alone building and will be a high quality department style liquor store which features modern and up market facilities with superior retail services and products. The site of the premises is currently vacant land within the relatively new shopping complex known as Cockburn Gateway Shopping Centre ("the Centre") which is a large complex that contains two main buildings (a main shopping centre mall and a smaller retail complex) and several other free standing premises including a tavern (the Gate Bar and Bistro), several fast food outlets and a service station. A copy of the Centre Directory was provided by the applicant.
- 15 Traffic would enter and exit the Centre from Beeliar Drive and Wentworth Avenue. Significant on-site parking is available at the Centre (approximately 1700 bays).
- 16 The total area of the premises will be approximately 1421 m², comprising 993.7 m² of display/sales area and 332.7 m² of cool room/liquor storage area plus staff amenities and office space. A floor plan was provided by the applicant.
- 17 The fit out of the premises will be in the Dan Murphy's corporate styling. The full range of Dan Murphy's services and products will be offered at the premises which includes:
- the best range of liquor (between 3000-4000 product lines, the majority of which will be wines);
 - "Cellar Release" wines;

- a wide range of premium, iconic, rare and old wines and fine/premium spirits;
- exceptionally well trained staff;
- a dedicated Fine Wine Manager present at the store during all trading hours;
- the Dan Murphy's Fine Wine Buyers Guide;
- twice weekly wine tastings;
- specialty events;
- gift cards;
- events planner services;
- trolleys for customer use;
- weekly specials on selected products;
- a lowest price guarantee; and
- a well managed, fully supervised store.

18 The premises will be a highly controlled, constantly supervised environment which is not conducive to adverse behaviours.

19 The applicant takes its responsibilities in the sale of liquor very seriously. It has a strong track record of responsibly managing licensed premises throughout Western Australia and nationally.

20 The PIA addresses matters relating to the following specific issues:

20.1 locality;

20.2 harm and ill-health;

20.3 amenity;

20.4 offence, annoyance, disturbance or inconvenience.

21 The applicant has consulted with a number of "community entities" in relation to the application including:

21.1 Local Government;

21.2 Police;

21.3 Health Department;

21.4 schools;

21.5 Centre Manager.

- 22 The applicant submits that in the course of consultations no major liquor related issues in the locality were identified. The applicant has commenced a cooperative dialogue with the Licensing Enforcement Division of the Police and is committed to working with the Local Government Association and the Police and other relevant stakeholders to address any issues which may arise at the premises.
- 23 The population of the locality is currently estimated to be almost 22, 400.

Demographics

- 24 The population of the locality is characterized as being predominantly:
- 24.1 adult;
 - 24.2 Australian born;
 - 24.3 relatively affluent with higher than average incomes.
- 25 No single group of the locality's population is significantly inconsistent with the Perth Statistical Division and State of WA proportions and overall the locality's population is low risk as far as 'at-risk' groups where liquor related harm is concerned as:
- 25.1 the locality is not characterized by tourists or itinerant workers;
 - 25.2 only a very small proportion of the locality's population has difficulty speaking English;
 - 25.3 the locality is not an economically or socially disadvantaged area;
 - 25.4 the locality is not a mining community; and
 - 25.5 the locality is not a tourist area.
- 26 Compared to other areas of Perth, a slightly higher proportion of children in the locality exists. This is due to the area being recently developed, attracting young families. Investigations and evidence obtained for the PIA revealed nothing to suggest this segment of the locality's population are currently experiencing any greater level of alcohol related harm compared to any other area of Perth, and notwithstanding the above, the style and nature of a Dan Murphy's operation generally attracts older customers who tend to be more affluent and discerning.

- 27 Research has found a significant proportion of alcohol related harm occurs on weekends between the hours of 9pm-3am. The proposed opening hours of the premises are less than those permitted for a liquor store. It will be closed by 9pm on any night, including weekends.
- 28 Currently (at the time of preparation of the PIA) there are 6 liquor licences in the locality capable of selling packaged liquor, and are:
- 28.1 Cellarbrations at Yangebup (a liquor store licence);
 - 28.2 Woolworths Liquor, Gateways (a liquor store licence);
 - 28.3 Atwell Cellars (a liquor store licence);
 - 28.4 1st Choice Liquor Superstore (a liquor store licence);
 - 28.5 The Gate Bar and Bistro (a tavern licence); and
 - 28.6 Fitzy's Lakeside Tavern (a tavern licence).
- 29 The licences are spread throughout the locality. One (Cellarbrations Yangebup) is largely removed from the main urban areas of the locality and another, Atwell Cellars is physically separated from Cockburn Central (and the Centre) by the Kwinana Freeway. The most recently granted commercial licence was granted in November 2007, when the estimated population was 18, 780 and was estimated to grow by 18.8%. by mid 2010. The current estimated population of the locality is almost 22, 400.
- 30 An analysis undertaken by the applicant of the services and nature of each of the existing licences revealed that all the outlets except the 1st Choice Liquor Superstore are small to medium sized outlets, that principally service "convenience" needs in distinct, localised markets.
- 31 A survey of a representative sample of members of the community associated with the locality was conducted and the survey results indicated overall that there is clear community support for the introduction of the premises, for reasons including:
- 31.1 *"more competition and more choice"*;
 - 31.2 *"the convenience of a department store liquor outlet, better pricing pressure on Woolworths and the Gate outlets (which are expensive) and a much better product range"*.

32 In addition to the submissions referred to above, the applicant made the following submissions and lodged the following documents:

32.1 Letter of support for the application dated 31 January 2010 from Lorenzo Bokshi of Cafe Nocello in Success;

32.2 applicant's final and additional submissions and documents with relevant annexures contained and referred to in the applicant's bundle of documents and the evidence files including:

32.2.1 applicant's response to the decision to allow the petition ("petition response");

32.2.2 applicant's response to resident objectors ("resident response");

32.2.3 applicant's response to the intervention by the Executive Director Public Health ("Health response"); and

32.2.4 table of evidence described by the applicant as "listing the applicant's key material and evidence referred to in the PIA and other documents lodged in support of the application lodged by the applicant (including those in the bundle of documents). The table of evidence details the key findings of each item and provides a cross reference to where a copy of the document can be found within the Bundle of Documents or PIA."

33 Responsive submissions were lodged by the applicant on 27 July 2011.

34 The Commission has considered in detail all the applicant's submissions referred to above and the oral submissions made by the applicant at the hearing of this matter.

Submissions on behalf of the Executive Director of Public Health (EDPH)

35 The EDPH made the following submissions and lodged the following documents:

35.1 A notice of intervention lodged on 10 March 2010.

35.2 Submissions in the letter to the Director dated 9 April 2011.

35.3 Submissions with attachments in letter to applicant's solicitors dated 3 May 2010.

35.4 Submissions lodged on 18 October 2010 with the Director.

- 35.5 Outline of Submissions dated 2 June 2011.
 - 35.6 Submissions in relation to application for site visit (letter to Liquor Commission dated 23 June 2011).
 - 35.7 Responsive submissions lodged 27 July 2011.
 - 35.8 In addition to the submissions referred to above the EDPH made oral submissions at the hearing of this matter.
- 36 The EDPH's submissions can be summarised as follows:
- 36.1 the purpose of the intervention by the EDPH is to make representations regarding high risk aspects of the application.
 - 36.2 key concerns regarding this application include:
 - 36.2.1.1 the risk of harm/ill-health caused to people in and outside the Cockburn Central locality should this application be granted;
 - 36.2.1.2 the proposed large size of the store (1421 m²) together with Dan Murphy's lowest price guarantee which will increase the availability of alcohol. Increased availability of alcohol in a society can increase the average consumption of its population and associated harm.
- 37 The reference on page 55 of the PIA to a meeting with representatives of the Drug and Alcohol Office was acknowledged by the applicant to be a misrepresentation.
- 38 In relation to 'at risk' groups which may be affected if the application is granted the proposed site of the premises is in close proximity to a youth centre and the proportion of children and young people in the locality is comparatively high.
- 39 There is a relationship between price, consumption and harm.
- 40 The prominent availability of alcohol in a community, the way in which it is made available and the associated normalisation of alcohol use as a necessary part of everyday life can significantly impact on the drinking patterns and behaviour of young people.
- 41 Research (referred to and provided by the EDPH) shows that there is a relationship between the increasing availability of alcohol and increasing consumption of alcohol which can be linked to increased violence. Reference was made to alcohol related

assault and domestic incidents in the locality and to drink driving and associated road trauma.

- 42 The EDPH offered evidence and representations in respect of two fundamental issues:
- 42.1 the degree of harm or ill-health likely to result from the inherent characterisation of the premises and in the application; and
 - 42.2 the degree of harm or ill-health likely to result from the proximity of the premises to Cockburn Youth Centre.
- 43 In relation to paragraph 42.2 above the EDPH in summary, submitted that:
- 43.1 children and young people comprise one of the "at risk" groups most vulnerable to the effects of alcohol;
 - 43.2 the consumption of alcohol by juveniles and the normalisation of binge drinking by young people are problems of increasing concern within the community;
 - 43.3 there is a high proportion of children in the locality;
 - 43.4 prominent and ready availability of alcohol in a community, and the associated normalisation of alcohol as an ordinary or essential part of everyday life can significantly impact on the drinking patterns and behaviour of young people. Such normalisation is likely to result in this instance both due to:
 - the characteristics of the premises proposed, which will position alcohol sales as a literally substantial aspect of the retail experience of what is *"expected to become one of the biggest regional centres south of the Perth CBD"* (PIA at 3); and
 - the increasing proliferation of liquor stores in the locality suggesting to young people that alcohol plays a key role in their community.
 - 43.5 the effect of the above factors on young people in the locality can reasonably be expected to be magnified by the presence of both a number of fast food outlets and the Cockburn Youth Centre. The latter provides a wide range of local, state and federal government services to local youth. Many of the clients accessing these services already experience alcohol and other drug issues;
 - 43.6 there is a pre-existing level of underage drinking in the area surrounding the Youth Centre;
 - 43.7 the applicant has submitted that the premises will be a reputable, high quality liquor store which provides a fully supervised and controlled environment where

packaged liquor is sold and supplied. Ultimately it is the customers personal choice as to whether he or she wishes to misuse alcohol. The EDPH does not accept the first proposition and accepts the second is axiomatic. However neither addresses the issue of normalisation addressed above, nor recognises that persons already experiencing alcohol and other drug issues are likely to exercise, at best, an impaired freedom of choice;

- 43.8 it was submitted that those young people over 18 who are accessing the Youth Centre are likely to purchase alcohol more frequently and in greater quantity in response to the presence of the premises, thereby incurring additional alcohol related harm;
- 43.9 those persons able to purchase alcohol will provide a potential source of secondary supply to underage youth congregating at the Youth Centre. While the applicant is correct in noting that the largest source of alcohol for underage youth was parents, its PIA also shows that the categories of "friends" and "someone else" combine to represent nearly as significant a source;
- 43.10 while the applicant has provided information sourced from a discussion with the Centre Co-ordinator of the Lynwood Youth and Family Centre it is unclear what relevance, if any, that information has to the application;
- 43.11 there are statements from the Cockburn Youth Centre Co-ordinator to the effect that he has observed youth congregating and drinking in the area 3-4 times a week; often cleaned up empty alcohol containers on Monday mornings; and was aware of the practice of young people to fill up cups from the nearby McDonalds with alcohol;
- 43.12 the applicants response only demonstrates that different circumstances exist at the Lynwood and Cockburn Youth Centres. The Commission is obliged to make its determination on the basis of the circumstances actually prevailing in the locality and not on the basis of circumstances which are patently inapplicable. The evidence shows that there is a clear level of alcohol related harm already affecting young people in the area; and
- 43.13 granting the application is likely to increase that harm to this vulnerable group.
- 43.14 the EDPH in its responsive submissions made the following points:
 - 43.14.1 the EDPH does not object to the application, accordingly whether there will be undue harm caused to any group of persons is not part of the EDPH's intervention.

- 43.14.2 it is unnecessary for the EDPH to establish the possibility of harm on the balance of probabilities. Section 69(8a) assumes evidence and representations as to harm or ill health led by the EDPH are relevant to the assessment to be made by the Commission, whether or not it establishes that the harm or ill health is “undue.” Accordingly the EDPH is permitted to intervene in regards to the potential for any liquor related harm or ill health, whether this could be characterised as undue or otherwise.
- 43.14.3 the EDPH is similarly not required to make any submissions as to the applicants long standing, compliant manner of trade. The EDPH has previously stated that it does not disagree with the assertion that, should the application be granted, the premises is likely to be well run and carefully managed. But these considerations are utterly irrelevant in the context of assessing other characteristics of the proposed operation of the venue such as high volumes of cheap liquor and proximity to at-risk groups which influence the harm or ill health that the grant of the application is likely to have on people, or any group of people, in the locality.
- 44 The impact of increasing the physical and economical availability of packaged liquor and the potential for even a minimal increase in the risk of alcohol related harm are relevant factors to consider when the Commission determines this application.
- 45 The harm which may result from the increase in physical and economical availability of packaged liquor is magnified by the proximity of a Youth Centre where *“a significant percentage of clients under the age of 25 and their families ... have experienced negative alcohol related incidents which have significantly impacted on their well being”*. The operation of such a large ‘liquor supermarket’ in close proximity to this focal point for at-risk youth has the potential to promote and normalise the consumption of alcohol by persons already adversely affected by such consumption.
- 46 It is open for the Commission to consider that the concerns referred to in paras 44 and 45 above may be, either collectively or individually, determinative in this situation.
- 47 The EDPH’s outline of submissions in response lodged on 27 July 2011 dealt with:
- 47.1 the further materials lodged by the applicant on 2 June 2011 under the headings;
- 47.1.1 “Style of Retailing”;
- 47.1.2 witness Statement of Mr Paul King;
- 47.1.3 witness Statement of Mr Andrew Pollard; and
- 47.1.4 total levels of alcohol consumption in the community.

- 47.2 additional evidence filed by the EDPH;
- 47.3 applicability of evidence filed by the EDPH, including reference to nexus between the application and harm or ill health;
- 47.4 proper test for assessing harm or ill health.

Submissions on behalf of the objectors

City of Cockburn (“the City”)

48 The City made submissions in its notice of objection lodged on 19 February 2010 and lodged further submissions on 11 May 2010 and responsive submissions on 28 July 2011. Oral submissions on behalf of the City were made at the hearing;

48.1 the City’s submissions can be summarised as follows:

48.2.1 the City lodged evidence in support of the City’s grounds of objection as follows:

- Statement of Mr Logan Howlett (Mayor of City);
- Statements of:
 - Nicholas Ian Jones
 - Barry Jones
 - Daniel Christopher Arnot
 - Paul de Bruin
 - Corina Dunnachie
 - Andrew Antre Trosic
 - Christa Reigler on behalf of Fremantle GP Network

48.2 the evidence lodged by the City addresses the potential for the grant of this application to cause harm or ill health to youths and young persons using the Cockburn Youth Centre.

48.3 The evidence before the Commission is:

48.3.1 the proposed premises is directly adjacent to the existing Cockburn Youth Centre;

- 48.3.2 the proposed premises shares a common boundary with the existing Cockburn Youth Centre, the proposed site of the planned GP super clinic/medical centre and an existing McDonalds family restaurant;
- 48.3.3 the Cockburn Youth Centre provides a wide range of health, support, training and other services, for youth and young persons drawn from throughout the Southern Metropolitan Area (including the locality);
- 48.3.4 the Cockburn Youth Centre is the major youth centre offering help and support services for youth and young persons in the Southern Metropolitan Area (including the locality);
- 48.3.5 a significant proportion of the youths and young persons utilizing the services provided at and through the Cockburn Youth Centre have existing health issues, including mental health and alcohol and substance abuse issues;
- 48.3.6 there are existing juvenile liquor use and abuse issues occurring in the vicinity of the Cockburn Youth Centre and the site of the proposed premises;
- 48.3.7 the immediate proximity of the site of the proposed premises to the Cockburn Youth Centre was not identified in the aerial photograph annexed to the applicants PIA notwithstanding the existence of the adjacent Cockburn Youth Centre directly adjacent to the site of the proposed premises and there is no analysis of the proximity of the Cockburn Youth Centre to the proposed liquor store site, the services provided at the Cockburn Youth Centre or the Cockburn Youth Centres patrons in the applicants PIA;
- 48.3.8 the proposed liquor store site borders a McDonalds family restaurant and is located in close proximity to other fast food outlets and retail services which are attractive to juveniles and families;
- 48.3.9 the proposed liquor store site shares a border with the proposed site for a future GP super clinic/medical centre to be developed to service the population of the locality;
- 48.3.10 a section of the patronage of the Cockburn Youth Centre is legally entitled to purchase liquor;

- 48.3.11 patrons of the Cockburn Youth Centre who are juveniles are currently exposed to liquor and are at risk of being exposed to liquor purchased legally by non-juvenile patrons of the Youth Centre;
- 48.3.12 youths and young people patronising the Cockburn Youth Centre will be at significant risk of harm and ill health due to the use of liquor as a result of the grant of the application and the grant of this application would not be in the public interest;
- 48.3.13 the applicant has not carried out a proper (or indeed any) risk assessment of the impact of the grant of the application on the patrons of the Cockburn Youth Centre, the PIA does not acknowledge the existence of, or the operations of the Cockburn Youth Centre and the applicant is therefore not in a position to assert that the grant of the application would be in the public interest;
- 48.3.14 the risk of harm and ill health being caused to youths and young people using the Cockburn Youth Centre if this application is granted is of sufficient significance and of a particularly serious nature in the particular circumstances of this case to outweigh the other objects of the Act and to justify the refusal of this application in its entirety;
- 48.3.15 In relation to "Offence, Annoyance, Disturbance or Inconvenience and Amenity and Public Interest" (Section 74(1)(9)(i)).
- residents of the Locality already experience liquor related offence, annoyance, disturbance and inconvenience;
 - there are high volumes of traffic using the roads in the immediate vicinity of the proposed premises and there are existing traffic congestion issues associated with Cockburn Central shopping centre; and
 - residents of the Locality already experience annoyance and inconvenience as a result of traffic congestion issues in and around the site of the proposed premises; and
 - there are no immediate proposals to improve the road systems.

49 Ms Grace Liew

49.1 Ms Liew made submissions in her notice of objection lodged on 1 February 2010, in a letter dated 1 June 2011 and made oral submissions at the hearing.

49.2 Essentially Ms Liew's grounds of objection and submissions can be summarised as follows:

- the application is not in the public interest because of the existence of 'at risk' groups in the Cockburn locality;
- granting the application would cause undue disturbance or inconvenience to persons who reside or work in the vicinity of the proposed premises; and
- the amenity, quiet or good order of the locality is affected.

49.3 In relation to each of the matters referred to in paragraph 49.2 above Ms Liew offered evidence and submissions

50 Objectors

50.1 Submissions were made in the notices of objection lodged by the residential objectors.

50.2 The grounds for the objections lodged were general and largely repetitive and related to perceived problems with harm and ill health, disturbance, annoyance and inconvenience which would arise were the application to be granted and how the amenity, quiet and good order of the area would be negatively affected by the grant of the application.

Determination

51 Section 38(2) of the Act requires an applicant for the grant of a liquor store licence to satisfy the licensing authority that granting the application is in the public interest. To discharge this onus the applicant must address the positive and negative aspects of the grant of the licence on the community. Pursuant to section 16 (1)(b)(ii) of the Act the Commission has to make its determination on the balance of probabilities.

52 In determining whether the grant of an application is in the public interest, the Commission needs to exercise a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd (2007) WASCA 175* and *Palace Securities Pty*

Ltd v Director of Liquor Licensing [1992] 7WAR 241). Tamberlin J in *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142* summarised the position thus:

... the expression "public interest" is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

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 public, society or the nation and its content will depend on each particular set of circumstances."

- 53 The *Interpretation Act 1984* at section 19 provides that regard may be had to extrinsic material, including the Second Reading Speech to a Bill, when considering the meaning and intent of a written law.
- 54 During the Second Reading Speech which accompanied the introduction of *Liquor and Gaming Legislation Amendment Act 2006* (see Parliamentary Debates, WA Parliament, vol 409, p 6342) the then Minister for Racing and Gaming, the Hon. Mr Mark McGowan, stated:
- "A key reform is the creation of the public interest test... Under the public interest test, all applicants will be required to demonstrate that the application is in the public interest and the licensing authority will be required to consider the application based on the positive and negative social, economic and health impacts of the community... it should be noted, however, that the government does not consider the proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test."*
- 55 Section 38(4) of the Act requires the potential negative impact of an application, to be addressed but these are not the only matters for consideration in evaluating what the positive and negative social, economic and health impacts that the grant of an application will have on the community.
- 56 Achieving the objects of the Act, as set out in section 5, is important in determining where the public interest lies (refer *Palace Securities* supra). The primary objects of the Act are set out in section 5 of the Act:
- to regulate the sale, supply and consumption of liquor;
 - to minimize 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.

- 57 In meeting the applicant's obligations in respect of establishing the public interest and satisfying section 5(1)(c) of the Act, regard must be had to the requirements of consumers of liquor and related services. The applicant must present supporting, (objective where possible) evidence at an appropriate level to satisfy the Commission. The Commission has previously considered that it is not sufficient for an applicant merely to express opinions and make assertions about perceived benefits of an application. Such opinions and assertions must be supported by an appropriate level of evidence.
- (Refer *Busswater Pty Ltd v Mr KV House and Mrs LV Verhoog* (LC 17/2010) at [36], *Element WA Pty Ltd v Director Liquor Licensing* (LC 32/200) at [23], *Harold Thomas James Blakely v Director Liquor Licensing* (LC 44/2010) at [39] and *Shallcross Investments Pty Ltd v Director Liquor Licensing* (LC26/2010 at [18] .)
- 58 Section 16 of the Act provides that ultimately each application must be considered on its merits. However conflict may arise between advancing the different objects of the Act, particularly the objects of minimizing alcohol-related harm as well as catering for the requirements of consumers of liquor. The licensing authority needs to weigh and balance those competing interests if such circumstances arise. (Refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258)
- 59 Furthermore, the private interests of an applicant wishing to establish a liquor outlet in a particular locality should not be confused with the public interest. The requirements of the Act are directed to ensuring that the licensing authority takes a balanced approach to the granting of new applications and concerns itself with the public's interest rather than private interests.
- 60 The applicant intends to open a new liquor store under the Dan Murphy brand at the Cockburn Gateway Shopping Centre in a purpose built building of approx. 1400 square metres. This by Western Australian standards is a large outlet.
- 61 There are 6 liquor stores in the locality of which one is a large outlet (1st Choice Liquor Superstore). The applicant submits that the remainder are smaller outlets catering for convenience shopping servicing relatively restricted areas.
- 62 A number of residential objectors submitted that the area was well enough served by current liquor outlets but this view was unsupported by any concrete evidence.
- 63 At the outset of the hearing the applicant argued that the objections other than that of the City of Cockburn should be struck out on the grounds they did not comply with section 73 and 74 of the Act.
- 64 The Commission ruled that it would allow those objections and accord them the weight it considered appropriate in deciding the matter. The residential objections save that of Ms Grace Liew, were repetitive and there was little if any supporting evidence for their contention that granting the licence would give rise to loss of amenity and an increase in harm generally.

- 65 Considering the very general nature of the objections lodged by the residential objectors and the lack of supporting evidence the Commission finds that the objectors have not discharged their onus under section 73(10) which places the burden of establishing the validity of any objection on the objector.
- 66 The objection lodged by Ms Grace Liew however falls outside of the comments made at para 65 concerning the lack of evidence supporting the objections and their repetitive nature. Although the Commission did accept the statements of Mr Ludwig Easton and Ms Fiona Johnson along with two reports "Crime in the Community" and "Alcohol and Disorderly Conduct on Friday and Saturday Nights" submitted by Ms Liew, these reports and the statements were extremely general in nature and the Commission held that they had little probative value.
- 67 Ms Liew submitted evidence based on her personal experience living and working in the area. Ms Liew also prepared a graph and statistics relating to the increase in WA Police incidents within the Gateways precinct and incidents related to the Public Transport Authority. The evidence supplied in light of her personal experience working in the area was well documented and was accorded some weight.
- 68 The applicant submitted that the grant of the application will provide a number of benefits to the local community in addition to the benefits of increased competition, the introduction of a large, modern liquor store with superior customer service and product range and convenience to visitors to the shopping centre.
- 69 It is the Commission's view, having regard to the advertising and other material supplied by the applicant, that although much was made of the fine wine aspect of the store, an outlet of this size would have an overwhelming majority of its floor space devoted to commonly consumed products with an emphasis on low priced lines.
- 70 The applicant argued that because the business model has proven to be popular elsewhere, the grant of a new licence in this locality is justified. The Commission held in LC 34/2011 (at para 54) that "*such a contention ignores the regulatory scheme and objects of the Act; the need to consider the merits of each case; and need to properly weigh and balance the public interest considerations in the context of each individual application*".
- 71 Little real evidence was presented that persons visiting the shopping centre might find it more convenient to purchase packaged liquor from the proposed store. In LC 13/2011, quoted by the Commission in LC 34/2011 Woolworths Ltd sought the grant of a liquor store licence at the Warnbro Fair Shopping Complex, and commissioned a market survey in which 409 customers of the Shopping Complex were interviewed. This evidence was given considerable weight by the Commission to demonstrate that persons attending the Shopping Complex had a requirement for one-stop-shopping and ultimately that application was approved.
- 72 It is important to observe that a primary object of section 5(1)(b) of the Act is to 'minimize'

harm or ill health, not to prevent harm or ill health absolutely. The Act is predicated upon establishing a regulatory mechanism for the granting of liquor licences and the operation of licensed premises which are in the public interest.

- 73 The Commission in *Ventorin Pty Ltd v Director of Liquor Licensing (LC04/2009)* observed that:

"A matter often overlooked in arguments for these sorts of permits is that the Commission must look at the whole of the Act to gain an understanding of the intention of the legislature. In terms of s 5(1)(c) of the Act the first primary object of the legislation is to regulate the sale, supply and consumption of liquor.

There is an expectation in the Act that the Commission will regulate the supply of liquor subject to the various provisions of the Act weighed up against the particular merits of each application. The disposition of the Act, read as a whole, is to regulate."

- 74 The EDPH identified a number of issues that bear on alcohol-related harm and ill-health, particularly the availability of cheap liquor, the large size of the proposed premises, increased availability of packaged liquor and outlet density. Research material to support this concerns was cited including Gardiner, R & Coase, P dated March 2011, Cheap Drinks, Drug and Alcohol Office, Department of Health, which establishes a link between the price of alcohol and consumption. The EDPH also referred to the work of Chikritzhs, T., Catalano P., Pascal, R., and Henrickson, N (2007), *Predicting Alcohol-related harms from licensed outlet density: A feasibility study*. Monograph Series No. 28 National Drug Law Enforcement Research Fund, Commonwealth of Australia, Hobart.

- 75 The applicant provided evidence to support the contention that there has been no increase in alcohol-related harm in other areas where Dan Murphy's stores operate and the EDPH cautioned against the significance of this data.

- 76 The Commission accepts that the Dan Murphy Liquor outlets are well managed and have adequate harm minimisation policies, well documented and evidently entrenched. Harm however can arise irrespective of the strength of management of licensed premises as a result of their location and nature. Bell J in *Director of Liquor Licensing v Kordister Pty Ltd [2011] VSC 207* at [180]: stated:

".....Depending on the evidence, it may significantly contribute to minimising harm to restrict the sale of alcohol from premises which trade responsibly. That is why the court refused to grant a licence for the bottle shop in premises opposite the Aboriginal gathering place in Western Australia. It was not suggested there that the licensee would not trade responsibly. The question is and always remains whether a licensing decision would contribute to minimizing harm in the ways specified in s4(1)(a) or otherwise."

The Commission notes that whilst this observation by Bell J is made pursuant to the provisions of section 4(1)(a) of the *Liquor Control Reform Act 1998* (Victoria), the intent of the section is germane to the objects of *Liquor Control Act 1988*.

- 77 The measurement of harm in respect of a suburban liquor store is made difficult by the fact that the liquor purchased is often transported some distance before consumption and a direct nexus between the premises and resultant harm is often difficult to establish.
- 78 Much of the academic research which shows a direct correlation between outlet density and increased levels of alcohol related harm is aggregated data and this general data must be applied with care to specific locations or situations.
- 79 Bell J in *Director of Liquor Licensing v Kordister Pty Ltd* supra expressed it as follows

“But by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and admissible, for it may, depending on the circumstance, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the ‘particular local, social, demographic and geographic circumstances’ of the given case.”

- 80 In addition to lack of evidence to show that the requirements of consumers will be met with the grant of this licence, it is the Commission’s view that the location of the proposed premises is the singularly important consideration in respect of harm and ill health which is likely to be caused by the granting of the application.
- 81 The proposed licensed premises are in close proximity to City of Cockburn Youth Centre and both the City and the EDPH dealt with this extensively in their submissions.
- 82 The submission of the City supporting its objection was in turn supported by statements from the Fremantle GP Network, Cockburn Youth Services, St John of God and Strong Families.
- 83 The EDPH submission whilst providing general information on alcohol related harm also specifically argued that the location of the proposed licensed premises in close proximity to the Cockburn Youth Centre would result in an unacceptable level of risk of additional alcohol related harm.
- 84 The City also brought to the attention of the Commission the proximity of the premises to the site of the Super Clinic which is to be constructed following the grant of Commonwealth funding in 2009.

- 85 The Commission gave considerable weight to the City of Cockburn's submission and that of EDPH in this specific regard. In doing so it had regard to the Lynwood Youth & Family Centre review report tendered in evidence by the applicant. This review, authorised by Peter Whennore, stated that the Lynwood Family & Youth Centre co-ordinator had no issue with the proximity of a Cellarbrations Liquor Store near the Lynwood Centre. The conclusions of this report cannot in the view of the Commission be held to apply automatically to Cockburn which is a different area and different circumstances apply as outlined in the statements provided by Paul De Bruin (Youth Centre Co-ordinator) and Corina Dunnacchie (Duty Supervisor) of Cockburn Youth Centre.
- 86 The applicant submitted a report by Caporn Services addressing the requirement of Section 38(4) in respect of any potential negative impact of granting the licence. The Caporn report gave a broad picture of the locality around the Cockburn Gateway Shopping Centre and was of a very general nature. Subsequently in May 2010, Caporn conducted a further study which more specifically addressed issues raised by the City of Cockburn and Ms Grace Liew in their objections and the EDPH in its intervention.
- 87 The Commission formed the view that the Caporn Reports did not give it sufficient comfort that the potential harm resulting from the establishment of a large liquor store in this location could be mitigated by simply relying on little more than the excellent training given to employees of the applicant in the responsible sale of alcohol.
- 88 The Commission found that there is real potential for harm if the licence were to be granted and there was not sufficient evidence that the concerns raised by the EDPH and the City of Cockburn had been appropriately addressed. Ipp J in *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* supra concluded that the mere possibility of harm or ill health was a relevant consideration.
- 89 The Commission held that the submissions concerning potential harm and ill health by City of Cockburn and EDPH were sufficiently supported by relevant evidence relating to the location proposed for the licensed premises.
- 90 This is consistent with the views of Wheeler J in *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2001] WASCA 410 where she said:

"The Act directs attention to the minimisation of alcohol related harm generally (s 5(1)(b)). The relevant question for the Court, in that case, is the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application. This does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather it seems to me that must necessarily be assessed against any existing harm or ill health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be commonly accepted in the community, the distinction is probably not significant. However, where there is already a very high and serious level of alcohol related

harm in a community, it may be that the Court would find a relatively small risk of increase in that level of harm to be unacceptable. In other words, it is not the "risk" of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made."

91 The applicant submitted a voluminous PIA and body of attendant material. The papers for this hearing ran to in excess of 2000 pages, however, the Commission had to carefully assess all of this material. Much of it was repetitious and often of little apparent relevance.

92 The Act places the onus on an applicant to provide sufficient evidence to satisfy the licensing authority that the grant of the application is in the public interest. In the Dan Murphy's Bicton determination (LC 34/2011) the Commission stated

The level and degree of evidence to be submitted by an applicant will invariably vary depending upon the facts and circumstances of each case. Whether evidence is relevant and probative depends not on the intrinsic qualities of the evidence but on what the evidence is said to prove.

93 The Commission finds that the evidence submitted to support the grant of the application for a new liquor store licence at this location does not satisfy the requirements of the Act as set out earlier.

94 The Commission further held that the objection by Ms Grace Liew had been made out and the amenity in the area would be detrimentally affected.

95 Ultimately the Commission was of the view that, on the evidence before it, any benefit of increased competition, range of products and diversity of choice is outweighed by the potential harm and loss of amenity that would result if the application were to be granted.

96 The application is refused.



JIM FREEMANTLE
CHAIRMAN