

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

Applicant: Rocky Patrick D'Costa and Deborah Ann D'Costa
(represented by Mr Phil Cockman, Canford Hospitality Consultants)

Objector & First Intervener: Commissioner of Police

Second Intervener: Executive Director of Public Health

Commission: Mr Seamus Rafferty (Deputy Chairperson)
Ms Helen Cogan (Member)
Dr Eric Isaachsen (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the Delegate of the Director of Liquor Licensing to refuse an application to grant a liquor store licence.

Premises: Cannington Supa IGA, 45 Cecil Avenue, Cannington

**Date of Determination:
(on papers)** 10 June 2014

Determination: The application for review is dismissed and the decision of the Delegate of the Director of Liquor Licensing is affirmed

Authorities referred to in the determination

- *Hancock v Executive director of Public Health* (2008) WASC 224
- *Executive director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).
- *LC20/2010 (David McGeogh and Paul Ozanne and Executive Director of Public Health & others)*
- *LC18/2012 (Liquorland Australia Pty Ltd and Executive Director of Public Health & others)*
- *LC24/2012 (Forest Road Liquor Pty Ltd and Executive Director of Public Health & others)*
- *Gull Liquor 1999 20 SR (WA) 321*
- *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492
- *O'Sullivan v Farrer* (1989) 168 CLR 210
- *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175

Background

1. On 1 March 2013, an application was lodged by Rocky D'Costa and Deborah D'Costa (the applicants) for the conditional grant of a liquor store licence in respect of premises to be known as Cannington Supa IGA located at 45 Cecil Avenue, Cannington. The application was made pursuant to section 41 and 62 of the *Liquor Control Act 1988* ("the Act").
2. On 26 April 2013, the Commissioner of Police ("the Police") lodged a Notice of Intervention and Objection pursuant to sections 69(6)(c) and 73 of the Act for the purpose of making representations in respect of the application.
3. On 29 April 2013, the Executive Director Public Health lodged a Notice of Intervention pursuant to section 69(8a) of the Act for the purpose of making representations in respect of the application.
4. On 21 November 2013 the delegate of the Director of Liquor Licensing ("the Director"), pursuant to sections 13 and 16 of the Act, determined the application on the papers and refused the application.
5. On 19 December 2013, the applicants lodged an application with the Liquor Commission ("the Commission") for a review of the decision of the Director pursuant to section 25 of the Act. At the request of the applicant, the Commission has determined this matter on the papers.

Legal principles governing review

6. The Commission is not constrained by the need to find error at first instance but is to undertake a full review of the materials before the Director by way of a rehearing. The Commission is to make its own determination of the merits of the application based solely on those materials (see *Hancock v Executive director of Public Health* (2008) WASC 224, (53) per Martin CJ).
7. In determining the review pursuant of section 25(4) of the Act, the Commission may do any of the following, namely :
 - a) affirm, vary or quash the decision;
 - b) make a decision in relation to any application or matter that should in the opinion of the Commission have been made in the first instance;
 - c) give directions as to any questions of law reviewed or to the Director to which effect shall be given; or
 - d) make any incidental or ancillary order.

Submissions on behalf of the applicants

8. The applicants made a detailed submission outlining their grounds for review. They outlined the support from the local community and the wider shopping public that utilise the retail services of the Super IGA store at Cannington. This support included a petition signed by 403 persons and 29 detailed witness questionnaires.
9. They confirmed their commitment to meet the conditions recommended by the Police should the application be granted. These recommendations included measures to physically segregate the sale of alcohol from the grocery items, provide for adequate security through staffing and CCTV coverage, limit the cross promotion within the store and to eliminate alcohol advertising on the exterior of the store.
10. The applicants commented on the availability of alcohol in the local community, contrasted their proposed stringent trading conditions with those of neighbouring alternate liquor outlets, and addressed the potential for harm or ill-health in the community. They were of the view that a small, discrete and responsibly designed outlet would provide a harm minimisation approach in a beneficial manner.
11. Sensitive venues in the vicinity were recognised with the applicants indicating a willingness to provide for direct and quick contact. The applicants see themselves and the business as very important members of the community and do not want to do anything to impact in any negative way on that community.
12. Cannington was noted to have some issues, but no more than other localities in the State. The applicants drew attention to other liquor store licences in the vicinity of schools in WA and noted that strict trading conditions were imposed without negatively impacting their respective communities.
13. The provision of a liquor store within a supermarket situation is considered to be at the low end of the risk spectrum of liquor licences. This store goes further in that it is small, discrete and proposes the most stringent trading conditions.

Submissions on behalf of the Commissioner of Police

14. The Police lodged a notice of intervention and an objection to the grant of the application.
15. The police assessment of the locality was that the grant of the application may adversely impact on a number of at-risk groups or social services providers. These were identified as : -
 - Cannington Community College - located directly across from the proposed liquor store and provides for students from ages three to 15 years. Students from the college use an adjacent bus stop and also frequent the current IGA store.
 - Sevenoaks Senior College - located directly across from the proposed liquor store with students aged 16 – 18.
 - Erin Clark Athletic Centre, a community facility located between the Cannington Community College and the Sevenoaks Senior College.

- Treasure Island Child Centre - located on the opposite side of the roundabout from the proposed liquor store and operates Monday to Friday from 6.30am to 6.30pm for children aged six weeks to eight years of age. A petition objecting to the grant of the application was received from 45 families who use this centre.
- Communicare Incorporated - a charity organisation which provides a number of community services in the area, including child care, disability services, youth programmes and training and education for workplace placement and traineeships. Communicare Incorporated works with vulnerable and at-risk groups including children and young people from low socio-economic backgrounds, aboriginal people and communities, domestic violence perpetrators and victims, and unemployed people, particularly those with mental health issues.

The CEO of Communicare Incorporated, Ms Pitt, provided police with a letter objecting to the application noting that having a liquor store within the confines of the grocery shop normalises the consumption of alcohol to children. Communicare Incorporated, through the provision of its men's domestic violence programme, experience firsthand the effect that alcohol plays in domestic violence and cannot support another liquor outlet in an area which is already well serviced for liquor.

- Centrelink, the Federal Government Department of Human Services - which provides information and support for family assistance, health and disability care, training and work placement services, migrant services and crisis accommodation.
- The Department of Child Development - which provides education services and crisis care organisation.

16 Next to the shopping area on Cecil Avenue, there is unused land which backs onto the Mason Bird Building. Maintenance services note that there is an increasing amount of empty alcohol containers left on this unused land and the police submit that with another packaged liquor outlet, the amount of rubbish will only negatively impact on the local amenity.

17 It was submitted by the Commissioner of Police that despite the applicants' claims that the locality is stable and educated, ABS data would suggest that the area has a low socio-economic demographic, with a higher percentage of unemployed and at-risk groups. Police are aware that there is a transient population in the locality, who flow past the proposed liquor store through to the Cannington train and bus station.

18 The Police provided data from their Incident Management System ("IMS") and Computer Aided Dispatcher System ("CAD"). The IMS records, suburb by suburb, offences detected and reported to Police. CAD exclusively records police attendance and is location specific.

- 19 Between March 2012 and February 2013, IMS recorded 1,708 criminal offences in Cannington, of which 40 were noted as alcohol related. A higher percentage of domestic assault offences and non-domestic assault offences had alcohol as a contributing factor. Police submit that an additional licensed premises that provides packaged liquor will add to the offence levels.
- 20 CAD information for Cannington over the same 12 month period revealed 907 attendances with 27 of these within 250m radius of the premises. These predominantly occurred between the hours of 9 am and 9 pm with 22 attendances relating to theft, disturbance and assault.
- 21 The applicant's premises has already received 26 calls for police assistance without a liquor licence. This represents existing problems at the premises which will only increase with the establishment of a liquor store.
- 22 In summary, it was submitted by the Police that the proposed liquor store is to be located in an area where there is a high density of community services for at-risk groups in a locality of low socio-economic status. Police data is reflective of a suburb already burdened with significant crime and anti-social behaviour and to grant a further packaged liquor outlet in the area would only exacerbate the existing problems.

Submissions on behalf of the Executive Director Public Health

- 23 The Executive Director Public Health ("the EDPH") lodged a notice of intervention in order to make representations regarding harm or ill-health due to the use of liquor and the minimisation of that harm. In the context of the current application, it was submitted that:
 - the locality in which the proposed liquor store is to be located is at relatively greater disadvantage compared to the State and national rankings and includes at-risk groups residing in the area, some who already experience harm related to alcohol use;
 - there are child care services located in close proximity to the premises that are already impacted by existing alcohol-related issues and anti-social behaviour;
 - social services within close proximity of the premises deal with clients seeking support for anti-social issues that are sensitive to, and exacerbated by, the effects of alcohol. Increasing the convenience and availability of alcohol (e.g. passing by the premises when going to and from services) will complicate resistance and recovery of these vulnerable groups;
 - school students from nearby schools and colleges frequent, and often remain at, the supermarket premises;

- in the absence of conditions to ensure that the integration of liquor within a supermarket setting does not occur, cultural influence and related harms can result; and
 - the collective research clearly demonstrates evidence of the burden of alcohol-related harm in the community.
- 24 Police data indicates that from 1 January 2010 to 31 March 2013, there were 441 assault offences in the suburb of Cannington, of which 18.6% (82) were reported as being alcohol-related. There are six suburbs in the Cannington Police Sub-District and the suburb of Cannington recorded the second highest (absolute) number of alcohol-related assault offences, and the fourth highest percentage of offences noted as alcohol related.
- 25 It was submitted that alcohol is strongly associated with domestic violence offences in the suburb of Cannington, with more than one in four domestic violence offences during the period 1 January 2010 and 31 March 2013 recorded as alcohol-related. In addition, data indicates that a proportion of drink-driving in the locality is associated with the consumption of package liquor. Introducing an additional package outlet in Cannington has the potential to increase drink-driving offences.
- 26 The EDPH submitted details of the existing social services for at-risk groups in the locality and provided information from representatives of the Department of Child Protection, Communicare Incorporated, Cannington Community College and Treasure Island Child Care Centre. All expressed concern that the granting of the application may negatively impact on the services they provide and the clientele who access their services and facilities.
- 27 Although the applicants submitted that the City of Canning LGA (within which the proposed liquor store is to be located) has a SEIFA score of 9 (and therefore is not disadvantaged), it was submitted by the EDPH that the reference to the City of Canning LGA, which consists of 14 suburbs, misrepresents the characteristics of the more immediate suburbs surrounding the proposed premises. Closer analysis based on 2011 data from the Australian Bureau of Statistics indicates that there is greater disadvantage in the immediate suburbs surrounding the proposed liquor store when compared to the City of Canning LGA as a whole.
- 28 According to the EDPH, there are currently four premises that sell packaged liquor within a 2 km radius of the proposed liquor store. It was submitted that granting this application will increase the physical availability of alcohol to at-risk groups within the locality. Harm minimisation conditions will not sufficiently mitigate the potential for harm to at-risk groups should this application succeed.
- 29 In the view of the EDPH, the granting of this application has the potential to increase

alcohol-related harm in a locality that experiences social and economic disadvantage, and places increased pressure on local services who are already supporting those 'at-risk' in the locality.

Responsive submissions on behalf of the applicants

- 30 In response to the matters raised by the Police and the EDPH, the applicants submitted that most West Australians consume alcohol responsibly and it is not the intent of the legislation to restrict access to liquor in a blanket form. The intent is that responsible liquor services should be provided in controlled situations so that the very many responsible members of the public may satisfy their reasonable liquor requirements in a convenient manner.
- 31 According to the applicant, liquor stores in a supermarket/shopping centre environment are at far lower risk and lower impact than stand alone stores and less likely to facilitate opportunistic purchases of liquor by the public. The applicant has incorporated many responsible design features in the proposed liquor store to reduce the potential for opportunistic purchasing of packaged liquor. Customers will have to make a conscious decision to enter the supermarket complex and then decide to enter the proposed liquor store. Also, the applicant does not propose to have any visible advertising or promotional material outside of the supermarket building.
- 32 The proposed liquor store will not be visible from many of the sites where the social service providers are located, including the Treasure Island Child Centre, because the proposed liquor store is completely enveloped within the supermarket building. The proposed liquor store can only be seen if someone ventures into the supermarket itself, and even then, the liquor store area is largely screened from general view.
- 33 In respect of the concerns that juveniles gather at the supermarket premises, it was submitted that there are about 15-20 students who gather each day between 8am and 8.20am and again from about 3pm to 3.15pm in the afternoons. The proposed liquor store would not open until 9am, so it would not be open when students are at the supermarket in the mornings, and the applicant is prepared to close the proposed liquor store each school day from 3pm to 4pm. In addition, in order to reduce any negative impact that the operation of the proposed liquor store may have on the local community, the applicants have:
- committed to 2m high opaque shelving so that liquor products are not visible from within the supermarket;
 - committed to entry and exit gates at the proposed liquor store;
 - committed to no liquor advertising on the exterior of the supermarket building;

- designed the proposed liquor store with no external entry or exit, so that the only way to enter the store is through the supermarket;
- designed the layout of the supermarket so that products which are attractive to minors are positioned at the far end of the supermarket away from the proposed liquor store;
- offered to employ a crowd controller for the first six months of operation to assist with the orderly operation of the proposed liquor store; and
- committed to having two trained liquor store staff on duty at all busy times.

Determination

- 34 The applicants seek to establish a small liquor store co-located in the same building as their existing IGA supermarket. The proposed liquor store will provide a range of imported and Australian liquor products, including some Asian liquor products to complement the Asian grocery items on offer at the supermarket. To demonstrate that the grant of the application would promote object 5(1)(c) of the Act (catering to the requirements of consumers for liquor and related services), the applicants submitted a petition signed by 403 people supporting the application and 29 more detailed witness questionnaires.
- 35 The evidence from the Police and EDPH is that there are a number of service providers for at risk and vulnerable groups (who have experienced harm from alcohol misuse) in close proximity to the proposed liquor store; there is an existing level of alcohol-related harm in the local community; and the proposed liquor store is to be located in an area which is at relatively greater disadvantage compared to the state and national rankings.
- 36 In response to the matters raised by the Police and EDPH, the applicants submitted that the proposed liquor store is low risk because it will be totally enveloped inside the supermarket building; it will not be visible from many of the sites where the social service providers are located; there will be no external advertising of liquor; and it will not be trading at times when juveniles gather at the supermarket (i.e. before 9am or between 3pm and 4pm on school days).
- 37 One of the primary objects of the Act is to minimise alcohol-related harm due to the use of liquor (object 5(1)(b)), while another primary object (5(1)(c)) is 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.
- 38 Where conflict arises in promoting the objects of the Act, the licensing authority needs

to weigh and balance the competing interests in each case (refer *Executive director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).

- 39 Pursuant to section 38(2) of the Act, an applicant for the grant of a liquor store licence must satisfy the licensing authority that the grant of the application is in the public interest. The burden of establishing the validity of any objection lies on the objector (refer section 73(10) of the Act) while an intervener carries no onus to establish their assertions of fact or opinion (refer *Re Gull Liquor* (1999) 20 SR (WA) 321).
- 40 In determining whether the grant of an application is “in the public interest” the licensing authority is required to exercise a discretionary value judgement confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O’Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).
- 41 From a harm minimisation perspective, the risks associated with the grant of an application must be considered not in some abstract or theoretical sense, but with regard to the proved circumstances of the particular area in relation to which the application is made.
- 42 Although the applicants state that the witness questionnaire was distributed to a representative group of people in the locality, a review of the questionnaires shows that the respondents are all existing customers of the IGA supermarket. In essence, this application is predicated upon providing a convenience to customers of a single shop. The applicants state in their submissions that “the Cannington Supa IGA supermarket and the proposed liquor store are better suited to the one stop shopper looking to just purchase grocery and packaged liquor ...” and “they will, when combined together, offer a quick, convenient, one stop shopping alternative in the locality, which will add to the diversity of retail and packaged liquor services there”.
- 43 The applicants submitted a stock list indicating their intention to provide a standard range of liquor products together with some asian liquor products to complement the asian grocery items on offer at the supermarket. There is very limited evidence, for whatever reason, to support the contention that there is a strong public demand for asian liquor products at the proposed liquor store.
- 44 The evidence of the Police and EDPH establishes that:
- the area surrounding the proposed liquor store is relatively disadvantaged compared to the state and national rankings and contains at-risk groups who already experience harm related to alcohol use;

- social service providers in close proximity to the proposed liquor store deal with clients seeking support for anti-social issues that are sensitive to, and exacerbated by, the effects of alcohol;
- there is a transient population who flow past the proposed liquor store; and

there are young people who frequent the area and in particular the Cannington Supa IGA supermarket.

- 45 Although the applicants have made submissions that the proposed liquor store is low risk and they would put in place a number of strategies to minimise the risks associated with the grant of the application, the possibility of harm or ill-health remains and is a matter relevant to the public interest consideration.
- 46 In consideration of the competing interests in this case, and the evidence submitted, the Commission is of the view that the potential negative impact from the grant of the application to existing at risk groups in the area outweighs the applicants' case that granting a liquor store licence for the premises would be in the public interest.
- 47 In this connection reference is made LC20/2010 (*David McGeogh and Paul Ozanne and Executive Director of Public Health & others*), LC24/2012 (*Forest Road Liquor Pty Ltd and Executive Director of Public Health & others*), and LC18/2012 (*Liquorland Australia Pty Ltd and Executive Director of Public Health & others*) – in each of these matters an application for a liquor licence was refused due to the presence of at risk groups or service providers to those groups in the vicinity of the relevant premises.
- 48 The Commission determines that the decision of the Director is affirmed and the application for review is dismissed.

SEAMUS RAFFERTY
DEPUTY CHAIRPERSON