

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

- Applicant 1:** Lano (WA) Pty Ltd
(represented by Mr Dan Mossenson and Ms Jessica Patterson of Lavan Legal)
- Applicant 2:** R J Bull and D L Thompson
(represented by Mr Will Clements of Williams Ellison Pty Ltd)
- Objectors:** Century West Holdings Pty Ltd
(trading as the Lancelin Beach Hotel and represented by Mr Peter Fraser of Dwyer Durack Lawyers)
- Lano (WA) Pty Ltd and Grant Stacey and Jennifer Stacey
- Clothoderick Nominees Pty Ltd
- Lancelin Chamber of Commerce and Industry Inc
- Beachfront Holdings Pty Ltd
(licensee of the Endeavour Tavern)
- Commission:** Mr Jim Freemantle (Chairperson)
Mr Greg Joyce
Ms Helen Cogan
- Date of Hearing:** 6 May 2010
- Date of Determination:** 31 May 2010
- Matters:**
1. Application for the conditional grant of a liquor store licence by Lano (WA) Pty Ltd for premises to be located at the corner of Walker Avenue and King Street, Lancelin and to be known as Lancelin Liquor and;
 2. Application for the Conditional grant of a liquor store licence by R J Bull and D L Thompson for

premises to be located at 25 Walker Avenue, Lancelin and known as Lancelin Bottle-O Warehouse.

Determination: The application by Lano (WA) Pty Ltd is refused and the application by R J Bull and D L Thompson is granted.

Authorities referred to in determination:

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

McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 per Tamberlin J

Sean Investments Pty Limited v McKellar [1981] 38 ALR 363 per Dean J

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

Introduction

1 These two applications came before the Commission pursuant to section 24 of the *Liquor Control Act 1988* ("the Act").

2 The first application is by Lano (WA) Pty Ltd ("the Lano application") for the conditional grant of a liquor store licence for premises to be known as Lancelin Liquor and located at Lot 13, corner of Walker Avenue and King Street, Lancelin.

The second application is by R J Bull and D L Thompson ("the Bull & Thompson application") for the conditional grant of a liquor store licence for premises to be known as Lancelin Bottle-O Warehouse and located at 25 Walker Avenue, Lancelin.

It should be noted that both applicants have simultaneously applied for the grant of an extended trading permit pursuant to section 60(4)(g) of the Act to authorise on-going trading on Sundays, however these applications were not referred to the Commission by the Director of Liquor Licensing and therefore form no part of this determination.

3 The two proposed premises are less than 200 metres apart. Consequently, the Commission determined that the applications should be heard together. Pursuant to section 16(12) of the Act, the evidence relating to one application is evidence relating to the other.

4 Each application was advertised to the public in accordance with instructions issued by the Director of Liquor Licensing.

Objections to the Lano application were lodged by:

- Clothoderick Nominees Pty Ltd;
- Lancelin Chamber of Commerce and Industry Inc;
- Century West Holdings Pty Ltd (trading as the Lancelin Beach Hotel); and
- Beachfront Holdings Pty Ltd (licensee of the Endeavour Tavern)

Objections to the Bull and Thompson application were lodged by:

- Century West Holdings Pty Ltd (trading as the Lancelin Beach Hotel); and
- Lano (WA) Pty Ltd and Grant Stacey (shareholder Lano (WA) Pty Ltd) and Jennifer Stacey (Director and Secretary of Lano (WA) Pty Ltd).

- 5 On 7 January 2010, the Executive Director Public Health was requested by the Director of Liquor Licensing to submit a report pursuant to section 69(8a)(a) of the Act on:
- The harm or ill-health caused to people or to any group of people residing in or resorting to the Lancelin locality due to the use of liquor; and
 - The granting of one or both applications in relation to the minimisation of that harm or ill-health.
- 6 That report was forwarded to the Commission for consideration with the applications.
- 7 A hearing was conducted on 6 May 2010.

The Lano Application

- 8 The applicant seeks the conditional grant of a liquor store licence for premises which will be constructed at the corner of Walker Avenue and King Street, Lancelin. According to the applicant, the premises will be a modern, community based liquor store offering a comprehensive range of stock, services and facilities in an area of approximately 92m².
- 9 The proposed liquor store will be constructed in association with an IGA supermarket, with the development being designed to cater to both the local community and tourists. The proposed liquor store will be located near the entrance into Lancelin, on the Town's main road.
- 10 If successful, the applicant proposes to trade Monday to Saturday 8.00am to 10.00pm and Sunday 9.00am to 9.00pm. These hours, it is submitted, have been carefully thought out and determined based on the need to service local residents, holiday-makers staying in town, people passing through and tourists stopping briefly at the site to use other services as they travel en-route to other destinations.
- 11 The applicant intends to stock a range of liquor products, including:
- White, red, fortified and sparkling wines, including premium products (from wineries around Australia and also some overseas);
 - Beers, including premium lines (both Australian and imported);
 - Spirits of all types;

- Liqueurs;
 - Ready-to-drink items; and
 - Cocktail mixers
- 12 The applicant also proposes to offer a range of ancillary products and services including ice, gift packs, cool drinks glassware, bar utensils, food and wine matching information, tourist information, tastings and free home delivery. Products and services will be monitored and reviewed to respond to public requirements.

The Bull & Thompson Application

- 12 The applicants seek the conditional grant of a liquor store licence at existing premises located at 25 Walker Avenue, Lancelin. The premises were built in the late 1980's and used as a crayfish processing factory until the late 1990's, when the operator went into receivership. The premises were sold three years ago and have remained unoccupied.
- 13 According to the applicant, they recognised the need for a locally run, professional liquor store with a wide range of goods to cater for the varied and expanding population of Lancelin. The liquor store would cater for local residents, weekend holiday home owners, tourists, campers and other visitors to the area. During the summer months approximately 3,000 day trippers come to town on any one weekend.
- 14 The applicants propose to trade under the "Bottle-O" brand which is part of Independent Brands of Australia Pty Ltd, associated with ALM, Australia's largest liquor wholesaler and backed by Metcash Trading. Through this branding the applicants will have on-going access to professional support and expertise in relation to the management of the proposed liquor store.
- 15 Compared to existing outlets in town, the proposed liquor store will have a much larger range of all types of liquor, particularly wine and beer, with the applicants intending to stock the top 200 sellers from Bottle-O. In consultation with ALM, the applicants have calculated that the proposed 140m² of display space and 103m² of cool room space will be adequate for this purpose and provide a spacious and comfortable retail liquor facility. The large cool room is necessary for the influx of day trippers and weekenders, particularly during summer.
- 16 The proposed liquor store would trade from 10.00am to 10.00pm seven days a week (subject to approval) and provide reliable trading hours that the town can

depend on. In addition to liquor, the applicants will offer a small range of gourmet foods and a pre-ordered packaging and delivery service.

- 17 Since the applicants intend making use of an existing and disused building, only fit out is required which means that the proposed liquor store can be operational within a few weeks of approval.

The Locality

- 18 Each applicant indicated that the relevant "locality" for the purposes of its application (ie the area surrounding the proposed licensed premises which is most likely to be impacted) was a three kilometre radius of their site, which is effectively the same for both applicants given the small distance which separates the two locations. This "locality" incorporates virtually all of the Lancelin township.
- 19 Lancelin falls within the Shire of Gingin and is approximately 95 kilometres north of Perth. Lancelin is not currently a destination town that one drives through or passes by as it is in a dead-end location, however, this will change with the impending completion of the Indian Ocean Road.
- 20 Detailed submissions on the demographics of the locality were provided by each applicant including existing population, increase in visitors over the summer months, population forecast in coming years and housing and income data. Submissions were also made on the social profile of the locality.

Existing Liquor Outlets in the Locality

- 21 There are currently six licensed premises in Lancelin:
- Lancelin Beach Hotel (hotel licence)
 - Endeavour Tavern (tavern licence)
 - Lancelin Community Sporting Club Inc (club licence)
 - Lancelin Angling & Aquatic Club (Inc) (club licence)
 - The Offshore Café & Store (restaurant licence)
 - The Lancelin Bay Restaurant (restaurant licence)
- 22 Of the above six premises, only two premises can sell packaged liquor to the general public: the Lancelin Beach Hotel and the Endeavour Tavern. There is

currently no dedicated liquor store in Lancelin, with the closest liquor store being located in Ledge Point, approximately 19 kilometres away.

- 23 Each applicant was critical of the hotel and tavern in respect of their packaged liquor services to the community, with the Lancelin Beach Hotel having a small browsing area as part of a single lane drive-through facility with a limited range of product whilst the Endeavour Tavern packaged liquor service was considered even more limited. Both premises were described as old, run-down, out of date and uninviting to visitors.

Catering to the needs of Consumers

- 24 Evidence was submitted by each of the applicants demonstrating the public's dissatisfaction with the existing packaged liquor services in the town, including personal testimonies and survey data and a desire, by a sample section of the community, for a dedicated liquor store. Because of a lack of choice, product line and competition, some members of the local community find it necessary travel to the Perth Metropolitan area to obtain packaged liquor.

The Objections

- 25 Clothoderick Nominees Pty Ltd and the Lancelin Chamber of Commerce and Industry Inc both objected to the Lano application raising similar issues concerning town planning matters. These objections were originally lodged in October 2008, and since that time the town planning matters appear to have been resolved. Neither objector availed themselves of the opportunity to participate in these proceedings or lodge any further submissions or information in support of their objection.
- 26 Century West Holdings Pty Ltd (trading as the Lancelin Beach Hotel) lodged an objection to both applications. By a submission dated 28 April 2010, Century West Holdings Pty Ltd sought leave to amend their ground of objection to both applications to:

"That 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."

In respect of this amended ground of objection, the objector primarily relied upon the data contained in the report from the EDPH. At the hearing of this matter, Mr Peter Fraser (Dwyer Durack Lawyers), representing the objector, indicated that his client expects one of the applications will be granted, however he argued that if both applications were approved there was the potential for increased harm to occur due to the increased density of packaged liquor outlets which would be

likely to lead to increased consumption of alcohol in a relatively small community. There was no suggestion that crime in Lancelin would skyrocket, however the possibility of even a small increase in harm and the negative impact on the community outweighs the granting of two licences.

27 Beachfront Holdings Pty Ltd objected to the Lano application asserting that the grant of the application would not be in the public interest and undue harm or ill-health would be caused to people or any group of people, due to the use of liquor if the application were granted. It was argued by Lano that this objection was commercially based by a licensee merely seeking to limit the competition.

28 Lano (WA) Pty Ltd and Grant Stacey and Jennifer Stacey objected to the Bull & Thompson application on the following grounds:

- That the grant of the application would not be in the public interest;
- That if the application was granted undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity , or to persons travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; and
- That the grant of the application would otherwise be contrary to the Act.

Much of the argument presented to support this objection was in the context of two competing applications for liquor store licences and trying to demonstrate that the Lano application should be granted in preference to the Bull application.

Report from the Executive Director Public Health (“EDPH”)

29 At the request of the Director of Liquor Licensing, the EDPH provided a report to the licensing authority on the potential health impacts that the granting of one or both of these may have for Lancelin. The EDPH report indicates that whilst there is limited data available for Lancelin, particularly given the small size of the community, research evidence links the availability of alcohol with consumption levels. As consumption levels rise, so do the frequency and range of social and health problems. Various research reports were referenced and it was submitted that the granting of one or both applications will have significant effects on harm or ill-health both in the Lancelin community and on those visiting the area. It was noted by both applicants that notwithstanding the report, the EDPH did not seek to exercise his statutory right under the Act and intervene in either application.

Determination

- 30 Pursuant to section 38(2) of the Act, an Applicant for the grant of a liquor store licence must satisfy the licensing authority that granting the application is in the public interest.
- 31 Furthermore, pursuant to section 33(1), the licensing authority has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest; the discretion being confined only by the scope and purpose of the Act (refer *Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241*).
- 32 When considering the public interest, the licensing authority is bound by the objects of the Act as set out in section 5. In respect of this application, the objects set out in sections 5(1)(b) and (c) are particularly relevant.
- 33 Furthermore, in determining what constitutes the public interest, the Commission also notes the following precedents –

“The expression “in the public interest”, when used as the criterion for the exercise of a statutory discretion, usually imports a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation” (Re Minister for Resources; ex parte Cazaly Iron Pty Ltd[2007] WASCA 175).

and

“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression 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.” (McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 per Tamberlin J)

and

“In a case such as the present, where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards.” (Sean Investments Pty Limited v McKellar [1981] 38 ALR 363 per Dean J).

- 34 Where there is conflict between the various objects of the Act, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health –v- Lily Creek International Pty Ltd & Ors [2000] WASCA 258*).
- 35 These competing applications have been heard together, therefore the evidence for one is evidence for the other (refer section 16(12) of the Act).
- 36 It was common ground between the applicants and Century West Holdings Pty Ltd (objector) that only one application should be granted. In consideration of the various submissions, including the report from the EDPH, the Commission accepts that granting both applications would not be in the public interest. To have a 100 per cent increase in the availability of packaged liquor in a small community such as Lancelin, particularly in the form of two specialist liquor stores in close proximity to each other creates an unacceptable risk in terms of the potential harm that may result in the community.
- 37 A relevant consideration then is the level of alcohol-related harm, due to the use of liquor, which is likely to result if one application is granted. As explained in *Lily Creek supra*, this does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather it must be assessed against any existing harm or ill-health so as to assess the overall level which is likely to result. In respect of this case, the existing level of alcohol-related harm is no greater than that which appears to be commonly accepted in the community and therefore the Commission finds on the balance of probability that the grant of one new liquor store licence in Lancelin will not unduly impact on existing levels of harm.
- 37 The Commission is of the view that based on the collective evidence submitted, the grant of one liquor store licence in Lancelin is consistent with object 5(1)(c) of the Act and for the purposes of section 38(2) of the Act would be in the public interest. Both applicants submitted evidence demonstrating the public's dissatisfaction with the existing packaged liquor services in the town and because of a lack of choice, product line and competition, some members of the local community find it necessary travel to the Perth Metropolitan area to obtain packaged liquor.

38 It remains, therefore, to determine which of these competing applications should be granted. Each application has merit with both applicants espousing the benefits and advantages of their respective application over their competitor. In isolation, each application might have succeeded, however as acknowledged by the applicants, and accepted by the Commission, only one application should be granted.

39 In respect of the various objections, the Commission finds that the validity of the objections by Clothoderrick Nominees Pty Ltd, the Lancelin Chamber of Commerce and Industry Inc, Century West Holdings Pty Ltd and Beachfront Holdings Pty Ltd has not been established as required under section 73(10) of the Act and are therefore dismissed. The Commission also finds that the validity of the objection by Lano to the Bull & Thompson application has not been established and should also be dismissed. It is noted that the expert planning report (by Thompson McRobert Edgeloe Group) submitted by Lano states in its conclusions that "...it is apparent that both locations could support a liquor store with few adverse impacts." Much of the Lano objection was merely highlighting why the Lano application should be preferred to the Bull application.

40 The Commission has weighed and balanced the considerable merits of each application, and in accordance with the discretion afforded the licensing authority under section 33(1) of the Act, the Commission has determined that the Bull & Thompson application should be granted and the Lano application refused.

41 Mindful of the words of Dean J in *Sean Investments supra* ("*it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards.*") the Commission preferred the Bull & Thompson application to the Lano application for the following reasons:

- Much of the Lano application was predicated on the advantages to the community of the one-stop-shop principle, where the public could purchase their liquor whilst obtaining groceries. However, as pointed out by Mr Clements during the hearing, to date, there is no binding contract between Mr Stacey and IGA. In his statement, Mr Stacey indicates that around the time of lodging his application (August 2008) he started discussions with IGA (para 27), however at this stage arrangements for the IGA store are still be finalised (para 37).

Whilst Mr Stacey states that those negotiations are almost complete, there is a risk that those negotiations may falter (since they haven't been finalised

after 21 months) and the IGA store may not be established. The Commission acknowledges that this risk may be small, but it is a risk nonetheless. In weighing and balancing the features of both applications, there is consequently a small risk that the advantages of one-stop-shop for the public may not materialise.

- Throughout the Lano submissions it is stated that their proposed store will be 150m² which "...has been determined as ideal to ensure that it fits well at its location, is not overbearing in terms of impact on the amenity, is not intimidating for a regional town and is a dedicated liquor store capable of meeting the requirements of the local community" (para 25.3 of submissions dated 28 April 2010).

However, in a letter dated 4 May 2010, Lavan Legal advised that references to the proposed store being 150m² are incorrect and the proposed store will actually be 92m². The Commission accepts that the error was unintentional, however, the issue that arises is that Lano throughout its submissions was advocating that premises of 150m² to be the "ideal size" to meet the requirements of the public for liquor and related services and therefore based on Lano's own submissions, a store of 92m² may be less than "ideal" to service the public. The display area for the Bull & Thompson application is 140m².

- In respect of the Lano application there is not yet an unconditional section 40 certificate issued by the local government authority, whilst in respect of the Bull and Thompson there is an unconditional section 40 certificate. The Commission is aware that the absence of an unconditional section 40 certificate can be overcome under the Act (refer to section 62A), but in simply weighing and balancing the competing applications this is a matter which weighs slightly in favour of the Bull and Thompson application. Lano has been indicating for some time that the unconditional section 40 will be issued shortly, but one still has not been issued.
- The Commission views the location of the Lano application in close proximity to a petrol station to be a disadvantage. In 2000 the Government amended the Act to insert sections 36A and 65A, which effectively preclude the establishment of liquor stores on the same premises as petrol stations. These provisions were introduced to reinforce the State's drink-driving campaign by preventing impulse purchasing of packaged liquor at petrol stations (refer second reading speech). The Commission accepts that the petrol station sits on a separate lot and therefore section 36A is not directly relevant, however

in the context of weighing and balancing the features of both applications, the Commission gives some weight to the Government's concerns about drink-driving and impulse purchases of liquor.

- The Bull & Thompson application will have a person with considerable experience in the liquor industry involved in running the premises (refer to the resume of Ms Anneze Camelleri).
- The Bull & Thompson applicants are local residents of Lancelin whereas Mr and Mrs Stacey are local land owners and developers, who may have a long history with the town (they have a holiday home in the town), but do not reside locally. According to the applicant's submission, Mr Bull and his partner reside in Lancelin and Mr Thompson owns a house in Lancelin but presently lives with his family in Dampier for work reasons, however if the application is successful Mr Thompson will return to live and work in Lancelin. Both Mr Bull and Mr Thompson would work at the proposed liquor store.
- The Bull & Thompson premises are larger and will therefore provide greater choice for the public and have larger cool room facilities which would be better suited to providing for the significant increase in the population over the summer months; and
- In consideration of the amount of work involved to get each of the premises up and running the Commission is of the view that it was likely that the Bull & Thompson premises would be open to the public before the Lano premises, notwithstanding that Mr Stacey is an experienced builder.

42 Accordingly, pursuant to section 62 of the Act, a liquor store licence is conditionally granted to the Bull & Thompson applicants subject to the premises being completed in accordance with the plans and specifications lodged; the holder of the conditionally granted licence seeking confirmation of the grant within 12 months and subject to the standard conditions imposed by the Director of Liquor Licensing.



JIM FREEMANTLE
CHAIRPERSON