

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

- Applicant:** Liquorland (Australia) Pty Ltd
(represented by Mr Steven Standing of Freehills with Ms Triska Diccico)
- Interveners:** Executive Director of Public Health
(represented by Mr Sam Nunn of State Solicitor's Office)
- Commissioner of Police
(represented by Mr David Leigh, Solicitor, Licensing Enforcement Division)
- Objectors:** Silversky Asset Pty Ltd
AFL Pty Ltd
(represented by Mr Andrew Websdane of Frichot & Frichot Lawyers)
- Ms Lisa Baker MLA and others listed in paragraph 4 of the majority determination
- Commission:** Mr Jim Freemantle (Chairperson)
Mr Seamus Rafferty (Deputy Chairperson)
Ms Helen Cogan (Member)
- Matter:** Application for the conditional grant of a liquor store licence referred under section 24 of the *Liquor Control Act (1988)*
- Premises:** Premises to be known as First Choice Liquor Superstore at 207 Guildford Road, Maylands
- Date of Hearing:** 21 December 2011
- Date of Determination:** 6 June 2012

Determination:

By a decision of the majority of members of this Commission, member Seamus Rafferty dissenting, the application for the conditional grant of a liquor store is refused.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

**JIM FREEMANTLE
CHAIRPERSON**

Authorities referred to in the Determinations:

- *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
- *Hermal Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241 public
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258
- *Highmoon Pty Ltd v Director of Liquor Licensing* LLC2 of 2004
- *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207
- *Executive Director of Public Health v Lily Creek Pty Ltd & Ors* [2001] WASCA 410

REASONS FOR DETERMINATION OF
JIM FREEMANTLE (CHAIRPERSON) AND HELEN COGAN (MEMBER)

Background

- 1 On 1 December 2010, an application was lodged by Liquorland (Australia) Pty Ltd for the conditional grant of a liquor store licence for premises to be known as and to trade as First Choice Liquor Superstore at 207 Guildford Road, Maylands (“the premises”).
- 2 On 24 January 2011 a notice of intervention was lodged on behalf of the Commissioner of Police (“the Police”).
- 3 On 7 February 2011, a notice of intervention was lodged by the Executive Director of Public Health (“EDPH”).
- 4 On various dates between 7 February 2011 and 10 February 2011 objections were lodged with the Director of Liquor Licensing, (“the Director”) from the following persons and entities:

- 4.1 Pamela Faye Hall
- 4.2 Janette Mary Wheare
- 4.3 Lisa Baker MLA (on behalf of her constituents)
- 4.4 Wendy Anne Dufty
- 4.5 Domenico Carlo Cuscuna
- 4.6 Terence Gaunt
- 4.7 Sonia Turkington
- 4.8 Nicola Sorrell
- 4.9 Marian Amanda Chudleigh
- 4.10 Jennifer Lote
- 4.11 Marie and Steven Cloughley
- 4.12 Bradley Smith and Stephanie Manners, (objection discontinued on 8 July 2011)
- 4.13 Old Bakery on 8th Gallery and Cafe
- 4.14 Maylands Business Association/Sylvan Albert
- 4.15 Julie Williams/The Shopfront
- 4.16 Silversky Asset Pty Ltd
- 4.17 AFL Pty Ltd
- 4.18 Maylands Ratepayers and Residents Association Inc/Barry Watkins

Late objections were lodged with the Liquor Commission (“the Commission”) by:

- 55 Central
- Elizabeth Hanson Autumn Centre (Derbarl Yerrigan Health Services)
- Faye Cockerell (Derbal Bidjar Hostel (AHL))

and were accepted by the Commission as in the public interest.

- 5 On 11 April 2011, pursuant to section 24 of the *Liquor Control Act 1988* (“the Act”) the Director referred the application to the Commission for determination.
- 6 On 31 August 2011 and 29 September 2011 respectively, orders were made by the Commission in relation to summonses for production of documents issued

pursuant to orders made by the Commission on 15 August 2011.

- 7 On 24 October 2011 and 25 October 2011 respectively, the solicitors representing Silversky Asset Pty Ltd and AFL Pty Ltd and EDPH respectively agreed for the purposes of the application not to rely on the contents of the reports entitled, "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. (Chikritzhs et al 2007). The report had been referred to in the objection lodged on behalf of Silversky Asset Pty Ltd and AFL Pty Ltd.
- 8 A hearing before the Commission was held on 21 December 2011.
- 9 At the hearing, a number of preliminary matters were raised as follows:
 - a. the late production by the objector Ms Lisa Baker MLA of the "Report no 10 in the 38th Parliament of the Education and Health Standing Committee entitled "Alcohol Reducing the Harm and Curbing the Culture of Excess". This matter was to be dealt with within the course of the hearing;
 - b. the production by the applicant of a bundle of advertisements - agreed to be admitted into the evidence; and
 - c. the fact that the section 40 certificate and the City of Bayswater Development Approval had each expired but new applications would be lodged-noted by the Commission .

Submissions on behalf of the applicant

- 10 The applicant's written submissions included :
 - a. a public interest assessment and supplementary public interest assessment ("PIA") together with a management plan, code of conduct and house policy;
 - b. the results of two surveys (telephone and intercept respectively) conducted by Data Analysis Australia (DAA) to obtain the views of a representative cross section of the community in relation to the application;
 - c. a section 40 certificate, City of Bayswater development approval and the draft lease for the premises;
 - d. a report from MGA town planners ("MGA Report") which:
 - examined the population of the locality (a radius of 2km from the site) at the time estimated at 25149 with –
 - relatively few children and young adults aged below 20 years;
 - a higher proportion of persons aged 20 – 29 and 30-49 than the Perth Statistical Division (PSD) average;
 - a lower proportion in later middle age and retirement age groups;
 - the proportion of indigenous persons in the locality was below metropolitan and state averages.
 - identified the characteristics and demographics of the locality;

- made observations on the development proposal for the site (it is noted that the development proposal has changed since the proposal referred to in the MGA Report, there no longer being a proposed tavern); and
 - dealt with traffic and access issues and the packaged liquor facilities in the locality and its surrounds.
- e. Statements by Kenneth James Vaughan, the WA State Business Manager of the applicant expressing the view that the applicant did not expect that the opening of the premises would increase or contribute to the amount of underage consumption of liquor and that the applicant did not expect that the opening of the premises would lead to an increase in the sale and consumption of liquor in the Maylands area. It was the experience of the applicant that when new packaged liquor outlets opened, other outlets generally experienced a decrease in sales.
- f. an explanatory memorandum in respect of the Socio- Economic Indexes for Areas index;
- g. an amended floor plan of premises; and
- h. submissions in response to submissions of other parties.

The applicant also made oral submissions at the hearing.

- 11 The applicant's written and oral submissions may be summarised as follows:
- a. the applicant seeks to open a First Choice Liquor Superstore at 207 Guildford Road, Maylands within a new retail development. The site is bordered by Ninth Avenue to the west and Rowland Street to the east and has high visibility with a large passing public;
 - b. Guildford Road is a major regional road with a high volume traffic flow, is easily accessible by public transport, (either by bus or train - with Maylands train station within walking distance of the site), or by pedestrian or cycle paths;
 - c. the selling and cool room area of the premises is 952 square metres with 28 square metres for storage and 70 square metres of office amenities, making a total of 1250 square metres which is substantially larger than other liquor stores in the vicinity and intended to be a 'destination outlet'; and
 - d. the premises will specialise in wine (approximately 65% of stock) and feature a wide range of liquor products and sundry items with a large selection of bulk beers and wine. The premises will have good display facilities, a quality fit out with prominent signage, wide aisles and will provide a superior customer service employing trained and knowledgeable staff. Regular tasting sessions will be conducted. There will be comprehensive security measures and strict enforcement of the responsible service of alcohol policy.
- 12 As to the provisions of section 38(4)(a) of the Act, the applicant submitted that the premises are not likely to cause harm or ill health due to the use of alcohol to

people, or any group of people and referred to the MGA Report conclusions on the low representation of 'at risk' groups in the locality and the high proportion of affluent, young and middle aged persons who could be expected to benefit from the establishment of the premises. The applicant also referred to the WA Police statistics for the 12 month period from July 2009 to June 2010, which it was submitted were not specific to the locality and did not identify which crimes, if any, are alcohol related.

- 13 The applicant further submitted in respect of section 38(4)(b) of the Act that the proposed development will complement the existing and anticipated land uses of the locality, generate local employment opportunities and also provide conveniently located facilities for residents, the local workforce, visitors to the Maylands Activity Centre and commuters travelling through the locality. These positive aspects outweigh any potential negative impact on the amenity of the locality. The proposed development will revitalise the currently vacant site (which has been vacant for some years) and contribute to the vibrancy of the immediate vicinity.
- 14 The proposed premises would not create any issues relating to noise or anti-social activities that would detrimentally affect the amenity of the locality due to the applicant's methods of operation, especially the decision to start trading from the premises at the later time of 9:30am and reducing the availability of some of the less expensive, high volume products. The applicant also referred to its adoption of the "Crime Prevention Through Environmental Design" principles referred to in the publication "Designing Out Crime" of the WA Planning Commission.
- 15 The applicant submitted details (with a map showing the relevant locations) of the existing licensed premises in the locality from which packaged liquor is available. Of these premises five are hotels/taverns, six are liquor stores, one is a sporting or social club and three are restricted to selling packaged liquor to members only.
- 16 The applicant's conclusion in the PIA is that the premises will cater for the packaged liquor requirements of consumers in the inner north east suburbs, who require a 'destination' liquor store, and also the needs of local residents, patrons of nearby restaurants or cafes, the Maylands Multi Purpose Centre and visitors to the Maylands Activity Centre. The premises are also intended to operate as a 'destination' outlet, being easily accessible to passing traffic (by rail or road) and meeting the requirement for high volume packaged liquor, a need that is not currently being met by any outlet along or near the railway line or along the north bank of the river until Midland (where another First Choice Liquor Superstore is located).
- 17 The applicant submits that, under the circumstances, the grant of the application would be in the public interest as required by the Act.
- 18 In response to the submissions by the EDPH (and to an extent the Police), the applicant submitted that the EDPH has placed excessive emphasis on evidence of alcohol related harm generally, without establishing any nexus to the particular supply of liquor proposed in the application. It was submitted the EDPH advocates an absolute position that the applicant's proposed harm minimisation measures (and implicitly any harm minimisation measures) are not adequate to mitigate the existing and predicted levels of alcohol related harm and ill health in the community; accordingly the EDPH contends that the licence should be refused, rather than seeking to ensure that trading conditions are designed to

contribute to the minimisation of that harm.

- 19 The applicant accepts that the relationship between alcohol supply, alcohol consumption and harm is complex, however, the circumstances of the application are such that there is a very low level risk of increasing the level of alcohol related harm and ill health beyond what is acceptable to the public interest. There is no evidence of a particular vulnerability to alcohol related harm in the region that might occur through the granting of this application nor is there is any nexus between the generalised evidence of alcohol related harm and the specific circumstances of this application.
- 20 The applicant further submitted that the applicant has provided independent objective evidence (in the form of two surveys) from a representative section of the public that the proposed licence would cater for the requirements of a significant proportion of consumers of liquor and hence would be in the public interest. Furthermore the objectors and interveners have not provided objective independent evidence that could safely be relied upon as reflecting the views of consumers or the community generally. The material filed by the objectors and interveners largely comprises subjective assertions or generalised evidence unrelated to the locality. Thus, as the evidence presented by the interveners is of a general nature it should carry little or no weight, and the objectors have not established the validity of their grounds of objection as required under section 73(10) of the Act.
- 21 In respect of the licensee objectors, the applicant submitted outlet density is not a ground prescribed in the Act and the contention by the objectors that the consumers in the locality are catered for by existing outlets, is likely to be motivated by private, commercial interests, rather than the public interest and as such should be given little weight. No relevant, reliable or logically probative evidence has been produced by either licensee objector that establishes the validity of the grounds of objection as required by section 73(10) of the Act.
- 22 There is no objective, specific, relevant (to the application, premises or locality) reliable or logically probative evidence in the interventions and objections from which it can be concluded that:
 - the applicant's evidence does not reflect consumer requirements (and hence a public interest in granting the application) or;
 - the grant of the application would result in an unacceptable level of alcohol related harm, such as would outweigh the public interest in granting the application.

Submissions on behalf of the Executive Director Public Health

- 23 The proposed premises are very large in size and located on a main arterial road and will provide cheap liquor at a lowest price guarantee. Such features are risk factors for alcohol related harm which are exacerbated when introduced into an environment that already contains existing risk factors, including the existing liquor availability in the locality and the social profile of the population which includes at risk groups.
- 24 The increased risk of harm is supported by research (excluding that referred to in paragraph 7 above) which shows increasing the physical and economic availability of liquor leads to increased consumption or higher risk drinking

patterns and related harm. Increased availability to at risk groups can lead to increased levels of consumption and harm.

- 25 The EDPH emphasised:
- the high risk features of the proposed premises;
 - the volume of liquor to be introduced to the community;
 - the physical availability and ease of access to alcohol;
 - discounted pricing;
 - the role of price in the consumption of alcohol, drinking patterns and harm;
 - at risk groups in the locality and services in the locality for those at risk groups; and
 - alcohol-related harm in the locality including assaults, violence and drink driving.
- 26 It was submitted that the associated harm cannot be mitigated by the strategies the applicant has proposed to implement. The impact of increasing the physical and economic availability of packaged liquor and the potential for even a minimal increase in the risk of alcohol related harm are relevant factors to consider.
- 27 The Commission invited the EDPH to put forward conditions that might mitigate the potential for alcohol related harm or ill health in the event that the Commission was minded to grant this application.

The conditions proposed for consideration were:

- i. A prohibition (or limitation) on bulk (i.e. carton) purchases before a certain time, for example 12 noon.
 - ii. Later opening hours and/or earlier closing times. For example, trading may not commence until 10:00am Monday to Saturday and not before 12:00 noon on any Sunday or Public Holiday (if indeed Sunday trade is contemplated at all by the Commission).
 - iii. Limitations on the sale of liquor below a certain price point. For example, no liquor (other than beer) to be sold under \$10 per item/bottle.
 - iv. Alternatively, if an absolute price-based limitation is considered unmanageable, then limitations on the quantity of liquor that may be purchased ought to be considered either in relation to:
 - a. the types of liquor to be purchased. For example, only 1 cask of wine or 1 bottle or cask of fortified wine may be purchased per customer per day; or,
 - b. the purchase of liquor below a certain price point: For example only 1 item/bottle of liquor (other than beer) priced under \$10 may be purchased per customer per day.
 - v. A prohibition is placed on the advertising or promotion of discounted liquor outside the store, including any promotion encouraging multiple purchases.
- 28 In response, the applicant submitted that from the evidence submitted, it cannot be concluded that such conditions are reasonably required to address the

circumstances of the application. Taking into account that the applicant has volunteered to apply delays in opening hours, will remove two of the cheapest lines of cask wine and has an excellent record of compliance generally, there is no coherent explanation as to how local residents (including 'at risk' residents in hostels in the locality) might be exposed to greater risk of harm than is already the case, particularly given the existing packaged liquor outlets in the locality that also compete for liquor sales on price.

- 29 The EDPH's proposed conditions are so broad and open to interpretation that in practical terms it would be difficult for the licensee to comply with them and the proposed prohibition or limitation on bulk purchases before a certain time is unwarranted on the evidence and would be ineffectual given that customers could make bulk purchases elsewhere in the locality.

Submissions on behalf of the Commissioner of Police

- 30 The submissions by the Police may be summarised as follows:-

- a. The applicant has failed to demonstrate that the grant of the application will not negatively impact on the amenity of the locality in which the premises are situated and has failed to demonstrate that the grant of the application is in the public interest.
- b. The report dated 24 January 2011 by Senior Constable H Kelly which accompanied the notice of intervention provided the following information/observations :
 - if the application was granted, public disorder or disturbance is likely to result;
 - police attendance records were tendered in relation to the period 8 August 2010 – 14 January 2011 of "place specific offences" in the vicinity of 207 Guildford Road, Maylands;
 - liquor stores sell more alcohol per licence than any other type of venue and sell far more high risk beverages – even a small percentage change in availability and access to alcohol via such a licence is likely to have an impact on alcohol related harm in the local community;
 - the premises is in an area which contains retail premises, including a number of fast food outlets which are attractive to youth and provide a focal point for young people living in the area;
 - there are no cogent public interest considerations to justify the grant of the application and it would be contrary to the policy and underlying principles of the Act;
 - there are already sufficient licensed premises within the area to meet the reasonable requirements of the public for packaged liquor and if this application were granted licensed premises and/or facilities would be unnecessarily duplicated contrary to the objects, spirit and intent of the Act; and
 - the Police had tendered CAD data which reflected a high incidence of disorder and disturbance related call outs and which supports a conclusion that there would be an increase in the risk of alcohol

related crime.

Submissions on behalf of the objectors

- 31 For the purposes of the determination, the objectors have been categorised as follows:-
- a. objectors representing constituents and residents for which Ms Lisa Baker, MLA, acted as spokesperson;
 - b. licensee objectors;
 - c. objectors representing organisations; and
 - d. service provider objectors.

Submissions by residential objectors and organisations

- 32 The objection and supporting document (which the Commission admitted into evidence) presented by Ms Lisa Baker, MLA, on behalf of her constituents was lengthy and thorough as were her oral submissions at the hearing.

In summary, Ms Baker submitted that:

- Residents and business owners were concerned about the prevalence of drunkenness, public drinking and antisocial (sometimes violent) behaviour in and around the commercial precinct areas of Maylands.
- There is concern in the local community that the availability of alcohol in Maylands is playing a major role in contributing to these anti-social problems.
- A major renewal of Maylands is currently underway, in particular to develop the Maylands Activity Centre Urban Design Framework, and the full potential of the site of the premises will not be realised with the construction of a “single storey, barn style warehouse”.
- There is international research which shows a clear and positive correlation between higher outlet density and increased alcohol related harm and generally the negative effect of the accessibility of alcohol.
- There is established research showing that higher risk drinkers are more responsive to cheap alcohol prices.
- There are currently 15 liquor outlets within a 2km radius of the premises and there are at least three more “ready to work” on Whatley Crescent.
- The evidence of the petition containing 1400 signatures opposed to the granting of the application was biased to the extent that it was directed only to the negative and that there was a difficulty with the statistical integrity of the petition.
- The core of the objection was that a destination retail liquor outlet of this size in this location and the “price war” this will generate will bring with it increased problems.

- If granted, this application would lead to an increase in harm and ill health in Maylands, will prejudice “at risk” people in the community and will have an adverse impact on the amenity of the locality. For these reasons it is not in the public interest and should be refused.

The objections lodged by those representing organisations largely reflected those of the residential objectors.

Submissions by licensee objectors

- 33 The licensee objector, Silversky Asset Pty Ltd, is the licensee of the liquor store known as Cellarbrations at Garrett and Guildford, situated at 397 Guildford Road, Bayswater (within a 2km radius of the premises) and the licensee objector AFL Pty Ltd is the licensee of the liquor store known as De Vine Cellars situated at 911 Beaufort Street, Inglewood (within a 2km radius of the premises).
- 34 The licensee objectors’ grounds for objection are:
- a. the grant of the application would not be in the public interest (section 74(1)(a));
 - b. the grant of the application would be likely to cause undue harm or ill health to people, or a group of people, due to the use of liquor (section 71(1)(b));
 - c. that if the application were granted undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur (section 74(1)(g)(i));
 - d. the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be situated would be in some other manner lessened (section 74(1)(g)(i)); and
 - e. that the grant of the application would otherwise be contrary to the Act (section 74(1)(j)).
- 35 The licensee objectors provided detailed particulars in support of each ground of the objection including (in brief summary):
- a. there are seventeen packaged liquor outlets in the locality, four packaged liquor outlets within a 1km radius of the premises of which two (BWS 43 – 45 Eighth Avenue, Maylands and Liquorland Maylands – 246 Guildford Road, Maylands) are within 300 metres of the premises;
 - b. the grant of the application will increase the community’s exposure to liquor and the availability of liquor in the locality in a manner which is by far disproportionate to the advent of a single additional packaged liquor outlet and will have a greater potential impact on the community than the grant of a more modest proposal;
 - c. research supports a conclusion that the grant of this application will increase the risk of harm or ill health to persons residing in and resorting to the locality;

- d. the premises are located adjacent to a number of sensitive premises including four churches and a mosque;
 - e. there is no convenient direct access to the premises for motorists travelling west along Guildford Road and it is likely this will lead to additional significant traffic congestion on Guildford Road as a result of motorists trying to turn on Guildford Road by way of illegal “u-turns” in order to access the proposed liquor store site.
- 36 The PIA does not adequately identify or assess all matters relevant to the public interest in this locality and on balance, the applicant has not established that the grant of the application would be in the public interest and:
- a. The conclusions expressed in the MGA report about the services proposed to be provided at the premises, the range of liquor and level of convenience to customers are unsupported by any objective evidence and should therefore be disregarded.
 - b. The DAA survey does not establish the applicant’s case as amongst other things the telephone survey demonstrates no preference for bulk purchases or for a large liquor store.
 - c. There is evidence supporting concern about existing criminal and antisocial behaviour occurring in the locality and the potential for the advent of the premises to exacerbate this behaviour.
 - d. The applicant’s PIA fails to identify relevant “at risk groups” and “sensitive premises” in the locality, in particular 55 Central (Crisis Centre) the Elizabeth Hanson Autumn Centre or the Faye Cockrell (Derbal Bidjar hostel) all of which are located within the locality. The supplementary PIA fails to adequately deal with these issues.
 - e. On balance, the applicant has not established its onus under section 38(2) and (3) of the Act and has not adequately addressed those matters specified at section 38(4) and as a result the applicant has failed to establish that the grant of this application would be in the public interest,
 - f. Even if the Commission is satisfied that the applicant has established its onus in accordance with the principles established in *Executive Director of Public Health v Lily Creek International Pty Ltd and Ors [2000] WASCA 258* there is sufficient evidence to justify a conclusion by the Commission on balance that the grant of the application would not be in the public interest by reference to the potential for harm or ill health to be caused by the grant of the application and the insufficient evidence produced by the applicant to support its submission that there is a consumer requirement for the particular characteristics of the premises or the services proposed to be provided at the premises.

Submissions by service provider objectors

- 37 The services provided by the service providers are:
- the Shop Front, 170 Whatley Crescent, Maylands – outreach support and resource centre of disadvantaged people – many with mental health issues which may be compounded by easier availability of alcohol;

- 55 Central, 55 Central Avenue, Maylands – crisis accommodation for 24 people who are homeless or at risk of homelessness with a high percentage of clients with issues of drug and alcohol dependency;
- Elizabeth Hanson Autumn Centre – Derbarl Yerrigan Health Service Inc. 340 – 344 Guildford Road, Bayswater – provides accommodation and care to Indigenous clients from remote and rural communities for haemodialysis or peritoneal dialysis and other medical treatment;
- Derbal Bidjar Hostels (AHL), 6 – 8 Harrow Street, Maylands – a 30 bed hostel for Indigenous people requiring medical treatment and also provides assistance to the homeless.

38 The service providers submitted that the granting of the application would:

- a. encourage competitive pricing resulting in very cheap liquor which may damage persons who face delays for medical treatment, when there is so much alcohol available;
- b. not be of any benefit, and would in fact be a hindrance to the health and well being of clients;
- c. make the risk of assisting clients with alcohol dependency issues extremely difficult when so much alcohol is available at cheaper prices; and
- d. increase pressure on staff, volunteers and clients through the sale of alcohol by another retail outlet particularly one selling alcohol at reduced prices.

Determination

39 The applicant wishes to establish a First Choice Liquor Superstore of 1250 sqm which is large by Western Australian standards and significantly larger than the average size of retail premises in the immediately surrounding shopping precinct.

40 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 impact (section 38(4)) of the grant of the licence on the community.

41 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.”

- 42 Section 33(1) of the Act gives the Commission a wide power to grant or refuse an application on any ground or for whatever reason that the Commission considers to be in the public interest. This is an absolute discretion confined only by the scope and purpose of the Act.

See Hermal Pty Ltd v Director of Liquor Licensing [2001] WASC356 at (6) – (7) per Wallwork J and Palace Securities v Director of Liquor Licensing [1992] 7WAR241 at 249-50 per Malcolm CJ and at 263 per Wallwork J.

- 43 In determining the public interest as set out in section 33(1) both section 5 (the objects of the Act) and section 38 must be considered.

See Palace Securities v Director of Liquor Licensing of [1992] 7WAR241.

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(1)(a)(b) & (c) of the Act as follows:

- to regulate the sale, supply and consumption of liquor;
- to minimise harm caused to people, or any group of people, due to the use of liquor;
- 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.

- 44 The *Interpretation Act 1984* at section 19 provides that regard may be had to extrinsic material, including a Second Reading Speech to a Bill, when considering the meaning and intent of a written law.

During the Second Reading Speech which accompanied the introduction of the *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.”

- 45 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 of 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* [LC 26/2010] at [18].)

- 46 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. (refer *Shallcross Investments Pty Ltd v Director of Liquor Licensing* [LC 26/2010] and *Harold Thomas Blakely v Director Liquor Licensing* [LC 44/2010]).
- 47 The proposed liquor store of 1250sqm approximately, the subject of this application, is to be established in Maylands in a shopping centre undergoing significant refurbishment. It will be large both absolutely by Western Australian standards and relatively in terms of other retail outlets in the centre. The existing liquor outlets in and around the shopping centre are relatively small.
- 48 A number of objections were lodged and are dealt with in the categories set out in paragraph 31 above.
- 49 The residential objectors for whom Ms Lisa Baker MLA acted as spokesperson were chiefly concerned with loss of amenity which, in their view, would result from the establishment of a large liquor outlet in addition to the outlets already in the vicinity. Whilst many of the objections were repetitive the Commission admitted them as a block in view of the fact they spoke as a single voice through Ms Baker.
- 50 The submissions both written and oral by Ms Baker were of some length and provided evidence of a variety of antisocial behaviours, concern at the number of liquor outlets in the area and the link between outlet density and increased harm established by international research.
- 51 In the Commission's view the level of evidence submitted to support these views reached the necessary standard of proof required by section 73(10) of the Act i.e. to establish the validity of the objection, and hence must be given weight by the Commission.
- 52 The licensee objectors submissions were detailed and thorough. It was submitted that the applicant had failed to properly support its application with objective evidence and had not dealt adequately with the effect on at risk groups. Although the Commission is quick to note that the objections lodged by the licensee objectors have to be assessed in the light of vested commercial interest in the outcome and a desire to prevent further competition in their market catchment, in view of the evidence submitted by the interveners and the other objectors, the Commission did have some regard to the submissions lodged by

the licensee objectors.

- 53 The service providers objected on the grounds that harm will be caused by the introduction of another, in this case large, outlet arising from pressure on volunteers and staff through the sale of alcohol at low prices and the added difficulty in assisting clients with alcohol dependency issues with more cheap liquor available. There are four places within the vicinity dealing with indigenous people, alcohol dependence and homelessness with its attendant high level of alcohol dependence.
- 54 The Commission gave considerable weight to the evidence submitted by service providers on the basis of not only the nature of objections but also on the fact that these objectors had considerable expertise in dealing with alcohol related harm and their testimony in itself should be regarded to have strong evidentiary value.
- 55 The applicant submitted that the liquor outlet proposed would provide a wide range of quality wines, spirits and specialty beers and ales. Two surveys were conducted by Data Analysis Australia to establish consumer demand for the outlet however the methodology of these surveys was questioned by both the EDPH and the first licensee objector (Silversky Pty Ltd). On balance, the Commission accepted that whilst there were some flaws and biases introduced by the sampling method, the survey at least gave some indication of a demand by consumers for this type of facility.
- 56 The MGA report dealt with the demographics of the vicinity within 2km of the proposed outlet and concluded that there was a lower representation of 'at risk groups' than generally in the Perth area. The applicant also submitted that the Police statistics quoted in the Police submission did not specify locality or which crimes were alcohol related.
- 57 The Commission had the difficulty of assessing much of the statistical evidence as different parties relied on statistics for the whole of the Shire of Bayswater, the Maylands area and at times the shopping centre itself. Generally the Commission took a cautious view of the specific conclusions drawn on the basis of the statistics but formed a view that whilst the immediate vicinity of the liquor store may not be a particular 'trouble spot' fed by the availability of take away liquor in terms of general amenity of the area, a significant degree of anti social behaviour existed in and around the location of the proposed premises.
- 58 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.
- 59 It is the Commission's view, having regard to all the evidence, that although much was made of the up-market 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 (emphasis added).
- 60 The Commission formed the view that the applicant had demonstrated a requirement of the public for this type of outlet and it would provide added competition and a better product range than currently available in the locality. To this extent the grant of the licence could be seen to be in the public interest.

61 The applicant however must also satisfy the requirements of section 38(4) of the Act in establishing the application is in the public interest. Importantly a primary object of the Act at section 5(1)(b) 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.

62 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 the each application. The disposition of the Act, read as a whole, is to regulate.”

63 The statement of Mr Vaughan, WA State Business Manager of the applicant indicated the applicant did not expect there would be any increase in the amount of under-age consumption of liquor nor did he expect any increase in the sale and consumption of liquor in the Maylands area as it was his experience that other outlets experience a commensurate decrease in sales.

64 The Commission acknowledges that there will be some degree of outlet substitution in buyer behaviour but given that the outlet is to be designed and operated as a high volume “destination” liquor store, the Commission believes there is, none-the-less, also a very high likelihood for an increase in liquor sold for consumption in the store locality.

65 In its application the applicant stated that the premises would have comprehensive security measures and strict enforcement of responsible service of alcohol policies. The Commission accepts this; 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*)

Pursuant to section 16 (1)(b)(ii) of the Act the Commission ultimately has to make its determination on the balance of probabilities and ultimately each application must be considered on its merits.

66 Further, in *Highmoon Pty Ltd (LLC2 of 2004)* at 35, Greaves J expressed this view:

“I record there is no evidence in this case that should lead the court to conclude that this applicant is likely to conduct the business to be carried on under the licence at these premises other than in accordance with the Act. That, however, is not determinative of the present issue. The principal area of objection, as I have said, is not in the operation of the proposed premises

themselves, but in the likely consequences in all the circumstances of the introduction of premises of this size in this location, accommodating the number of persons proposed” (emphasis added).

Whilst this judgement refers to a tavern licence the principle is equally applicable to this licence application.

- 67 The Commission accepts that a Liquorland outlet would be well managed and have adequate harm minimisation policies. 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 section 4(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, Western Australia*.

- 68 The very plausible potential for further harm to be caused to the “at risk” groups who are clients of the service provider objectors with the introduction of as in this case, a very large outlet with a significant part of its business in the cheaper end of the market is a cause of concern for the Commission.

Ipp J in *Executive Director of Public Health v Lily Creek International and Ors* (supra) concluded that the mere possibility of harm or ill health was a relevant consideration.

- 69 The Commission accepts that liquor purchased at a suburban liquor store may well be transported some distance before consumption hence it is often difficult to establish a nexus between individual premises and harm.

- 70 There is a considerable body of research which demonstrates a correlation between outlet density and harm caused but this needs to be applied with caution to specific locations as much of the data is aggregated and general in nature. Dr John Henstridge of Data Analysis Australia, who the Commission accepts as an ‘expert’ in the field of applied statistics, went as far as to conclude that the statistical evidence itself is not able to tell whether or not a new First Choice Liquor Store is likely to increase harm in Maylands.

- 71 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'.

As stated earlier at para 57 above the Commission took a cautious view of the statistical evidence per se and the conclusions that could be drawn from it.

- 72 The Commission forms the view that the location of this proposed liquor outlet is a critical consideration in forming its view of the likelihood of harm and ill health resulting from the grant of the application.
- 73 Evidence submitted identifies four establishments in the immediate vicinity which are dealing with at risk groups as defined by the Act. These establishments have made submissions as to the harm and ill health likely to be caused by the granting of the application. It is the view of the Commission that these were not adequately dealt with by the applicant in its responsive submissions.
- 74 The EDPH in its intervention set out certain restrictions on trading that could be implemented to mitigate the risk were the application granted. The Commission considers that even with these restrictions imposed on the licensee there is a real likelihood of harm and ill health resulting from the grant of the application due to the proximity of the outlet to the four service institutions. The conclusion of Ipp J in *Executive Director of Public Health v Lily Creek international Pty Ltd & Ors* supra referred to in 65 above is again relevant.

Wheeler J in *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2001] WASCA 410 concurs where she said:

"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."

- 75 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.
- 76 Ultimately the Commission was of the view that, on assessing the evidence before it, any benefit of increased competition, range of products and diversity of choice is outweighed by the potential harm that would result if the application were to be granted.
- 77 The application is therefore refused.



JIM FREEMANTLE
CHAIRPERSON

REASONS FOR DETERMINATION OF
SEAMUS RAFFERTY (DEPUTY CHAIRPERSON)

- 1 I have had the benefit of reading the joint decision of Commissioners Freemantle and Cogan in respect of this application pursuant to section 24 of the *Liquor Control Act 1988* (“the Act”). I agree with the outline of the background to the application, the summary of evidence and the outline of relevant law applicable to the application set out in their reasons for decision. I however do not agree with the decision to refuse the granting of the licence to the applicant.
- 2 An applicant must establish that the granting of the licence is in the public interest pursuant to section 38(2) of the Act. The matters that the Liquor Commission (“the Commission”) may have regard to in determining whether granting an application is in the public interest are set out in section 38(4) of the Act. Based on the materials put before the Commission, which are voluminous and which need not be specifically referred to, I consider that the applicant has discharged its onus in establishing that the granting of the licence is in the public interest. In reaching that decision, I have considered the various matters raised by the interveners and the objections made by each of the objectors.
- 3 The matter upon which there is a divergence of opinion between myself and the majority, is the consideration of section 38(4)(a) of the Act, that being ‘the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor.’ Concerns were raised in objections and in submissions at the hearing of the application in respect to the location of four service providers in the area dealing with persons it was submitted were “at risk”, namely:
 - a) The Shop Front, 170 Whatley Crescent, Maylands – outreach support and resource centre for disadvantaged people – many with mental health issues which may be compounded by easier availability of alcohol;
 - b) 55 Central, 55 Central Avenue, Maylands – crisis accommodation for 24 people who are homeless or at risk of homelessness with a high percentage of clients with issues of drug and alcohol dependency;
 - c) Elizabeth Hanson Autumn Centre – Derbarl Yerrigan Health Service Inc, 340-344 Guildford Road, Bayswater – provides accommodation and care to indigenous clients from remote and rural communities for haemodialysis or peritoneal dialysis and other medical treatment;
 - d) Derbal Bidjar Hostels (AHL), 6-8 Harrow Street, Maylands – a 30 bed hostel for indigenous people requiring medical treatment and also provides assistance to the homeless.
- 4 It should be noted that there are a number of licensed premises selling packaged liquor within close proximity of the proposed licensed premises. Those premises are:
 - a) Liqourland Maylands – 246 Guildford Road, Maylands;
 - b) BWS Maylands – 43-53 Eighth Avenue, Maylands;

- c) Cellarbrations at CJays – 32 East Street, Maylands;
 - d) Peninsula Tavern – 223 Railway Parade, Maylands;
 - e) Cellarbrations at Garrett & Guildford – 397 Guildford Road, Bayswater;
 - f) Your Shout Liquor – 49 Guildford Road, Mt Lawley.
- 5 Other licensed premises were identified in the applicant’s Public Interest Assessment (“PIA”), however for the purpose of these reasons these are the relevant outlets from which packaged liquor can be purchased.
- 6 Each of the service providers identified has a licensed premises in closer proximity than the proposed First Choice outlet, as reflected by the following analysis, namely:
- a) The Derbal Bidjar Hostel has two outlets in closer proximity than the proposed outlet, they being the Peninsula Tavern and BWS Maylands;
 - b) The Elizabeth Hanson Autumn Centre has two outlets in closer proximity than the proposed outlet, they being Cellarbrations at Garrett & Guildford and the Liquorland Maylands;
 - c) 55 Central has two outlets in closer proximity than the proposed outlet, they being BWS Maylands and Cellarbrations at CJays;
 - d) The Shop Front has two outlets in closer proximity than the proposed outlet, they being the Peninsula Tavern and BWS Maylands.
- 7 Had the relevant objectors adduced evidence on the hearing of the application that the existing licensed premises were having a negative impact on those “at risk” persons who resort to the service providers for assistance, there would have been a proper basis upon which to conclude that the addition of another liquor outlet would involve a significant risk of harm or ill-health to people as a result of the granting of the licence. However, no such evidence was adduced by any objector or intervener.
- 8 As Wheeler J noted in *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2001] WASCA 410, ‘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.’
- 9 No evidence before the Commission went further than the abstract sense referred to by Wheeler J. Simply because an area has people within it that are considered at risk is not a sufficient basis to determine that the granting of a licence is not in the public interest. There must be something tangible that links those at risk and the granting of the licence that gives rise to a conclusion that it is not in the public interest to grant the licence due to the harm or ill health that might be caused to people, or any group of people, due to the use of liquor.
- 10 If a specific matter is addressed as a basis for objection by an objector pursuant to section 74(1) of the Act, it is for that objector to establish the validity of the objection pursuant to section 73(10) of the Act. Merely because an applicant does not refer to the same matter in its PIA is not a valid basis to determine that the validity of the ground has been made out.

- 11 In the absence of any objection of merit or supported by cogent evidence and having regard to the fact that the applicant has satisfied the criteria set out in section 38(4) of the Act and being mindful of the objects set out in section 5 of the Act, I would grant the application.

A handwritten signature in black ink, appearing to read 'Seamus Rafferty', with a long horizontal flourish extending to the right.

SEAMUS RAFFERTY
DEPUTY CHAIRPERSON