

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Riley Enterprises (WA) Pty Ltd
(represented by Mr Phil Cockman of Canford Hospitality Consultants Pty Ltd)
- Interveners:** Commissioner of Police
(represented by Mr John Carroll of State Solicitor's Office)
- Director of Liquor Licensing
(represented by Mr John Carroll of State Solicitor's Office and Mr Peter Minchin of Department of Racing, Gaming and Liquor)
- Objectors:** Marowga Pty Ltd
(represented by Peter Fraser of Dwyer Durack Lawyers)
- Pastor David Hunt
- Commission:** Mr Jim Freemantle(Chairperson)
Mr Eddie Watling (Member)
Mr Alex Zilkens (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 for a liquor store licence.
- Premises:** Liquor Barons Silver Sands, Mandurah
- Date of Hearing:** 24 September 2014
- Date of Determination:** 7 November 2014
- Determination:** The application is dismissed and the decision of the delegate of the Director of Liquor Licensing is affirmed.

Authorities referred to in this determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Busswater Pty Ltd v Director of Liquor Licensing* LC17/2010
- *Harold Thomas James Blakely v Director of Liquor Licensing* LC 44/2010
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1192) 7 WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Palace Securities Ltd v Director of Liquor Licensing supra*
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258)
- *Liquorland (Australia) Pty Ltd v Austin Nominees Pty Ltd* (unreported decision of Supreme Court of WA No. 98161 in 1998)
- *William Street Bird v Director of Liquor Licensing* LC 07/2010
- *Woolworths Pty Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Executive Director of Public Health v Lily Creek International Pty Ltd and Ors* [2001] WASC 410
- *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC 51 at [57]
- *Highmoon Pty Ltd v City of Fremantle and others* [2004] WLLC 4

Background

- 1 On 24 June 2014, the Director of Liquor Licensing refused an application for the grant of a liquor store licence lodged by Riley Enterprises (WA) Pty Ltd in respect of premises situated at 116A Anstruther Road, Mandurah to be known as "Liquor Barons Silver Sands".
- 2 On 14 July 2014, Canford Hospitality Consultants Pty Ltd lodged an application for review on behalf of the applicant.
- 3 The Commissioner of Police ("the Police") who intervened in the original application also intervened in the review application pursuant to section 69(6)(c)(ii) and (iv) of the Act.
- 4 A hearing of the application was conducted on 24 September 2014.

Submissions on behalf of the applicant

- 5 The applicant's position is set out in its Public Interest Assessment lodged with the original application and in various responses to the objection lodged on behalf of Marowga Pty Ltd and the intervener.
- 6 The applicant made oral submissions at the hearing, however, some of these submissions introduced material not before the Director when he made his determination and had to be disregarded by the Liquor Commission.
- 7 Essentially the applicant's written submissions relied on the history and experience of the applicant's principal, Mr Adam Riley, and the success of a similar operating model initiated by Mr Riley at Meadow Springs (Cellarbrations).
- 8 The applicant submits that Mr Riley is a very capable licensee and a responsible and upright member of the local community with a proven 'track record' of operating liquor stores (of which neither of the interveners make a mention).
- 9 The proposed Liquor Barons Silver Sands will offer:
 - a) a wider range of product than is currently available;

- b) a safe and comfortable retail experience for the browse customers;
 - c) assistance to the elderly in carrying purchases to their car, a service not currently offered locally;
 - d) a proactive contribution to the responsible service of alcohol as has been demonstrated at the applicant's other liquor stores;
 - e) liquor products at reasonable prices, unlike some of the other liquor outlets locally;
 - f) an extensive range of WA wines from smaller producers including an extensive range of Windance and Woody Nook wines;
 - g) a well-liked, responsible vendor of liquor in Mr Riley.
- 10 The premises are to be located in a neighbourhood shopping centre and will offer convenient one stop shopping for patrons of the centre.
- 11 The population of Mandurah is expected to increase and the Mandurah Terrace Precinct Plan anticipates future growth in the area served by the proposed liquor store.
- 12 The locality has, according to the applicant, the second lowest number of alcohol related offences when compared with selected areas such as Harvey, Pinjarra, Rockingham, Bunbury, Busselton and Kwinana. Alcohol hospitalisations for Mandurah are well below State averages.
- 13 Of the 14 existing licensed premises within a 3 kilometre radius of the proposed premises only seven have dedicated packaged liquor facilities. The applicant claims that the proposed liquor store will be different from existing outlets.
- 14 The applicant submitted 751 witness petitions and 33 needs witness questionnaires which it claims demonstrates that there is a requirement for the proposed store.

Submissions on behalf of Marowga Pty Ltd

- 15 It was submitted on behalf of Marowga Pty Ltd that juvenile drinking in the area was a significant issue. The work of Dr Boxco Rowland and Deakin University was cited which identified that 45% of young people in Mandurah are using alcohol by age 14 years.

- 16 The Census of Population and Housing, Socio Economic Indexes for Areas (SEIFA) identifies Mandurah as the most disadvantaged area in the Greater Perth region. Alcohol related admissions to hospital were higher in Mandurah than in other southern metropolitan regions.
- 17 The Peel region, in which Mandurah is the principal population centre, had, according to police statistics, a very high number of assaults relative to the greater South Western area and experienced a very significantly higher incidents of drink driving offences.
- 18 There are seven packaged liquor outlets within a three kilometre radius of the proposed premises, one of which is directly across the road.

Submissions on behalf of Pastor David Hunt

- 19 Pastor Hunt objected on the grounds that there were already sufficient liquor outlets in the local community and a further licence is not required.

Submissions on behalf of the Commissioner of Police

- 20 The extent to which the grant of the licence will cater for the requirements of consumers is limited as the area is already well serviced by existing outlets in close proximity.
- 21 The existing high levels of harm and disorder will be exacerbated by granting of a further licence to enable the sale of packaged liquor. Between 12 October 2012 and 13 September 2013, 2789 relevant criminal offences were recorded in Mandurah, of which 217 were alcohol related.
- 22 Alcohol related violence is disturbingly high in Mandurah over the same period (75 alcohol related domestic assaults, 70 alcohol related non-domestic assaults and six alcohol related sexual assaults).
- 23 Also Police data for this period show 119 attendances within a 250 metre radius of the proposed liquor store.

- 24 Should the application be granted, it should be subject to the conditions submitted by the intervener to the original application viz:

Trading Hours

As per the application:

Monday to Saturday from 9:30 am to 9:30 pm.

Trading Conditions

As per the application:

- a The premises is to predominantly stock, supply and sell organic wine liquor products from the South West and Peel region;*
- b Premium liquor is to be available, including the sale of Woody Nooks Wines and Windance Wines; and*
- c The licensee will participate in the local Liquor Accord.*

Dress Standards

The licensee must refuse entry to the licensed area to any person wearing a jacket or any other clothing bearing patches or insignia including accoutrements, jewellery, visible tattoos, branding or any other items which indicates membership or association with Outlaw Motorcycle Gangs, including but not limited to the following.

- a Coffin Cheaters;*
- b Club Deroes;*
- c Gods Garbage;*
- d Gypsy Jokers;*
- e Outlaws*
- f Finks*
- g Rebels*
- h Comancheroes*
- i Mongols*
- j Hell's Angels; and*
- k Rock Machine*

Closed Circuit Television System

- a A system is to be in place and operational at all times covering the internal access/egress of each entrance and exit of premises;*

- b These cameras must allow clear identification of patrons;*
- c The system must comply with the Director's Policy (6) relating to CCTV; and*
- d Images recorded via the CCTV system must be retained for twenty eight (28) days and must be made available for viewing or removal by the police or other persons authorised by the Director.*

Submissions on behalf of the Director of Liquor Licensing

- 25 The Director's representative made oral submissions highlighting various aspects of the reasons for his determination as set out in Decision A224659 and the Commission does not believe it is necessary to, in effect, reproduce in this determination what has been clearly set out in the original decision.
- 26 In essence the Delegate of the Director had found that the applicant had relied heavily on the proposed focus on organic wines and wines from Woody Nook and Windance in particular for which, in the applicant's opinion, there is demonstrated requirement. However the Delegate held that the evidence for this, based as it was, on the questionnaires and witness statements was not persuasive.
- 27 The Delegate also held that the significance of so called one stop shopping in the circumstances of this application relating to a small neighbourhood shopping centre was overstated. In fact in terms of convenience there was a packaged liquor outlet directly opposite the proposed site of these premises.
- 28 It was submitted that this particular location was also a police identified "hot spot" in relation to anti-social behaviour.
- 29 Ultimately, the requirements of section 38 were not met.

Determination

- 30 This application is brought pursuant to section 25(2c) of the Act which provides that when conducting a review of a decision of the Director, the Commission

may have regard only to the material that was before the Director when making the decision.

- 31 In conducting a review pursuant to section 25 of the Act, the Commission is not required to find an error in the Director's decision. The Commission is required to undertake a full review of the materials before the Director and make its own determination on the merits, based upon those materials (*Hancock v Executive Director of Public Health [2008] WASC 224*).
- 32 Pursuant to section 25(4), the Commission may inter alia, -
- affirm, vary or quash the decision subject to the review;
 - 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;
- 33 Section 38(2) of the Act provides that an applicant must satisfy the licensing authority that granting the application is in the public interest. To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
- 34 It is not enough that an applicant express assertions or opinions about the public interest; any assertion or opinion must be supported by an appropriate level of evidence (*Busswater Pty Ltd v Director of Liquor Licensing LC 17/2010*).
- 35 The private interests of an applicant do not equate to, and should not be confused with the public interest (*Harold Thomas James Blakely v Director of Liquor Licensing LC 44/2010*).
- 36 Determining whether the grant of an application is "in the public interest" requires the Commission to exercise a discretionary value judgment 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] WACA 175* and *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*).

- 37 The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 where he observed at paragraphs 8 and 9:

“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.”

- 38 In determining whether granting an application is in the public interest, the Commission may have regard to the matters set out in section 38(4) of the Act, specifically:

- i. the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and
- ii. the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and
- iii. whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises.

- 39 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (*Palace Securities Pty Ltd v Director of Liquor Licensing, supra*).

- 40 The objects with particular relevance to the application under review are:

- 5(1)(b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor;

5(1)(c) 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.

- 41 Section 16 of the Act requires each application to be considered on its merits and be determined on the balance of probabilities. If a conflict arises between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258).
- 42 The Commission is not bound by the rules of evidence and must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms (section 16(7) of the Act).
- 43 The application concerns the establishment of a liquor store of approximately 120 sqm in a local shopping centre which according to the applicant will be different from other packaged liquor outlets in the locality in that it will have particular emphasis on local organic wines and a large range of Windance and Woody Nook wine. The store will provide convenient one stop shopping.
- 44 Objections to the grant of the application were lodged by Marowga Pty Ltd, the holder of a liquor store licence in the locality, and Pastor David Hunt from the Church of Living Waters.
- 45 In Commission's view, Pastor Hunt's objection has not been made out as it is not supported by cogent evidence. However the objection lodged on behalf of Marowga Pty Ltd is supported by cogent supporting evidence as summarised in paragraphs 15 to 18 above and therefore it's objection has been made out.
- 46 The Commission accepts that Marowga Pty Ltd has a pecuniary interest in the outcome and the commercial self interest is not, per se, a ground of objection. However as found in *Liquorland (Australia) Pty Ltd v Austin Nominees Pty Ltd* (unreported decision of Supreme Court of WA No. 98161 in 1998) the Commission is obliged to take into account these matters, raised in such an

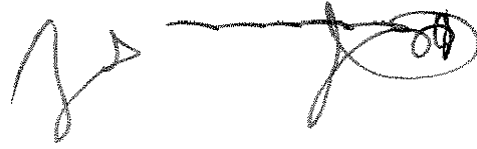
objection, which meet the requirements of section 74 of the Act as it would if these matters had been raised by the party with no such pecuniary interest.

- 47 The applicant submitted a number of questionnaires and petitions which it claimed supported the establishment of the outlet.
- 48 The evidence indicates that there are seven packaged liquor outlets in the locality (defined as a 3km radius from the proposed premises). One of these liquor stores is almost directly opposite the proposed location of the premises subject to this application. Another of these liquor stores is a large outlet carrying an extensive range of wines including those on which the applicant states his different offering will largely be based.
- 49 The petitions and questionnaires whilst generally supportive of the proposal did not demonstrate any real requirement of consumers for the proposed store. The Commission has generally taken a cautious approach to the evidential value of petitions as they are not always balanced in the questions asked and often do not reflect the number of people with a different view.
- 50 The evidence does not demonstrate that there is any particular requirement of consumers that is not already satisfied by existing packaged liquor stores in the locality.
- 51 The application seemed to be based on the perception that Mr Adam Riley, a director of the applicant company, was “an excellent and very capable licensee and a responsible and upright member of the local community” and that, as he ran a successful liquor store in Meadow Springs, there was no apparent reason this application should not be granted.
- 52 The Commission accepts that Mr Riley is as described in application and that his liquor store at Meadow Springs is successful and conducted very well, however, the applicant has failed to reach the threshold of section 38(2) of the Act in demonstrating that the grant of the application is in the public interest.

- 53 Section 38(2) of the Act imposes a positive obligation upon the applicant to satisfy the licensing authority that the application is in the public interest.
- 54 Thus it is incumbent upon the applicant to adduce sufficient evidence for the licensing authority to satisfy itself that the application is in the public interest. (see *William Street Bird v Director of Liquor Licensing LC07/2010*, [38]. This position was further supported by *Heenan J in Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384* at 37.
- 55 The Liquor Commission has further concerns concerning the harm and ill health in which granting this application might result.
- 56 There is some disagreement between the applicant on one side and the intervener and Marowga Pty Ltd on the other as to what the data on Police attendance in the locality and hospitalisations in Mandurah actually demonstrated. This appeared to the Commission to be a result of use of different data sets e.g. locality specific compared with Mandurah (or Peel) as a whole.
- 57 The Commission accepts the statistics in relation to police attendances and is persuaded that there is a significant level of harm and ill health extant in the Mandurah area in the immediate locality.
- 58 As Wheeler J stated in *Executive Director of Public Health v Lily Creek International Pty Ltd and Ors [2001] WASCA 410*, where there is high level of alcohol related harm it may be that even a small risk of incremental harm is unacceptable. This view was further reinforced by Edelman J in *Liquorland (Australia) Pty Ltd v Executive Director of Public Health [2013] WASC 51* at [57] as :
- In assessing the overall question of whether granting the application is in the public interest it is relevant to consider the baseline level of risk and, in that context, the effect of an increase in risk from the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated. (Emphasis added.)*

59 Notwithstanding that, the Commission accepts Mr Riley is a competent, and responsible licensee who runs his premises well, however, as Greaves J found in *Highmoon Pty Ltd v City of Fremantle and others* [2004] WLLC4 "it is the consequences of the granting of the licence in a particular location rather than the proposed operation of the premises themselves that is the determining factor in assessing the likelihood of the amenity of an area being diminished";

60 Given the Commission's finding that there is insufficient evidence that there is any real requirement of consumers for the proposed liquor store and it being persuaded as to the potential incremental harm in an area with an already high level of harm, the application is refused and the decision of the delegate of the Director is affirmed.



JIM FREEMANTLE
CHAIRPERSON