

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Woolworths Limited
*(represented by Mr Gavin Crocket of Cullen Babbington
McLeod Lawyers formerly known as GD Crocket & Co)*
- Intervener:** Commissioner of Police
(represented by Mr Sam Nunn of State Solicitor's Office)
- Objectors:** Liquorland (Australia) Pty Ltd
*(represented by Mr Steve Standing of Herbert Smith
Freehills formerly known as Freehills)*
- Commission:** Mr Seamus Rafferty (Deputy Chairperson)
Mr Eddie Watling (Member)
Dr Eric Isaachsen (Member)
- Date of Hearing:** 22 October 2012
- Date of Determination:** 27 November 2012
- Date of Reasons for
determination:** 10 July 2013
- Premises:** Premises to be known as Dan Murphy's South Fremantle,
situated at 219 Hampton Road, South Fremantle.
- Matter:** Application for the conditional grant of a liquor store licence
referred under section 24 of the *Liquor Control Act 1988*
- Determination:** The application is granted.

Authorities considered in the determination:

- *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*
- *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384*
- *Woolworths Ltd v Liquorland (Australia) Pty Ltd and Others (LC42/2012)*

Introduction

- 1 On 29 May 2012, an application was lodged by Woolworths Ltd (“the applicant”) for the conditional grant of a liquor store licence to trade as Dan Murphy’s South Fremantle, located at 219 Hampton Road, South Fremantle (“the Premises”).
- 2 The application by Woolworths Ltd was advertised for public comment. Pursuant to section 69 of the *Liquor Control Act 1988* (“the Act”), on 20 June 2012, a notice of intervention was lodged by the Commissioner of Police (“the Police”).
- 3 On 11 July 2012, notices of objection were lodged by Liquorland (Australia) Pty Ltd and Orebo Pty Ltd (licensee of Moondyne Joes, premises situated at 73 Wray Avenue Fremantle). The objection by Orebo Pty Ltd was subsequently withdrawn on 25 September 2012.
- 4 On 1 August 2012, pursuant to section 24 of the Act, the Director of Liquor Licensing (“the Director”) referred the application to the Liquor Commission (“the Commission”).
- 5 A hearing before the Commission was held on 22 October 2012.

Submissions on behalf of the applicant

- 6 In October 2011, the Commission granted a conditional liquor store licence (Decision LC44/2011) which allowed the opening of a Dan Murphy’s liquor store in South Fremantle at 256 Hampton Road, South Fremantle on the basis that the services and facilities of a Dan Murphy’s store would cater to the requirements of consumers and the introduction of the store would contribute to the development of the liquor industry in the local area.
- 7 Owing to its proprietary rights being extinguished, the applicant was unable to proceed with the establishment of the proposed Dan Murphy’s at the site for which the licence was granted. The applicant therefore now seeks to open a Dan Murphy’s liquor store located in an existing tenancy within an existing development known as “Douro Road Trade Centre” located at 219 Hampton Road (at the corner of Douro Road), South Fremantle just over 330m from the original premises with a total floor area of 1,320m².
- 8 The proposed liquor store will provide a large trading floor including a walk in cool room as well as storage areas to the rear, office accommodation and staff amenities. Servicing will occur from the laneway to the rear of the premises.
- 9 The Centre provides a large parking area providing 300 car bays to customers of the Centre. 30 of these bays immediately in front of the proposed premises will be specifically reserved for customers of the Dan Murphy’s store. A large range and variety of retailers and services currently occupy the Centre. Although the visitor numbers to the Centre are

not available, the Woolworths Supermarket at the Centre averages 14,399 customers per week, which gives an indication of the significant volume of people that visit the Centre.

- 10 The applicant proposes to cater to modern consumer demand for packaged liquor in a locality which it submits is currently inadequately serviced by the existing packaged liquor outlets. Apart from the change to the physical location of the new premises, the material facts and relevant considerations for this application are substantially the same as for the application, the subject of decision LC44/2011. To support this contention the applicant has relied on the findings of the decision of the Commission (LC 44/2011) wherein it found:
1. Dan Murphy's is well managed and provides a high level of responsible retailing of liquor products.
 2. Dan Murphy's is a large and diversified packaged liquor outlet that offers an extensive range of products.
 3. Dan Murphy's facilities and services cater to the requirements of consumers.
 4. The existing packaged liquor outlets in the locality are primarily of a convenience store nature and the proposed Dan Murphy's will provide a range of products, services and facilities that are substantially greater than those currently available.
 5. Introduction of a Dan Murphy's store into the South Fremantle area will contribute to the development of the liquor industry in the area.
 6. Of the existing liquor licences in the locality, there are only two liquor stores within 1 km of the proposed site.
 7. The local community does not experience any greater levels of alcohol related harm greater than that which is generally accepted in the community.
 8. The grant of the licence will not result in an increase in the level of harm to an unacceptable level by being greater than that which is generally accepted by the community.
- 11 The applicant's Public Interest Assessment ("PIA") lodged in support of the application provided extensive details of the business proposed to operate at the new premises and its location, Dan Murphy's services and facilities, security measures, harm minimisation strategies and demographic as well as a socio economic profile of the locality. It was submitted that the socio-demographic and socio economic profile of the locality has remained unchanged since the grant of the liquor store licence by the Commission for premises 330m away from the proposed premises. The applicant relevantly quoted the following finding of the Commission in its decision LC 44/2011:

“From the evidence presented the Commission is of the view that the prime matter to be considered in assessing this application is the harm and ill-health impact (section 38(4)(a)) that the granting of this licence might have. The Commission sees no negative public interest issues in relation to the impact on the amenity (section 38(4)(b)) nor whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the proposed licensed premises (section 38(4)(c)).” (Paragraph 58)

“The Commission is not persuaded that given the circumstances of this locality that the granting of this application will result in an increase in the level of harm to an unacceptable level by being greater than that which is generally accepted in the community” (Paragraph 72)

“From evidence submitted by the Applicant, including data in the Data Analysis Australia Pty Ltd Report “A Study of the Balga, Albany and Mandurah Dan Murphy’s Outlets in Western Australia”, there is little to indicate any likely change (positive or negative) to levels of harm or ill-health as a consequence of the opening of those Dan Murphy’s stores. Whilst this evidence is not specific to this locality the Commission does accord it some weight.” (Paragraph 73)

“Therefore the Commission is unable to reach a negative conclusion based upon the evidence and material advanced by the Executive Director of Public Health as it applies to the circumstances of this application. The data presented by the EDPH does not reflect a local community experiencing any greater levels of alcohol-related harm than that which appears to be commonly accepted in the community.” (Paragraph 75)

- 12 As a Dan Murphy’s store the premises will be a high quality, well managed “Department” destination liquor store which specialises in a broad range of liquor products (specifically premium and commercial wines) at the lowest possible prices.
- 13 The core aims of the Dan Murphy’s business are fine wine, staff knowledge and superior customer service which will include:
 - Twice weekly wine tastings;
 - Speciality events;
 - Gift cards;
 - Free customer information and education;
 - Event planner services; and

- Trolleys for customer use.
- 14 Comprehensive security measures, standard to all Dan Murphy's stores will be put in place at the premises to minimise and deter crime and anti-social behaviour. In addition to 24 high quality, colour CCTV cameras and comprehensive harm minimisation strategies implemented, there will be bright lighting throughout all areas of the store; at least six to eight staff supported by at least one manager to deter shoplifting, limited access points with entry through "one way" Electronic Article Surveillance gates, removable bollards in place when the premises is closed; clear security film applied to all shopfront windows; in-store security alarm system which is monitored off site and Llexan security tagging of many products.
 - 15 Other evidence submitted in support of the PIA and considered by the Commission included expert reports and witness statements – "Statement of Dr. Henstridge", "Statement of Mr. Martin Smith", MGA Town Planner Report (2)", "Caporn Services Report" and "Data Analysis Australia Pty Ltd Report".
 - 16 To discharge its onus under section 38(2) of the Act the applicant also lodged extensive empirical materials to which the Commission had regard to in the grant of the licence at 256 Hampton Road, which included:
 - identification and review of market research and relevant data;
 - investigations into the nature of the locality (three kilometres from the premises);
 - field assessments and site visits;
 - research and analysis of demographic data for the locality, publicly available data on alcohol related harm, health and crime and relevant literature;
 - consulting with the relevant stakeholders, such as the City of Fremantle, the City of Cockburn and the WA Police;
 - a comprehensive review of the other packaged liquor outlets in the locality including the "Secret Shopper Survey" (defined in and annexed to the PIA) and the Smith Field Notes (defined in and annexed to the PIA) to assess the range and depth of products stocked by existing packaged liquor outlets;
 - commission of the Impact Review Report (defined in and annexed to the PIA) to analyse the measurable impact on liquor related harm resulting from the operation of certain existing Dan Murphy's stores in Western Australia;
 - a review of the provisions of the Act distinguishing how its provisions sharply differ from the previous liquor licensing legislation in Western Australia.

- 17 In summary it was submitted that the Commission was satisfied that the granting of the original application was in the public interest. The PIA and other information provided by the applicant to support the application demonstrates that apart from the difference in the physical location of the proposed Dan Murphy's store, none of the criteria have changed so accordingly, the findings of the Commission in relation to the original application ought to apply and the application be granted.

Submissions on behalf of the Commissioner of Police

- 18 On 20 June 2012, the Police lodged a notice of intervention, for the purpose of making representations regarding existing alcohol related offences and trading conditions to be imposed on the licence to minimise alcohol related harm if the application is granted.
- 19 The Police have concerns over the proposed liquor store as there is a Liquorland Store within the same shopping precinct which may result in price competition and promotion of cheap alcohol sales thereby promoting excessive consumption.
- 20 According to the Police, between June 2011 and May 2012, 381 reported crimes were recorded in the suburb of South Fremantle. Raw statistical data sourced from "Incident Management System" and "Computer Aided Dispatcher System" was provided to assist the Commission in making an informed decision in relation to this application. Further information in support of the intervention in the form of collated Police data for the locations of South Fremantle (proposed store); and existing stores in Southern River, Kelmscott, Highgate and Mandurah were also lodged. If the application is approved appropriate conditions were recommended to be imposed on the licence.

Submissions on behalf of the objector - Liquorland (Australia) Pty Ltd

- 21 Liquorland (Australia) Pty Ltd ("Liquorland") originally objected on the following grounds:
- i. The application is, in substance, an application for the removal of a conditionally granted licence, which is contrary to section 81(7) of the Act.
 - ii. The application is not supported by valid planning approval or the requisite certificate, as required by sections 37(2) and 40 of the Act.
 - iii. The application was not advertised in accordance with section 67 of the Act.
 - iv. The grant of the application would be contrary to section 36A of the Act which prevents the grant of a licence which would authorise the sale of packaged liquor from any premises in the metropolitan area if there is a petrol station on the premises.

- 22 On 27 September 2012, Liquorland lodged an application to amend its grounds of objection by no longer relying on grounds i to iii and instead included an additional ground namely, that the grant of the application would not be in the public interest pursuant to section 74(1)(a) of the Act.
- 23 By correspondence dated 11 October 2012, the Commission determined not to grant the request for leave to amend the notice of objection on the basis that as at the hearing date of this application, the conditional grant of a liquor store licence will no longer exist at 256 Hampton Road, South Fremantle. That licence ceased to exist on 13 October 2012. Further, as the original objection already included the ground of close proximity of the proposed liquor store to a petrol station and the impact of such proximity on impulse purchase of packaged liquor, there was no basis to amend the objection as outlined above.
- 24 On 12 October 2012, Liquorland sought to renew its application to amend its ground of objection on the basis that it had lodged an application for review against the decision of the Director to refuse it leave to apply for transfer of the existing licence for premises located at 256 Hampton Road, South Fremantle.
- 25 In response to the Commission's direction to verify whether Liquorland in its capacity as an objector in these proceedings has any direct or indirect pecuniary interest in the refusal of the application, Mr Shawn Holloway, Western Australia State Manager, Operations in his statutory declaration lodged under cover letter dated 17 October 2012 submitted that:

To the best of my knowledge, information and belief, and after having made due enquiry, Liquorland does not have any direct pecuniary interest in the refusal of the Application or any expectation of such interest. The only indirect pecuniary interest which Liquorland, arguably has in the refusal of the Application are as follows:

- a) *The refusal of the Application would protect the Liquorland South Fremantle store from a possible fall in trading revenue; and*
 - b) *The refusal of the application would result in the proposed liquor store at 256 Hampton Road, if approved, potentially having a higher level of trading revenue than would otherwise be the case.*
- 26 In its submissions, Liquorland noted that section 36A of the Act prevents the approval of the grant of a licence where there is a close connection between proposed licensed premises and a petrol station such that it can be said that they are on the same premises. Whether or not separate buildings or separate titles are involved cannot be determinative. In addition to the operational connection between the proposed store and the existing petrol station, both being owned and operated by Woolworths, there is a very strong physical and visual connection between the proposed store and the petrol station thereby creating an environment of impulse purchases of liquor made by petrol station patrons.

- 27 It was further submitted that the grant of the application would not be in the public interest because the application wrongly assumes the absence of other licensed premises in the locality that could provide the services and facilities proposed to be provided by the Dan Murphy's store.

Preliminary matters

- 28 At the hearing an application was made by Liquorland to adjourn the hearing of the application until the Director's decision to refuse leave for transfer was determined on the basis that it was not appropriate to determine this application when there is uncertainty regarding a liquor store licence in the immediate vicinity.
- 29 The Commission refused to grant the request for a adjournment of the proceedings on the basis that there was no reason to prejudice the applicant as the application for the subject licence was lodged prior to the application for transfer of the licence at 256 Hampton Road, South Fremantle to Liquorland.
- 30 A further application was made by the objectors to renew its application to amend its notice of objection at the hearing of this matter or alternatively invite the Commission to take the matter into account as a further objection pursuant to section 73(6) of the Act.
- 31 On the basis that there was no change in circumstances between the date on which the Commission advised of the refusal to allow a amendment to the notice of objection and the date of the hearing, the Commission has determined that the objector's application to amend the application is refused.

Determination

- 32 Pursuant to section 38(2) of the Act an application for the grant of a liquor store licence must satisfy the licensing authority that granting the application is in the public interest.
- 33 In discharging the onus under section 38(2) of the Act all applicants must address both the positive and negative impacts that the grant of the application will have on the local community.
- 34 When considering the public interest, consideration of both section 5 and section 38 of the Act is relevant when making the decision - *Palace Securities Pty Ltd v Director of Liquor Licensing ((1992) 7 WAR 241 per Malcolm (CJ))*.
- 35 The primary objects of the Act as set out in section 5 are:
- (a) to regulate the sale, supply and consumption of liquor;

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

36 Section 38(4) of the Act sets out the matters that the licensing authority may have regard to in determining whether granting an application is in the public interest:

- (a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and
- (b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and
- (c) 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; and
- (d) any other prescribed matter.

37 Pursuant to section 33(1) of the Act 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 (*Palace Securities supra*). In *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384* EM Heenan J described the term “absolute discretion” as :

The 'absolute discretion' to grant or refuse an application of (sic) any ground or for any reason that the Commission considers in the public interest, s 33(1), is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole: Hermal Pty Ltd v Director of Liquor Licensing [2001] WASC 356 [6] - [7] (Wallwork J) and Palace Securities Pty Ltd v Liquor Licensing (1992) 7 WAR 241, 249 - 250 (Malcolm CJ) and 263 (Wallwork J). Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest or make those objects the exclusive considerations nor the sole determinants of the public interest: Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASC 231; (2002) 25 WAR 511, [52] - [55]; O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210, 216 and Jericho Nominees Pty Ltd v Dileum Pty Ltd (1992) 6 WAR 380, 400.

- 38 Save for the objection relating to whether section 36A(2) of the Act had been contravened and the change in premises, the Commission finds that there is little material difference between the evidence upon which the conditional liquor store licence was granted in October 2011 and the evidence in respect to this application.
- 39 The objection has not been made out bearing in mind that the objector bears the burden of establishing the validity of the objection pursuant to section 73(10) of the Act. It was incumbent on the objector to satisfy the Commission that the granting of the application would otherwise be contrary to the Act pursuant to section 74(1)(j) of the Act.
- 40 The essential argument of the objector was that the premises on which the proposed liquor store would operate, were the same premises on which a petrol station was currently operated and that there was such a nexus between the two locations that the Commission should determine that the proposed liquor store and petrol station would effectively operate on the same premises.
- 41 The term “premises” is defined in section 3 of the Act as including land or a vehicle or a part of premises. The definition of the term is not limited to the matters listed in section 3 of the Act. The Concise Oxford Dictionary defines the term premises as “a house or building together with its land and outbuildings occupied by a business or considered in an official context”.
- 42 In determining the meaning of a premises in the context of section 36A (2) of the Act, the Commission has adopted the dictionary definition outlined above. The public policy purpose of the section is obvious- the legislature did not want alcohol to be sold from the same building/premises in which drivers would purchase petrol.
- 43 In any event, the Commission is not satisfied that the proposed liquor store and existing petrol station will operate from the same premises. Based on the evidence before the Commission it is clear that:
- a) the two businesses will operate from separate buildings;
 - b) there is a car park between the petrol station and the building from which the liquor store will be operated;
 - c) the rear of the petrol station faces the building from which the liquor store will be operated.
- 44 The proposed liquor store will not contravene section 36A(2) of the Act and as such, the objection is not made out.

- 45 The matters raised by the intervener are noted, however the conditions that can be attached to the proposed licence are such that the potential adverse effects that may be occasioned by the licence can be minimised, that being a specific object of the Act.
- 46 Having considered all of the voluminous evidence in support of the application, the Commission is satisfied that the applicant has discharged the onus set out in section 38(2) of the Act primarily for the same reasons set out in the decision relating to the nearby premises. Accordingly, the liquor store licence is conditionally granted subject to, in addition to the standard conditions which the Director may impose, the following conditions:
- a Certificate under Section 39 of the Act being lodged before the operation of the licence;
 - compliance with the *Local Government Act 1960*, *Health Act 1911* and any written law relating to the sewerage and drainage of these premises;
 - all work being completed within twelve (12) months (i.e. 9 July 2014) in accordance with the plans and specifications dated 29 May 2012;
 - a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed.
 - the applicant seeking confirmation of the grant on or before 9 July 2014 pursuant to section 62(4)(c) of the Act;

47 When the licence commences operation it will be subject to the following conditions:

Trading hours

The permitted trading hours in accordance with section 98D of the Act will be as follows:-

- Monday to Saturday: 8 a.m. until 10 p.m.;
- Sunday: 10 a.m. until 10 p.m. (in the metropolitan area only); and
- ANZAC Day: 12 noon until 10 p.m.

No trading will be permitted on Good Friday or Christmas Day.

Trading conditions

The applicant is permitted to sell and supply liquor in accordance with the provisions of section 47 of the Act as it relates to liquor store licences.

Tasting condition

Pursuant to section 47(2) of the Act, the licensee is authorised to supply liquor by way of free sample for consumption within the licensed premises subject to the following conditions:-

1. Tastings must be conducted under the full responsibility and supervision of the licensee or approved manager at all times.
2. Tastings cannot be supplied to juveniles.
3. Glasses to be used for tastings are to be washed in accordance with the provisions of the Standards of Licensed Premises Policy of the Director of Liquor Licensing unless single use disposable containers are used.
4. Compliance with the *Food Act 2008* at all times.
5. Tastings per sample must not exceed the following measures:
 - Wine – 50 mls
 - Beer – 100 mls
 - Spirits – 15 mls.
6. Free drinking water must be made available at all times that samples of liquor are available for tasting.

Registers

The licensee must maintain on the licensed premises the following registers:

1. a register of prescribed incidents that take place at the licensed premises (section 116A of the Act and Regulation 18EB refer); and
2. a register that records training compliance for all staff (refer section 103A of the Act and Regulation 14AG).

These registers must be maintained in a form approved by the Director of Liquor Licensing. The licensee, or an employee or agent of the licensee of the business conducted under the licence shall, at the request of an authorised officer, produce the registers for inspection by that authorised officer.

Compliance with harm minimisation policy

The licensee has lodged a copy of the House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Harm

Minimisation Policy. These documents must be retained on the licensed premises and produced to any Authorised Officer if required.

Licence fees

Pursuant to section 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.

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

MR SEAMUS RAFFERTY
DEPUTY CHAIRPERSON