

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Mr Grant McClintock
(licensee, Moody Cow Brewery)

Respondents: Mr Michael R Bell and Mrs Irene A Bell
Mr Stephen Miller and Mrs Catherine Miller
Mr John S Ferguson and Ms Sheila E Ferguson
Mr Tyrrell G Gardiner and Ms Jennifer R Gardiner
Mr Brian Humphreys
Ms Susan Buckley
Ms Anne Elizabeth Verbrugge

Commission: Mr Seamus Rafferty (Chairperson)
Ms Mara Barone (Member)
Ms Emma Power (Member)

Matter: Application for variation of trading conditions referred to Liquor Commission pursuant to section 24 of the *Liquor Control Act 1988*.

Premises: Moody Cow Brewery
791 Ferguson Road, Ferguson

Date of Determination (on papers): 7 March 2018

Determination: The application is dismissed.

BACKGROUND

1. On 20 January 2015, the Liquor Commission upheld applications for review of a decision made by the Director of Liquor Licensing (“DLL”) at first instance allowing Moody Cow Brewery to increase its capacity from 120 patrons to 200 patrons. In essence, the applications for review were upheld on amenity grounds. The Commission determined that it, ‘accepts the evidence of the applicants in relation to the likelihood that undue offence etc would occur to persons who reside in the vicinity of the premises and that the amenity, quiet and good order of the locality in which the premises are located would be lessened if the number of permitted patrons were to increase from 120 to 200.’
2. On 22 July 2017, a further application was made by Moody Cow Brewery for a variation of the existing licence, which would allow the increase in patrons from 120 to 200 people. It is effectively the same variation application that was determined by the Commission on 20 January 2015, however the evidence in support of the application is different and therefore requires the Commission to determine the application afresh without consideration of the matters previously before the Commission.
3. On 8 August 2017, Mr Peter Minchin, a delegate of the DLL referred the matter to the Commission pursuant to s.24 of the Act for determination. Given the history of this matter, it was entirely appropriate for the referral of the matter to the Commission for determination.
4. Seven objections were lodged by the following people in respect to the application, they being:
 - a) Tyrell and Jennifer Gardiner;
 - b) John and Sheila Ferguson;
 - c) Michael and Irene Bell;
 - d) Brian Humphreys;
 - e) Susan Buckley;
 - f) Stephen and Catherine Miller; and
 - g) Anne Verbrugge.

EVIDENCE IN SUPPORT OF THE APPLICATION

5. A significant amount of material was filed in support of the application to vary the licence, including:
 - a) a letter from Grant McClintock dated 31 October 2017, headed "Primary Submissions";
 - b) Public Interest Assessment ("PIA") prepared by Lavan Legal dated 14 July 2015;
 - c) Acoustic Assessment prepared by Geoffrey Harris of Herring Storer Acoustics dated May 2015;
 - d) Local Planning Strategy Document for the Shire of Dardanup dated March 2014;
 - e) various correspondence;
 - f) Public Survey conducted on behalf of the applicant;
 - g) letter from Lavan Legal dated 19 January 2016 and various attachments; and
 - h) other documents, including responsive submissions.

6. In determining this application, the Commission has had regard to all of the evidence lodged by the applicant. The fact that the evidence has not been referred to in these reasons for decision should not be construed as a failure to consider such evidence.

EVIDENCE IN SUPPORT OF OBJECTIONS

7. The materials lodged in support of the objections was as follows:
 - a) letter from John and Sheila Ferguson dated 24 August 2015;
 - b) letter from Tyrell Gardiner dated 28 August 2015;
 - c) undated written submissions from Michael and Irene Bell with supplementary materials attached;
 - d) undated submissions from Brian Humphreys and supplementary materials attached;
 - e) letter from Anne Verbrugge dated 30 August 2015;
 - f) objection of Sue Buckley; and
 - g) undated written submissions from Stephen and Catherine Miller and supplementary materials attached.

8. In determining this application, the Commission has had regard to all of the evidence lodged by the objectors. The fact that the evidence has not been referred

to in these reasons for decision should not be construed as a failure to consider such evidence.

STATUTORY FRAMEWORK

9. In *Woolworths v Director of Liquor Licensing*¹ His Honour Buss JA set out the statutory framework for a determination of an application of this nature in the following terms, namely:
- a) by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;
 - b) the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;²
 - c) the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act, as set out in section 5(2) of the Act;
 - d) the factual matters which the Commission is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act;
 - e) section 5(2) is mandatory whereas section 38(4) is permissive;
 - f) on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and

¹ [2013] WASCA 227

² *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute. See *O'Sullivan* (216).

- facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.
10. Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:
- a) the grant of the application would not be in the public interest; or
 - b) the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor; or
 - 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; or
 - the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened;
 - d) that the grant of the application would otherwise be contrary to the Act.

MATTERS FOR CONSIDERATION RELEVANT TO THE APPLICATION

11. The most significant aspects of this application are the issue of amenity and the potential effects on those who reside or work in the vicinity of the licensed premises were the application to be granted. There is little doubt that the granting of the application would have some positive effect in respect to increasing the liquor related services available to consumers who attend the locality, particularly tourists. The Commission does not consider that the issues of harm and ill health have primacy in the context of this application. The basis for reaching that conclusion is that there is no evidence before the Commission that suggests one way or the other that the granting of the application would be detrimental in the context of harm and ill-health.

12. Some of the objectors have raised issues with respect to planning related issues, specifically that the original granting of the tavern licence was contrary to the Shire of Dardanup's Town Planning Scheme. The Commission has not taken this issue into account in determining this application as the application relates to existing licensed premises and the relevant permits and approvals must have been granted to allow the licensed premises to operate in the first place. In that context, the objection of John and Sheila Ferguson is not established to the requisite standard as they have not discharged the onus required by section 73(10) of the Act. That specific objection has therefore not been taken into account in determining this application. The same applies to the objection of Susan Buckley.

13. The location of the licensed premises is within The Ferguson Valley, which according to the applicant's PIA is a locality the land use of which is 'mainly rural and agricultural as well as some residential, retail and commercial'. The fact that each of the objectors operates farming properties within a close proximity to the licensed premises best exemplifies the predominant use of land within the locality and surrounding areas.

SUBMISSIONS OF THE APPLICANT

14. It is contended by the applicant that it is in the public interest to grant the application for the following reasons:
 - a) the traditional type industries carried out in the region are in decline, whereas the tourism industry is showing steady growth;
 - b) the licensee provides a venue that caters for the needs of tourists;
 - c) the applicant has a policy of employing locals, with 10 of the existing 17 employees living within the region. The granting of the licence will result in further employment opportunities;
 - d) the existing patronage limit has resulted in the licensee having to turn away members of the public on occasions; and
 - e) the premises are a family oriented venue and there are no other venues in the Ferguson Valley that caters for families in the same manner which the licensee provides.

15. In respect to the earlier application, the Commission noted that 'the licensee offered little more than what could be described as superficial observations concerning the impact of the increase in patron numbers. The only step taken by the licensee was the provision of additional parking which only addresses one part of the amenity and annoyance issues. In the context of this application, the applicant has provided a detailed PIA and supporting evidence that considers the issue of amenity and the potential effects within the vicinity of the licensed premises were the application to be granted.
16. An Acoustic Assessment report was relied upon by the applicant. The ultimate finding of that report was that, 'noise levels associated with general operations at the Moody Cow Brewery comply with the *Environmental Protection (Noise) Regulations 1997* at the nearest noise sensitive premises during all proposed operations.' This report took into account expected noise levels associated with an increase in patronage from 120 to 200 people.
17. A detailed public survey regarding the application for increased capacity at the licensed premises was also conducted. The overwhelming results of that survey were positive.
18. The PIA relied upon by the applicant referred to several steps taken by the applicant to address amenity issues, including:
 - a) ceasing live music on Sundays until a new sound system has been installed;
 - b) refusing to hold concert type events at the premises;
 - c) planting trees along the boundary easement to create a buffer;
 - d) increasing the size of the car parking area to accommodate more bays; and
 - e) increasing the cross-over to allow for better bus access to the premises.

SUBMISSIONS OF THE OBJECTORS

19. The objectors summarised the existing amenity related issues that they currently experience as follows:
 - a) Michael and Irene Bell refer to being annoyed by cooking fumes that emanate from the licensed premises. Reference is also made to inconvenience experienced by levels of noise from the licensed premises and parking related issues;

- b) Brian Humphreys referred to similar issues;
 - c) Anne Verbrugge stated that ‘any increase in patron numbers will obviously add to the noise and nuisance that this business causes in the farming area’ with reference to specific examples;
 - d) Stephen and Catherine Miller referred to parking related issues and that an increase in incapacity would result in an increase in traffic, noise and other issues; and
 - e) Tyrell Gardiner referred to patrons accessing his property believing it to be the licensed premises and other amenity issues.
20. The proximity of some of the objectors to the existing licensed premises is:
- a) Tyrell and Jennifer Gardiner operate a large scale beef farming operation, with their property adjoining the property on which the licensed premises operate;
 - b) Michael and Irene Bell’s house is 60m away from the licensed premises and they operate a farming property; and
 - c) Anne Verbrugge’s home is 140m away from the licensed premises.
21. It is clear from the totality of the evidence that the majority of the objectors either live or work within close proximity to the licensed premises.

DETERMINATION

22. The determination of this application involves a consideration of the positive effects that the granting of the application would occasion against the detrimental effects, particularly in respect of the issue of amenity.
23. There is little doubt that the increasing of the capacity of the licensed premises would cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, that being a primary object of the act set out in section 5(1)(c) of the Act. The Commission accepts the evidence of the applicant that the Ferguson Valley region is a growing tourist region and that by increasing the capacity of the licensed premises would allow the licensee to cater for the requirements of those who visit the region and that the applicant has taken steps to mitigate concerns raised by the objectors.

24. However, the Commission must be mindful of the fact that the licensed premises operate in a location that is predominantly agricultural and that the majority of those who reside or work in the location are involved in a range of rural activities. The increase in capacity sought by the applicant is a significant number, with the applicant effectively seeking to almost double the capacity of the existing premises. That of itself will result in a significant increase in traffic and noise within the proximity of the licensed premises, thus giving rise to a consideration of the impact on amenity in the location. The mere fact that evidence relied upon by the applicant establishes that expected noise levels are within regulatory limits, is not determinative of the impact that noise levels currently have on the objectors or that will result from a granting of the application.
25. It should also be noted that the report states that, 'noise levels at neighbouring residence were determined through calculation based on the distance to the neighbours and the measured noise levels'. It was not an actual measurement from the residences of the objectors. This is not a criticism of the author of the report, merely a factual matter that must be taken into account in determining what weight should be given to the Herring Storer Acoustics Report.
26. Section 38(4)(b) of the Act allows the Commission to have regard to the impact on the amenity of the locality in which the licensed premises are situated. Section 38(4)(c) of the Act allows the Commission to have regard to whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises in considering whether the granting of the application is in the public interest. The evidence of the majority of objectors establishes that the existing premises have already impacted on the amenity of the location in which they reside or work and that there is a certain level of annoyance, disturbance and inconvenience to those who reside or work in the vicinity of the licensed premises.
27. In written submissions dated 10 November 2017, the applicant relevantly submitted that:
 - a) the nature of the objections clearly indicate collusion and dishonesty amongst the objectors, even in the compilation of their latest submissions;
 - b) a number of the objectors being good friends; and

c) The objectors seriously lack credibility.

28. The Commission rejects the submissions made by the applicant on the basis that they are mere assertions without any evidentiary basis. It is clear that there is a degree of animus between Mr McClintock and the various objectors, however that of itself would not be a sufficient evidentiary basis to make credibility findings against the objectors. The same applies to the negative assertions made by the objectors against Mr McClintock. The parties requested that the matter be dealt with on the papers and therefore there has been no ability for the Commission to properly consider issues of credibility.
29. The real issue for the Commission to determine in this matter is to balance the potential positive aspects that the granting of the application would have against the potential adverse impacts.
30. Having regard to the totality of the evidence, the Commission considers that if the application were granted, that there would be an adverse impact on the amenity of the locality and that the offence, annoyance, disturbance or inconvenience that might be caused to people who reside or work in the vicinity of the licensed premises outweighs the potential positive impacts of the increasing of the capacity of the licensed premises. Based on the evidence relied upon by the objectors, there is an existing level of annoyance, disturbance and inconvenience experienced by the objectors and the increase in patronage sought by the applicant would inevitably lead to an increase in numbers attending the premises, thus increasing traffic and noise within the vicinity of the licensed premises.
31. The fact that existing and potential noise limits within the vicinity of the licensed premises are within regulatory limits does not mean that those who are residing or working in the vicinity do not currently experience annoyance, disturbance or inconvenience. Notwithstanding the Commission's acceptance of the applicant's evidence in this regard, the Commission has accepted the evidence of the objectors that they do currently experience annoyance, disturbance and inconvenience as a result of the operation of the licensed premises and that an increase in the patronage of the premises will exacerbate these issues.
32. The crucial factors in this determination are the predominant agricultural nature of the area in which the licensed premises operate and the close proximity of the

objectors to the licensed premises. A granting of the application will inevitably result in an increase of annoyance, disturbance or inconvenience to people who reside or work in the vicinity of the licensed premises and an impact on the amenity of the locality in which the licensed premises are situated due to an increase in traffic and noise levels. Given the nature of the locality in which the licensed premises are situated and the close proximity of the objectors to the licensed premises, this would not be in the public interest.

33. The objectors have therefore discharged the onus prescribed by section 73(10) of the Act and established that the granting of the application would occasion undue annoyance, disturbance or inconvenience to those who reside or work in the vicinity of the licensed premises and the amenity, quiet or good order of the locality in which the premises are situated would in some other manner be lessened.
34. The applicant has failed to discharge the onus required by section 38(2) of the Act.
35. Accordingly, the application is refused.



SEAMUS RAFFERTY
CHAIRPERSON