

REASONS FOR DETERMINATION OF MR SEAMUS RAFFERTY (CHAIRPERSON)

1. I adopt the background to these proceedings and the summary of the evidence and submissions detailed in the decision of Commissioners Watling and Egan. However, I would grant the application on the basis that I am satisfied that the applicant has discharged the onus prescribed by section 38(2) of the Act and established that the granting of the application is in the public interest and that the objectors have not discharged their onus prescribed by section 73(10) of the Act.
2. It is important to recognise that this is an application for an alteration/redefinition of existing licensed premises pursuant to section 77(4) of the Act. Therefore, in determining whether the granting of the application is in the public interest, the application must be viewed in its entirety. The primary objections to the application have been based on the development of a Dan Murphy's outlet which it is accepted is a relevant consideration to this application. However, in determining the application, all aspects of the application must be considered.
3. This is another application where there is a tension between the primary objects of the Act in which the Commission has to determine which of these objects takes precedence. The majority has determined that the harm and ill-health issues associated with the locality are such that it is not in the public interest to grant the application. I do not agree with that assessment as I am not persuaded that there is cogent evidence specific to this application that establishes that harm and ill-health will be occasioned by the granting of the application.

Statutory Framework

4. In *Woolworths v Director of Liquor Licensing*¹ 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;

¹ [2013] WASCA 227

- 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
 - facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.
5. 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

² *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & GaudronJJ). 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).

- 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.

Approach

6. Where harm and ill-health is a potentially determinative factor in an application the approach that must be adopted by the Commission is that outlined by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing*³. Based on that decision, the Commission is required to:
- a) make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
- b) make findings about the likely degree of harm to result from the grant of the application;
- c) assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
- d) weigh the likely degree of harm, so assessed, together with any relevant factors to determine whether the applicant had satisfied the Commission that it was in the public interest to grant the licence.

³ [2015] WASC 208

Findings as to existing levels of harm and ill-health

7. Based on a consideration of the evidence before the Commission, I am satisfied that there are existing levels of harm and ill-health caused by the use of alcohol to people living in the relevant locality. The evidence of the service providers who deal with “at-risk” persons and crime statistics provided by the Commissioner of Police have been relied upon in making the relevant finding. However, it cannot be concluded that the levels of harm or ill-health could be characterised as high, such as the conclusion reached by the Commission in the recent Kununurra Liquor Barons decision.⁴

Likely degree of harm to result from the grant of the application

8. This assessment requires the Commission to predict whether the granting of the application would result in an increase in the degree of harm or ill-health caused by the use of alcohol in the relevant locality.
9. In *Executive Director of Health v Lily Creek International Pty Ltd & Others*⁵, Ipp J stated that, ‘whether harm or ill-health will in fact be caused to people, or any group of people, due to the use of liquor is a matter for the future and, in the sense referred to in *Malec v JC Hutton Pty Ltd*, is essentially a matter of prediction. The Licensing Authority will only be able to determine the likelihood of harm or ill-health occurring by reference to a degree of probability.’⁶
10. I accept that the introduction of a large destination scale liquor store may cause an increase in harm or ill-health based on the materials submitted by the parties, particularly the EDPH and Commissioner of Police. However, there is nothing in that material that supports a conclusion that there would be such an increase to levels that would be deemed to be unacceptable or in other words, would be inconsistent with the primary object of the Act set out in section 5(1)(b) to minimise the harm or ill-health caused to people, or any group of people, due to the use of liquor.
11. I note that the in the majority decision it was concluded that the harm and ill-health likely to be caused to the “at risk” groups was high and that the consequential harm

⁴ LC09/16

⁵ (2000) 22 WAR 510

⁶ *supra*, at 516

and ill-health to these “at risk” groups was likely to be significant if the application was granted. Other than general evidence relating to outlet density and much general anecdotal evidence from various objectors, there is no evidence of a specific nature upon which a conclusion could be reached that the harm and ill-health that would be caused by the granting of the application would be high.

Assessment of the likely degree of harm to result from the granting of the application against the existing degree of harm

12. There is nothing in the evidence before the Commission that leads to a conclusion that there would be a significant increase in harm and ill-health over and above the level that currently exists in the locality in which the proposed premises would operate.
13. The mere existence of “at-risk” persons in a locality is not of itself enough to form a conclusion that such persons will be at a greater risk of further harm or ill-health if the application is granted. Other factors must be taken into account, including:
 - a) in the context of this application, there is already a licensed premise in existence from which alcohol may be purchased;
 - b) the Commission has repeatedly made positive findings in respect to the operation of Dan Murphy’s outlets and the responsible service of alcohol and other measures taken by the operator to minimise harm and ill-health.
14. The Commissioner of Police descended into much detail about the pricing policies of Dan Murphy’s. It was effectively submitted that the applicant sold liquor at prices that would be favoured by vulnerable groups and problem drinkers. That may well be the case, however there is no evidence to suggest that those persons would be consuming more liquor than they already consume and as such would be at greater risk of harm or ill-health than currently exists.
15. It should also be noted that the primary object of the Act is the minimise harm or ill-health, not eradicate it.

Weigh the likely degree of harm, so assessed, together with any relevant factors to determine whether the applicant had satisfied the Commission that it was in the public interest to grant the licence

16. The benefits of the proposed redevelopment have been described as follows:
- a) a transition from the current outdated venue to a new high quality modern, family-friendly bistro;
 - b) elimination of risk factors associated with the current venue, including improved design of safety features and full security upgrade to the redevelopment;
 - c) increased amenity to the area adding to the evolving local precinct which is developing in the area;
 - d) provision of a high end packaged liquor store committed to responsible management;
 - e) reduced closing time from the current 12.00 midnight closing time on weekends for the BWS store to 9.00 p.m. for the Dan Murphy's store;
 - f) employment opportunities;
 - g) elimination of drive-through access to the liquor store; and
 - h) development of facilities including the bistro, liquor store, car park and landscaping that better integrate the surrounding neighbourhood and effectively manage traffic flow and access.
17. I accept that the granting of the application will result in the benefits referred to above. In circumstances where there is an absence of cogent evidence that the persons in the locality or anywhere else will be at peril of an increase in harm or ill-health to a level that would be considered unacceptable, the applicant has discharged its onus and established that it is in the public interest to grant this application.

Consumer Requirement

18. It was contended that there is no consumer requirement for the proposed Dan Murphy's and that the locality is already adequately serviced by the liquor stores

currently in operation. The difficulty with that submission is that it suggests that there is no need for a further liquor store in the locality.

19. Prior to legislative amendments that mandated that applications of this nature would be determined based on an assessment of the public interest, a “needs test” was the basis upon which applications were determined. In amending the legislation, parliament specifically abolished the issue of “need” as being relevant to applications of this nature.
20. The primary object of the Act set out in section 5(1)(c) of the Act involves an assessment as to whether an application will 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. That assessment involves two primary considerations in the context of this application, namely:
 - a) will the application cater for the requirements of consumers for liquor?
 - b) will the granting of the application be consistent with the proper development of the liquor industry?
21. In respect to the first issue, the granting of the application will obviously cater for the consumers for liquor and related services. It will allow the operation of a modern bistro/tavern and large outlet liquor store, which will offer a greater variety of product than that which currently is offered from the existing licensed premises.
22. In respect to the second issue, it is suggested that a large destination liquor store will reduce competition in the retail liquor industry. In essence, smaller stores that cannot compete with the larger outlet and therefore lose custom will close. The difficulty with that suggestion is that there is no evidence before the Commission as to the effect that other large destination liquor stores have had on the retail liquor industry. It is accepted that the development of a monopoly or duopoly between Coles and Woolworths would not be consistent with the proper development of the liquor industry. But in the absence of evidence that such a situation is occurring, the Commission cannot conclude that the granting of applications such as these will have an adverse impact on smaller retailers to the extent that competition will be reduced and the development of the liquor industry would be adversely impacted.

23. The submission to the effect that the proposed premises are not needed in the locality as it is already adequately serviced is rejected in that it relies upon a test that no longer has application.

Determination

24. Despite the concerns expressed by various parties in respect to the issue of harm and ill-health, I am of the view that there is insufficient evidence that the welfare of “at-risk” persons in the locality will be further jeopardised by the granting of this application. It needs to be recognised that if the application is granted an existing bottle shop will be replaced by a larger liquor store and an outdated and under utilised tavern will be replaced by a modern and attractive bistro/tavern facility. Whilst the volume of alcohol available at the premises may be increased, it is not the development of a new licensed premise.
25. Having regard to the totality of the evidence, I make the following findings, namely:
- a) there is insufficient evidence to conclude that there might be harm or ill-health caused to people by the granting of the application to a level that would be considered unacceptable for the reasons already articulated. Accordingly, the granting of the licence would be consistent with the primary requirement of the Act set out in section 5(1)(b);
 - b) the granting of the application will result in the catering for the requirements of consumers for liquor and related services, consistent with the primary object of the Act set out in section 5(1)(c);
 - c) the granting of the application will result in a tired and old licensed premise being altered to a modern and appealing destination for consumers. This alteration will therefore facilitate the development of a licensed facility, consistent with the secondary object of the Act set out in section 5(2)(a) and improve the amenity of the area in which the premises are located, that being a relevant matter pursuant to section 38(4)(b) of the Act;
 - d) the granting of the application is not likely to result in offence, annoyance, disturbance or inconvenience over and above that which already exists in the locality, that being a relevant matter pursuant to section 38(4)(c) of the Act.

26. Having made those findings, I am satisfied that the applicant has discharged its onus and that the objectors have failed to discharge their onus. The granting of the application for a redefinition/alteration of the premises known as the Peninsula Tavern is in the public interest and I would therefore grant the application.



SEAMUS RAFFERTY
CHAIRPERSON