

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: BODIGA PTY LTD (REPRESENTED BY CANFORD HOSPITALITY CONSULTANTS PTY LTD)

OTHER PARTIES: 122 OJECTORS (REPRESENTED BY RYAN & DUREY SOLICITORS)

NATURE OF APPLICATION: CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

APPLICATION REF: A206452984

PREMISES: CELLARBRATIONS AT BODDINGTON, 36 BANNISTER ROAD, BODDINGTON

DECISION OF: BRETT SNELL, DEPUTY DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF NOTICE OF DECISION: 9 MARCH 2019

DATE OF REASONS: 7JUNE 2019

Introduction

1. On 18 September 2018, an application was made to the Director of Liquor Licensing (the Director) by Bodiga Pty Ltd (the Applicant) for the conditional grant of a liquor store licence for premises to be known as *Cellarbrations at Boddington* and to be situated at 36 Bannister Road, Boddington.
2. The application was made pursuant to ss 47 and 62 of the *Liquor Control Act 1988* ("the Act") and was advertised in accordance with instructions issued by the Director, which resulted in 122 objections from residents of Boddington, who were all represented by the same counsel. A submission in opposition to the application was also lodged by the Boddington Sports and Community Club.¹
3. On 9 March 2019, pursuant to the provisions of ss 13 and 16 of the Act, I determined the application on basis of the written submissions of the parties and published a notice of decision, pursuant to s 18AA of the Act, in which the application was conditionally granted.
4. In correspondence dated 20 March 2019, both the Applicant and Objectors requested written reasons for the notice, in accordance with s 18AA(4) of the Act. Accordingly, my reasons for conditionally granting the application follow.
5. As this is an administrative decision, rather than referring in detail to the entirety of the evidence before me, I will set out what I consider to be the relevant material facts. Further, the fact that I have not referred to any specific piece of evidence in these written reasons does not mean that I have not considered it.

¹ A person who makes a submission to the Director is not a party to proceedings

The Application

6. The Applicant proposed to establish a 'convenient browse style liquor store adjacent to and connected to the Boddington IGA supermarket' and submitted that the Boddington IGA is a focal point of the town, being located on the main street, opposite the Shire Office.
7. According to the Applicant's Public Interest Assessment, the 'addition of these important packaged liquor services will be very important to local people, and people from farms, other businesses and towns nearby who resort to Boddington for their grocery shopping and other services...'
8. The Applicant also submitted that the store's size will allow for a wide range of liquor to be displayed, including:
 - (a) local WA red and white wines;
 - (b) national and international brands of red and white wines;
 - (c) a range of premium spirits;
 - (d) local popular craft and boutique beers and ciders;
 - (e) international beers;
 - (f) a range of quality liqueurs; and
 - (g) ready-to-drink lines and fortified wines.
9. The PIA also explained that the proposed premises would be located in a part of the building previously occupied by the National Australia Bank (the bank).²
10. It was also submitted by the Applicant that:
 - (a) it had considered outlet density of the location and that the grant of the licence would not constitute a proliferation of liquor licences in the locality;
 - (b) it had also considered the demographics of the locality and the proposed liquor store has very little potential for increased harm or ill health; and
 - (c) it is an experienced licensee and has prepared a detailed Harm Minimisation Plan to manage any potential for harm or ill health.
11. In terms of outlet density, the Applicant identified the following licences as relevant:
 - (a) the *Boddington Hotel*, Bannister Road, Boddington (hotel licence), which the Applicant submitted does not have a dedicated packaged liquor facility, with packaged liquor only available for purchase over the bar counter; and

² NB: at the time of making the application, the relevant area was occupied by the bank

- (b) *The Boddle'O* (also known as *The Golden Nugget*), Lot 14 Bannister Road, Boddington (Liquor store licence), which the Applicant submitted was very small at just 50m², operates with irregular trading hours, is frequently unmanned, has no product signage and very limited stock.
12. In contrast, the Applicant submitted that the proposed liquor store, in combination with the *Boddington IGA Supermarket*, will offer residents and other consumers with the convenience of a full-service supermarket and a quality packaged liquor offer adjacent to each other. It was also submitted that the proposed liquor store will include the following attributes:
- (a) easy to read in-store signage,
 - (b) a range of liquor products that are familiar and well-known,
 - (c) consistent and reliable opening hours,
 - (d) modern and well laid out premises,
 - (e) trolley access from the supermarket;
 - (f) assistance for customers (in particular elderly people) with liquor products to the car park area, if requested; and
 - (g) an extensive CCTV system for the convenience and safety of customers and neighbours.
13. The Applicant also advised that its application to the Shire of Boddington for a 'change in use' development application, which was granted on 18 April 2018, was initially met with a number of concerns by some residents, with 'the majority of concerns centred around the prospect of the loss of an active bank branch in the town rather than the prospect of the proposed liquor store.'
14. Further, in accordance with the conditions of the development approval, the Applicant submitted that it will provide additional car bays for consumers at the site.
15. It was also submitted that, Ruben Camarda and Jim Ireland, who are directors of the Applicant, are also directors of licensee companies for liquor stores in Onslow and Kalgoorlie and that neither of those premises have received any liquor infringements.
16. The application was supported by 41 witness questionnaires.
17. In conclusion, the Applicant submitted that the grant of this application will enable it to provide the growing locality of Boddington with reliable packaged liquor services, which are currently lacking.

The Objection

18. The Objectors, who were all represented by the same counsel, objected to the application on grounds that the grant of the application:
- (a) would not be in the public interest;

- (b) would cause undue harm or ill-health to people, or any group of people, due to the use of liquor;
 - (c) would cause undue offence, annoyance, disturbance or inconvenience to persons in or travelling to or from an existing or proposed place of public worship, hospital or school;
 - (d) would lessen the amenity, quiet or good order of the locality in which the premises are situated; and
 - (e) would be contrary to the Act.
19. In particular, the Objectors expressed concern about the uncertainty of the Applicant's tenure of the premises, given that the bank was occupying the premises at the time of the application.
20. The Objectors also:
- (a) expressed the view that the evidence submitted by the Applicant was 'insufficient to support a finding that the proposed premises is in the public interest';
 - (b) raised some concerns with the Applicant's assessment of the services offered by *The Boddle'O*;
 - (c) submitted there is an unacceptable level of harm and ill-health currently suffered in the locality and there is the potential that this Application will to increase the levels being experienced currently; and
 - (d) submitted that the grant of the application would result in undue offence, annoyance, disturbance or inconvenience and a lessening of amenity, quiet or good order of the locality due to issues associated with traffic and parking.
21. In conclusion, the Objectors submitted that the Applicant did not provide sufficient objective evidence to establish that consumers require another liquor store in the locality and that it is in the public interest for the application to be granted.

Determination

22. At the outset, it should be noted that there is no presumption in favour of the grant of the application; but rather the Applicant must adduce sufficient evidence to discharge its burden under ss 5 and 38(2) of the Act.
23. Similarly, s 73(10) of the Act provides that the burden of establishing the validity of any objection lies on the objector.
24. Further, while the rules of evidence do not apply to proceedings before the licensing authority (refer section 16(7) of the Act), decisions of the authority must be made on the balance of probabilities and be based on the evidence before it. Furthermore, notwithstanding that s 5(2)(e) of the Act requires the licensing authority to provide as little formality or technicality as may be practicable, the evidence of parties needs to be

relevant, reliable and logically probative to assist the authority to assess the probability of the existence of the facts asserted in each case.³

25. Decisions of the licensing authority must also be made in accordance with the written law as outlined in the Act. In my view, the following provisions are relevant to this determination:

- (a) section 5(1) of the Act, which provides that the primary objects of the Act are:
 - (i) to regulate the sale, supply and consumption of liquor; and
 - (ii) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - (iii) 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;
- (b) section 5 (2) of the Act, which provides that the secondary objects of the Act are:
 - (i) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and
 - (ii) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - (iii) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act; and
 - (iv) to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community.
- (c) section 38(2), which provides that an application for the grant of a licence must satisfy the licensing authority that granting the application is in the public interest;
- (d) section 38(4), which provides that without limiting the matters to which the licensing authority may have regard in determining whether granting an application is in the public interest, it may consider:
 - (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

³ Refer Liquor Commission of Western Australia decision in *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17 of 2010)

- (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; and
 - (iv) any effect the granting of the application might have in relation to tourism, or community or cultural matters; and
 - (v) any other prescribed matter⁴.
26. Where tension arises between advancing the objects of the Act, the licensing authority needs to weigh and balance any competing interests.⁵
27. Pursuant to s 38(1)(a) of the Act and r 9EA of the *Liquor Control Regulations* 1989, an applicant for the grant of a liquor store licence must satisfy the licensing authority that granting the application is in the public interest. To discharge its onus under s 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.
28. Determining whether the grant of an application is 'in the public interest' requires the exercise of a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation.⁶
29. In *McKinnon v Secretary, Department of Treasury*⁷, Tamberlin J observed that:
- '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.'
30. Section 33(1) of the Act provides the licensing authority with an absolute discretion to grant or refuse an application on any ground or for any reason that is in the public interest. The scope of this discretion was recently considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing*⁸ as:
- '...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. Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the

⁴ NB: no other matter has been prescribed

⁵ *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258.

⁶ 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

⁷ [2005] FCAFC 142 (*McKinnon v Secretary*)

⁸ [2012] WASC 384 (*Woolworths v DLL* (2012))

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 to make those objects the exclusive consideration nor the sole determinants of the public interest.'

31. In making my determination to grant the application, I noted that the Applicant proposed to operate a 'convenient browse liquor store adjacent to and connected with the Boddington IGA supermarket.'

32. According to the Applicant:

'...the proposed liquor store will be located next to the Boddington IGA Supermarket, shopping for liquor can be conveniently done as part of the normal weekly shopping excursion and will not require a separate trip or stop. This will be an extremely convenient one-stop shopping service, particularly for those shoppers who have transport or mobility issues or time pressure. It will also be convenient for those people who live outside of the town itself, and make special trips into town for their shopping and other needs.'

33. In *Woolworths Ltd -v- Director of Liquor Licensing*⁹ Buss JA found that it was a notorious fact in contemporary Australia life that one stop shopping is of great importance, especially to working people. While I acknowledge that the proposed premises is not synonymous with that proposed in *Woolworths -v- DLL*, I nonetheless consider the grant of the licence will nonetheless provide consumers in Boddington with a level of convenience for the purchasing of groceries and liquor, which does not exist elsewhere else in Boddington.

34. In the same determination, Buss JA explained that the licensing authority is required to make finding and draw conclusions from the evidence, including by inference (an affirmative conclusion which arises from facts that have been established.)

35. In the determination of this matter, I have considered:

- (a) the Applicant's Public Interest Assessment (PIA);
- (b) the consumer evidence lodged by the Applicant;
- (c) the Applicant's business model;
- (d) the relevant experience of the Applicant's directors in successfully operating liquor stores in conjunction with supermarkets in other regional areas (i.e. in Onslow and Kalgoorlie);
- (e) the planning approval granted by the Shire of Boddington, included a requirement for the Applicant to provide additional car bays for consumers at the site; and
- (f) the notorious fact that in contemporary Australian life, one-stop shopping is of great importance, especially to working people.

⁹ [2013] WASCA 227 (*Woolworths -v- DLL*)

36. As noted in the Notice of Approval issued on 19 March 2019, after consideration of all the information before me, including the notices of objection and submissions lodged on behalf of the 122 Objectors, I formed the view that many of the Objectors' concerns were not relevant considerations, such as those relating to the closure of the bank.
37. In making this finding, I noted the comments of Banks-Smith J in *Australian Leisure and Hospitality Group Pty Ltd -v-Commissioner of Police*¹⁰, that the Act does not confer on the licensing authority an arbitrary or unlimited power, or permit it to grant or refuse an application, other than consistently with the objects and other provisions of the Act.
38. Therefore, after considering the submissions of all the parties, I formed the view that:
- (a) the grant of the application would promote objects 5(1)(c) and 5(2)(a);
 - (b) the risk of increased harm was not significant when regard was had to the circumstances of the locality and trading conditions offered by the Applicant;
 - (c) the likely degree of harm to result from the grant of the application was no greater than that which appears to be commonly accepted in the community; and
 - (d) the Objectors had failed to establish the validity of their objections as required under s 73 of the Act.
39. Having considered all of the evidence presented by the parties, I was satisfied that the Applicant had discharged its onus under s 38(2) and demonstrated that the grant of the application was in the public interest. I was also satisfied that the Applicant had complied with all the necessary statutory criteria, requirements and conditions precedent to the application being granted. Accordingly, I conditionally granted the application.
40. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
41. This matter has been determined by me under delegation pursuant to s 15 of the Act.



DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

¹⁰ [2017] WASC 88



Department of
**Local Government, Sport
and Cultural Industries**

Your Ref:

Our Ref: A206452984

Enquiries: Richard Duncan
☎ (08) 6551 4810

Canford Hospitality Consultants Pty Ltd
PO Box 389
GUILDFORD WA 6935

Dear Sir/Madam

**APPLICATION FOR THE CONDITIONAL GRANT OF A LIQUOR STORE LICENCE:
CELLARBRATIONS AT BODDINGTON**

I refer to your request for written reasons in support of the Notice of Decision issued in respect of the above application. Please find enclosed a copy of those reasons.

Should you have any queries regarding this please contact me on (08) 6551 4810.

Yours faithfully

Richard Duncan
CUSTOMER SERVICES OFFICER – LIQUOR CONTROL AND ARBITRATION

7 June 2019

[Enc]

cc: Ryan & Durey
Solicitors