

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: KIA KAHA TE MAHI PTY LTD (REPRESENTED BY CULLEN MACLEOD LAWYERS)

OTHER PARTIES: MIAMI BAY HOLDINGS PTY LTD (FIRST OBJECTOR) (REPRESENTED BY LAVAN)

ROGER JAMES CROSS AND GENEVIEVE MAY DOUGLAS (SECOND OBJECTOR)

JOHN HANSCOMBE (THIRD OBJECTOR)

TINA LORD (FOURTH OBJECTOR)

RICHARD BRETT LORD (FIFTH OBJECTOR)

SHANE JONES (SIXTH OBJECTOR)

JADE STANDEN-RIDGLEY (SEVENTH OBJECTOR)

GREGORY LEON RIDGLEY AND JANINE ANN STANDEN (EIGHTH OBJECTOR)

SHAYNE CHRISTOPHER THOMSON (NINTH OBJECTOR)

LEON DESCHAMPS (TENTH OBJECTOR)

HOWARD COCK AND IOLANTHE COCK (ELEVENTH OBJECTOR)

MARC WESCOTT (TWELTH OBJECTOR)

GIUSEPPE RAVI (THIRTEENTH OBJECTOR)

KELVIN FRANCIS (FOURTEENTH OBJECTOR)

RENEE FEAST (FIFTEENTH OBJECTOR)

CATHERINE CONNOR (SIXTEENTH OBJECTOR)

NATURE OF APPLICATION: CONDITIONAL GRANT OF A LIQUOR STORE LICENCE

APPLICATION REF: A461579307

PREMISES: CELLARBRATIONS AT DENHAM
UNIT 2-3/89 KNIGHT TERRACE, DENHAM

DECISION OF: BRETT SNELL
DEPUTY DIRECTOR LIQUOR CONTROL & ARBITRATION

DATE OF NOTICE OF DECISION: 22 MARCH 2019

DATE OF REASONS: 11 JUNE 2019

Introduction

1. On 9 October 2018, an application was made to the Director of Liquor Licensing (the Director) by Kia Kaha Te Mahi Pty Ltd (the Applicant) for the conditional grant of a liquor store licence for premises to be known as *Cellarbrations at Denham* and situated at Unit 2-3/89 Knight Terrace, Denham.
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 the lodgement of the sixteen notices of objection from business operators and residents of Denham.
3. In relation to the Objectors:
 - (a) the First Objector is the licensee of premises known as *Denham Waterfront Hotel*;
 - (b) the Second Objector is the operator of *Shark Bay Supermarket*;
 - (c) the Eighth Objector declared that Greg Ridgely is the licensee of the vessel *Aristocat 2*; and
 - (d) the Sixth Objector is a director of the licensee of premises known as the *Shark Bay Hotel*.
4. On 22 March 2019, pursuant to the provisions of ss 13 and 16 of the Act, I determined the application on the 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.
5. In correspondence dated 25 March 2019, the Applicant requested written reasons for the notice, in accordance with s 18AA(4) of the Act. On 28 March 2019, counsel for the First Objector also requested written reasons. Accordingly, my reasons for conditionally granting the application follow.
6. 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.

The Application

7. The application was supported by a Public Interest Assessment (PIA), in which it was submitted that the grant of the licence will provide for diversity in packaged liquor options in the locality.
8. The application was also supported by a number of documents, including:
 - (a) a Town Planning Report, dated May 2017 and prepared by MGA Town Planners (MGA Report);
 - (b) 65 Survey Questionnaires;

- (c) an Analysis of Long Form Questionnaire Data, dated 18 April 2018 and prepared by the Applicant's counsel;
 - (d) eight witness statements; and
 - (e) a 2016 Tourism Western Australia fact sheet on overnight visitor numbers to Australia's Coral Coast.
9. Further, according to the Applicant, it has knowledge of the locality, tourists and consumers in the locality, due to its successful operation of its IGA supermarket in Denham and as such, submitted that:
- (a) there is a materially deficient range of packaged liquor products and services available in the locality; and
 - (b) there is significant demand for the products and services it proposes to provide, based on its market research.
10. The Applicant submitted that the proposed premises will be a medium sized dedicated liquor store, which will provide convenient, browse-style retail packaged liquor services and facilities. The Applicant also explained that the proposed premises will have an internal area of approximately 166.9 m², which would make it the largest packaged liquor outlet in Denham.
11. According to the Applicant, the proposed premises will be located in a convenient location:
- (a) within the 'Town Centre' of Denham and the Denham activity centre;
 - (b) proximate to a major highway, namely Shark Bay Road, that links Denham to North West Coastal Highway;
 - (c) proximate to other complementary businesses, including a supermarket;
 - (d) with sufficient on-site parking; and
 - (e) that it is highly accessible to other parts of Denham.
12. It was also submitted by the Applicant that the proposed premises has been designed in accordance with *Crime Prevention through Environmental Design* (CPTED) principles and will provide a high level browsing experience for customers, to ensure the orderly flow of customers in the proposed liquor store. Further, in relation to the two existing packaged liquor outlets in the locality that are capable of selling to the public, the Applicant submitted that only one of these existing outlets contains a browse area, which is between around 18 to 22 m².
13. Accordingly, the Applicant submitted that the proposed liquor store's design will provide it with the capacity to provide a high level and range of products and services, for the benefit of consumers, both residents and tourists.

14. Additionally, the Applicant also submitted that the proposed premises will be located within a key retail hub and given there is no shopping complex in Denham to provide a wider range of retail facilities for consumers, will provide consumers with the convenience of being able to purchase packaged liquor close to a supermarket.

The Objections

15. When considered together, the objections touched on every ground permitted by s 74(1) of the Act. Essentially, the Objectors raised concerns about:
- (a) the likely degree of harm to result from the grant of the application, given that it will increase the availability of packaged liquor within a locality that is already experiencing existing levels of alcohol-related harm and ill-health;
 - (b) parking and road access to the proposed premises from the main road in Denham;
 - (c) the low number of permanent residents in Denham and the already adequate numbers of existing licensed premises;
 - (d) the grant of a new licence being at odds with action taken by the licensing authority to limit the supply of packaged liquor in the Pilbara;
 - (e) the objectivity, accuracy and relevancy of the evidence provided in support of the application;
 - (f) the IGA supermarket and a fuel station operated by the Applicant in Denham being expensive, which the First Objector submitted is relevant because much of the support for the proposed liquor store is based on the belief that it will provide lower prices;
 - (g) the Applicant failing to adequately assess the locality in terms of “at-risk” groups and or to consider that information from the 2016 Census and Socio-Economic Indexes of Areas (SEIFA)¹, which indicate that Denham is a low socio-economic area;
 - (h) Denham being a regional and remote town, subject to risk factors such as not having a permanent doctor and a shortage of medical services;
 - (i) the Applicant not addressing harm concerns about tourists being an at-risk group and that the sale of low priced packaged liquor to tourists staying in caravan parks or camping grounds is of concern;
 - (j) there being a significant increase in the Denham crime rate in the past financial year, based on statistics reported on the WA Police website; and
 - (k) the Applicant’s motivation to make the application.

¹ Published by the Australian Bureau of Statistics

Statutory Framework

16. 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.
17. 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.²
18. In *McKinnon v Secretary, Department of Treasury*³, 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.'
19. Section 33(1) of the Act gives the licensing authority 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 considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing*⁴ 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 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.'
20. The primary objects of the Act are:
 - (a) to regulate the sale, supply and consumption of liquor; and

² 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

³ [2005] FCAFC 142 (*McKinnon v Secretary*)

⁴ [2012] WASC 384 (*Woolworths v DLL* (2012))

- (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.

21. The secondary objects of the Act are:

- (a) 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
- (b) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
- (c) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act; and
- (d) 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.

22. Section 16 of the Act:

- (a) requires that each application is considered on its merits;
- (b) requires that the licensing authority makes its determination on the balance of probabilities;
- (c) specifies that the *Evidence Act 1906* does not apply to the proceedings of the licensing authority, which is not bound by the rules of evidence or any practices or procedures applicable to courts of record; and
- (d) specifies that the licensing authority is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

23. Further, when determining the merits of an application where tension may arise between advancing the objects of the Act.⁵

Determination

24. I have carefully considered the evidence and submissions of the parties to these proceedings in the context of the statutory requirements of the Act and the decisions of Buss J in *Woolworths v Director of Liquor Licensing*⁶ and Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing*.⁷

⁵ Refer *Executive Director of Health -v- Lily Creek International Pty Ltd & Ors* (2000) 22 WAR 510 (*Lily Creek No 1*)

⁶ [2013] WASCA 227 (*Woolworths v DLL*)

⁷ [2015] WASC 208

25. Based upon the evidence submitted, I was satisfied that the Applicant has discharged its burden under s 38(2) of the Act and the grant of the application was in the public interest.
26. In this regard, I considered that the Applicant's proposal would provide consumers with:
 - (a) a level of convenience in being able to purchase packaged liquor close to a supermarket;
 - (b) a greater range of packaged liquor products than currently exists in Denham; and
 - (c) a medium sized browse-style liquor store in a key retail hub in Denham.
27. Further, when I considered the Applicant's survey data, I concluded that the grant of the application would further the Act's object of catering 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.
28. In *Woolworths -v- DLL*, Buss JA set out the statutory framework for a determination of an application in which an applicant had to satisfy the licensing authority that the granting of an application was in the public interest in the following terms:
 - (a) by s 38(2) of the Act, an applicant has to satisfy the licensing authority 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;
 - (c) the factual matters which the licensing authority is bound to take into account, in determining whether he is satisfied that the granting of an application is in the public interest are those relevant to the objects of the Act, as set out in s 5(2) of the Act;
 - (d) the factual matters which the licensing authority is entitled to take into account, in determining whether he is satisfied that the granting of an application is in the public interest are those set out in s 38(4) of the Act;
 - (e) section 5(2) is mandatory whereas s 38(4) is permissive; and
 - (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 licensing authority is obliged to take into account the public interest in:
 - (i) 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
 - (ii) facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.
29. Buss JA also observed that:
 - (a) on a proper construction of the Act (in particular s 5(1), s 5(2), s 16(1), s 16(7), s 30A(1), s 33 and s 38(2)), the licensing authority is obliged to determine an

application in accordance with the evidence (including notorious facts) before it and the criteria imposed by the Act; and

(b) this statutory duty involves two aspects:

- (i) first, the licensing authority must evaluate the evidence before it and make findings and draw conclusions from the evidence, including by inference (an affirmative conclusion which arises from facts that have been established) and this fact-finding task extends to the making of findings and the drawing of conclusions, wholly or partly, from notorious facts; and
- (ii) secondly, the licensing authority must apply the public interest criterion to the relevant circumstances and to the findings it has made and the conclusions it has drawn, by reference to the issues which arose from the application in the context of the relevant provisions of the Act, the evidence (including notorious facts) and any submissions made by the parties.

30. I note that the Objectors have generally opposed the grant of the licence because of concerns about alcohol-related harm in the locality; the limited number of permanent residents in Denham and because they are personally satisfied with the current packaged liquor services in the locality, although concerns were also raised about procedure and the cogency of the Applicant's evidence.
31. In this regard, while I have noted that the First Objector sought to discredit much of the Applicant's evidence, I consider it is clearly open to me to infer from the evidence and submissions before me, that there is a consumer requirement for the proposed range of liquor products and services in Denham.
32. Further, I consider that the concerns of the Objectors are largely speculative and are not substantiated by compelling evidence. Those Objectors who are Licensees clearly have a vested interest in the application being refused and it is difficult not to think that these objections have been motivated by the Licensees wanting to maintain their existing market share; which is not a matter for consideration under the Act. Similarly, I consider that the objection by the Second Objector is also commercially motivated, albeit to protect its supermarket business, which competes directly with the Applicant's supermarket. Further, those consumers who have indicated a preference to shop at the existing licensed premises in Denham can continue to do so.
33. 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 grant of the application would have a positive effect on tourism in Denham⁸;
 - (c) the risk of increased harm was not significant when regard was had to the circumstances of the locality;

⁸ Refer *Liquor Control Act 1988*, s 38(4)(ca)

- (d) 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
 - (e) the Objectors had failed to establish the validity of their objections as required under s 73 of the Act.
34. 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 and conditionally granted the application.
35. 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.
36. This matter has been determined by me under delegation pursuant to s 15 of the Act.



DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING



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

Your Ref: SN:DN:161032

Our Ref: A461579307

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Ms S Nicholson
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Dear Ms Nicholson

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

I refer to the application lodged by Kia Kaha Te Mahi Pty Ltd on 9 October 2018 and enclose reasons to support the decision of the Director's delegate of 22 March 2018.

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

Yours faithfully

Richard Duncan
CUSTOMER SERVICE OFFICER – LIQUOR CONTROL AND ARBITRATION

12 June 2019

Enclosure

cc: Mr A Weston (Your Ref: AGW:1161206)
Lavan
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