

Liquor Commission of Western Australia

(Liquor Control Act 1988)

Applicant: Woolworths Limited
(represented by Mr Gavin Crocket of GD Crocket & Co)

Intervener: Executive Director Public Health
(represented by Mr Sam Nunn of State Solicitor's Office)

Commission: Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan (Member)
Dr Eric Isaachsen (Member)

Matter Application for the conditional grant of a liquor store licence referred under section 24 of the *Liquor Control Act 1988*

Premises: Premises to be known as Dan Murphy's Cannington, situated at 1490 Albany Highway, Beckenham

Date of Hearing: 25 August 2011

Date of Determination: 3 January 2012

Determination The application is approved

Authorities referred to in Determination:

- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258; 22 WAR 510.
- *Re Minister for Resources: Ex Parte Cazaly Iron Pty Ltd* [2007] WASCA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207
- *Malec v JC Hutton Pty Ltd* (1990) 169 CLR

Introduction

- 1 On 17 December 2009 Woolworths Limited lodged an application with the Director of Liquor Licensing for the conditional grant of a liquor store licence, pursuant to sections 47 and 62 of the *Liquor Control Act 1988* ("the Act"), in respect of premises to be known as Dan Murphy's Cannington and located at 1490 Albany Highway, Beckenham.
- 2 The application was advertised in accordance with instructions issued by the Director of Liquor Licensing. No objections were lodged to the grant of the application.
- 3 On 23 February 2010 pursuant to section 69(8a)(b) of the Act, the Executive Director Public Health lodged a Notice of Intervention.
- 4 On 29 March 2011 the Director of Liquor Licensing, pursuant to section 24 of the Act referred the application to the Commission for determination.
- 5 A hearing before the Commission was held on 25 August 2011.

Submissions on behalf of the Applicant

- 6 The applicant seeks to open a Dan Murphy's liquor store within the retail shopping complex known as Hometown Cannington. Hometown Cannington contains around 21 major "destination" speciality stores and showrooms. Westfield Carousel, one of the largest regional retail and leisure centres outside the CBD, is within 1 km to the north west of the Premises.
- 7 The proposed liquor store will be located in an existing freestanding building at the Hometown Cannington Centre. Following refurbishment, the building will provide approximately 1,403 m² of floor space of which 1,055 m² will be trading area, including a cool room area of 76 m².
- 8 It was submitted that Dan Murphy's is an established, reputable liquor store brand which successfully operates in other parts of Australia, but is relatively new to the WA market. The proposed liquor store will provide a full range of services and products which includes:
 - the best range of liquor (between 3,500 to 4,000 product lines, the majority of which will be wine);
 - "Cellar Release" wines;
 - a wide range of premium, iconic rare and old wines and fine/premium spirits;
 - exceptionally well trained staff;
 - a dedicated fine wine manager present at the store during all trading hours;

- the Dan Murphy's Fine Wine Buyers Guide;
 - twice weekly wine tastings;
 - specialty events;
 - gift cards;
 - event planner services;
 - trolleys for customer use;
 - weekly specials on selected products;
 - a lowest price guarantee; and
 - a well managed, fully supervised store.
- 9 According to the applicant, almost 16,000 people live in the locality. It was submitted that no single group of the locality's population is significantly inconsistent with the Perth Statistical Division (PSD) and WA proportions. Overall, the locality's population is low risk as far as 'at risk' groups for liquor related harms are concerned. Although some alcohol-related harm and ill-health occurs in the greater area that includes the locality, the level of harm or ill-health is no greater than or inconsistent with, that which occurs in the Perth metropolitan area as a whole. It is recognized by the applicant that the relationship between alcohol consumption and social health problems is a complex one. While there is some research that suggests an increase in the availability of liquor can lead to increased harms, such research is often general in nature, not necessarily reflective of local factors including demography, nor the management of the outlet. The applicant was of the view that the grant of this application would be unlikely to have a negative impact on any alcohol-related harm or ill-health that occurs in the locality as defined.
- 10 The applicant submitted that the grant of the application will have a number of benefits, including:
- the premises will introduce a packaged liquor amenity of a modern liquor store conveniently located off Albany Highway, being a major arterial road;
 - as a branded Dan Murphy's store, the premises will appeal to older, more affluent and discerning customers.
- 11 The applicant takes its responsibilities in the sale of liquor very seriously and is committed to:
- proactively keeping abreast of liquor related issues;
 - introducing new initiatives designed to have a tangible impact on drinking behaviour; and

- helping to deliver a more responsible consumption and drinking culture in Australia.
- 12 It was also submitted that the existing packaged liquor outlets within the locality are limited in range and hours of opening whereas Dan Murphy's Cannington would provide a combination of superior customer service, knowledgeable trained staff and an extensive product range of local, national and international liquor products, with a focus on fine wines (including a Cellar Release Program) at the one location. The applicant also obtained the views, by way of questionnaire, of people who either live, work, visit or pass through the locality. The 10 respondents indicated support for the convenience, affordability, expert advice and improved browsing space available in a Dan Murphy store and commented that the current liquor stores in the locality were unsatisfactory from their viewpoint.
- 13 According to the applicant, it is committed to working to minimise and manage the risk of alcohol-related harm to the local community. The applicant will implement and rigorously enforce the comprehensive management practices and policies that are in place at its licensed premises throughout Australia. Dan Murphy's stores are unattractive to "at risk" persons due to the design of the stores, presence of numerous staff and management practices.
- 14 In order to fulfil its obligations under section 38 of the Act, the applicant submitted a Public Interest Assessment (PIA) together with additional evidence and expert reports. The expert reports included a town planning report (The MGA Town Planners Report), and an environmental and health assessment (the Caporn Services Report), report.
- 15 The MGA Town Planners Report:
- identified the locality for the application;
 - identified the characteristics of the locality;
 - made observations on the demographics of the locality and provided a socio-demographic profile;
 - reviewed from a town planning perspective, the nature of the immediate surrounds for the proposed premises and commented on the appropriateness of the premises in this location;
 - provided a locality traffic flow analysis;
 - identified, reviewed and commented on each of the liquor licences authorised to sell packaged liquor in the locality and reviewed the services and amenity of each; and
 - considered the requirement of the public for the services to be offered at the proposed premises.

16 The Caporn Services Report:

- considered the health and environmental aspects relevant to the application taking into account the demographics of the locality, health and crime statistics for the locality; the location and services to be offered from the proposed premises;
- looked at the nature, services, facilities and amenities of the locality;
- identified, what, if any, sensitive or at-risk groups or places in the locality or within close proximity to the licensed premises;
- detailed consultations undertaken with the local government authority and police;
- reported on the existing packaged liquor facilities in the locality; and
- considered the appropriateness of the proposed premises.

17 Overall, it was submitted that the proposed premises will provide an unrivalled matrix of packaged liquor services specifically designed to meet the requirements of modern day consumers which are not provided for by existing packaged liquor outlets in the locality.

Submissions on behalf of the Executive Director Public Health

18 The Executive Director Public Health (“EDPH”) intervened in the application for the purposes of introducing evidence or making representations in relation to the harm or ill-health caused to people, or any group of people, due to the use of liquor, and the minimisation of that harm or ill-health.

19 The key public interest considerations in relation to harm or ill-health regarding this application include;

- the risk of harm/ill-health caused to people in and outside the Cannington locality should this application be granted;
- the existing liquor availability in the locality and surrounds;
- the increase in physical and economic availability created by Dan Murphy’s, including the proposed large size of the store (1,403 m²) and their lowest price guarantee;
- research which shows increasing availability of alcohol in society, particularly by way of amount of alcohol sold, can increase the average consumption of its population and associated harm;
- the social profile of the population in the locality of the Dan Murphy store; and
- from January 2008 to December 2009, almost 40% of recorded domestic violence offences in the locality were alcohol-related.

- 20 It was submitted by the EDPH that interventions in relation to alcohol-related harm are routinely framed in general terms of the potential for alcohol-related harm to eventuate any specific evidence relevant to the locality of an application can be difficult to obtain and substantiate. Nonetheless, minimising alcohol-related harm is one of the primary objects of the Act and in weighing and balancing the competing interests and other relevant considerations to determine whether an application is in the public interest, it is open to the Commission to consider the concerns and evidence presented by the EDPH.
- 21 The potential for harm or ill-health to people that may result as a consequence of the grant of an application, irrespective of whether the harm or ill-health is proven on the balance of probabilities is a powerful public interest consideration. The mere possibility of harm or ill-health would always be a relevant matter for the licensing authority when discharging its functions (refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* (2000) WASCA 258; 22 WAR 510).
- 22 In this context, the EDPH has identified a number of characteristics of this application that have the potential to contribute to alcohol-related harm and ill-health, including:
- the availability of cheap liquor;
 - the large size of the proposed premises; and
 - the associated increase in the physical and economical availability of packaged liquor in the community.
- 23 The EDPH provided a variety of research material to support these concerns. For example, a recent local study by Gardiner, R & Coase, P dated March 2011, *Cheap Drinks*, Drug and Alcohol Office, Department of Health, establishes a link between the price of alcohol and consumption. The EDPH also referred to the work of Chikritzhs, T., Catalano, P., Pascal, R., and Henrickson, N (2007), *Predicting Alcohol-related harms from licensed outlet density: A feasibility study*. Monograph Series No. 28. National Drug Law Enforcement Research Fund, Commonwealth of Australia, Hobart. The overall aim of the feasibility study was to progress the development of an Australian model sensitive to local risk factors to help authorities determine appropriate liquor outlet densities for minimising alcohol-related harms within communities.
- 24 The EDPH also commented on the demographics of the locality and noted the presence of several 'as risk' groups as identified by the Director of Liquor Licensing's Policy *Public Interest Assessment*, 7 May 2007 (and 2007,2008 reviews). Specifically –
- (a) there is a high proportion of young adults compared with the Perth Statistical Division PSD) and WA overall;
 - (b) proportion of indigenous persons higher than the PSD but lower than WA;
 - (c) the proportion of students in the locality is higher than average;

- (d) proportion of residents who do not speak English well, or at all, is high compared with PSD and WA;
- (e) income levels – individual / household / family - below the PSD and state average.

25 In summary, it was submitted by the EDPH that:

- the area affected by the application is broader than the immediate 2km vicinity, as the proposed premises is a “destination liquor store” targeting locals and people passing through the region. As a result it is appropriate that the evidence on which the EDPH relies should not be limited to the locality;
- Police data shows that overall there is already a level of alcohol-related harm in the locality and surrounding suburbs, in particular violence, domestic incidents and drink-driving;
- media reports and advertisements indicate that the applicant is a retailer which promotes the sale of cheap liquor;
- there is sufficient documentation to establish a link between the price of alcohol, alcohol consumption and alcohol-related harm, specifically that an increase in the availability of alcohol leads to an increase in alcohol consumption which in turn is linked with increased violence, drink-driving and property damage, The conclusion to be drawn regarding the potential for the relative price of liquor to influence consumption is supported by evidence provided by the EDPH;
- there are also published studies that establish the connection between the sale of packaged liquor and alcohol-related harm;
- recent media reports indicate the level of community concern in regards to alcohol-related harm and the availability of cheap liquor; and
- although the applicant may adopt some harm minimisation strategies within the bounds of its licence, the fundamental issue is the general risk to persons in the locality and surrounding suburbs promoted by the increased access to cheap liquor which is consumed away from the premises;
- there are already 6 liquor outlets within a 2km radius which sell packaged liquor in the locality catering for the package liquor requirements of the community.

26 Consequently, the EDPH submitted that the impact of increasing the physical and economical availability of packaged liquor and the potential for even a minimal increase in the risk of alcohol-related harm are relevant to consider when the Commission determines the application.

Determination

- 27 Pursuant to section 38(2) of the Act, an applicant for the grant of a liquor store licence must satisfy the licensing authority that granting the application is in the public interest.
- 28 Section 38 of the Act was substantially amended in 2007 by the *Liquor and Gaming Legislation Amendment Act 2006*. As a consequence, the old “needs test” was replaced with a broad public interest consideration.
- 29 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175 and *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241). The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 where he said:

“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.

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”

- 30 In considering the public interest under section 38, the licensing authority needs to consider both the positive and negative social, economic and health impacts that the grant of an application will have on the community.
- 31 Furthermore, advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities* supra). The primary objects of the Act are:
- to regulate the sale, supply and consumption of liquor;
 - to minimize harm caused to people, or any group of people, due to the use of liquor; and
 - to cater for the requirements of consumers of liquor and related services, with regard the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

- 32 Pursuant to section 16 of the Act, each application must be considered on its merits. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimizing alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health -v- Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).
- 33 The applicant has provided detailed and voluminous evidence to address the matters set out in section 38(4) of the Act and to demonstrate the benefits to the community of a grant of the application.
- 34 The applicant seeks to establish within the Hometown Cannington shopping complex a 1,403 m² packaged liquor outlet trading under the Dan Murphy's banner. The display/sales area will be approximately 1,055m², including a cool room area of 76m², and a storage area of 348m², making this proposed outlet one of the larger liquor stores in the State.
- 35 In respect of the harm or ill-health that may be caused to the community by the grant of the application, the Commission is unable to reach a negative conclusion based upon the evidence and material advanced by the EDPH. Whilst general harm data is relevant and of assistance to the licensing authority in its determination and should be given due consideration, the weight to be given to this general data will depend on the circumstances of each application, particularly where the general harm data is supported by more specific evidence relating to the area to which the application relates. This approach is consistent with the views expressed in a recent decision in Victoria, *Director of Liquor Licensing v Kordister Pty Ltd & Anor* [2011] VSC 207, where Bell J said:

“As the tribunal has held, every application for a liquor licence cannot be refused on the basis of general harm minimisation evidence. That would be a perversion of the regulatory scheme. The legislation regulates the supply and consumption of liquor by individuals exercising freedom of market choice. It acknowledges the benefits which the industry brings and provides a regulatory framework for the realisation of those benefits.

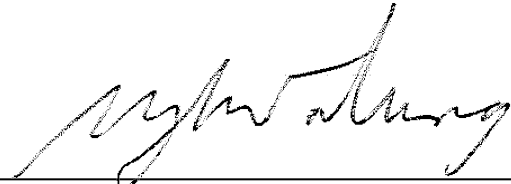
But by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and admissible, for it may, depending on the circumstance, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the ‘particular local, social, demographic and geographic circumstances’ of the given case.”

- 36 It is also important to observe that the primary object in section 5(1)(b) of the Act is to 'minimize' harm or ill-health, not to prevent harm or ill-health absolutely. Furthermore, the statutory framework is not predicated upon the concept of prohibition, but establishes a regulatory mechanism for the granting of liquor licences and the operation of licensed premises which are in the public interest.
- 37 In this case, the harm 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. The demographic factors indicate that there are 'at risk' groups in the locality albeit as a small proportion on the total population in the case of both the indigenous persons (2.6 %) and 'limited English' category (3 %). In relation to this application the Commission is unable to conclude or predict (refer *Malec v JC Hutton Pty Ltd (1990) 169 CLR*), on the balance of probabilities, that the grant of the licence would pose an unacceptable risk of increased alcohol-related harm in the local community when regard is given to the "particular local, social, demographic and geographic circumstances" of this case.
- 38 In consideration of the evidence submitted by the applicant, particularly the MGA Town Planners Report and the Caporn Services Report, the Commission is satisfied that the grant of the application will not negatively impact on the amenity of the locality or cause undue offence, annoyance or disturbance to people who reside or work in the vicinity of the proposed premises.
- 39 As observed earlier, in considering whether the grant of an application is in the public interest, the Commission needs to consider both the positive and negative aspects of the application and how the application will promote the objects of the Act, particularly the harm minimisation objective and whether the grant of the 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.
- 40 The applicant submitted that the grant of the application will provide a number of benefits to the local community, including the introduction of a large, modern liquor store with superior customer service and product range; the convenience of the location situated adjacent to a major arterial road, and a branded Dan Murphy's store which will appeal to older more affluent and discerning customers. To demonstrate that the grant of the application will cater to the requirements of consumers for liquor and related services, the applicant relies upon the paucity of liquor outlets in the vicinity, the demonstrated standards of Dan Murphy's business practice, responses of the 70 people interviewed in relation to the Statutory Notice (as per "Additional Submission"), the 10 responses to its questionnaire; and the general assertion that because Dan Murphy's stores have proven to be popular in other localities it will therefore be popular in this locality.
- 41 The Commission has previously determined that it does not accept the general principle that because a business model has proven to be popular in other localities that this justifies the grant of a new licence in any other locality. The Commission does, however, accept that the Dan Murphy's liquor store business model is well managed, offers an

extensive range of products and services and provides a high level of responsible retailing of liquor products.

- 42 Therefore, in association with the particular circumstances of the locality, particularly the absence of a packaged liquor supermarket style of operation or “destination” liquor store, the Commission is prepared to give some weighting to the contribution that such a facility would meet the requirements of consumers, as prescribed in section 5(1)(c) of the Act.
- 43 The applicant submitted that with no objections and only one intervener, and a compelling case, that approval should be readily achieved. The Commission took full consideration of all the material presented at the hearing, however, does not accept the proposition that the lack of objection is indicative of demonstrating that the application is in the public interest. Harm and ill health issues incorporating social profile, outlet density, product pricing and recorded alcohol related harm in the locality is a major factor to be considered in evaluating applications.
- 44 As stated in paragraph 38 the Commission is however, not of the view that, on the balance of probabilities, that the grant of the licence would pose an unacceptable risk of increased alcohol-related harm in the local community when regard is given to the “particular local, social, demographic and geographic circumstances” of this case.
- 45 The Commission also notes that within the Hometown Cannington shopping precinct and adjacent to the proposed Dan Murphy’s site, is the premises of the South West Aboriginal Land and Sea Council (SWALSC). At the request of the Commission, the applicant provided supplementary material to confirm that the SWALSC was well informed of the liquor store proposal and had been served the Statutory Notice, the purpose of which had been discussed with the manager. There had also been no negative reaction from any of the wider group (approximately 70 people) who had been served the Statutory Notice. The SWALSC premises are used for administrative purposes and not as a community centre.
- 46 The Commission is persuaded that the evidence submitted in this case does satisfy it that the grant of the application for a new liquor store licence will cater for the requirements of consumers and that it is in the public interest for the introduction of retail packaged liquor services and facilities not currently available in this locality.
- 47 Accordingly the application for the conditional grant of a liquor store licence is approved.
- 48 Prior to the commencement of the hearing before the Commission, the applicant sought some interlocutory orders in respect of the status of the intervener, the submissions made by the intervener and other matters. With the consent of the parties the Commission reserved its decision on the proposed orders. The Commission confirms that the defined locality for the application is a 2 kilometre radius around the proposed site of the premises, which is in accordance with the policy of the Director of Liquor Licensing. The reference to the locality in respect of an application is to define the area which relates to the potential impact that the grant of the application may have on the

amenity of the locality (refer section 38(4)(b)). It does not limit the consideration in respect of the harm or ill-health that may result from the grant of an application or any other public interest aspects. Indeed it was clearly contemplated by the applicant that it would be providing for the requirements for liquor and related services by consumers beyond the locality by reference to the needs of the passing traffic, estimated at 50,000 vehicles per day. By consent the status of the EDPH was confirmed as that of an intervener and the Commission has given appropriate weighting to the submission made by the EDPH without the deletions as requested by the applicant.

A handwritten signature in black ink, appearing to read 'Eddie Watling', written over a horizontal line.

EDDIE WATLING
DEPUTY CHAIRPERSON