

**Liquor Commission of Western Australia
(*Liquor Control Act 1988*)**

Applicant: Lima Lima Pty Ltd
(*represented by Mr Peter Fraser of Dwyer Durack*)

Intervener: Commissioner of Police WA
(*represented by Ms Leanne Atkins*)

Objector: Alpine Court Pty Ltd
(*represented by Mr Andrew Websdane of Frichot and Frichot*)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling
Ms Helen Cogan

Date of Hearing: 23 February 2011

Date of Determination: 18 April 2011

Premises: PK Fresh IGA Plus Liquor
397 Warnbro Sound Avenue, Port Kennedy

Matter: Application for a Liquor Store Licence referred under
section 24 of the *Liquor Control Act 1988*

Determination: The application is approved

Authorities Referred to by Parties and Considered in Determination

- *McGeogh & Ozanne v Ivory Bow Pty Ltd & Ors, LC20/2010*
- *Shallcross Investments Pty Ltd v Director of Liquor Licensing, LC26/2010*
- *Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR21*
- *Executive Director of Health v Lily Creek International Pty Ltd and ors [2000] WASCA258 lpp J*
- *Executive Director of Health v Lily Creek International Pty Ltd and ors [2001] WASCA410*

Introduction

1. In March 2010, an application was lodged by Lima Lima Pty Ltd (“the Applicant”) for the conditional grant of a liquor store licence for premises located at 397 Warnbro Sound Avenue, Port Kennedy.
2. An objection to the application was lodged by Alpine Court Pty Ltd. A Notice of Intervention was lodged by the Commissioner of Police.
3. Pursuant to section 24 of the Liquor Control Act 1988 (“the Act”), the Director of Liquor Licensing referred the application to the Commission for determination. When referring this application to the Commission, the Director also referred an application by Woolworths Ltd for the conditional grant of a liquor store licence at the corner of Warnbro Sound Avenue and Palm Springs Boulevard, Warnbro. However, at a Directions Hearing held on 15 November 2010 the Commission directed that the applications be heard and determined separately.
4. A hearing in respect of the Lima Lima Pty Ltd application was held on 23 February 2011.

Submissions by the Applicant

5. The Applicant wishes to open a liquor store of approximately 155sqm within its current tenancy which occupies 1,633sqm of the 9,000sqm shopping centre.
6. The liquor outlet will benefit consumers as they will be able to avail themselves of “one stop” shopping in satisfying their liquor purchasing requirements whilst doing their supermarket shopping.
7. A wide range of local, New Zealand and Portuguese wines and beers will be stocked catering for the local, New Zealand and Portuguese communities as a specialty and offering diversity to consumers generally.
8. The store will be open during supermarket opening times 7.00am – 8.00pm 7 days of the week.
9. The store, as part of the supermarket itself and the shopping centre generally, will enjoy excellent lighting and CCTV coverage with 3 CCTV cameras located in the premises ensuring a high level of crime prevention and safety measures.
10. The staff will be properly trained in their responsibility in respect of attempted purchase of liquor by minors and will implement the “ID25” program.
11. Port Kennedy has been identified as a key location for potential development of tourism and recreation and has been identified in the City of Rockingham Strategic Plan as a growth area requiring development of the shopping and commercial areas.
12. Support for the Liquor Store is evidenced by a number of letters of support from

local businesses and members of the community.

13. The store will not have any adverse effect on the amenity of the area but will compliment the range of alternatives within the shopping centre.
14. The store will not result in any offence, annoyance, disturbance or inconvenience to people residing or working in the vicinity. The trading hours will be the same as for the supermarket thus not causing any “after hours” issues.
15. The design features mitigate against offence or disturbance and the locality is well catered for by public transport and adequate car parking.

Submissions by the Objector

16. The locality, and the City of Rockingham generally has an existing high packaged liquor outlet density, there being at least fourteen liquor store outlets and eleven tavern/hotel licensed premises. The establishment of additional take-away liquor premises in this locality is likely to result in an increase in consumption of liquor resulting from greater accessibility of liquor from increased outlet density and is likely to result in undue harm or ill health to people due to the increased use of liquor.
17. Increased liquor outlet density increases the promotion and availability of liquor within a locality, and has a number of potential negative health and harm consequences, including increased consumption levels and resultant anti-social and harm issues. The public already has access to packaged liquor and packaged liquor services in the locality.
18. The proposed liquor store is in very close proximity to the Port Kennedy Tavern packaged liquor facility, and these existing packaged liquor services provide a convenient packaged liquor service for persons resorting to the vicinity of the proposed premises.
19. It is well documented that alcohol consumption levels are influenced by the availability of alcohol (The Prevention of Substance Abuse, Risk and Harm in Australia; a Review of the Evidence; Loxley et al (2004); Alcohol: No Ordinary Commodity; Babor et al (2003); Restrictions on the Sale and Supply of Alcohol: Evidence & Outcomes; National Drug Research Institute (2007)). Liquor store licensed premises present a high risk for harm when compared to other licence types.
20. The grant of this application may lead to a reduction in the price of liquor in the locality, which is associated with increased alcohol consumption.
21. The grant of this application would result in an unjustified proliferation of packaged liquor outlets in the locality and is not in the public interest.
22. There is no significant projected population increase for the locality in the short

to mid-term which would justify the grant of this application.

23. There are existing indicators of alcohol related harm and ill-health within the region in which the locality is located including significant rates of death due to alcohol related diseases, injuries and alcohol-related conditions. Police statistics indicate that there were existing high levels of assaults in Port Kennedy within the period May 2009 to January 2010 (second only to Burglary (Dwelling) in terms of number of offences). There were also high levels of graffiti offences recorded in Port Kennedy.
24. There are a number of potential at risk groups within the population of the City of Rockingham and the locality, including four primary schools and one pre-primary school located in the suburb of Port Kennedy.
25. The grant of this application will significantly increase the risk of harm or ill health to persons within the locality due to the use of liquor.
26. The grant of a new liquor store in the metropolitan area, on average, would see an extra eight (8) assaults in private homes (Chikritz – National Drug Research Institute – Curtin University) reference “Predicting Alcohol Related Harms from Licensed Outlet Density: a feasibility study” – National Drug Research Institute and also “Increased domestic violence and unexpected consequences of new liquor licences, new licensing model can predict impact on alcohol related violence” db.ndri.curtin.edu.au
27. A number of statements by local residents supporting the objection were submitted by the Objector.

Submissions on behalf of the Commissioner of Police

28. The Commissioner of Police intervened in the application pursuant to section 69(6)(c)(ii) of the Act and submitted that granting the application may cause harm or ill-health due to the use of liquor.
29. It was further submitted that it would be contrary to the public interest, policy and the intent of the Act. Thus the application should be refused on the following grounds:
 - the grant of the application is not necessary in order to provide for the reasonable requirements of the public because the licensed premises in the proximity of the area are sufficient to meet the requirements of the public;
 - there are adequate outlets selling liquor for consumption off licensed premises already existing in the affected area which are in close proximity to the Objector's premises; and
 - if the application was to be granted, licensed premises and/or facilities would be unnecessarily duplicated contrary to the object, spirit and intent of the Act.

30. Police incident reports submitted indicate a level of offences and anti social behaviour in the area.

Report by Department of Health

31. Pursuant to section 69(8a) of the Act the Director of Liquor Licensing, prior to referring this application to the Commission for determination, requested the Executive Director of Public Health (EDPH) to provide a report on the harm or ill-health caused to people due to the use of liquor and the impact that granting this application would have on that harm or ill-health. That report was provided to the parties and the Commission.
32. The EDPH's report largely addressed the combined effect of this application and an application by Woolworths Ltd as these applications are in respect of premises in close proximity to each other. As a consequence of the two applications being heard separately and not together as originally contemplated, this aspect of the EDPH's report is not applicable.
33. Nonetheless, the report does address the issue of harm in the locality and at risk groups in the area. Information was also provided on the issue of young people and alcohol-related harm.

Responsive Submission by the Applicant

34. In the decision of *McGeogh & Ozanne v Ivory Bow Pty Ltd & Ors*, LC20/2010, the Liquor Commission of Western Australia ("the Commission") refused an application for a liquor store licence on the grounds that the evidence submitted by the Applicant to discharge its onus under section 38(2) of the Act was not compelling, particularly the evidence that the grant of the licence would cater for the requirements of consumers for liquor and related services. The Commission stated that this requirement should not be confused with protecting licensees from competition or protecting existing market share.
35. The public interest "test" to be satisfied by the Applicant was further clarified in the Decision of *Shallcross Investments Pty Ltd v Director of Liquor Licensing*, LC 26/2010 delivered on 29 July 2010.
36. The grant of the present Application is in the public interest, as there is a demonstrable requirement amongst consumers within the locality to be able to purchase packaged liquor at the proposed site.
37. As outlined in the Public Interest Assessment Submissions lodged in support of the application, the proposed liquor store will be located within the PK Fresh IGA Supermarket located within the Port Kennedy Central Shopping Centre and will provide residents and persons passing through the locality with the ability to purchase packaged liquor, either by itself or in conjunction with their grocery shopping.

38. The Patterson Report contains details of a survey, commissioned by the Applicant, targeting a random pool of consumers within the locality. For the purpose of this Application, the locality is a 3km radius from the Applicant's proposed store.
39. The Paterson Report evidences that a significant percentage of consumers within the locality are not having their packaged liquor needs met within that locality and are having to venture further afield to satisfy these requirements. A significant percentage of respondents, however, meet their shopping needs for groceries at the Applicant's supermarket and, overall, the survey reveals that a significant percentage, (51%), are very interested in being able to purchase packaged liquor from a liquor store located adjacent to the Applicant's supermarket.
40. In all the circumstances it is submitted that the intervention lodged by the Commissioner of Police is of no assistance in relation to the determination of the present application.
41. It is submitted, however, that when the other localities sought to be incorporated by the Objector are properly disregarded, the existing licensed premises within Port Kennedy, as identified by the Objector, are:
 - (a) Port Kennedy Tavern (the Objector);
 - (b) St Clair Liquor Store; and
 - (c) Warnbro Fair Liquor Store.
42. The submission of the Objector that the grant of the present application is likely to result in undue harm or ill health to people due to the increase of liquor appears based upon the assumption that, if the locality is defined widely enough to include such areas as Rockingham, the increased density of licensed premises due to the addition of the present proposed store will result in an increase in the consumption of liquor resulting from a greater accessibility to liquor from increased outlet density.
43. This argument falls away when:
 - (a) the existing density of liquor outlets in Port Kennedy is properly considered; and
 - (b) regard is had to the findings of the Patterson Report, namely that a significant percentage of between 43% - 50% of respondents are required to travel outside of the locality to satisfy their packaged liquor needs.
44. The Objector has made reference to a number of published reports documenting the link between liquor and various alcohol-related harm indicators. No attempt has been made by the Objector to apply the findings of this research to the present application. Further, no attempt has been made to analyse the nature of the Objector's proposed licensed premises, its proposed facilities or the management proposed. Rather, the Objector has relied upon the general assertion that, *"Research indicates that liquor store licensed*

premises present a high risk for harm when compared to other licence types".

45. It is significant that the Executive Director of Public Health has chosen not to object or intervene in relation to the present application.
46. The Objector makes reference to Police statistics which indicate that there were existing high levels of assaults in Port Kennedy within the period from May 2009 to January 2010. The Objector has not, however, presented any statistics in relation to alcohol-related crime occurring within the locality. The crime statistics available upon the Commissioner of Police website reveals that there is not a high level of crime occurring within Port Kennedy, as asserted by the Objector.
47. The Objector makes reference to a number of other "at risk" groups which are present in the locality (although no evidence has been presented to support this assertion). No evidence has been presented to suggest that these groups identified are in fact experiencing any levels of harm or ill health due to the use of liquor.

Responsive Submissions by the Objector

48. The Objector contends that the evidence lodged by the Applicant does not establish that the grant of the application would be in the public interest and that consumers can meet their requirements conveniently from the existing licensed outlets.
49. The Patterson Market Research Report is of little value and is methodologically flawed.
50. The point of difference in catering for the Portuguese and New Zealand communities is significantly exaggerated as the communities are relatively and absolutely small.
51. The convenience of "one stop" shopping is exaggerated and already adequately catered for.
52. Liquor purchases are predicated more on price (and people will travel to avail themselves of lower priced liquor) than convenience.

Determination

53. Section 38(2) of the Act requires an Applicant seeking the grant of a liquor store licence must satisfy the licensing authority that granting the application is in the public interest.
54. In discharging its onus under section 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.
55. When considering the public interest; consideration of both the objects of the Act as set out in section 5 in the Act and section 38 of the Act is necessary when making the decision (refer *Palace Securities v Director of Liquor Licensing* [1992] 7WAR 241 per Malcolm CJ).
56. In terms of this application, the Applicant proposes to establish a liquor store as part of its existing supermarket, which is located within the Port Kennedy Shopping Centre. The catchment area of the Shopping Centre has a resident population of approximately 12,800 people. The Applicant has provided evidence that there is a demand by persons attending the Shopping Centre to be able to purchase packaged liquor while doing their grocery shopping. The application is essentially predicated on the convenience to the public of one-stop-shopping and catering for the needs of the local Portuguese and New Zealand communities. Furthermore, the population of the area has increased substantially over the last decade, however the last liquor store licence granted in the area was in 2001.
57. Whilst the Applicant went to some lengths to highlight one of its main points of difference being its intention to cater for the Portuguese and New Zealand communities by stocking an array of liquor sourced from Portugal and New Zealand, the statistics show the percentage of people of Portuguese or New Zealand origin is not particularly high. However, the Applicant does make the point that there exists a small niche market for which it intends to cater and it is not unreasonable to expect that others will be drawn to products not obtainable elsewhere thus providing a further diversity of choice for consumers.
58. The objection lodged by Alpine Court Pty Ltd, the licensee of the Port Kennedy Liquor Store, raised the issue of increased harm as a result of increased availability of packaged liquor and pointed to a number of at risk groups, particularly primary schools in the suburb. The Objector further stated that over half the indigenous population are under 18 years of age and there is much higher population of indigenous persons under 30 years of age than in the State generally. This statement is disingenuous and without any indication of the total population of indigenous people the figures are all but meaningless.
59. The Objector fails to adequately address any identifiable “at risk group” in the locality or establish any “casual link” between the grant of this application and potential harm or ill-health being caused in the community.

Much of the Objectors submission concerned the lack of any need for another

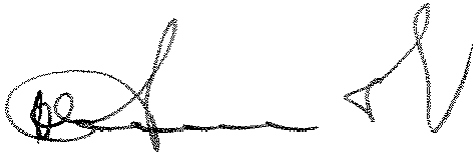
liquor outlet. The supporting statements of local people also appeared to be directed to the lack of need for this liquor store. The Commission formed the view that the Objector was effectively making an attempt to limit competition rather than presenting any properly grounded view of the grant of the licence being contrary to the public interest and failed to establish any real grounds of objection.

60. The Intervener submitted information about the possible negative impact that the grant of the application may have on the local community, harm and ill-health.
61. It is often the case when determining the merits of an application that tension may arise between the various objects of the Act, particularly objects 5(1)(b) and 5(1)(c). In such circumstances, 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).
62. The potential for harm or ill-health is a major public interest consideration when determining an application (refer *Lily Creek supra*). Consequently, it is necessary for the licensing authority to consider the level of alcohol-related harm, due to the use of liquor, which is likely to result from the grant of the application. Wheeler J stated in *Executive Director of Public Health v Lily Creek International & Ors* [2001] WASCA 410:

"This does not mean that only the increased harm which may result from the specific premises in question is to be considered, rather it seems to me that must necessarily be assessed against any existing harm or ill health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be commonly accepted in the community, the distinction is probably not significant."
63. The primary object in section 5(1)(b) is to "minimize" harm or ill-health, not to prevent harm or ill-health absolutely; refer Ipp J in *Lily Creek supra*.
64. The Commission is of the view that the evidence presented by the Intervener indicates that existing levels of harm in the area of the proposed licensed premises are no greater than that commonly found in the community and that the grant of the licence will not add significantly to that level of harm.
65. In weighing and balancing the competing interests presented by the Objector and the Intervener, the Commission concludes that the grant of the application is unlikely to have any measurable negative impact on the local community and the overall positive aspects of the grant of the application outweigh any potential negative impact that granting the application may have on existing levels of harm in the area.
66. The Commission is satisfied that the Applicant has satisfied the requirements of section 38 of the Act and the grant of the licence is in the public interest. The

Commission is also satisfied that the Applicant has complied with all necessary statutory criteria, requirements and conditions precedent to the application being granted.

67. Thus, a liquor store licence is conditionally granted to the Applicant for premises to be known as PK Fresh IGA and located at the Port Kennedy Shopping Centre subject to the premises being completed in accordance with the plans and specifications lodged, the holder of the conditionally granted licence seeking confirmation of the grant within 12 months and the standard conditions imposed by the Director of Liquor Licensing.
68. Finally, pursuant to section 104 of the Act, the Commission also approves of the profit sharing arrangement between the Applicant and the landlord of the premises as set out in the lease document submitted with the application.

A handwritten signature in black ink, consisting of a stylized 'J' followed by a series of loops and a final flourish.

JIM FREEMANTLE
CHAIRPERSON