

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

Applicant: Element WA Pty Ltd
(*represented by Mr Dan Mossenson of Lavan Legal*)

Intervener: Director of Liquor Licensing
(*represented by Mr Ian Repper of State Solicitor's Office*)

Commission: Mr Jim Freemantle (Chairperson)
Mr Greg Joyce
Ms Helen Cogan

Date of Hearing: 19 August 2010

Date of Determination: 6 September 2010

Premises: Naked Bottle Whitfords

Matter: Application for the conditional grant of a liquor store licence

Determination: The application is refused

Authorities cited in determination:

Hancock -v- Executive Director of Public Health [2008] WASC 224

Palace Securities v Director of Liquor Licensing [1992] 7WAR 241

Busswater Pty Ltd v Director of Liquor Licensing (LC 17/2010)

Introduction

- 1 On 19 January 2010 an application was lodged by Element WA Pty Ltd (“the applicant”) for the grant of a liquor store licence in respect of premises to be known as Naked Bottle Whitfords and located at Shop 231A, Westfield Whitfords City Shopping Centre.
- 2 The application was advertised to the general public in accordance with instructions issued by the Director of Liquor Licensing. No objections or interventions were lodged in respect of the application.
- 3 In decision A207851, dated 31 May 2010, the Delegate of the Director of Liquor Licensing refused the application.
- 4 On 30 June 2010, Element WA Pty Ltd, lodged an application for a review of the Delegate’s decision pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”).
- 5 Pursuant to section 69(11) of the Act, the Director of Liquor Licensing lodged a Notice of Intervention in respect of the review application.
- 6 In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director of Liquor Licensing, but is to undertake a full review of the materials before the Director and make its own determination on the basis of those materials (refer *Hancock -v- Executive Director of Public Health [2008] WASC 224*).
- 7 A hearing before the Commission was held on 19 August 2010.

Submissions on behalf of the applicant

- 8 The applicant proposes to establish a small liquor store, of approximately 35m², in the Whitfords City Shopping Centre specialising in “cleanskin” wines sold under the Naked Bottle label.
- 9 According to the applicant’s Public Interest Assessment (PIA) lodged in support of its application, the Naked Bottle concept is based around the fact that most Australian wine producers have an excess of quality wine each year. The applicant proposes to purchase this excess wine on a large scale and relabel it under the Naked Bottle brand. Purchasing this wine on a large scale from the producers means the applicants are able to negotiate a substantially reduced price, resulting in the customer being able to purchase quality wine at lower prices. Wines that the customer might pay a retail price of \$15 can be sold by Naked Bottle for a price of between \$9 and \$10.
- 10 The applicant proposes to sell mostly wine, with a range of between 60 and 85 products; however, it would also offer four spirits and four beers under the Naked Bottle brand, which it is anticipated would represent less than 5 per cent of the business. The applicant would not be selling any other branded liquor products.

- 11 A major contributing factor to the proposed location of the applicant's liquor store is that it will be set up in the fresh food section of a large shopping centre. According to the applicant, its research and experience shows a strong relationship between the weekly family fresh food shop and the sales of premium wine products. Once a week a family member will come to the fresh food precinct to purchase the items needed for the household, with premium wines being one of those items, with the inference therefore being that most of the products the applicant proposes to sell will be consumed as part of the family meal in the evening.
- 12 The applicant provided information about the existing licensed premises in the locality. Specifically, there are two premises in the immediate proximity to the applicant's proposed premises. The Whitfords Tavern is adjacent to the Whitfords City Shopping Centre and Woolworths Liquor is located in the shopping centre. The applicant is of the opinion that what it proposes to offer will be significantly different from what is available at either of these premises. Whilst these two venues offer a large range of products, they actually offer a limited number of products over a large number of categories. It was asserted that the quality of wines available at both these venues is limited and generic, especially at Woolworths liquor, whose range of product fits in to their business model of ranging the 50 or so most popular brands within a particular wine style. This results in the proliferation of the same brands across most of the retail liquor outlets, making it difficult for consumers to find a unique wine or even try something different. This business model impacts on wine producers in two ways: firstly, many producers find it hard to break into this market and have their products sold by the multi-nationals; and secondly, those producers whose wines are sold by the multi-nationals are forced to reduce their prices in order to get their products onto the shelves. This subsequently inhibits the profitability of these wineries, which must cut costs to remain viable, and thus negatively impacts on the quality of the product the consumer is buying.
- 13 It is therefore contended by the applicant that its retail concept will give consumers more choice of better wines at a lower price, whilst helping to keep the wine industry viable by providing another revenue stream for wine producers.
- 14 The applicant in its PIA also provided some information on the demographics of the locality and generally addressed matters set out in section 38(4) of the Act.
- 15 It was also submitted that one of the most potent benefits for the community by the grant of the application will be the reintroduction of choice back into the shopping centre. Woolwoths Liquor at the Whitfords City Shopping Centre was previously a privately owned wine store, however after Woolworths took over the liquor store, the product range went from 'interesting' to 'generic'. The grant of this application will reintroduce choice for the families of the area. A small, quality focussed, unique wine store like Naked Bottle would provide the local community with an interesting wine store alternative providing consistent quality wines to complement their weekly household shopping purchases.

- 16 Finally, it was submitted that the weight the Commission should give to any form or type of evidence should depend on all the relevant circumstances and sections 16(1)(a) and 16(7)(a) provides that the licensing authority is not bound by the rules of evidence and should act without undue formality.

Submissions on behalf of the Director of Liquor Licensing

- 17 It was submitted on behalf of the Director of Liquor Licensing that section 38(2) imposes a positive obligation upon an applicant to satisfy the licensing authority that granting the application is in the public interest. An applicant must therefore adduce sufficient evidence to allow the licensing authority to satisfy itself in this regard.
- 18 The applicant's case is generally characterised by speculation and assertions with little or no actual evidence provided to support the various claims in the PIA.
- 19 Similarly, it was submitted that the applicant did not properly identify at risk groups in its PIA and how the grant of the application would not negatively impact on these groups, but rather relied upon general statistics for the area to support the assertion that the target demographic of the proposed liquor store will be people who drink responsibly.

Determination

- 20 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.
- 21 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities v Director of Liquor Licensing* [1992] 7WAR 241).
- 22 To discharge 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 (refer Section 19 of the *Interpretation Act 1984* when read in conjunction with the *Second Reading Speech, Parliamentary Debates, WA Parliament, vol 409, p 6342*).
- 23 In this regard, it is not sufficient for an applicant merely to express opinions and make assertions about the perceived benefits of their application. Such opinions and assertions must be supported by an appropriate level of evidence (refer *Busswater Pty Ltd v Director of Liquor Licensing* LC 17/2010).
- 24 In this case, the applicant seeks to establish a small liquor store specialising in "cleanskin" wines sold under the Naked Bottle label, which will be located in the fresh food precinct of a large suburban shopping centre (Whitfords City Shopping Centre). The applicant asserts that patrons of the shopping centre will be inconvenienced by being able to purchase wine from its liquor store at the same time as doing the weekly fresh food shopping. The applicant's research and experience shows a strong relationship between the weekly family fresh food shop and the sales of premium wine products; however the

applicant did not lodge any evidence to support this claim or reference the relevant research material. Similarly, no detailed evidence was submitted in respect of the number of cleanskin wines available at the Woolworths Liquor Store or the Whitfords Tavern or the pricing of these products or whether any member of the public in the locality has a requirement for this liquor and the related services to be provided by the applicant as contemplated by object 5(1)(c) of the Act. The argument that the grant of the application will result in the re-introduction of choice for consumers of the shopping centre is therefore difficult to accept in the absence of appropriate evidence.

- 25 Other assertions relating to the perceived benefits to the public of the grant of the application lacked any supporting evidence. At the hearing, Counsel for the applicant stated that this was an unsophisticated application, prepared by the applicants and the Commission should not be influenced by form, but should look at the substance of the application. However, based upon the applicant's PIA, the Commission can find little substance. The applicant provided no evidence to support its claims.
- 26 During the hearing, Counsel for the applicant highlighted previous decisions of the Director of Liquor Licensing (or his delegate) granting liquor store licences in respect of specialist cleanskin liquor stores, and the apparent inconsistency in the level of evidence accepted by the Director of Liquor Licensing to justify the grant of these licences. According to Counsel, this inconsistency in the approach by decision-makers is unhelpful to the industry and applicants. In this case, the applicant has followed the Director's policy on the preparation of its PIA and as indicated in the policy document, the Director could have sought more information.
- 27 This case and others that have recently come before the Commission, highlight that applicants are of the mistaken belief that the Director of Liquor Licensing will seek further information from an applicant if their PIA is deficient. Although the Commission has previously acknowledged that it is unreasonable to expect the Director of Liquor Licensing to 'run an applicant's (or any other party to proceedings) case for them', a practical balance needs to be achieved so that applications are genuinely considered on their merits.
- 28 The Commission must be satisfied, based on the evidence presented, that the grant of the application is in the public interest. Based upon the scant evidence submitted by the applicant, the Commission is unable to arrive at that conclusion. The applicant's submissions are largely predicated on assertions which are not supported by any evidence, and therefore the Commission is unable to be satisfied about the veracity of those assertions.
- 29 To grant a liquor store licence based upon a 'good idea' by an applicant is not consistent with the Act or the intent of Parliament. The proliferation of licences was not an intended outcome of the introduction of the public interest test under section 38 of the Act (see *Parliamentary Debates, WA Parliament, vol 409, p 6342*). As stated earlier in this decision (and previous decisions of the Commission), the public interest test under

section 38(2) requires the licensing authority to consider the merits of an application based upon the positive and negative impact that the grant of the licence would have on the local community. In this context, an applicant needs to adduce sufficient evidence to support its claims, not just abstract generalisations. Otherwise, the granting of licences under the Act would become arbitrary and not in accordance with the objects of the Act. Needless to say, the level and quality of evidence to be submitted by an applicant will vary on a case by case basis. Whilst the Commission acknowledges the provisions of sections 16(1)(a) and 16(7)(a), this does not diminish an applicant's obligations under section 38(2) of the Act.

- 30 Counsel for the applicant submitted that if the Commission is not convinced by the evidence submitted by the applicant, the application should be remitted to the Director of Liquor Licensing because the applicant followed the Director's policy document in the preparation of its PIA submission and the Director denied the applicant procedural fairness by not seeking further information from the applicant. The Commission does not accept the argument that the applicant was denied procedural fairness simply because the Director of Liquor Licensing (or his Delegate) did not seek further information and does not accept the proposition that the application should be remitted to the Director so the applicant can supplement its application with new material. Such an approach would result in the untenable situation where every unsuccessful party to proceedings before the Commission would seek to have the matter sent back to the Director so they can submit new material to substantiate their claims.
- 31 When the Commission considers the merits of this application, based upon the evidence submitted, the Commission is not satisfied that the grant of the application is in the public interest as required under section 38(2) of the Act. Accordingly, the application is refused.

A handwritten signature in black ink, consisting of a stylized 'J' and 'F' followed by a horizontal line.

JIM FREEMANTLE
CHAIRPERSON