A189135

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT:	STARWEST INVESTMENTS PTY LTD
PREMISES:	SHENANIGANS BAR & GRILL
PREMISES ADDRESS:	WALTER ROAD, MORLEY
LICENCE NO:	6020048546
NATURE OF MATTER:	**APPLICATION TO ALTER/REDEFINE LICENSED PREMISES**

On 11 April 2008 Starwest Investments Pty Ltd lodged an application under section 77 of the *Liquor Control Act 1988* ('the Act') to alter the premises to allow for the sale of packaged liquor without the requirement to also operate a public bar from the premises under section 41(2) of the Act.

If approved, the applicant will not provide public facilities for the consumption of liquor on licensed premises, and the licensee would effectively be permitted to operate a liquor store under a tavern licence.

MERITS OF THE APPLICATION

On 11 April 2008, Minter Ellison stated:

> *... a licensee under a tavern licence is permitted but is not required to sell liquor for consumption on the premises but may do so (if it) chooses to. Similarly the licensee is permitted to sell (but not required to sell) packaged liquor either over a public bar or from the premises laid out in a retail liquor store format.*
>
> *We interpret the word 'may' in section 42(2) of the Act as importing discretion on the part of the licensee to sell liquor in packaged or unpacked form or both. This interpretation is consistent with section 56 of the Interpretation Act 1984 (WA) and the Explanatory Memorandum that was tabled in Parliament along with the Liquor and Gaming Legislation Amendment Bill 2006 (which states that section 41(2) is amended 'to remove the obligation on a hotel licence to receive people').*
>
> *Accordingly, it is our client's position that:*
>
> *(a) the Licensee has the right under section 41(2) to not operate a public bar area; and*

(b) the Authority therefore has the power to not require an application to be made for the alteration/redefinition of the premises as there is not intended to be any change to the licensed area or use of the premises.

...

If the Authority determines an application is required, it our client's respectful position that:

(a) the Authority should exercise it's (sic) discretion to allow the application and approve the alteration of the premises to not require the public bar to remain open and so have the effect of only selling packaged liquor;

(b) as there will be no increase or decrease in the Licensed Area of the Premises, only a change to the fitout to allow for the sale of packaged liquor, the application can be approved without the need for a Public Interest Assessment in accordance with Director's policy as amended on 22 January 2008;

(c) similarly, as the existing licensee has the right under section 41(2) of the Act to not operate a public bar area, the Authority should not exercise its discretion to require the application to be advertised; and

(d) the alteration to the premises will not have any adverse impact on the public, having regard to the likely health and social impacts on the community, as the sale of packaged liquor and removal of the public bar will remove any adverse impact of a tavern within a shopping centre district.

On 23 May 2008 the applicant was advised that:

The Director General is of the opinion that the licensee should be applying for a liquor store licence given the proposed layout and mode of operation of the proposed premises. The current tavern licence could then be surrendered contemporaneously upon grant of the licence if successful.

On 18 June 2008 the applicant advised the authority that it wished to proceed with the application notwithstanding the Director General's opinion.

On 30 June 2008 the applicant further advised that

There is sufficient information, material, evidence and documentation before the licensing Authority for it to make the determination on how section 41(2)(a) and (b) is to be applied. The transferee / licensee has disclosed how it will utilise the premises for the sale and supply of packaged liquor exclusively. It does not intend to provide public facilities for the consumption of liquor on licensed premises.

DETERMINATION

Legislative provisions

In carrying out its function, the licensing authority must consider the primary objects of the Act which, pursuant to section 5(1)(a), includes "to regulate the sale, supply and consumption of liquor" and also the object contained in section 5(1)(c) which is:

> *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.*

The scheme of the Act and the regulation of the liquor industry is premised on distinct categories of liquor licences, one of which authorises the operation of a premises from which only packaged liquor is sold for consumption off-site (that is, a liquor store). The application for alteration/redefinition proposes a situation where licensed premises, selling only packaged liquor, would be operating under different licence categories, which is not consistent with the scheme of the Act.

Section 41(2) of the Act states:

> *(2) Subject to this Act, during permitted hours the licensee of a hotel licence is authorised to keep open the licensed premises, or part of those premises, and, while those premises are open —*
>
> *(a) may sell liquor on the premises to any person for consumption on the premises; and*
>
> *(b) may, unless the licence is a small bar licence or a hotel restricted licence, sell packaged liquor on and from the premises to any person.*

Section 41 does not address the issue of whether premises operated under a tavern licence must have facilities for the service and consumption of liquor at those premises.

The *Liquor Control Act* does not specifically require the holder of a tavern licence to make an area of the premises available for the on-site consumption of liquor or to keep such an area open at any particular time. The implication of the former section 41 of the Act required liquor to be sold for consumption on the premises at the times when packaged liquor was being sold for off-site consumption. The removal of that requirement removed that implication.

However, the requirement that a premises operating pursuant to a tavern licence must have facilities for the sale and consumption of liquor on those premises is discernable from the scheme of the *Liquor Control Act* itself and the very meaning of the word "tavern".

The Macquarie Dictionary Online defines a tavern as "a place where food and alcoholic drink are served, but where no accommodation is provided". Accordingly, it would be a nonsense

to use the expression "tavern Licence" to facilitate the operation of something which is other than a tavern (that is, a bottle shop).

Section 41 was amended by the *Liquor Licensing Amendment Act* 2006 ("Amendment Act").

Clause 34 of the *Liquor Licensing Amendment Bill 2006* ("the Bill") introduced into Parliament by the Minister for Racing and Gaming, proposed to insert the following new subsection (2a):

> *Packaged liquor may be sold on and from licensed premises under subsection (2)(b) only if, at the time of sale, liquor may be purchased for consumption on those premises.*

During consideration of the Bill in Parliament (Legislative Assembly, Consideration in Detail, Hansard for October 24 2006 p 7517), when the proposed new subsection (2a) was deleted, the Minister for Racing and Gaming expected:

> *...99 per cent of the time the hotel will keep a bar open because it makes money form the bar, but one can imagine circumstances in which a hotel has no trade on a Saturday morning, but to keep the bottle shop open it must keep a bar open with people working in it when not a single customer is coming through the door.*

The Minister later stated:

> *We are trying with these reforms to level the field for operators to make sure they can compete on an equal basis.*

The Parliament did not contemplate that by the amendment to section 41, it would be allowing any premises to which any form of hotel licence relates, to do away with facilities for the consumption of liquor on the premises altogether.

The hours during which the premises the subject of a tavern licence is permitted to be open are longer than those for which a liquor store is permitted to trade. Allowing what is effectively a liquor store to operate pursuant to a tavern licence, would afford an advantage to the holder of the tavern licensee as a result of the longer trading hours available to that licensee. What was intended by amending the former section 41(2)(a) by the Amendment Act, was to put the holder of a tavern licence and the holder of a liquor store licence on an equal footing with respect to the sale of packaged liquor. It would be incongruous if the amendment actually had the effect of advantaging the holder of a form of hotel licence over liquor store licensees. In this regard, section 19 of the *Interpretation Act* 1984 is relevant. In addition, section 18 of the *Interpretation Act* provides that:

> *In the interpretation of a provision of written law, a construction that would promote the purposes of object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.*

This "purposive test" is a common law principle of statutory interpretation to give primacy to the interpretation that best suited the overall intention of an Act when read as a whole. The rule does not require that the words being analysed be ambiguous or doubtful in meaning of themselves, but rather that a proposed alternative interpretation be available in order to promote the objects of an Act.

Accordingly, as the *Liquor Control Act* provides for a separate category of licence which authorises the operation of premises from which packaged liquor for consumption off-site may be sold (that is, a liquor store licence), it would be contrary to the scheme of the Act for an identical form of premises to operate under a different category of licence.

Public Interest

The Act empowers the licensing authority to grant or refuse an application "on any ground or for any reason, that the licensing authority considers in the public interest" (section 33(1)); this is an absolute discretion.

In *O'Sullivan v Farrer* (1989) 168 CLR 210 the term 'public interest' was described as a term of "wide import". In this case the majority of the High Court, referring Dixon J's judgment in *Water Conservation and Irrigation Commissioner (NSW) v Browning* (1974) 74 CLR 492 said that:

> *... the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "'in so far as the subject matter and the scope and the purposes of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view."*

In *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 21 Malcolm CJ described the discretion of the authority as "... an 'absolute discretion' to grant or refuse an application on any ground or for any reason that the licensing authority considers in the public interest", and referring to Dixon J in the *Water Conservation and Irrigation Commission* (supra) noted:

> *... where a discretion was described as "absolute" or the matter was "entirely" within the discretion of the relevant body the discretion was confined to the scope and subject of the Act and was not arbitrary and unlimited."*

Later, in *Palace Securities Pty Ltd v Director of Liquor Licensing* (supra), it was further provided:

> *That is not, of course, a case where the context provides no positive indication of a consideration by which the decision is to be made. The reference is to the 'public interest'. In this respect s 5 of the Act is relevant as are the provisions of s 38 relating*

to "the requirements of the public" and the provisions of s 35 which reflect that it is in the public interest that licences should only be granted to fit and proper purposes.

In relation to the requirements formerly specified in s38 of the Act, primary object (a) includes catering "for the requirements of consumers for liquor and related services" in section 5.

With respect to the potential through the administration of the Act, for an advantage to be bestowed on the holder of a tavern licence over liquor store licensees, Malcolm CJ considered the meaning of 'public interest' in *Vermouth Nominees Pty Ltd v The Cabaret Owners Association of WA Inc & Ors* No. 2155, and stated:

> *The objects of the Act set out in s 5 include the regulation and proper development of the liquor industry and the provision of adequate controls. One of the basic purposes of the Act is to regulate the sale of liquor by licensing in a manner which ensures that the reasonable requirements of the public are met... It would not be in the public interest to have a licence granted in or removed to an area, if the result would be that the overall standard of services and facilities would fall because of significant adverse effects on the viability of the individual outlets in the area. The public, therefore, have an interest in the administration of the Act in a way which will take account of and be consistent with the objects and purposes of the legislation.*

Furthermore, Anderson J in *Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd Lib.* No 990160C recognised that:

> *... a proliferation of liquor stores selling packaged liquor at discount prices may result in a decline in other forms of Category A licences such as hotels and taverns, and that if this happened it would disadvantage a significant section of the public who prefer that form of supply ... These cases expressly recognise that it is a legitimate objective in the field of liquor licensing to ensure, in so far as reasonably practicable, the viability within the affected area of a range of Category A licences. This is not for the purpose of advancing the economic interests of existing licensees but to satisfy the requirements of the public for a range of licence types. Diversity of consumer demand, is of course, a matter to which the licensing authority is bound to have regard ...*

Conclusion

Section 33 of the Act provides that the licensing authority has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest, provided that the application is dealt with on its merits.

To approve the application would be contrary to the primary objects contained in (a) and (c) of section 5(1) of the Act, in that:

1. it would be contrary to the scheme of the Act for an identical form of premises to operate under a different category of licence; and
2. on the balance of probabilities it would not be in the public interest for the Act to be administered in such a way that bestows an advantage on the holder of a tavern licence that sells only packaged liquor over liquor store licensees.

Accordingly, the application is refused.

If the applicant is dissatisfied with the decision it has a right to seek a review under section 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.

Barry A. Sargeant
DIRECTOR OF LIQUOR LICENSING
4 July 2008