JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	COMMISSIONER OF POLICE -v- LIQUOR COMMISSION OF WESTERN AUSTRALIA [2019] WASC 165
CORAM	**:**	ARCHER J
HEARD	**:**	18 APRIL 2019
DELIVERED	**:**	18 APRIL 2019
FILE NO/S	**:**	CIV 1501 of 2019
BETWEEN	**:**	COMMISSIONER OF POLICE Applicant AND LIQUOR COMMISSION OF WESTERN AUSTRALIA Respondent DIRECTOR OF LIQUOR LICENSING First Other Party CHIEF HEALTH OFFICER Second Other Party SUNSEASONS PTY LTD (ACN 070 489 495) Third Other Party DELTA POINT HOLDINGS PTY LTD (ACN 009 351 455) Fourth Other Party BUSHFALLS PTY LTD (ACN 071 171 821) Fifth Other Party

SONSAN PTY LTD (ACN 085 132 476)
Sixth Other Party

WALKABOUT HOLDINGS PTY LTD (ACN 616 051 640)
Seventh Other Party

LIQUOR STORES ASSOCIATION OF WESTERN AUSTRALIA INC
Eighth Other Party

AUSTRALIAN HOTELS ASSOCIATION (WESTERN AUSTRALIA)
Ninth Other Party

REGIONAL PROPERTY CUSTODIAN PTY LTD (ACN 626 322 629)
Tenth Other Party

RINGTHANE PTY LTD (ACN 009 372 990)
Eleventh Other Party

MARK CARLSON
Twelfth Other Party

RAMPEARL PTY LTD (ACN 081 413 673)
Thirteenth Other Party

REDSANDS NOMINEES PTY LTD (ACN 153 316 075)
Fourteenth Other Party

RAMINEA PTY LTD (ACN 008 883 994)
Fifteenth Other Party

HAYBAR PTY LTD (ACN 154 717 610)
Sixteenth Other Party

RUM HOLDINGS PTY LTD (ACN 009 289 785)
Seventeenth Other Party

WOOLWORTHS GROUP LIMITED (ACN 000 014 675)
Eighteenth Other Party

Catchwords:

Judicial review - Jurisdictional error - Proper construction of s 26 of the *Liquor Control Act 1988* (WA)

Legislation:

Liquor Control Act 1988 (WA)

Result:

Application for judicial review

Category: B

Representation:

Counsel:

Applicant	:	J M Carroll & D E Leigh
Respondent	:	No appearance
First Other Party	:	No appearance
Second Other Party	:	J M Carroll & D E Leigh
Third Other Party	:	No appearance
Fourth Other Party	:	No appearance
Fifth Other Party	:	No appearance
Sixth Other Party	:	No appearance
Seventh Other Party	:	No appearance
Eighth Other Party	:	No appearance
Ninth Other Party	:	No appearance
Tenth Other Party	:	No appearance
Eleventh Other Party	:	No appearance
Twelfth Other Party	:	No appearance
Thirteenth Other Party	:	No appearance

Fourteenth Other Party	:	No appearance
Fifteenth Other Party	:	No appearance
Sixteenth Other Party	:	No appearance
Seventeenth Other Party	:	No appearance
Eighteenth Other Party	:	No appearance

Solicitors:

Applicant	:	State Solicitor's Office
Respondent	:	No appearance
First Other Party	:	No appearance
Second Other Party	:	State Solicitor's Office
Third Other Party	:	No appearance
Fourth Other Party	:	No appearance
Fifth Other Party	:	No appearance
Sixth Other Party	:	No appearance
Seventh Other Party	:	No appearance
Eighth Other Party	:	No appearance
Ninth Other Party	:	No appearance
Tenth Other Party	:	No appearance
Eleventh Other Party	:	No appearance
Twelfth Other Party	:	No appearance
Thirteenth Other Party	:	No appearance
Fourteenth Other Party	:	No appearance
Fifteenth Other Party	:	No appearance
Sixteenth Other Party	:	No appearance
Seventeenth Other Party	:	No appearance
Eighteenth Other Party	:	No appearance

Case(s) referred to in decision(s):

Australian Unity Property Limited as responsible entity for the Australian Unity Diversified Property Fund v City of Busselton [2018] WASCA 38

Basra v Minister for Immigration and Border Protection [2018] FCA 422

Bray v Workers Rehabilitation & Compensation Corporation (1994) 62 SASR 218

Director of Public Prosecutions (Cth) v Ede [2014] NSWCA 282; (2014) 289 FLR 82

Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum [2017] WASCA 153; (2017) 51 WAR 425

Hossain v Minister for Immigration and Border Protection [2018] HCA 34; (2018) 359 ALR 1

Maxcon Constructions Pty Ltd v Vadasz (No 2) [2017] SASCFC 2; (2017) 341 ALR 628

McKay v Commissioner of Main Roads [2013] WASCA 135

Mohammadi v Bethune [2018] WASCA 98

Re Narula, Ng & Hammersley; Ex parte Atanasoski [2003] WASCA 156

Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82

ARCHER J:

(This judgment was delivered extemporaneously on 18 April 2019 and has been edited from the transcript.)

1 The Commissioner of Police brought an application for judicial review of a decision of the Liquor Commission of Western Australia (Commission) in relation to 91 liquor licences. The Commission's decision had the effect of preventing the commencement of conditions imposed by a delegate (Delegate) of the Director of Liquor Licensing (Director) on each of the 91 licences. There is an issue as to whether the conditions were imposed by a single decision of the Delegate covering 91 licences or 91 decisions, each one imposing conditions on a particular licence. As I will later explain, the conditions were imposed by 91 decisions.

2 The applicant submits that the Commission did not have the power to stay the operation of the Delegate's decision in relation to a particular licence unless the holder of that licence had applied to the Commission for a review of the Delegate's decision to impose the conditions on that licence. Only the holders of 17 of the 91 licences had applied for a review.

3 The applicant further submits that, because the Commission decided to stay the operation of the Delegate's decisions in relation to all 91 licences, it should be inferred that the Commission misunderstood its jurisdiction, even in relation to the 17 licences in respect of which an application for review had been made.

4 The Commission, the respondent, filed a notice that it intended to abide by the decision of the court other than as to costs. The Director of Liquor Licensing, the First Other Party, filed a similar notice.

5 Appearances were entered by the fourth, fifth and sixth other parties and by the tenth to seventeenth other parties. Each of these parties had also applied for review of the Delegate's decision. Subsequently, however, each of these parties sought leave to amend their appearances to submitting appearance. I granted that leave.

Background to challenged decision

6 On 11 January 2019, the Delegate imposed conditions on 91 liquor licences in the Pilbara region. I will refer to these decisions as the 'Delegate's Decisions'.

7 In his reasons, the Delegate acknowledged that alternate mechanisms to address alcohol-related harm were supported by some proponents. However, he considered that those alternatives could take too long to implement. He found that, due to the high level of existing alcohol-related harm in certain areas of the Pilbara, more immediate intervention and remedial action in the form of further restrictions imposed under s 64 of the *Liquor Control Act 1988* (WA) (Act) were necessary.

8 To allow time for affected licensees to adjust their business operations and for the public to be informed of the new restrictions, the Delegate decided that the restrictions would not take effect until 31 March 2019.

9 Fourteen licensees (Review Applicants) applied to the Commission for a review of the Delegate's Decisions in relation to 17 licences (Review Applications).

10 On 15 March 2019, the Commission made interim orders purporting to stay the operation of the Delegate's Decisions in relation to all of the 91 liquor licences in the Pilbara region (Interim Orders), pursuant to s 26 of the Act, until the Commission had determined the Review Applications.

11 Section 26 relevantly provides that:

> Where -
>
> (a) The holder of a licence applies to the Commission for a review of a decision made by the Director in respect of that licence;
>
> …
>
> effect is to be given to the decision made by the Director unless the Commission, by way of interim order, otherwise directs.

12 The Commission did not give reasons for making the Interim Orders.

13 The Review Applications have been listed for hearing in the Commission on 27 June 2019, approximately three months after the date that the Delegate's Decisions would have otherwise taken effect.

14 The applicant filed its application for judicial review on 21 March 2019.

15 The applicant asserts that the Commission fell into jurisdictional error in making the Interim Orders in relation to all 91 licences. The applicant submits that the Commission only had the power to make Interim Orders under s 26 of the Act in relation to those licences in respect of which an application for review had been made.

16 Further, the applicant submits that, by making Interim Orders in relation to all of the licences, including those in respect of which an application for review had not been made, the Commission demonstrated that it misunderstood the nature and scope of its power to make the Interim Orders. The applicant submits that this infects the entirety of the Interim Orders. The applicant therefore seeks that the Interim Orders be quashed in relation to all 91 licences.

17 The following issues arise:

(1) What is the proper construction of s 26 of the Act? In particular, is there jurisdiction to make interim orders staying the operation of a decision made by the Director in respect of a particular licence only if the holder of that licence has applied to the Commission for a review of that decision?

(2) What was under review? In particular:

(a) did the Delegate make one decision or 91 decisions?

(b) if the latter, was each Review Application an application to review the decision that applied to the applicant's own licence or was it an application to review all 91 decisions?

(3) If the Delegate made 91 decisions, was it open to the Commission to grant Interim Orders under s 26 of the Act in respect of decisions that were not the subject of an application for review?

(4) Should relief be granted?

(5) If so, should the entire decision be quashed?

18 Before considering those issues, I will set out the relevant legal principles and the legal framework.

Legal principles

Jurisdictional error

19 When dealing with an application for judicial review, the court's jurisdiction does not extend to engaging in a review of the merits. The court's jurisdiction is confined to determining whether the Commission made a jurisdictional error in reaching the decision.

20 In ***Re Refugee Review Tribunal; Ex parte Aala***[1] Hayne J explained:

> There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

21 As was recently explained by the High Court in ***Hossain v Minister for Immigration and Border Protection***,[2] determining the limits of a decision-maker's function and powers is a question of statutory construction.

22 First, it is necessary to identify 'the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process'. It is also necessary to identify the conditions which the statute requires to be observed in order for the decision-maker to make a decision of that kind. Identifying the preconditions and conditions is a question of statutory construction.[3]

23 It is ordinarily an implied condition that the decision-maker proceed by reference to 'correct legal principles, correctly applied'.[4]

24 Second, if a decision-maker has failed to comply with a precondition or a condition, it is necessary to determine whether *the extent* of the non-compliance resulted in the purported decision 'lacking characteristics necessary for it to be given force and effect by the

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[1] ***Re Refugee Review Tribunal; Ex parte Aala*** [2000] HCA 57; (2000) 204 CLR 82 [163]. This statement was applied in ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153; (2017) 51 WAR 425 [86] - [88].
[2] ***Hossain v Minister for Immigration and Border Protection*** [2018] HCA 34; (2018) 359 ALR 1.
[3] ***Hossain*** [23], [27] (Kiefel CJ, Gageler & Keane JJ).
[4] ***Hossain*** [29].

statute pursuant to which the decision-maker purported to make it'. If so, the purported decision will involve 'jurisdictional error'. That is, it will have been made outside jurisdiction. Determining the extent of non-compliance which will have this result is also a question of statutory construction.[5]

25 In ***Hossain***, the plurality said:

> [A] statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.
>
> … the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made.[6]

Statutory construction

26 As was recently said by the Court of Appeal in ***Mohammadi v Bethune***,[7] '[s]tatutory construction requires attention to the text, context and purpose of the Act. While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context'.

27 In the recent decision of ***Australian Unity Property Limited v City Busselton***,[8] the Court of Appeal reiterated the primacy of the legislative text in determining legislative intention. The court emphasised that the meaning of the legislation must emerge from the statutory text, understood in its context and having regard to the statutory purpose being pursued.

Legislative framework

28 The relevant statutory framework was helpfully set out in the applicant's submissions and I gratefully acknowledge that what follows is taken from, or draws from, that summary.

Imposing conditions on liquor licences

29 Section 64 of the Act empowers the licencing authority to (subject to the Act) impose, vary or cancel conditions 'in relation to any licence'.

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[5] ***Hossain*** [24], [27].
[6] ***Hossain*** [29] - [30].
[7] ***Mohammadi v Bethune*** [2018] WASCA 98 [31]. See also all of [31], and [32] - [36].
[8] ***Australian Unity Property Ltd v City of Busselton*** [2018] WASCA 38 [77] - [85].

The licensing authority may also vary or cancel any condition previously imposed.

30 The Act defines the 'licensing authority' to mean the Commission in relation to an application or matter that is to be determined by the Commission and to otherwise mean the Director.[9]

31 The Director may delegate any of his or her functions other than the power of delegation.[10]

Applying to the Commission for a review of a decision of the Director

32 Section 25(1) of the Act provides that:

> [W]here a person who is a party to proceedings before the Director is dissatisfied with a decision made by the Director … the person may apply to the Commission for a review of that decision.

33 'Party to proceedings' is defined in the Act to include 'an objector' and 'a person who intervenes in proceedings'.[11]

34 There is no definition of a person 'dissatisfied with a decision'. In ***Bray v Workers Rehabilitation & Compensation Corporation***,[12] the court concluded that the appellants were persons 'dissatisfied' with a decision of the Workers Rehabilitation and Compensation Commission. That commission had decided to release to a particular person sections of a report, previously exempted from disclosure, that contained statements made by the appellants under compulsion and on a confidential basis. The court held that the appellants were persons 'dissatisfied' because they had an interest in the matter 'of an intensity and degree well above that of the ordinary member of the public'.

Staying the effect of a decision of the Director

35 Section 26 of the Act relevantly provides:

> Where –
>
> (a) the holder of a licence applies to the Commission for a review of a decision made by the Director in respect of that licence;
>
> …

[9] Act, s 3(1).
[10] Act, s 15(1)(a).
[11] 'Party to proceedings' is defined within the Act to include 'an objector' and 'a person who intervenes in proceedings': Act, s 3(1).
[12] ***Bray v Workers Rehabilitation & Compensation Corporation*** (1994) 62 SASR 218, 221 - 224.

> effect is to be given to the decision made by the Director unless the Commission, by way of interim order, otherwise directs.

What is the proper construction of s 26?

36 The first question is what is the proper construction of s 26 of the Act?

37 The ordinary and natural meaning of the section is plain.

38 The Commission only has the power to make an interim order if *a holder of a licence* applies to the Commission for *a review of the decision made* by the Director *in respect of that licence*.

39 The reference to 'a review of the decision made by the Director' can only be a reference to an application for review under s 25.

40 The references italicised demonstrate that the Commission has no power to make an interim order to stay the operation of a decision made by the Director in respect of the particular licence unless the holder of that licence has applied to the Commission for review of that decision. The context and statutory purpose do not suggest some other construction is required.

41 Accordingly, on the proper construction of s 26, it is a precondition to the power to make an interim order to stay the operation of a decision made by the Director in respect of the particular licence that the holder of that licence has applied to the Commission for a review of the decision made by the Director in respect of that licence.

42 Making an interim order in the absence of this precondition would involve 'jurisdictional error'. That is, it would have been made outside jurisdiction. The error is clearly material.

What was under review?

43 In order to determine whether the Commission in this case fell into jurisdictional error, it is necessary to determine what was under review under s 25 of the Act.

A single decision or 91 decisions?

44 The first question that arises is whether the Delegate made a single decision to impose conditions on 91 licences or 91 decisions to impose conditions on each licence.

45 Although the Delegate issued a single set of reasons, this does not mean he made a single decision. To determine whether or not he did, it is necessary to consider the statutory scheme.[13]

46 As I will explain, the statutory scheme compels the conclusion that the Delegate made 91 decisions. The power to impose conditions is a power to impose conditions on a particular licence, not a power to impose conditions on a geographical basis or some other class of licences.

47 The applicant set out in its written submissions the various matters that led to this conclusion,[14] all of which I accept. It is sufficient to note the following.

48 The power to impose conditions is given by s 64(1). The power is given 'in relation to any licence' as distinct from a geographical area.

49 By s 64(2)(a), where the licensing authority proposes to impose a condition, it may require *the licensee* to show cause why the condition should not be imposed.[15]

50 Section 64(3) sets out a number of purposes for which conditions may be imposed. Many of those purposes specifically refer to the particular licence or the particular premises upon which the condition will be imposed.

51 A condition imposed under s 64 may relate to any aspects of the business carried on under *the licence* and any activity carried on at *the licensed premises*.[16] This requires consideration on a licence by licence basis, having regard to the business activities of a particular licensee and the activities carried out on the licensed premises.

52 The plain meaning of s 64 is that the licensing authority has the power to impose conditions on a particular licence. Each time the licensing authority exercises that power, it is a decision to impose conditions on that particular licence. No doubt, the licensing authority may give reasons for exercising this power in relation to multiple licences in a single set of reasons. However, each exercise of power in relation to each licence is a separate decision under the Act.

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[13] See, for example, ***Basra v Minister for Immigration and Border Protection*** [2018] FCA 422 [36].
[14] Applicant's Outline of Submissions filed 29 March 2019 [43] - [53].
[15] Act, s 64(2a).
[16] Act, s 64(6).

53 Further, the plain meaning of s 64 is that the licensing authority does not have the power to impose conditions on licences within a geographical area or some other classification.

54 The context and purpose of the Act do not suggest a contrary interpretation is appropriate.

55 Each of those 91 decisions could have been the subject of an application for review under s 25 of the Act. The Commission may hear multiple applications together and, if it does, the evidence relating to one application is evidence relating to the other or others.[17]

Was each Review Application an application to review all 91 decisions?

56 The second question that arises is whether each Review Application sought to review all 91 decisions, or only the decision that applied to the Review Applicant's own licence(s).

57 The applicant argues that s 25 gave a licence holder the right to make an application for a review of a decision to impose conditions on a licence held by that licence holder, but not otherwise.

58 The applicant submits, in effect, that an applicant will only have a greater interest in a decision that is 'of an intensity and degree well above that of the ordinary member of the public' where that decision imposes conditions on a licence held by that applicant.

59 Counsel for the applicant conceded that a licence holder may have a greater interest in conditions imposed on the licences of others than a member of the public. However, counsel made two points.

60 First, that it would not be an interest 'well above' that of a member of the public. Counsel pointed out that, in the context of the Act as a whole, it could not have been intended to set the bar for review at such a low level as to risk a flood of review applications.

61 Second, and in any event, such a person must not only be dissatisfied but must also have been a party to the proceedings in which the decision was made to impose conditions on the licence of another, noting s 64(2a). Counsel pointed out that the rights and obligations of such a person would not be affected by the imposition of conditions on the licence of another.

[17] Act, s 16(12).

62 I accept both of these submissions.

63 I conclude, therefore, that each Review Applicant could only seek a review of the conditions imposed on a licence held by that applicant.

Jurisdictional error

64 For the above reasons, I am satisfied that the Commission fell into jurisdictional error. It had before it applications to review 17 of the decisions made by the Delegate. It only had power to make orders in relation to those 17 decisions. It did not have the power to stay the operation of the remaining 74 decisions.

Should relief be granted?

65 The applicant properly acknowledged that, if there is a power to appeal the Interim Orders, this would weigh against the exercise of discretion to grant relief.

66 Section 28(2c) of the Act provides that '[n]o appeal lies against a decision of the Commission constituted by one member if the decision was made on a review under section 25 of a decision of the Director'.

67 The Interim Orders were made under s 26. That section gives the Commission the power to suspend, in effect, the Director's decision in relation to licences the subject of a review application. The purpose of s 26 is plain. It is to allow the Commission to stay the operation of a decision made by the Director pending the Commission's determination under the Review Application as to whether the Director's decision should be affirmed, varied or quashed.

68 The critical question is whether an interim order made under s 26 is a decision 'made on a review under s 25'. Two interpretations are open. First, the phrase may mean decisions made in the course of a review application under s 25 (First Construction). This would pick up both Interim Orders under s 26 and the final determination under s 25. Second, it may mean only the final determination, as this is 'the' decision under s 25 (Second Construction).

69 Section 28 as a whole indicates an intention to limit rights of appeal. Some decisions made by the Commission constituted by a single member (Singular Commission) may be appealed to the Commission of three members (Full Commission),[18] but may not be

[18] Act, s 28(1) and (2b).

further appealed.[19] A decision of the Full Commission cannot be appealed if the decision was based on confidential police information and otherwise may only be appealed on a question of law.[20]

70 Two other types of decisions may not be appealed. First, as noted, a decision made on review under s 25. Second, a decision to suspend the operation of a licence for a period of two weeks or less.[21]

71 In relation to the latter, I would surmise that Parliament chose to prevent an appeal from that type of decision because it is of such short duration. It is likely that Parliament chose to prevent an appeal from the first type of decision because it is, itself, akin to a decision on appeal. It is a review of a decision of the Director.

72 While the content and apparent purpose of s 28 do not compel a particular construction of s 28(2c), the intention to limit appeals tends towards the First Construction. So too does the undoubted exclusion of an appeal from the final determination under s 25.

73 I conclude, therefore, that the proper construction is the First Construction, and there is no right of appeal against the Interim Orders.

74 There is no other reason not to exercise my discretion to grant relief.

Should the entire decision be quashed?

75 The next question is whether the entire decision should be quashed or whether it should be quashed only in relation to the 74 licences in respect of which there was no power.

76 In ***Re Narula, Ng & Hammersley; Ex parte Atanasoski***,[22] Roberts Smith J (with whom Murray and Barker JJ agreed), said:

> In ***Skirving***, Anderson J said:
>
> > 'The general rule is that where part only of a decision of an administrative tribunal is beyond power, the Court may quash that part without interfering with the remainder. Of course, the impugned parts must be capable of severance from the unexceptionable parts. As the learned authors of Wade and Forsythe "Administrative Law" (7th ed) say:

[19] Act, s 28(3).
[20] Act, s 28(2) and (2a).
[21] Act, s 28(3a).
[22] ***Re Narula, Ng & Hammersley; Ex parte Atanasoski*** [2003] WASCA 156 [49] - [51].

> "If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing ... [the] cases depend not upon rigid rules but upon the balance of advantage as perceived by the court." '
>
> Aronson & Dyer 'Judicial Review of Administrative Action', 2nd Ed, draws attention to the principle that severance must not be used to achieve substantive alteration.
>
> If the impugned decision as a whole is dependent or conditioned upon the impugned element, or is one of several elements which are interrelated in that the flaw which affects the one, necessarily also affects the other or others, then the impugned element cannot be severed. Where however they can stand apart and the flaw which affects one is confined to it, severance should be preferred. On judicial review, an administrative decision should not be struck down to any greater extent than the defect has affected it. (citations omitted)

77 ***Re Narula*** has been cited in numerous cases, including ***Maxcon v Vadas (No 2)***.[23] In ***Maxcon***, the South Australian Full Court was considering an adjudication determination in which, among other things, the adjudicator had determined that the retention provisions in the relevant contract had been rendered void by s 12 of the *Building and Construction Industry Security of Payment Act 2009* (SA). Although the court did not find this to have been a jurisdictional error, it said that, even if it had been, it would not follow that the entire adjudication needed to be quashed. Blue J, with whom Lovell J agreed, said:[24]

> When what appears to be a single decision upon analysis is divisible into two separate elements such that as a matter of substance (rather than form) there are really two decisions, the jurisdictional error affects one element but not the other element and the two elements are independent, the element affected by jurisdictional error can be severed from the other element. Even a single order can be the subject of division into two elements for this purpose.

78 The applicant submits that the Interim Orders cannot be severed so as to maintain interim orders only in relation to the 17 licences the subject of the Review Applications. The submission is based on the following two reasons:

> First, in making the Interim Orders so as to apply to all 91 licences, the Commission misunderstood the nature and scope of the power to make interim orders, and this infects the entirety of the orders.

[23] ***Maxcon Constructions Pty Ltd v Vadasz (No 2)*** [2017] SASCFC 2; (2017) 341 ALR 628 [224].
[24] ***Maxcon*** [222].

> Secondly, the Applicant and the First and Second Other Parties' submissions provided to the Commission in response to the Interim Order Application pointed out that region-wide restrictions were imposed by the Delegate to reduce the likelihood of the restrictions being circumvented by people simply travelling to other towns to purchase alcohol. As a consequence, it was submitted that granting interim orders in respect of only 17 affected licences would undermine the purpose of the Decision in imposing uniform restrictions across the region. … [I]t cannot be safely concluded that those submissions would not have impacted upon the Commission's decision as to whether or not to grant interim orders, had the Commission understood the proper scope of s 26 of the Act.

79 I do not accept the applicant's first reason.

80 Just as the Delegate made 91 decisions, the Commission's Interim Orders were, in effect, 91 decisions to stay the operation of each of the 91 decisions made by the Delegate. All but 17 were made without power.

81 I accept that the Commission misunderstood the nature of its power under s 26. It wrongly considered that it had jurisdiction to make interim orders in relation to all of the licences, regardless of whether the licence-holder had made a review application. However, I am not satisfied that that misunderstanding infected the Commission's decisions in relation to the 17 licences the subject of the Review Applications.

82 In relation to the applicant's second reason, the applicant offered, in his written submissions, ***Director of Public Prosecutions (Cth) v Ede***[25] as an example. In that case, Ms Ede was discharged by a judge without conviction, subject to a 'good behaviour' condition and a community service condition. The Court of Appeal held that the judge had no power to impose the community service condition and it was not possible to sever the impugned condition because it was inextricably linked to the conditional discharge on probation. The court said:[26]

> It cannot be safely concluded that his Honour would probably have made [the discharge order] if not for the inclusion of the impugned condition. In these circumstances … it is not possible to sever the impugned condition.

83 While this is a very different case to what occurred in ***Ede***, it still raises a useful inquiry. In this case it cannot be safely concluded that,

[25] ***Director of Public Prosecutions (Cth) v Ede*** [2014] NSWCA 282; (2014) 289 FLR 82.
[26] ***Ede*** [47].

had the Commission realised it only had the power to stay the conditions in relation to 17 of the 91 licences, it still would have made orders in relation to those 17. Because the Commission misconstrued its power, it would have had no reason to consider, and it can be inferred it did not consider, whether it was appropriate to grant stays in relation to only 17 licences given the effect that would have on the aims sought to be achieved by the imposition of uniform restrictions across the region. Had it done so, it may still have made Interim Orders, but it is not inevitable that it would have.

84 I accept the applicant's second reason and would order that the decision be quashed in its entirety.

85 The final question relates to a late application by the applicant for an order that the matter be remitted to the Commission for its consideration, in accordance with these reasons, by a differently constituted Commission.

86 The applicant informed the court that there was a division of authority in relation to the appropriate principles to be applied, but drew the court's attention to a recent decision of the Court of Appeal in ***McKay v Commissioner of Main Roads***, where the Court of Appeal appeared to indicate an inclination to follow the New South Wales line of authority.[27] A court may order a matter to be heard by a differently constituted body where, for example, there is a reasonable apprehension of bias.

87 The applicant submits that the order should be made as a result of a combination of the following facts.

88 First, no explanation was given by the Commission for granting the Interim Orders.

89 Second, the stay orders were sought:[28]

> [O]n the basis that the [Commission] is unlikely to determine this matter before 31 March 2019, and in order for Licensees to have some certainty as to the nature of the restrictions and date of effect pending the [Commission] hearing….

[27] ***McKay v Commissioner of Main Roads*** [2013] WASCA 135 [362].
[28] Affidavit of Gemma Mullins sworn 21 March 2019 (First Affidavit).

90 As the applicant indicated, the asserted basis upon which the interim order was sought does not provide a rational basis for staying the Delegate's Decisions.

91 Third, the applicant and the Director filed detailed reasons in written submissions as to why interim orders should not be made.[29]

92 Fourth, very soon after those submissions were filed (less than four hours after the second set of submissions were filed), the Interim Orders were made.

93 As noted in the first point, no reasons were provided for why those orders were made. The applicant submits it is not possible to infer any particular reason because the application for the Interim Orders did not provide a rational basis for the orders. The applicant submits that, looking at all of the circumstances, a layperson may perceive that the Commission had pre-judged the matter.

94 The Commission is not required to give reasons and, ordinarily, a failure to give reasons would be unsurprising. It can be expected that an applicant for interim orders, from time to time, will provide an inadequate basis upon which the orders should be made. Routinely, detailed submissions will be provided to the Commission that provide reasons as to why interim orders should not be made. However, it is the combination of all of those circumstances that the applicant submits gives rise to the reasonable likelihood that the Commission would be perceived to have pre-judged the issue if it was remitted to that person. I accept that submission. It is particularly the very swift delivery of the decision after the submissions had been filed, with no explanation provided, in all of the circumstances.

Conclusion

95 I would make an order setting aside the decision of the Commission in its entirety and remitting it to the Commission, differently constituted, to consider the application for Interim Orders, taking into account these reasons.

[29] First Affidavit pages 68 - 81 and 83 - 92.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JS
Associate to the Honourable Justice Archer

20 MAY 2019