
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : COMMISSIONER OF POLICE -v- SYLVESTER
PTY LTD [2020] WASC 450

CORAM : CURTHOYS J

HEARD : 11 SEPTEMBER 2020

DELIVERED : 9 DECEMBER 2020

FILE NO/S : GDA 6 of 2020

BETWEEN : COMMISSIONER OF POLICE
Appellant

AND

SYLVESTER PTY LTD
Respondent

Catchwords:

Licence condition – Variation of condition – Whether variation of condition is legally unreasonable – Interaction between *Security and Related Activities (Control) Act 1996 (WA)* and *Liquor Control Act 1988 (WA)* – Whether crowd controller regime in the *Security and Related Activities (Control) Act 1996 (WA)* applies to premises licensed under the *Liquor Control Act 1988 (WA)*

Legislation:

Interpretation Act 1984 (WA), s 3(1)(c), s 10

Liquor Control Act 1988 (WA), s 3, s 5, s 95, s 96, s 100, s 101, s 102F, s 115, s 121, s 165

Security and Related Activities (Control) Act 1996 (WA), s 4A, s 35, s 37, s 38,

s 39, s 52(1), s 67A

Security and Related Activities (Control) Regulations 1997 (WA), reg 4

Result:

Appeal allowed

Category: B

Representation:

Counsel:

Appellant : J Carroll
Respondent : No appearance

Solicitors:

Appellant : State Solicitor's Office
Respondent : Dwyer Durack

Cases referred to in decision:

A v Corruption and Crime Commissioner [2013] WASCA 288; (2013) 306 ALR 491.

Craig v South Australia (1995) 184 CLR 163.

Hall and Company Ltd v Shoreham-by-Sea Urban District Council (1964) 1 WLR 240.

Minister for Immigration and Border Protection v Singh (2014) 231 FCR 437.

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332. ,

Mixnam's Properties Ltd v Chertsey Urban District Council [1963] 3 WLR 38.

Mondello v McEwan [2004] WASCA 225.

Northbridge Enterprises Pty Ltd v Commissioner of Police [2014] WASC 135.

Osland v Secretary to the Department of Justice [No 2] (2010) 241 CLR 320.

S v Department of Communities [2019] WASC 260.

Tocoanh Pty Ltd v Commissioner of Police [2013] WASC 318.

CURTHOYS J:

Introduction

1 The appellant, the Commissioner of Police, appeals against the
decision of the Liquor Commission (the Commission) made upon a
complaint brought against the respondent, Sylvester Pty Ltd (the
Complaint) under s 95 of the *Liquor Control Act 1988* (WA) (LC Act).

2 The respondent is the licensee of The Gold Bar Kalgoorlie, 137
Hannan Street, Kalgoorlie (the Premises). He holds a current nightclub
licence for the Premises (the Licence).

3 The Complaint, as amended, alleged a cause for disciplinary
action against the respondent on four grounds relating to 16 incidents
that occurred at the Premises between 10 August 2017 and 31 October
2019.

4 A number of the incidents involved the respondent's employees
assaulting patrons either on the Premises or in the vicinity of the
Premises. Further, persons who were approved to be managers by the
Director of Liquor Licensing (the Director) – rather than licensed
crowd controllers – were being used as crowd controllers, in
contravention of condition 6 of the Licence.¹

Commission's decision

5 The Commission found that each of the 16 incidents were proven
and upheld the Complaint.²

6 The Commission imposed disciplinary action, including by
varying condition 6 of the Licence. Condition 6, as varied by the
Commission, is now in the following terms (with the varied portions in
italics):³

Crowd controllers, licensed under the Security and Related Activities
(Control) Act 1996 (or persons authorised to undertake crowd control
activities on licensed premises but who are exempted from the
requirement to obtain and hold a crowd controller's licence by virtue of
Regulation 4 of the Security and Related Activities (Control)
Regulations 1997) are to be employed inside the premises;

¹ *Commissioner of Police v Sylvester Pty Ltd* [2020] LC 12 [72] - [73].

² Commission's Reasons [104].

³ See Commission's Reasons [104]; see also Appellant's Submissions [24].

- (a) at a minimum ratio of two (2) crowd controllers for the first 100 patrons or part thereof;
- (b) at a minimum ratio of one (1) crowd controller for the first additional 100 patrons or part thereof; and
- (c) at a minimum ratio of one (1) crowd controller for the next additional 100 patrons or part thereof; from 8 p.m. (or the time of opening the premises if after 8 p.m.) until trading ceases;
- (d) two (2) crowd controllers or *authorised persons*, additional to those inside the premises, to be stationed at the entrance door of the premises from 11:00pm (or the time of opening the premises if after 11:00pm) and to monitor the licensed premises *until 60 minutes after trading ceases*.
- (e) *The crowd controllers or authorised persons referred to in condition 6:*
 - (i) *must be at least 50% comprised of crowd controllers licensed under the Securities and Related Activities (Control) Act 196; and*
 - (ii) *may be up to 50% comprised of employees of the licensee who:*
 - (A) *are capable of acting as an approved manager of the Premises; and*
 - (B) *who have completed and passed the course 'CPP20218 Certificate II in Security Operations' (or whichever course succeeds that course);*
 - (f) *Crowd controllers and authorised persons referred to in condition 6 are required to wear a high visibility uniform, described as a full-sized florescent tabard style shirt so as to be completely distinguishable to patrons.*

Appeals to the Supreme Court

7 An appeal to this court from a decision of the Commission can only be brought on a question of law.⁴

8 An appeal from an administrative body confined to a question of law is properly understood as being in the nature of judicial review.⁵

⁴ LC Act, s 28(2).

⁵ *Osland v Secretary to the Department of Justice [No 2]* (2010) 241 CLR 320 [18] (French CJ, Gummow and Bell JJ); In relation to the LC Act see, eg, *Northbridge Enterprises Pty Ltd v Commissioner of Police* [2014] WASC 135 [33] (Edelman J).

This appeal

9 The appellant filed a notice of appeal on 18 June 2020. The appellant appeals on two grounds:

1. The Commission erred in law by varying condition 6 in a manner that was legally unreasonable (Ground 1); and
2. The Commission erred in law by varying condition 6 in a manner which renders condition 6 internally inconsistent, thereby coming to an irrational conclusion (Ground 2).

10 In effect, the appellant's position is that condition 6, as varied, is likely to result in the respondent engaging persons to act as unlicensed crowd controllers in circumstances where those persons, by so acting, will commit a criminal offence, and ultimately result in the respondent counselling or procuring such persons to engage in criminal conduct.

11 The issue is whether the Commission can impose a condition permitting persons who are not licensed under the *Securities and Related Activities Control Act 1996* (WA) (SRA Act) to act as crowd controllers.

Legislative regime

SRA Act and regulations

12 The long title of the SRA Act is an Act to provide for the licensing of persons engaged in work relating to a number of matters including 'crowd control'.⁶ Part 5 of the SRA Act deals with 'licensing of crowd control activities'.

13 Section 35 of the SRA Act defines the term 'crowd controller' as follows:

- (1) A crowd controller is a person who in respect of any licensed premises, place of entertainment, or public or private event or function, as part of his or her regular duties, performs for remuneration any function of -
 - (a) controlling or monitoring the behaviour of persons;
 - (b) screening persons seeking entry; or
 - (c) removing persons for behavioural reasons,

⁶ SRA Act.

or any other prescribed function.

- (2) In subsection (1) licensed premises has the meaning given by section 3(1) of the *Liquor Control Act 1988*.

14 Section 37 provides that a person 'must not act as a crowd controller except under the authority of a crowd controller's licence'. By s 38(1), a person who is licensed as a crowd controller must not act as such unless he or she does so as an employee of a crowd control agent.

15 Section 39 prohibits a person employing as a crowd controller a person who does not hold a crowd controller's licence.

16 Sections 37, 38(1) and 39 are offence-creating provisions.

17 Section 6 of the SRA Act allows for regulations to be made to exempt certain persons from any provision of the SRA Act.

18 Regulation 4 of the *Security and Related Activities Regulations 1997 (WA)* (SRA Regulations) provides such an exemption. It relevantly states:

- (1) In this regulation -
licensed premises has the same meaning as in the *Liquor Control Act 1988*.

...

- (4) A natural person who is the licensee or manager of licensed premises is exempt from section 37 to the extent that he or she performs crowd control activities on those premises in compliance with the *Liquor Control Act 1988*.

19 Under s 52(1)(g) of the SRA Act, a licensing officer cannot issue a licence unless satisfied that, amongst other things, an applicant has satisfactorily completed and passed any prescribed training course in respect of the licence.

20 The prescribed training course of the issue of a crowd controller's licence is an 'approved training course in crowd control activities', which is CPP20218 'Certificate II in Security Operations'.⁷

⁷ An applicant for a licence issued under the SRA Act must, among other things, complete any training course prescribed in respect of the licence: SRA Act s 47(1)(f); s 52(1)(g). SRA Regulations reg 16(1)(c) prescribes 'an approved training course in crowd control activities' as the prescribed training course in respect

21 A person who is a 'prohibited person' is unable to be issued with a licence or a temporary licence, and if the Commissioner of Police is satisfied that a licensee is a 'prohibited person', the Commissioner must give the licensee written notice of the revocation of every licence held by the licensee.⁸

22 Under s 4A of the SRA Act, a person is a 'prohibited person' if there has been a finding of guilt in relation to a 'disqualifying offence' committed by the person, and during the 'disqualifying period' prescribed in respect of the offence.⁹

23 The list of disqualifying offences is lengthy. It is sufficient to note that common assault under s 313 of the *Criminal Code* is a disqualifying offence, for which the disqualifying period is 5 years commencing from the date of the finding of guilt, unless no penalty or a penalty of, or in total of, less than \$500 was imposed for the offence.¹⁰

LC Act

24 The LC Act is an Act which regulates the sale, supply and consumption of liquor, and also those involved in the liquor industry.¹¹

25 The primary objects of the Act are regulating the sale, supply and consumption of liquor, minimising harm or ill-health caused to people, due to the use of liquor, and catering for the requirements of consumers for liquor and related services, with regard to the proper development of certain industries.¹²

of a crowd control licence. 'Approved training course' is defined in the SRA Regulations to be, among other things, a training course accredited for the purposes of the *Vocational Education and Training Act 1996* (WA) (VET Act) and delivered by a training provider registered under the VET Act. Training courses can be accredited under the VET Act in a variety of ways, including where the course has been approved by the National VET Regulator created by the *National Vocational Education and Training Regulator Act 2011* (Cth) (National VET Act): see VET Act s 5(1) (definition 'approved training course') and *Vocational Education and Training (General) Regulations 2009* (WA) reg 4 (in effect, that a vocational training course accredited by the National VET Regulator will be approved for the purposes of the VET Act). CPP20218 'Certificate II in Security Operations' is approved by the National VET Regulator under Pt III of the National VET Act and listed on the Register maintained by the National VET Regulator pursuant to s 216 of that Act: see <https://training.gov.au/Training/Details/ CPP20218>. CPP20218 must be delivered by a training provider registered under the VET Act.

⁸ SRA Act, s 52, s 67A.

⁹ 'Disqualifying offence' is defined in s 3 of the SRA Act, and such offences are prescribed by reg 24 and Sch 2 to the SRA Regulations; 'Disqualifying periods' are prescribed by reg 25 and Sch 2 to the SRA Regulations; see also SRA Act, s 4A.

¹⁰ See SRA Regulations, reg 25 and Sch 2.

¹¹ LC Act.

¹² LC Act, s 5(1).

26 The conduct of business under a licence is always the responsibility of a licensee and is to be personally supervised and managed by a natural person.¹³ In most circumstances, the premises is to be personally supervised and managed by the licensee or by an approved unrestricted manager.¹⁴

27 The LC Act imposes strict responsibilities and liability on licensees and managers of licensed premises.¹⁵

28 To avoid criminal liability the employees of licensees are obliged, to some extent, to monitor the behaviour of patrons on licensed premises.¹⁶

29 In certain circumstances, 'authorised persons' are entitled to refuse persons entry to licensed premises and require persons to leave licensed premises.¹⁷

30 If a person does not comply with a requirement given by an authorised person to leave licensed premises, the authorised person has the power to remove the person from the premises, using such force as may be reasonably necessary.¹⁸

31 An 'authorised person' is defined by s 3 of the LC Act to mean a licensee or occupier of the premises, a manager of the premises, an employee or agent of the licensee or occupier or manager, or a member of the police force.

32 Under s 102B of the LC Act, the Director is able to approve a person to be a restricted or unrestricted manager. The Director has powers to take disciplinary action against an approved manager, which can include suspending or revoking a manager's approval.¹⁹

33 The Commission has a disciplinary jurisdiction under s 95 and s 96 of the LC Act. Where a ground of complaint is established under s 95, the Commission has the power to impose one or more of the disciplinary actions set out in s 96(1) of the LC Act, which includes the power to impose and vary a condition on a licence.²⁰

¹³ LC Act, s 100(1).

¹⁴ LC Act, s 100(2).

¹⁵ See, eg, LC Act, s 100, s 101, s 121(1), s 165.

¹⁶ See, eg, LC Act, s 115(1), s 115(2).

¹⁷ See LC Act, s 115(4), s 115(4a).

¹⁸ LC Act, s 115(4)(c).

¹⁹ LC Act, s 102F.

²⁰ LC Act, s 96(1)(b) and (c).

Interaction between the SRA Act and the LC Act

Does the SRA Act apply to licensed premises?

34 The provisions regulating to crowd controllers in the SRA Act apply to licensed premises under the LC Act.²¹

Does reg 4(4) of the SRA Regulations justify condition 6?

35 Regulation 4(4) of the SRA Regulations provides an exemption from s 37 of the SRA Act where a natural person who is the licensee or manager of licensed premises performs crowd control activities on those premises.

36 The Commission found, correctly, that although multiple persons employed by a licensee may, at a particular point in time, concurrently hold qualification to act as an approved manager of a particular venue, and may be present and working at a venue, there can only be one person acting as a manager at any point in time and therefore reg 4(4) only allows one manager to be exempted at any one time.²²

37 Section 3 of the LC Act defines a manager to be a person appointed by the licensee 'to supervise and manage the premises'. The ordinary meaning of 'manage' is to 'take charge or care of', 'to handle, direct, govern, or control'.²³ The ordinary meaning of 'supervise' is to 'oversee; have oversight and direction of'.²⁴ Only one person can manage or take care of premises at any one time.

38 Section 100(1) and s 101(2) of the LC Act require the conduct of a business under a license to be '*personally* supervised and managed by '*a* natural person'²⁵ (emphasis added). Further, reference is made in s 100(2) to '*a* person who is *the* ... approved manager'²⁶ (emphasis added).

39 Section 10(c) of the *Interpretation Act 1984* (WA) (Interpretation Act) provides that words in the singular are taken to be plural.

²¹ SRA Act, s 35.

²² Reasons [82] (Appeal Bundle, 262).

²³ *Macquarie Dictionary* (online) ('manage').

²⁴ *Macquarie Dictionary* (online) ('supervise').

²⁵ LC Act, s 100(1).

²⁶ See also LC Act, s 102F(a) ('*the* approved manager has failed to supervise and manage ...') (emphasis added). References to 'any manager who is supervising and managing' in LC Act s 121(1)(b) and 'any manager who was on duty' in reg 18EC of the *Liquor Control Regulations 1989* (WA) can be explained as a consequence of the fact that many premises do not have a manager because the licensee is personally present and in charge, rather than being as a consequence of the fact that multiple persons can concurrently act as manager.

40 However, s 3(1)(b) of the Interpretation Act provides that its provisions do not apply when the context of the subsidiary legislation is inconsistent with such an application. To interpret the references to a singular licensee and a singular manager within the LC Act as plural would be contrary to the content of the LC Act.

41 Under s 100(7) and s 101 of the LC Act, a manager is made liable for offences committed at licensed premises as if the person were also a licensee of the premises. It would be incongruous for the manager to be criminally responsible without having the remit to take effective action to prevent offences and failures under the Act. If multiple persons could act as manager concurrently control and supervisory authority would be fractured. If it were possible to have two managers at the same time, a situation might arise where each manager could avoid conviction by arguing that at a particular time the other manager was responsible for the breach. The whole aim of the regime of licensee and manager under the LC Act is to ensure that responsibility can be attributed to one person.

42 As Jenkins J stated in *Mondello v McEwan*,²⁷ 'it is clear that under the LC Act there can only be one manager at any one time'.

43 The ordinary meaning of the text of reg 4(a) provision is that it applies only to a singular licensee or manager of the premises.

44 There is no reason to consider that the reference to 'manager' in reg 4(4) would be a reference to any other person (or persons) other than the manager of the premises who is required to personally supervise and manage the business under s 100(2) of the LC Act.

Ground 1: legal unreasonableness

Condition 6 prior to the Commission's variation

45 Condition 6 of the Licence, as it existed prior to the s 95 Complaint, required the respondent to engage 'crowd controllers' licensed under the SRA Act, or exempted from holding such a licence under reg 4 of the SRA Regulations in prescribed ratios.

46 At the time of the 16 incidents which were the subject of the Complaint, some of the respondent's 'crowd control' staff were licensed under the SRA Act. However, in the majority of incidents the subject of the Complaint, a number of 'crowd controllers' involved in a

²⁷ *Mondello v McEwan* [2004] WASCA 225 [57].

particular incident were not licensed under the SRA Act, but were employees of the respondent and were approved by the Director to be a manager of a licensed venue under s 102B of the LC Act.

47 The appellant's submission before the Commission was that on the proper construction of reg 4(4) of the SRA Regulations, only one 'approved manager' could benefit from the reg 4(4) exemption at a particular point in time, which was inconsistent with the manner in which the respondent was operating.²⁸

48 The respondent argued that any person who is an 'authorised person' under the LC Act when exercising a power granted to them under the LC Act is a 'manager' for the purposes of the exemption within reg 4(4) of the SRA Regulations.²⁹

49 The Commission accepted the appellant's argument that only one approved manager may benefit from the reg 4(4) exemption at a particular point in time.³⁰ The Commission therefore implicitly found that the respondent had contravened condition 6 of the Licence by failing to employ the required number of crowd controllers licensed under the SRA Act.³¹

50 Despite this finding, the Commission varied condition 6 of the Licence in a manner which would expressly permit the respondent to engage persons who are neither licensed as crowd controllers under the SRA Act, nor exempted from holding such a licence under reg 4(4) of the SRA Regulations, to act as crowd controllers at the premises.³²

Effect of condition 6 as varied

51 Condition 6(e) requires at least 50% of the crowd controllers to be licensed under the SRA Act, and allows for up to 50% of the 'crowd controllers' to be 'capable of acting as an approved manager of the Premises' and who have completed and passed the prescribed training course.

52 Condition 6(e) would permit persons who are 'capable of acting as an approved manager' but not licensed as crowd controllers under the SRA Act, but can nevertheless be engaged as 'crowd controllers'.

²⁸ See Complainant's Submissions [45] - [53] (Appeal Bundle, 53 - 56).

²⁹ See Respondent's Submissions [63] - [71].

³⁰ Commission's Reasons [82].

³¹ The Commission did not make an explicit finding to this effect, but this much is clear by a reading of the Commission's Reasons, especially [2] - [3] and [70] - [73].

³² Commission's Reasons [83] - [92], [104].

53 The effect of condition 6(e), when read with condition 6(a) and condition (d) is that the respondent is purportedly permitted to engage at least one person as a 'crowd controller' within the meaning of the SRA Act who is neither licensed as a 'crowd controller' under s 37 of the SRA Act, nor is exempt from being so licensed under reg 4(4) of the SRA Regulations.

54 Doing so would likely result in the person so engaged contravening s 37 of the SRA Act and committing a criminal offence. The respondent would likely be counselling or procuring the individual it so engages to contravene s 37 of the SRA Act.

55 Pursuant to s 7(d) of the *Criminal Code*, the respondent would thus likely be deemed to have taken part in, and be guilty of, any offences so committed.

56 Section 39 of the SRA Act prohibits a person from employing a person (or persons) to act as a crowd controller who does not hold a crowd controller's licence. Accordingly, if the respondent acted upon condition 6(e) and employed a person to act as a crowd controller who is neither licensed nor exempted from holding a licence, the respondent would likely commit an offence under s 39 of the SRA Act.

Commission's error

Legal unreasonableness

57 In *S v Department of Communities*,³³ Tottle J provided a useful summary of the principles of legal unreasonableness:³⁴

Legal reasonableness or an absence of legal unreasonableness is an essential element in the lawfulness of decision-making. This is because Parliament is taken to have intended that a statutory power will be exercised reasonably.

... judicial restraint is required. The concept of legal unreasonableness does not provide a vehicle for the court to remake the decision according to its view as to reasonableness and by implication finding a contrary view unreasonable.

The concept of legal unreasonableness is not amenable to minute and rigidly-defined categorisation or precise textual formulery. A more

³³ *S v Department of Communities* [2019] WASC 260 [51].

³⁴ Citations omitted. These principles were derived from cases such as *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 and *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 [43] - [52] (Allsop CJ, Robertson & Mortimer JJ).

sophisticated approach is required - one that focusses on the question of whether an administrative decision is one which is within the authority of the decision-maker. This requires close attention to be given to the relevant features of the particular statutory framework within which the authority arises

There are two species of legal unreasonableness. First, there are those cases in which the reviewing court identifies an underlying jurisdictional error in the decision-making process, and second, there are those cases in which legal unreasonableness may be 'outcome focussed'. An outcome focussed conclusion of legal unreasonableness may be an inference drawn because the court cannot identify how the decision was arrived at, in which case the exercise of power may be seen by the supervising court as lacking 'an evident and intelligible justification'. It has the character of being 'arbitrary, capricious or without common sense'. Outcome focussed unreasonableness occurs in an 'area of decisional freedom'.

...

The intelligible justification for the decision must lie within the reasons the decision-maker gave for the exercise of the discretion or the making of the judgment. If the reasons demonstrate a justification it would be a rare case that the exercise of the power would be seen to be legally unreasonable.

58 Where unreasonableness is established on the basis of either jurisdictional error or in the 'outcome focused' sense, the decision-maker will have acted outside of jurisdiction. In other words, the decision-maker will have made a jurisdictional error.³⁵

59 Legal unreasonableness has previously been considered in relation to an administrative power to impose conditions, including in relation to the LC Act.³⁶ For example, in *Tocoan Pty Ltd v Commissioner of Police*,³⁷ Le Miere J observed that the imposition of conditions under s 96 of the LC Act 'may amount to an error of law if they are unreasonable in the sense of Wednesbury unreasonableness'.

³⁵ A lack of legal reasonableness is a jurisdictional error: see, eg, *S v Department of Communities* [2019] WASC 260 [5] (Tottle J); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [23 et seq] (French CJ), [63 et seq] (Hayne, Kiefel and Bell JJ), [88] (Gageler J). Where a decision-maker makes a decision outside the limits of the functions and powers conferred upon that decision-maker, or does something which the decision-maker lacks power to do, there will be a jurisdictional error: *Craig v South Australia* (1995) 184 CLR 163, 179 (per curiam); *A v Corruption and Crime Commissioner* [2013] WASCA 288; (2013) 306 ALR 491 [57] (Martin CJ and Murphy JA).

³⁶ See eg *Mixnam's Properties Ltd v Chertsey Urban District Council* [1963] 3 WLR 38, 43 (Willmer LJ), 49 - 50 (Danckwerts LJ), 53 (Diplock LJ); *Hall and Company Ltd v Shoreham-by-Sea Urban District Council* (1964) 1 WLR 240, 247 (Willmer LJ), 255 (Harman LJ), 261 (Pearson LJ).

³⁷ *Tocoanh Pty Ltd v Commissioner of Police* [2013] WASC 318.

Variation to condition 6 was legally unreasonable

60 The variation to condition 6 was legally unreasonable in the
'outcome focused' sense.³⁸

61 Condition 6, which effectively permits a breach of the SRA Act
and regulations, is plainly unreasonable. There is nothing in the LC
Act which would authorise the Commission to impose a condition
which permits such a condition.

62 The Commission's reasons do not provide any rational justification
for the outcome reached.

63 This is a case where, in the circumstances, 'the result itself
bespeaks error'.³⁹

64 The variation to condition 6 does not have any evident or
intelligible justification, and is therefore legally unreasonable. As a
result, Ground 1 is made out.

Ground 2: irrationality

65 Having found in favour of Ground 1, it is unnecessary to deal with
Ground 2 which is framed in legally similar terms.

Appropriate orders

66 This appeal raises a question of law.

67 This Court has broad powers on appeal. Section 28(5) of the LC
Act provides:

On an appeal under this section to the Supreme Court, the Supreme
Court may:

- (a) affirm, vary or quash the decision appealed against; or
- (b) make any decision that the Commission could have made
instead of the decision appealed against; or
- (c) send the decision back to the Commission for reconsideration in
accordance with any directions or recommendations that the
court considers appropriate, and, in any case, may make any
ancillary or incidental order the Supreme Court considers
appropriate.

³⁸ Appellant's Submissions [107].

³⁹ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (Li) [85] (Hayne, Kiefel and Bell JJ).

68 Where the appropriate outcome to the proceedings rests upon a discretionary or evaluative judgment, it will ordinarily be appropriate for the court to remit the matter to the Commission for reconsideration, especially given that the Commission is a specialist tribunal.⁴⁰

69 I accept the appellant's submissions that there is no further discretion or evaluative judgment to be exercised by the Commission.

70 The reason why there is no need for any further evaluative judgment is:

1. The chapeau to condition 6 and conditions 6(a), (b), (c) and (d) were all imposed by the Commission following a s 95 Complaint in 2012. The Commission was therefore satisfied at that time that in order to provide sufficient protection to the public, and in accordance with the primary objects of the LC Act, it was reasonable and necessary to impose a condition which required the respondent to engage crowd controllers in prescribed ratios, who are licensed as such under the SRA Act, or who are exempted from being so licensed.
2. There was nothing in the circumstances of the present Complaint which would provide a basis for the Commission to make such a requirement less onerous.
3. It would be an irrational outcome to the Complaint if, having established the grounds set out in the Complaint, the Commission proceeded to make less onerous the crowd controller condition such that the respondent did not need to engage as many crowd controllers.

71 I thank Mr Carroll for his detailed submissions.

Orders

72 The court orders that:

1. The appeal be allowed.
2. Condition 6 of the licence is varied by:
 - (a) deleting 'or authorised persons' referred to in condition 6(d);

⁴⁰ See, eg, *Tocoan Pty Ltd v Commissioner of Police* [63] - [64] (Le Miere J).

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- (b) deleting condition 6(e); and
 - (c) renaming conditions 6(f) as 6(e).
3. There be no order as to costs.

I certify that the preceding paragraphs comprise the reasons for decision of the Supreme Court of Western Australia.

SB

Research Associate to the Honourable Justice Curthoys

8 DECEMBER 2020