

DECISION OF THE DIRECTOR OF LIQUOR LICENSING

APPLICANT: REDPORT ENTERPRISES PTY LTD

PREMISES: CAPE CELLARS

PREMISES ADDRESS: SHOP 8 170-172 BUSSELL HIGHWAY BUSSELTON WA
6280

LICENCE NUMBER: 6030048116

APPLICATION NO.: A000064676

NATURE OF MATTER: APPLICATION FOR GRANT OF AN EXTENDED
TRADING PERMIT

DATE OF DETERMINATION: 9 SEPTEMBER 2015

Introduction

1. By way of background, on 9 September 2011, Redport Enterprises Pty Ltd (“the Licensee”) sought:
 - (a) the conditional removal of its liquor store from premises situated at Shop 1, Lot 58 Bussell Highway, Busselton to premises at Shop 8, 170-172 Bussell Highway, Busselton; and
 - (b) an extended trading permit (“ETP”) pursuant to s 60(4)(g) of the *Liquor Control Act 1988* (“the Act”) to authorise trading at the new premises on Sundays.
2. The application for an ETP at the premises was deferred pending determination of the Licensee’s removal application.
3. On 8 May 2012 the conditional removal was granted, which was subsequently issued on 9 April 2015. Accordingly, this determination relates to the Licensee’s deferred application for the grant of an ETP.
4. While the ETP application initially sought approval to trade on Sundays between the hours of 10 a.m. and 10 p.m., it was subsequently amended to between the hours of 11 a.m. to 7 p.m.
5. The application was advertised for comment in accordance with instructions issued by the Director of Liquor Licensing (“the Director”), which resulted in the lodgement of:
 - (c) a notice of objection, pursuant to the provisions of s 73(2) of the Act, by Lyndal Hayes, a resident of the locality; and

- (d) a notice of intervention, pursuant to the provisions of s 69 of the Act, by the Executive Director Public Health (“EDPH”).
6. To give effect to the provisions of s 16 of the Act, a document exchange process was initiated between the parties in order to ensure that each party was given a reasonable opportunity to present its case.
7. Pursuant to ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, which have been briefly summarised below.

Submissions of the Licensee

8. The Licensee submitted that the following reasons are compelling factors to warrant Sunday trading at *Cape Cellars*:
- (a) the tourist nature of the locality and surrounding area;
 - (b) the level of tourist visitations in the area; and
 - (c) the lack of liquor store services in town on a Sunday.
9. The Licensee further submitted that there is clear evidence from the public and others in support of the application for Sunday trading, with 98% of a total of 65 respondents to a public survey expressing a desire for Sunday trading at *Cape Cellars*.
10. The Licensee also submitted confidential information sourced from businesses at the West Busselton Shopping Centre to further illustrate that Sunday is a busy day of trade at the Centre, particularly in respect of the supermarket. Accordingly, the Licensee submitted that there is a consumer requirement for one stop shopping on Sundays, which together with the supermarket, the liquor store would be able to provide.
11. Even though there are other packaged liquor services within the locality operating on a Sunday, the Licensee submitted that:
- (a) none are liquor stores;
 - (b) all but one are directly associated with in-house drinking facilities and the only one that is not, namely *Liquor Barons at Vasse Café*, is small and hidden away;
 - (c) none offer one stop shopping at the same shopping centre;
 - (d) none are situated at, or even near, the busy Sunday shopping location of West Busselton Shopping Centre; and
 - (e) no other liquor outlets provide anywhere near the number of different lines, particularly locally produced wines or beers, as *Cape Cellars* does.

12. In conclusion, the Licensee submitted that it was clear from the evidence, information and submissions, that it is in the public interest for the extended trading permit to be issued and there are no negative public interest considerations or other negative factors which should impede the grant.

Submissions of the Objector

13. The objection of Ms Hayes was concerned that the grant of the application would not be in the public interest, based on her opinion that the premises is located in an area of Busselton renown for trouble and that the neighbourhood has already experienced social and drug related problems (refer s 74(1)(a) of the Act) and that if the application were granted:

- (a) undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or persons travelling to or from an existing place of public worship, hospital or school, would be likely to occur (refer s 74(1)(g)(i)); and
- (b) the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be situated would in some other manner be lessened (refer s 74(1)(g)(ii)).

14. Ms Hayes also questioned the Licensee's assertions regarding Sunday trade at the West Busselton Shopping Centre, submitting that some shops are closed on Sundays and that the newsagent closes at 4 p.m.

Representations of the Intervener

15. The representations of the EDPH relate to concerns that the granting of the application may potentially cause harm or ill-health to people, or any group of people, due to the use of liquor, and the minimisation of that harm.
16. The specific grounds for the intervention include:
 - (a) that the public has access to packaged liquor on a Sunday in Busselton from three hotel licences and one tavern licence (which operates as a *Liquor Barons* store), all of which are in close proximity to the *Cape Cellars* store;
 - (b) an increased capacity for more (competitively priced) alcohol into the community on Sundays and resulting harm;
 - (c) there is existing harm occurring in the locality of *Cape Cellars*; and
 - (d) research that shows extended trading and increased availability of alcohol is associated with increased consumption and harm.

17. The representations of the EDPH noted that while no liquor stores in Busselton currently trade on Sunday, packaged liquor is available from the *Esplanade Hotel, Albies Bar & Bistro, The Royal Palms* (now known as *The Ship Inn, Busselton*) and *Vasse Café Bar*, which are all located within three kilometres of *Cape Cellars* and are already servicing the packaged liquor requirements of the community and visitors/tourists to Busselton.
18. Concern was also expressed by the EDPH that the proposed extended trading permit will present harm and ill-health risks on Sundays, arising from the size of the premises and the volume of alcohol that will be offered for sale on Sundays. In this regard, the EDPH submitted that:

“There is an established relationship in the literature between price, consumption and harm. Low priced liquor sold from Cape Cellars is an additional characteristic (along with increased store size and stock range) that reinforces the submission that a large amount of alcohol that would not have otherwise been introduced to the community on Sundays, will occur, if this application is granted.”
19. The EDPH also noted that Sundays are traditionally days where less alcohol-related harm is experienced due to limits on alcohol availability on this day and that increasing the availability of liquor to “thousands of shoppers” every Sunday, as claimed by the Licensee in its PIA, has the potential to impact on harm in the locality.
20. Attachment 1 to the notice of intervention described the social profile of the locality, based on Census 2006 data sourced from the ABS and notes that:
 - (a) the percentage of public housing in West Busselton, which is indicative of a high proportion of lower income earners and low socio-economic circumstances for some residents, with many international studies showing that people in lower socio-economic groups tend to have a more hazardous and harmful pattern of alcohol use;
 - (b) increasing the availability of alcohol from a liquor store on a Sunday increases the risk of alcohol-related harm and ill-health to at-risk groups, with police data used to establish:
 - (i) that there have been a number of alcohol-related offences on a Sunday in Busselton between the dates of 1 January 2009 to 21 October 2011; and
 - (ii) the number of drink-driving offences for the same period and the risk posed to increased drink driving offences by the grant of the application.
21. Information was also included:
 - (a) on alcohol-related hospitalisations in Busselton, including Emergency Department presentations;
 - (b) on per capita consumption levels; and

(c) that communities which experience high levels of tourists are a recognised at risk group.

22. In conclusion the EDPH submitted that packaged liquor is already available in the locality of *Cape Cellars* on a Sunday and that increasing the availability of alcohol in the locality on a Sunday is likely to result in increased harm to the community.

Determination

23. Pursuant to s 38(1)(b) and r 9F(b), an applicant for the grant of an extended trading permit under s 60(4)(g) of the Act for a period in excess of three weeks must satisfy the licensing authority that the grant of the application is in the public interest.

24. In determining whether the grant of an application is “in the public interest” I am required to exercise a discretionary value judgment confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O’Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175).

25. The scope and purpose of the Act can be ascertained from its objects as set out in s 5. The three primary objects of the Act are:

- (a) to regulate the sale, supply and consumption of liquor;
- (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
- (c) 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.

26. Notwithstanding the lodgement of the objection and intervention, an applicant must discharge its onus under s 38(2) of the Act. In this regard, the Licensee submitted a Public Interest Assessment (PIA), which included a Consumer Survey, to show that the grant of the application will cater for the requirements of consumers for liquor and related services in the locality on Sundays.

27. As already noted, the primary objection of the Act articulated at s 5(1)(a) is to regulate the sale, supply and consumption of liquor.

28. In relation to the Act’s regulatory object, the long title of the Act provides that it is “An Act to regulate the sale, supply and consumption of liquor...” and one of the key regulatory controls contained in the Act’s licence classification scheme relates to the constraint of trading hours. The Act’s prescribed trading hours clearly reflect Government policy that the sale and supply of liquor; and therefore it’s availability to the public, should not be unrestricted.

29. This Government policy is reflected in the prescribed trading hours under a liquor store licence, pursuant to ss 97 and 98D of the Act, with ss 98D(1)(b) and (2) providing that there is no permitted trading on Sundays for liquor stores located outside of the metropolitan area.

30. In relation to ETPs, McLure J examined the Act's relevant provisions in *Re Romato; Ex Parte Mitchell James Holdings Pty Ltd* [2001] WASCA 28 and noted:

"The provisions of the Act dealing with ETPs do not make any distinction between Sunday and any other day of the week (except Good Friday). However, it is wrong to focus on the ETP provisions of the Act. Regard must be had to the Act as a whole... Subject to the Act, the Director has an absolute discretion to refuse an application for an ETP on any ground, or for any reason, that he considers in the public interest: (s 33)... the ETP provisions of the Act do not require the Director to treat Sunday in the same way as other days of the week.

There is nothing in the purposes or objects of the Act which prevents the Director in the exercise of his discretionary powers differentiating Sunday from other days of the week insofar as trading hours are concerned. Indeed, to do so is... consistent with the Act."

31. Furthermore, in *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 351, Templeman J said:

"The only question is whether, having regard to all of the circumstances and the legislative intention, an extended trading permit is justified. In answering this question the Director has a wide discretion: it is a matter for him to decide what weight he will give to the competing interests and other relevant considerations."

32. Similarly, when considering an application for the grant of an extended trading permit at *Pemberton Cellars* (see matter LC 04/2009), the Liquor Commission also noted that:

"A matter often overlooked in arguments for these sorts of permits is that the Commission must look at the whole of the Act to gain an understanding of the legislature. In terms of s 5(1)(c) of the Act the first primary object of the legislation is:

'to regulate the sale, supply and consumption of liquor'

There is an expectation in the Act that the Commission will regulate the supply of liquor subject to various provisions of the Act weighed up against the particular merits of each application. The disposition of the Act, read as a whole, is to regulate."

33. As such, after taking into account the comments of McLure, J in *Re Romato* (supra), the Liquor Commission in the *Pemberton Cellars* matter concluded that the Director "...was correct in treating Sunday differently from the rest of the week..." and concluded that it was not in the public interest to issue the permit.

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34. In my view, the circumstances of the *Pemberton Cellars* application are largely synonymous with the current application, in that both applicants made submissions:
- (a) that there is an appropriate level of support for the grant of the ETP;
 - (b) about the tourism nature of the area;
 - (c) that there is an obvious existing demand for retail services at the IGA supermarket which trades seven days per week; and
 - (d) about the lack of packaged liquor services in the locality on Sundays.
35. In the *Pemberton Cellars* determination, the Commission also noted the Director's reliance on the judgments of McLure J in *Re Romato* (supra) and Templeman J in *Hermal* (supra), as well the Director's policy on *Extended Trading Permits – Sunday Trading: Non-metro Liquor Stores*, which acknowledges that many country communities already have access to packaged liquor on Sundays from a number of different outlets and that travelling distance to the nearest outlet will be one of the circumstances of particular relevance.
36. In this regard, McLure J observed in *Re Romato* (supra), that where a decision maker adopts a policy, it is entitled to apply that policy where applicants are given an opportunity to show that there are exceptional reasons why it should not be applied in their case. In the current application, the Licensee simply submitted that "There is nothing contained in the Policy of the Director...which should impede the grant of the ETP application." As such, I consider that the Applicant has failed to properly take into account the Director's policy and to establish why it should not apply.
37. In forming this view, I have particularly noted that the evidence in this matter establishes that there are four other licensed premises within three kilometres of *Cape Cellars* that are already capable of selling and supplying packaged liquor on a Sunday, consisting of three hotels and one tavern and in terms of travelling distance to the nearest outlet, as mentioned in the Director's policy, I consider that three kilometres is negligible in the circumstances of this application.
38. I have also noted that one of those hotels, *The Ship Inn, Busselton*, has recently had an application for alteration/redefinition approved, which will result in the establishment of a large destination packaged liquor outlet (with a retail sales area of 871 sqm and a walk-in cool room of 62 sqm), which will operate under the *Dan Murphy's* banner. Typically, *Dan Murphy's* outlets provide consumers with thousands of stock items and because it is licensed under a hotel licence, it will be authorised to trade on Sundays. In relation to this development, the Licensee suggested that some respondents to the consumer survey sought the ability to be able to purchase locally produced wines or beers that are not stocked by other licensed premises in the locality, including at *Dan Murphy's* outlets, which the Applicant submitted will be "a usual and standard Woolworths' model Dan Murphy's outlet."

39. In relation to the Act's primary object as articulated at s 5(1)(b), I note that:
- (a) the relevant object is to 'minimise' harm or ill-health and not to prevent harm or ill-health absolutely; and
 - (b) the framework of the Act is not predicated upon the concept of prohibition, but rather establishes a regulatory mechanism for the granting of liquor licences and permits and the operation of licensed premises in the public interest (refer *Woolworths Limited -v- Director of Liquor Licensing* [2012] WASC 384),

I also accept that the evidence adduced in this matter establishes that the relationship between alcohol availability and the level of consumption and associated harm or problems is complex and variable.

40. Therefore, in my consideration of the application, I agree with the representations of the EDPH regarding the Licensee's evidence establishing the possibility of extended trading hours on Sunday resulting in increased availability/access to liquor and large amounts of alcohol being sold into the community at a time when liquor stores in country areas are not permitted to trade. In this regard, I note that the Act's harm considerations extend to harm caused to people in the community and to persons other than the consumer of liquor.
41. I have also considered whether the Licensee's undertaking to reduce the hours of trade sought under the permit to between 11 a.m. and 7 p.m. is somehow indicative of its recognition of the level of alcohol-related harm occurring in the locality.
42. I now turn to the Act's remaining primary object, which is to cater for the requirements of consumers for liquor and related services and note the Licensee's submission that *Cape Cellars* is located in the West Busselton Shopping Centre, which has several businesses trading on Sundays, including an IGA supermarket and that the Licensee wishes to trade, because Sunday is a busy day of trade at that shopping centre and because there is a consumer requirement for one-stop shopping on Sundays.
43. While I am aware of the importance of the one stop shopping concept as a way to establish the requirements of consumers to have convenient access to a liquor store while doing other domestic or household shopping, there is little in the evidence to suggest to me that the West Busselton Shopping Centre is capable of providing patrons with one stop shopping, particularly in the terms considered by Buss JA in *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227, particularly on a Sunday when the evidence of the objector and EDPH are that some shops are actually closed on Sundays.
44. Therefore, I do not consider that the application is predicated on one-stop shopping, but more on convenience.
45. However, in relation to the results of the Licensee's customer surveys, I have noted that while such evidence has a degree of relevance, the Liquor Commission has

previously commented that it treats such evidence with caution (for example, see the determination in *Woolworths Ltd v Director of Liquor Licensing* [LC 12/2013].)

46. When determining an application for the grant of an extended trading permit, I note there is wide discretion afforded to me in deciding what weight to give to the competing interests and other relevant considerations raised in the application. Ultimately, the pertinent question is whether, having regard to all the circumstances and the legislative intent, an extended trading permit is justified (see Templeman J in *Hermal Pty Ltd vs Director of Liquor Licensing* [2001] WASCA 356, CIV 2758 of 2000).
47. Therefore, notwithstanding the provisions of s 60(4)(g), it is a matter for each applicant to sufficiently establish the merits of its application, particularly given the expectation in the Act that the approach of the licensing authority will be regulatory.
48. As such, it is important for applicants to appreciate that applications under the Act cannot proceed on the basis of any legal or factual presumption in favour of approval or on the expectation that the commercial interests of an applicant will necessarily coincide with the public interest (see *Woolworths Limited -v- Director of Liquor Licensing* [2012] WASC 384).
49. Furthermore, in relation to the representations made in notices of intervention, it is important to note that as an intervener, the EDPH carries no burden of proof (see Greaves J, *Gull Petroleum (WA) Pty Ltd* (1998) LLC No. 13/98), but rather provides comment in order to assist the licensing authority in making an informed decision.
50. After considering the evidence, I find that I am not prepared to exercise discretion in this instance and treat Sunday in the same way as other days of the week, particularly after taking into account:
 - (a) that the Act's regulatory object, which requires the licensing authority to regulate the supply of liquor;
 - (b) Government policies, as articulated in the Act, in relation to restricting trading hours for liquor stores located outside of the metropolitan area on Sundays;
 - (c) that the Act's harm considerations are not restricted to consumers of alcohol at licensed premises, but also extends to harm caused to people in the community and to persons other than the consumer of liquor;
 - (d) the Director's policy on *Extended Trading Permits – Sunday Trading: Non-metro Liquor Stores* and that there are four licensed premises located in close proximity that are already capable of selling and supplying packaged liquor on a Sunday, including one that will have a destination packaged liquor outlet consistent with a *Dan Murphy's* liquor store; and
 - (e) that consumers of liquor in the locality can obtain packaged liquor from existing outlets that trade on Sundays, without any significant degree of inconvenience.

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51. Overall, I find that the Licensee has failed to discharge its onus under s 38(2) of the Act to provide evidence which is sufficient to demonstrate that granting the application is in the public interest and therefore, it is my view that the Licensee has failed to justify why the extended trading permit should be granted. The application is therefore refused.
 52. Finally, I have found that the objection by Ms Hayes has not been substantiated by any objective or otherwise probative evidence and therefore consider that she has not established the validity of her objection, as required under s 73(10) of the Act.
 53. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 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.
 54. This matter has been determined by me under delegation pursuant to s 15 of the Act.



Brett Snell
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

9 SEPTEMBER 2015