**LC02/2019**

**Liquor Commission of Western Australia**

**(*Liquor Control Act 1988*)**

**Applicant:** Event Logistics Australia Pty Ltd

 *(represented by Mr Peter Fraser, Dwyer Durack Lawyers)*

**Respondent:** Director of Liquor Licencing
 *(represented by Mr Francis Cardell-Oliver, State Solicitor’s Office)*

**Commission:** Mr Eddie Watling (Deputy Chairperson)

 Ms Wendy Hughes (Member)

Ms Kirsty Stynes (Member)

**Matter**: Application pursuant to section 25 of the *Liquor Control Act 1988* for review of a decision by the delegate of the Director of Liquor Licensing to refuse a grant of a Special Facility Licence (Catering).

**Date of lodgement of**

**Review Application:** 27 August 2018

**Date of Hearing:** 8 November 2018

**Date of Determination:** 11February 2019

 **Determination:** The application is refused and the decision of the Delegate of the Director of Liquor Licensing is affirmed.

**Authorities referred to in determination:**

* *The Cocktail Guy Pty Ltd v Director of Liquor Licensing* LC04/2017
* *Chernov Pty Ltd, Chitty Pty Ltd and Legge Pty Ltd trading as Sunset Events LC25/2009*

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

**Background**

1. On 18 December 2017, Event Logistics Australia Pty Ltd (“the Applicant”) applied for a special facility licence for the purpose of catering pursuant to section 46 of the *Liquor Control Act 1988* (“the Act”).
2. The application was supported by a Public Interest Assessment (“PIA”) enclosing a number of annexures.
3. By letter to the Applicant dated 16 March 2018, the Delegate of the Director of Liquor Licensing (“the Director”) invited the Applicant to provide further information demonstrating the Applicant was a “caterer” within the meaning of regulation 9A(14A) of the *Liquor Control Regulations 1989* (WA) (“the Regulations”). The Applicant provided subsequent material including further submissions dated 25 June 2018.
4. On 30 July 2018, the Director refused the application.
5. On 27 August 2018, the Applicant applied for a review of the decision of the Director pursuant to section 25 of the Act.
6. The Director intervened in the matter for the purpose of making submissions pursuant to section 69(11) of the Act.
7. Submissions by the Applicant and the Intervener were lodged on 25 October 2018 and responsive submissions were lodged by the Intervener on 1 November 2018 and by the Applicant on 2 November 2018.
8. A hearing of the Liquor Commission of Western Australia (“the Commission”) was held on Thursday, 8 November 2018.

**Statutory Framework**

1. The following provisions of the Act are relevant:
	1. *The Licensing Authority shall not grant a special facility licence except for a prescribed purpose – s 46(1) of the Act.*
	2. *The Licensing Authority shall not grant a special facility licence if granting another class would achieve the purposes for which the special facility licence is sought – s 46(2) of the Act.*
	3. *The Applicant must demonstrate how the business meets the prescribed purposes for which a special facility licence may be granted – s 46(2b) of the Act.*
2. The prescribed purpose of the application, as elected by the Applicant, is catering.
3. Regulation 9A (13) and 14(A) of the Regulations outlines the purpose for which a special facility licence may be granted and relevantly provides:

**Catering**

 *9A (13) A special facility licence may be granted for the purpose of allowing at a function the sale, by a caterer, of liquor supplied at premises at which the caterer has agreed with the person organising the function to provide liquor (whether with or without food), for consumption by persons at that premises.*

*9A(14A) In subregulation (13) —*

 *caterer means a person who —*

1. *carries on a food business as defined in the FoodAct 2008 section 10; and*

*(b)  handles or sells food for consumption at functions.*

1. Section 10 of the *Food Act 2008* defines “food business” as follows:

*In this Act, food business means a business, enterprise or activity (other than a business, enterprise or activity that is primary food production) that involves —*

*(a)  the handling of food intended for sale; or*

*(b)  the sale of food,*

*regardless of whether, subject to section 6, the business, enterprise or activity concerned is of a commercial, charitable or community nature or whether it involves the handling or sale of food on one occasion only.*

1. Section 3 of the Act defines “function” to mean a gathering, occasion or event (including a sporting contest, show, exhibition, trade or other fair, or reception) at which it is proposed that liquor be sold or supplied to those present.
2. The Director’s Policy on Special Facility Licences (“the Policy”) provides guidance to applicants on the requirements of the Act for such a licence.
3. The Policy refers to section 37(1)(f) of the Act which stipulates that the Licensing Authority shall not grant an application unless it is satisfied that the premises to which the application relates are of sufficient standard and suitable for the conduct of the business. Further the Policy specifies that the applicant must have exclusive access to a kitchen during the preparation, cooking and heating of supplied food.
4. The Policy also requires the Applicant to lodge details of the refrigeration and transport arrangements.
5. The Policy is a guide for applicants and does not constrain how the Licensing Authority will determine an application; each case must be determined on its merits having regard to the provisions of the Act and the Regulations.

**Submissions on behalf of the Applicant**

1. The Applicant seeks a Special Facility Licence (Catering) in order to provide off-site food and liquor services at booked functions, festivals and special events (“Events”) in Western Australia.
2. The application was supported by PIA submissions which outline the background details of the Applicant, the Events the Applicant has been engaged in, the proposed business model and submissions in relation to the objects and provisions of the Act.

1. The application is supported by a proof of evidence statement of Mr Timothy John Caporn, the sole Director of the Applicant. Mr Caporn has over 26 years’ experience in the liquor and entertainment industry.
2. The Applicant has been operating since 2005 and has been involved in a number of large-scale events and festivals. These events include Parklife, Big Day Out and Soundwave. At Events such as Parklife, patron numbers can reach up to twenty thousand.
3. The Applicant has provided event management services in the 2017/2018 season to a number of clients, with the lowest number of patrons reaching six hundred and the maximum reaching up to thirty thousand.
4. It was submitted that the Applicant is currently the only company operating in Perth that is a complete one stop shop for event management services. The current services provided by the Applicant include the following:
5. staging;
6. event bar services;
7. bar labour hire;
8. site management;
9. booking artists/performers;
10. marketing;
11. overseeing door revenue;
12. furniture rental.
13. The motivation for applying for a Catering Licence is the fact that the demand for the Applicant to provide liquor and catering services for functions and events far exceeds the threshold stipulated in the Director’s Policy:

*As a general principle, occasional liquor licenses may be granted up to 12 times within a 12 month period.*

1. Further, the grant of the application will also allow the Applicant to better meet the requirements of event organisers who seek a holistic approach to management services at large scale events.
2. The Applicant submitted that there is no other licence that would satisfy the purpose for which the Applicant is seeking the Special Facility Licence (Catering).
3. It was submitted that the Applicant satisfies the requirements of such a licence in that it will:
	1. carry on a food business with respect to catering for events, all of which will be held off site;
	2. supply the events (with or without food), for consumption by persons at events; and

c) cater to requirements of consumers at events and by doing so will support the proper development of liquor, tourism, entertainment and other hospitality industries with respect to liquor and related services.

1. All the necessary factors are in place to commence trading as a caterer, per the definition in the legislation as evidenced by:
2. access to a commercial kitchen, - letter dated 12 October 2017 from the owner of Redfish, Fish, Chips & Grill (“Redfish kitchen”);
3. the Redfish kitchen is compliant with the *Food Act 2008* (WA) as per the food inspection report dated 26 May 2017;
4. the engagement of a chef Mr Satterthwaite as per the proof of evidence statement of Simon Barry Satterthwaite; and
5. example menus of food and drink packages to be offered.
6. The Applicant has no objection to complying with general licence conditions as outlined in the PIA which includes seeking a variation of the licence where the Applicant is engaged as a caterer to sell and supply liquor directly to guests at a function with more than two hundred patrons.
7. The Applicant submitted that the granting of the application will provide the following public interest benefits:
	1. positively contribute to the amenity and success of the Events by provision of food and beverage services for ticket holders;
	2. not have a negative impact on the locality;
	3. attract visitors to the host locality where the Events will be held which will:
8. support the success of each Event;
9. promote the host locality and tourism; and
10. support local business.

31 In addressing the public interest criteria, the Applicant submitted the following:

*Harm and ill health – s5(1)(b)*

1. the Applicant will apply the following harm minimisation measures:
2. employ security at each event; and
3. ensure staff employed by the Applicant holds Responsible Service of Alcohol (“RSA”) certification.
4. The Applicant will abide by a Management Plan, House Management Policy and Code of Conduct which includes but is not limited to:
5. the right to refuse service of alcohol;
6. not to allow violent, disorderly or indecent behaviour to take place on licensed premises;
7. staff will be required to undertake an approved course in the RSA; and
8. management will provide adequate numbers of security staff and will determine the maximum number of patrons.

1. the Applicant will operate events in an area specifically designated and approved by the local authority for the provision of dining, liquor and entertainment services;
2. the Applicant is committed to engaging with various stakeholders;
3. the primary focus for the Applicant is live entertainment services. The Catering services are ancillary that will be made available to meet requirements of ticket holders and is therefore less likely to be associated with alcohol related violence and aggression.

*Consumer Requirement*

1. the applicant’s current client base has expressed an interest in catering services (copies of 4 letters and one statement have been provided with the PIA);

*Offence annoyance and disturbance*

1. the Applicant and its staff are committed to taking all reasonable steps to control the behaviour of ticket holders;
2. the Applicant in its Code of Conduct outlines that the Applicant and staff support the rights of neighbours not to be disturbed by patrons when on and leaving the premises.

**Submissions on behalf of the Intervener**

1. The Intervener asserted that an applicant for a Catering Licence must demonstrate that they will “carry on” a business which:
2. is not primary for production;
3. involves handling of food intended for sale, or the sale of food, regardless of whether the business is of a commercial, charitable or community nature; and
4. the food handled or sold is for consumption at gatherings, occasions or events at which it is proposed that liquor be sold or supplied to those present.
5. The following factors were outlined for the Commission’s consideration as to whether the Applicant meets the definition of a caterer in the Regulations:
6. Commercial kitchen: there is no formal agreement for use or financial commitment; no explanation of the facilities and area and how the kitchen meets those requirements; there is no evidence the Applicant has used the Redfish kitchen or will continue to do so in the future;
7. Mr Satterthwaite’s involvement: the letter of engagement states that the employment “will be on an ad-hoc basis, as required and agreed between the parties from time to time” and he will be engaged for specific events and paid at an hourly rate;
8. Background of the Applicant: provides bar services and pop up bars at festivals and has no past experience in food catering;
9. Demand for services: letter from various past clients do not appear to provide any evidence of demand for supply of services including a substantial food component in the future;
10. Letter from Truck Freezer Rentals: merely outlines the services provided by that company and does not provide a commitment to provide those services to the Applicant, or an indication that the Applicant has previously used the services or is committed to using them in the future; and
11. Future operations: there is no evidence before the Commission for proposed future operations involving a substantial food offering by the Applicant or its clients.
12. Upon a proper construction of the Act, Regulations and consistent with the Director’s Policy and the legislative scheme to be a caterer, “a licensee must be a genuine caterer of food, running a business of substance, with appropriate facilities, qualifications and capability for the preparation and service of food, and not merely a provider of pop-up or mobile bar services whose principal purpose is to serve alcohol.”[[1]](#footnote-1)
13. An alternative construction of the Regulations according to the Director would convert a Catering Licence into an ongoing substitute for occasional licences which the licensee “could carry in his or her back pocket to use whenever he or she chooses to do so at unlicensed premises.” Further it would be contrary to the general thrust of the Act.
14. The Director outlined that it is appropriate for the Commission to have regard to the Applicant’s past experience in catering events to assist in determining the nature of the business and how it may be expected to operate. It was accepted by the Director that is not required to demonstrate that it is already carrying on the business, however, the lack of evidence is relevant to whether the Applicant has discharged its onus of demonstrating that it will operate as a genuine food caterer.
15. The Applicant has failed to discharge its onus of demonstrating it will serve the purpose prescribed in the Regulations.

**Applicant’s Responsive Submissions**

1. The Applicant filed responsive submissions on 2 November 2018 and outlined as follows:
2. the Catering Licence is not restricted to existing or current caterers;
3. the Intervener has not provided any evidence that there is anything to suggest the Applicant will fail to continue a food business;
4. the Intervener seems to suggest that the Applicant should provide food at every event;
5. The Act, Regulations or Policy does not require that an Applicant “be a substantial and capable caterer of food” and the observations made to that effect in the *That Cocktail Guy[[2]](#footnote-2)* do not apply as the case can be distinguished from the present application;
6. the Applicant bears no onus of providing evidence of an agreement in relation to the Redfish kitchen;
7. the Applicant has provided evidence from existing clients who have indicated support and interest in utilising the proposed services. The delegate in the first instance did not make any findings as to any deficiencies in the evidence for demand for the Applicant’s proposed services;
8. no negative inference should be drawn for failure to provide evidence of Events proposed to be catered in the future; and
9. a lack of financial commitment, future bookings or consideration cannot support a negative inference against the Applicant.

**Intervener’s Responsive Submissions**

1. The Director filed responsive submissions on 1 November 2018 and outlined as follows:
2. a letter from the owner of Redfish although compliant with the Policy is not determinative of whether the Applicant is a genuine and substantial caterer of food;
3. a consideration of whether the Redfish kitchen is suitable for the kind of food the Applicant intends to provide is relevant to a consideration of whether the Applicant intends to carry on a food business;
4. the Inspector on the face of the Report does not appear to have visited the kitchen or turned their mind to the suitability of the kitchen for the kind of food envisaged by the Applicant’s menu; and
5. the Director did not make credibility findings in relation to Mr Capron but took account of all of the evidence including the background of the Applicant and past operations in assessing how it is to trade in the future.

**Determination**

1. Section 25(2c) of the Act provides that when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
2. On a review under section 25 of the Act, the Commission may –
	1. *affirm, vary or quash the decision subject to the review; and*
	2. *make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and*
	3. *give directions –*
		* 1. *as to any question of law, reviewed; or*
			2. *to the Director, to which effect shall be given; and*
			3. *make any incidental or ancillary order.*
3. In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director. The Commission is to undertake a full review of the material before the Director and make its own decision on the basis of those materials.[[3]](#footnote-3)
4. The Applicant is seeking a special facility licence for the purpose of catering (“Catering Licence") pursuant to section 46 of the *Liquor Control Act 1988*.
5. In determining whether the Applicant has discharged that onus, the Commission must have regard to, and must exercise its judgement in accordance with, the objects and provisions of the Act.
6. The Commission must not grant a special facility licence if granting another class would achieve the purposes for which the special facility licence is sought.[[4]](#footnote-4)
7. Based on the submissions of the Applicant an occasional licence would satisfy the purpose of the application, however, the demand would exceed twelve applications within a twelve-month period.
8. The Occasional Liquor Licence Policy outlines as a general principle that occasional liquor licences may be granted up to 12 times within a 12-month period. This is a general policy and there is sufficient flexibility for the Licensing Authority to approve more than 12 if it is in the public interest.[[5]](#footnote-5)
9. Notwithstanding the above, the Commission is not satisfied that the application meets the requirements of a Catering Licence.
10. The Applicant submitted documentation in support of its compliance with the Act and the Director’s policy which includes but is not limited to:
11. a letter dated 12 October 2017 outlining the Redfish Kitchen is suitable for exclusive use at mutually available times for the preparation and cooking of food for functions;
12. certificate in “I’m Alert in Food Safety” certifying Timothy Capron’s completion of training in food safety issued by the City of Swan;
13. letter dated 23 November 2017 from the director of Truck Freezer Rentals advising of the availability of refrigerated vehicles/trailers;
14. employment arrangement entered into with Simon Barry Satterthwaite;
15. letters from clients in support of the application; and
16. samples of street food menus.
17. The Applicant contends that its existing and proposed business model meets the prescribed purpose.
18. It is accepted that the Applicant is highly regarded in the community as a responsible server of alcohol. Further, that Mr Caporn has significant experience in and knowledge in the management and service of alcohol at events where liquor is sold and supplied.
19. However, the Commission has a number of reservations in determining the Applicant is a caterer for the purposes of the Regulations including:
20. whether cooking will be conducted at the Redfish kitchen;
21. whether the Redfish kitchen is suitable for the proposed menu;
22. the availability of the kitchen on an exclusive basis when required;
23. the primary focus for the Applicant is entertainment services; catering will be an ancillary service;
24. the engagement of the chef on an ad-hoc basis.
25. Mr Satterthwaite in his proof of evidence statement outlined that the Redfish Kitchen is more than adequate for the preparation and cooking that will be required for any catered event.
26. Mr Caporn in his proof of evidence statement indicated that food preparation and possibly cooking will be undertaken at the kitchen. At the hearing on 8 November 2018 the Applicant indicated there would be no cooking at the Redfish Kitchen and it would be used for food preparation only. At the hearing the Commission also queried the Applicant as to how, for example, the spit roast beef slider would be cooked (given the time it takes). The Applicant in response indicated it would be cooked at the Event location early in the morning.
27. The Applicant has engaged a chef, Mr Satterthwaite, to manage the catered food component of its business. Mr Satterthwaite has been engaged by the Applicant on an as needs basis and retains his own business. Whilst the Commission is not critical of Mr Satterthwaite’s proposed role, the catering side of the business has been presented as being dependent on his availability and expertise. The operational relationship between Mr Satterthwaite’s other business interests, particularly Accolade Catering, and the time demands of the Applicant’s proposal are not clear.
28. The Commission reiterates the observations enunciated in the decision of *That Cocktail Guy[[6]](#footnote-6)* that “*having regard to the purpose, scope and provisions of the Act as a whole, that a Catering Licence may be granted to a catering business of substance, capable of appropriately qualified and experienced in preparing and distributing food in compliance with the Food Act, not to businesses such as portable mobile or bar services whose primary or principal purpose is to only serve alcohol.”*
29. It is accepted that the Applicant does not have to show that it has previously engaged in catering services. In considering whether the Applicant is a caterer for the purpose of the Act the Commission can have regard to an Applicant’s past experience in catering events to assist in determining the nature of the business and how it may be expected to operate. Whether or not the Applicant can satisfy that it is a catering business of substance is not dependant on whether it has had a history of catering, it is one factor in an overall consideration of the application and the documentation filed in support.
30. A primary object of the Act is to regulate the sale, supply and consumption of liquor. A special facility licence pursuant to s 46 of the Act allows the holder of the licence to sell liquor in accordance with conditions imposed on the licence. The Catering Licence will allow the Applicant to sell liquor at an Event with or without food without further conditions if there is under 200 patrons. The breath of the licence imposes a responsibility on the Licensing Authority to ensure it is satisfied that the Applicant is a caterer of food and is likely to be employed for this purpose by third parties and not for their ability to provide liquor or other services.
31. The concession that the Applicant’s primary focus is on entertainment services, the thrust of the letters in support indicating a demand for liquor services and the suitability of the proposed kitchen has not satisfied the Commission that the Applicant is a caterer for the purposes of the Act or that the application is in the public interest.
32. In summary the Commission cannot grant a special facility licence (catering) as it considers that an occasional licence would satisfy the purpose of the applicant. As referred to in paragraph 46 above, the number of occasional licenses granted in a 12 months period can exceed the policy limitation of 12 if it is considered to be in the public interest.
33. The Applicant has not provided sufficient evidence to satisfy the Commission that it is a caterer for the purposes of the Regulations.
34. The application is refused, and the decision of the Delegate of the Director of Liquor Licensing is affirmed.



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**EDDIE WATLING**

**DEPUTY CHAIRPERSON**

1. *The Cocktail Guy Pty Ltd v Director of Liquor Licensing* LC04/2017. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)
3. *Hancock v Executive Director of Public Health* [2008] WASC 224. [↑](#footnote-ref-3)
4. Act, s 46(2). [↑](#footnote-ref-4)
5. Chernov Pty Ltd, Chitty Pty Ltd and Legge Pty Ltd trading as Sunset Events LC25/2009 at [8]. [↑](#footnote-ref-5)
6. LC04/2017. [↑](#footnote-ref-6)