

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

Applicant: Spandau Pty Ltd
(represented by Mr Michael Hardy of Hardy Bowen
Lawyers)

Other Parties: Director of Liquor Licensing, Intervener
(represented by Ms Naomi Eagling of State Solicitor's
Office)

Executive Director Public Health, Intervener
(represented by Ms Naomi Eagling of State Solicitor's
Office)

Commission: Mr E. J. Watling (Chair)
Mr G Joyce
Ms K Lang

Date of Hearing: 1 April 2009

Date of Determination: 11 May 2009

Premises: O'Connor Cellars

Matter: Application for Review, Section 25 review of the
Liquor Control Act 1988 ("the Act")

Determination: The Application for an Extended Trading Permit is
refused.

Authorities referred to by the Applicant:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Leisure in Rockingham; Minora Investments Pty Ltd v Midchime Pty Ltd*
[2—2] WALLC 1
- *Drake v Minister for Immigration and Ethnic Affairs* [1979] 46 FLR 409

- *Clive Elliot Jennings & Co Pty Ltd v Western Australian Planning Commission* [2002] WASCA 276
- *Mount Lawley Pty Ltd v WAPC* [2004] 29 WAR 273
- *Beale v Government Insurance Office (NSW)* [1997] 48 NSWLR 430
- *Re Romato; ex-parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258

Authorities referred to by the Intervener:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Palace Securities v Liquor Licensing* [1992] 7 WAR 241
- *Executive Director, Public Health V Meers* [2007] WASCA 187
- *Re Romato; ex-parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2001] WASCA 410

Authorities referred to in the Commission's Decision:

- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2001] WASCA 410
- *Re Romato; ex-parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356

1. Background

1. On July 30 2007, Spandau Pty Ltd trading as O'Connor Cellars ("the Applicant") lodged an application under section 47 of the *Liquor Control Act 1988* ("the Act") for a Liquor Store licence in respect to premises at Lot 776 Maguire Street, Kalgoorlie.
2. On May 30 2008, the Director of Liquor Licensing ("the Director") granted the Liquor Store licence.
3. On March 13 2008, the Applicant lodged an application for an Extended Trading Permit ("the ETP application") for Sunday trading at the premises between 10.00am and 8.30pm.
4. On July 18 2008, the Executive Director of Public Health lodged a notice of intervention in relation to the ETP application, under section 69(8a) of the Act.
5. On July 22 2008, the Kalgoorlie Alcohol Action Project and the National Drug Research Institute lodged Notices of Intervention in relation to the ETP application.
6. On December 16 2008, the Director refused the ETP application.
7. On January 16 2009, the Applicant lodged an application for a review of the decision of the Director ("the application") under section 25 of the Act.
8. The Liquor Commission of Western Australia ("the Commission") conducted the review hearing on 1 April 2009.

Review of Director's decision

Under section 25, a person who is dissatisfied with a decision of the Director may apply to the Commission for a review of that decision. The Commission may have regard only to the material that was before the Director when making the decision.

Martin CJ in *Hancock v Executive Director of Public Health* [2008] WASC 224 stated at [54] that the Commission:

"...is not constrained by the finding of error on the part of the Director, but is to undertake a full review of the materials before the Director and to make its own determination on the basis of those materials".

Materials before the Director

Applicant's Evidence:

The Applicant lodged a Statutory Declaration sworn by Mr Ian Frederick Johnson, sole director of the applicant company. Mr Johnson states:

- *The Sunday ETP component is a very important aspect of the proposal.*
- *The supermarket trades 7 days a week and Sunday is consistently the busiest day of the week. The supermarket is particularly busy on Sundays which indicates to me very clearly that a large proportion of the local community does its shopping on a Sunday and requires services and facilities to be available to it on Sundays.*
- *The role that the liquor store will play in complementing the supermarket operation and the importance of providing a one-stop shopping service at the location are strong reasons to support the liquor store trading on Sundays.*
- *The Sunday ETP will provide a valuable public service because if the liquor store does not trade on Sundays the public will be forced to travel some distance out of their area and across town to access packaged liquor. The service and range will be sub-standard and inadequate elsewhere compared to my company's proposal.*
- *The community should not be forced to make the special effort to travel substantial distance, away from where they do their other shopping, particularly on a Sunday which should be a day of rest and relaxation with family and friends.*

- *In order to ensure that a full and comprehensive liquor store service, which meets modern expectations of the public is provided, Sunday trading is important.*

The Applicant lodged seven additional Statutory Declarations in support of the Liquor Store application, which included support for the ETP.

The Applicant also lodged a document entitled 'Further Submissions – Extended Trading Permit – Sunday Trading', which re-stated the arguments previously lodged in support of the ETP application.

Objection of Kalgoorlie Alcohol Action Project:

An objection was lodged on 22 July 2008, stating:

- Kalgoorlie already suffers from much higher rates of alcohol related harm than the rest of the state;
- The density of liquor licences per capita in Kalgoorlie-Boulder is one of the highest in the state;
- Increased outlet density makes alcohol more accessible, and greater availability increases consumption and alcohol-related problems;
- An additional 'average' liquor store would see an extra 8 domestic violence assaults in private homes in the metropolitan area;
- One in four Kalgoorlie residents believe domestic violence is one of the three main alcohol related problems and most believe it has got worse in the past 12 months;
- Until now there has been no stand alone bottle shop trading on Sunday;
- The objection is supportive of the intervention by the Executive Director, Public Health.

Intervention of Executive Director, Public Health:

On 8 September 2008 the Executive Director, Public Health lodged an intervention against the ETP application, which may be summarised as follows:

- Packaged liquor is currently available on a Sunday from hotels;
- O'Connor Cellars is located in an area of high outlet density, including premises that sell packaged liquor on a Sunday;
- Contrary to the Applicant's statement, O'Connor Cellars is located in an area already well serviced by packaged liquor on Sundays;
- There are 6 liquor outlets that sell packaged liquor on a Sunday in a 3 kilometre radius of O'Connor Cellars;
- O'Connor Cellars will be operating in a local community where alcohol related harm occurs regularly;
- Increased availability of alcohol has the potential to increase harm and other negative consequences for at-risk populations;
- Enabling a liquor store to trade on a Sunday in Kalgoorlie-Boulder, which already has a high level of consumption and sales of regular strength beer purchases from liquor stores, is a significant public health concern;
- There is therefore an even greater risk of problems associated with the introduction of a liquor store that trades on Sundays, given it would be operating within an external environment (community attitudes and acceptance/tolerance of anti-social and drunken behaviours) that does not support the prevention and minimisation of alcohol-related harm;
- Increasing access and the convenience of obtaining alcohol on a Sunday in a community that already experiences consumption significantly higher than the State average is of concern;
- Alcohol related violence, public drunkenness and drink driving were the three main alcohol related problems in the community identified by respondents;

- People in Kalgoorlie-Boulder are consuming alcohol at a level higher than the State average and engaging in high risk behaviour (ie binge drinking);
- The granting of a Sunday ETP to a liquor store in Kalgoorlie is likely to further exacerbate the existing levels of harm associated with packaged liquor in Kalgoorlie-Boulder;
- Packaged liquor sales to the general public on Sundays in Kalgoorlie are currently limited only to sales from hotel and tavern bottleshops;
- Several international and Australian studies have found that, when limits have been placed upon days of sales, reductions in levels of alcohol related harm have been observed;
- In areas of high alcohol consumption and related harms in WA, limiting packaged liquor availability on certain days has been recognised as a useful harm minimisation strategy and implemented in numerous locations with success;
- Contrary to the Applicant's PIA, packaged liquor is available in Kalgoorlie-Boulder on a Sunday within a 3km radius of O'Connor Cellars. With the exception of convenience to patrons, the applicant has not established how this Sunday ETP, in the context of a community experiencing significantly high levels of per capita consumption and related harm, is in the public interest.
- Drinkers already at high-risk of alcohol-related harm (e.g. young people, and in particular young men and the alcohol dependent) are more likely to take advantage of the increased trading hours and are not inclined to, or less able, to regulate their drinking (Chikritzhs and Stockwell, 2002);
- During the later part of 2006, the Kalgoorlie Alcohol Action Project conducted a community survey with a representative sample of over 400 residents of Kalgoorlie-Boulder. The survey aimed to investigate people's drinking habits and their perception of alcohol-related harm in Kalgoorlie-Boulder (National Drug Research Institute, 2007);

- The results of the interviews provided Kalgoorlie-Boulder with a score of 3.0, which indicates that most people feel that there is a local concern but there is no immediate motivation to do anything about it (National Drug Research Institute, 2007);
- According to a recent feasibility study: Predicting alcohol-related harms from licensed outlet density 2007, the greatest driving force for alcohol-related harm is sales of regular strength beer (Chikritzhs et al. 2007);
- The models suggest that, on average, in Western Australia, the additional sales of 81,000 litres of regular strength beer at a retail bottle shop in a particular LGA will lead to an additional 8 assaults in that LGA (P Catalano 2008, pers. comm., 14 August);
- A recent study examined variations in the association between consumption and alcohol-related harms by type of liquor outlet. The study revealed that 'the positive association between night-time assault and consumption was highest when alcohol was purchased from either a hotel or a liquor store' (Chikritzhs et al. 2007);
- The study also found that 'volumes of beer purchases was the most important predictor for levels of reported assaults (eg liquor stores and private assaults in the Goldfields)';
- A study on the relationship between different types of licences (sic) premises and various indications of alcohol-related harm across local areas of Western Australia showed that, per capita, alcohol sales made by liquor stores were closely and positively related to levels of assaults, road crashes, breath alcohol levels of drink-drivers and alcohol-attributed hospitalisations (Stockwell et al. 1995). Thus, the greater the per capita alcohol sales made by liquor stores, the greater the levels of alcohol-related harms;
- Given that, per licence, liquor stores sell more alcohol than any other type of liquor licence, including high-risk beverages, even a small percentage change in availability and access to alcohol via such a

licence is likely to have a measureable impact on alcohol-related harm in the local community (Chikritzhs & Hawkes, unpublished 2004);

- The relationship between alcohol availability, consumption and related harms has been the subject of several comprehensive reviews in recent years (Babor et al., 2003, Heather, Peters & Stockwell, 2001, Loxley et al. 2004);
- *'Changes in the physical availability of alcohol can be influential in affecting local, regional and state levels of alcohol-related use and problems'* (Stockwell and Gruenewald, cited in Heather, Peters and Stockwell, 2001);
- Several international and Australian studies have found that, when limits have been placed upon days of sales, reductions in levels of alcohol-related harm have been observed. Some studies have also found a combined reduction in alcohol consumption levels (Stockwell and Gruenewald, cited in Heather, Peters and Stockwell, 2001);
- For example, in Port Hedland, a ban on Sunday trade of packaged liquor resulted in a reduction in Police callouts and a change in the nature and severity of the problems being experienced on a Sunday (Midford, 2007);
- Offences were found to be more common in postcodes with higher volumes of alcohol sales. There was also a significant positive correlation between alcohol sales through off-licenses and both malicious damage to property and offensive behaviour incidents (Briscoe, Donnelly, 2001 & Stevenson, 1996);
- From this model, it was estimated that if the 50 postcodes which sold the highest volume of alcohol reduced their sales to the State-wide mean, there would be 324 fewer offensive behaviour incidents, 1744 fewer malicious damage incidents and 635 fewer assault incidents (Stevenson, 1996);

- Patterns of alcohol consumption are not only influenced by consumer demand, but also by 'the ease with which alcohol may be purchased for consumption' (Gruenewald, 1993);
- The form and degree of alcohol availability suggests its social acceptability or appropriateness, especially to young people (Babor et al, 2003);
- The price of alcohol 'appears to have an influence on the level and pattern of consumption' and decreased prices encourage increased alcohol consumption (Osterberg, cited in Heather, Peters & Stockwell, 2001);
- Research shows that Liquor Stores consistently demonstrate strong positive associations across all alcohol-related harm indicators (e.g. domestic violence, assaults) (Chikritzhs et al, 2007).

Applicant's submissions in response to Intervention:

The Director also had regard to submissions from the Applicant in response to the intervention of the Executive Director, Public Health, stating:

- Most of the arguments put up by the Executive Director, Public Health are macro arguments against alcohol in general, and are not specific to, nor do they relate, to this liquor store, or to trading on a Sunday;
- The Executive Director, Public Health makes no distinction between hotel bottle shops and liquor stores which offer bulk discounted liquor for sale and the type of quality liquor store that is proposed by the applicant;
- Many of the reports quoted by the Executive Director, Public Health clearly demonstrate that it is far more effective to reduce access to bulk cheap liquor, than to reduce access to liquor in general. The principle is 'raising the floor', or raising the cost of the cheapest liquor available that has the most beneficial impact on reducing harm and ill-health;

- The Kalgoorlie Police and City Council were supportive of this liquor store, and have not sought to intervene in the application for this ETP;
- The Executive Director, Public Health fails to understand that with the many shift workers in Kalgoorlie a Sunday is just another day of the week, and a very convenient day for shopping, as evidenced by the popularity of the O'Connor Fresh Supa IGA on a Sunday;
- Kalgoorlie can be considered a regional metropolitan area, and not a country town, due to its size and importance, and therefore its residents ought to be afforded the same retail opportunities as the Perth metro area;
- The granting of this ETP will not set a precedent for other liquor stores in Kalgoorlie-Boulder to follow, as no other liquor store is located in such a quality, affluent suburb, next to a quality, modern supermarket which trades seven days a week;
- There may be as many as 17 hotels and taverns which have no dedicated packaged liquor facility, although they are permitted to have one;
- Within the 3km locality there are only three premises open on a Sunday which may sell packaged liquor, and they are The Star & Garter Hotel, The Albion Shamrock and the Broken Hill Hotel. To access the Broken Hill Hotel residents of the locality need to go through the centre of Boulder, and in any case that hotel bottle shop has almost no stock and no dedicated staff member. The Star & Garter Hotel bottle shop is a very small drive through facility, with very limited wine range, and no easy browse access. The Albion Shamrock bottle shop is reasonably well stocked, but is in the heart of Boulder, and as a consequence is not a comfortable option for residents of Somerville or shoppers of O'Connor Fresh Supa IGA. This is because, as illustrated in the PIA for the liquor store licence application, even the Police are in need of security cameras in the town centres for their own protection;
- There is no quality packaged liquor facility located in a safe, comfortable and convenient place within the locality;

- The important issue here is the quality of the proposed packaged liquor offer that O'Connor Cellars will bring to the locality;
- It is highly unlikely that such a quality liquor store will contribute in any significant way to alcohol related harm. O'Connor Cellars will be a quality liquor store, which will complement a quality supermarket in an affluent suburb and will be a threat to no-one;
- The Applicant provided WA Police statistics which showed that the rate of alcohol related offences in the locality was extremely low;
- It can be seen that Somerville is in fact a very safe locality where 'alcohol related crime' does not occur regularly at all, contrary to what the Executive Director says;
- The Applicant is proposing a quality liquor store in an affluent suburb, featuring, amongst other things, a dedicated premium wine selection, at least 100 imported wines, wines displayed by wine region, structured wine tastings, over 50 premium whiskeys, including at least 16 malt whiskeys, a selection of wine accessories, wine literature, tasting notes, and wine maps available, a fully air conditioned premises to maintain and store the premium wines in top condition;
- The Applicant has given very careful consideration to harm minimisation strategies, and will not be stocking bulk discount liquor products, nor specific liquor products as identified by the Kalgoorlie Police, that might attract the recognised at risk groups;
- The Applicant has devised and will implement a detailed harm minimisation strategy, over and above what is required under the *Liquor Control Act 1988*;
- The Executive Director, Public Health talks about high consumption levels in the local community but then does not back this up with any figures for the Somerville/O'Connor locality. The locality is being unfairly characterised as just another part of Kalgoorlie-Boulder. Somerville/O'Connor is a very distinct and different suburb of Kalgoorlie-Boulder and is a quality, affluent suburb unlike any other part of Kalgoorlie;

- The Applicant will not be stocking king browns, nor 4 litre casks of wine, which are products which people use for rapid alcohol consumption;
- To suggest that all sales on a Sunday would be new or increased sales is misleading. Sunday sales would almost be entirely sales that would otherwise occur on another day or at another outlet;
- Those who are seeking alcohol due to some form of dependency will visit one of the existing hotel bottle shops that sell cheap liquor;
- It is cheap liquor sold by below standard outlets that is most likely to contribute to alcohol related harm. An upmarket, quality liquor store like the one proposed by the applicant will not add to it;
- The lack of discounts will mean that O'Connor Cellars will not be an attractive destination for at risk groups.

Having considered all of the above materials, the Director refused the ETP application and published reasons for that decision on 16 December 2008.

On January 16 2009, the Applicant lodged an application for a review of the decision of the Director ("the application") under section 25 of the Act.

2. Application for Review

9. The Applicant stated the following grounds for review of the Director's decision:
- 1) The Director failed to accord any or proper weight to the submissions of the applicant when responding to the intervention of the Executive Director, Public Health;
 - 2) In so doing, insufficient weight was accorded the particular circumstances of the operations of the applicant;
 - 3) The Director gave undue weight to the generic policy considerations underpinning section 98D of the *Liquor Control Act 1988*;

- 4) The Director gave undue weight to the fact that there are 25 hotels and taverns able to sell packaged liquor on Sunday without giving proper weight to the circumstances of trading within the City of Kalgoorlie-Boulder and the distinction to be made between the operations of the applicant and the operations of the hotels and taverns referred to;
- 5) The Director erred in determining that, on the balance of probabilities, the applicant had not adduced sufficient evidence to support the grant of the application.

In support of its application, the applicant lodged written submissions and presented oral arguments at the review hearing. The Applicant's submissions may be summarised as follows:

10. The Director has placed undue weighting on the objectives of section 5(1)(b) of the Act in relation to the Intervention Notice of the Executive Director of Public Health in that:
 - The evidence provided was not controversial;
 - The argument that the suburb of Somerville is not "affluent" is incorrect and that there is a distinction between Somerville and the wider Kalgoorlie-Boulder area;
 - The nature of the ETP application is not of an exceptional nature;
 - That the specific features of the proposal to ensure that the store only attracts mature and responsible patrons was not given sufficient weighting.
11. The original liquor store licence application was not subject to the same level of objections and that it was difficult to understand why Sunday trading is attracting such provocation.
12. The argument by the Executive Director of Public Health that "Alcohol sales by the premises on a Sunday will increase alcohol consumption and lead to further harm" need to be taken in the context that there are already a number of other liquor outlets in the district that trade on Sunday.

13. The Director did not explain the differences between the various outlets trading in Kalgoorlie-Boulder on a Sunday, nor was sufficient weighting given to the operating style of the O'Conner Cellars.
14. There also seemed to be little consideration to the fact that the suburb of Somerville was a mining community which, because of shift work, rendered Sunday no different to any other day of the week in relation to consumer needs and habits.
15. Mr. Hardy cited *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 at [34]:

"In my view, the crucial point here is that the Act does not require an application for an extended trading permit to demonstrate that there are exceptional circumstances which warrant a departure from the normal trading hours. The Director therefore took an irrelevant consideration into account in finding that there were no such circumstances."

16. Mr. Hardy submitted that an ETP would not necessarily exacerbate problems in the community and that the weight of evidence supports the ETP.
17. The applicant contends that the arguments put forward by Kalgoorlie Alcohol Action Project have been addressed in a submission previously lodged by Canford Hospitality Consultants Pty Ltd on behalf of the applicant. That submission stated:
 - 1) Most of the arguments put up by the KAAP are macro arguments against alcohol in general, and are not specific to nor do they relate to this liquor store, or to trading on Sunday;
 - 2) The KAAP makes no distinction between hotel bottle shops and liquor stores which offer bulk discounted liquor for sale and the type of quality liquor store that is operated by our client;
 - 3) Many of the reports quoted by the KAAP clearly demonstrate that it is far more effective to reduce access to bulk cheap liquor, that to reduce access to liquor in general. The principle is "raising the floor", or raising

the cost of the cheapest liquor available that has the most beneficial impact on reducing harm or ill-health;

- 4) The Kalgoorlie Police and City Council were supportive of this liquor store, and have not sought to intervene in the application for this ETP;
 - 5) The KAAP fails to understand that with many shift workers in Kalgoorlie a Sunday is just another day of the week, and a very convenient day for shopping, as evidenced by the popularity of the O'Connor Fresh Supa IGA on a Sunday;
 - 6) Kalgoorlie can be considered a regional metropolitan area, and not a country town, due to its size and importance, and therefore its residents ought to be afforded the same retail opportunities as the Perth metro area;
 - 7) The granting of this ETP will not set a precedent for other liquor stores in Kalgoorlie-Boulder to follow, as no other liquor store is located in such a quality, affluent suburb, next to a quality, modern supermarket which trades seven days a week.
18. The Applicant disputes that the KAAP submission represents the views of the Kalgoorlie community.
19. The Applicant also provided details of stakeholder consultation in response to the KAAP claim that this did not occur.

Submissions of the Interveners:

20. The Director and the Executive Director of Public Health (the Interveners) lodged written submissions and presented oral submissions at the review hearing.
21. In summary, the Interveners submitted that:
- The Applicant's submission that Kalgoorlie can be considered a regional metropolitan area, and not a country town, should be rejected.
 - 21 liquor outlets trading on a Sunday within 5 kms of O'Connor Cellars met market demand.

- Statistics show that alcohol is the cause of significant harm and problems in Kalgoorlie and alcohol consumption in the Goldfields is significantly higher than the State average. Accordingly, alcohol sales by the premises on a Sunday will increase alcohol consumption and lead to further harm.
- There is little evidence to support the argument that Somerville is an “affluent” suburb.
- In any event, there is no evidence to suggest that the severity and breadth of alcohol problems in Kalgoorlie are confined to less “affluent” areas.

22. Ms Eagling for the Interveners submitted that even without the evidence of harm and ill-health, the Departmental policy applies and therefore the ETP application should not be granted.

Submissions from Kalgoorlie Alcohol Action Project and the National Drug Research Institute:

23. These organisations were not represented at the hearing but had lodged submissions which repeated the original objections before the Director and focused on the harm or ill-health that might be caused as a consequence of granting the ETP.

3. Reasons for Decision

Legal Principles

Section 97(1) of the Act provides that, subject *“to this Act and any condition imposed by the licensing authority, a licensee is authorised to sell liquor during (a) such of the permitted hours specified... and (b) such of the hours that may be specified under an extended trading permit, as the licensee wishes to do so”*.

The permitted hours for a liquor store licence are specified in section 98D:

- (1) (a) *on a day other than a Sunday, Good Friday, Christmas Day or ANZAC Day — from 8 a.m. to 10 p.m.;*

(b) on a Sunday that is not ANZAC Day — subject to subsection (2), from 10 a.m. to 10 p.m.;

(c) on ANZAC Day - from 12 noon to 10 p.m.

(2) Subsection (1)(b) applies only to liquor stores in the metropolitan area.

Extended Trading Permits, under section 60 of the Act, authorise licensees 'to sell and supply liquor... according to the tenor of the permit, upon such terms as are specified at the discretion of the Director in the permit at times, in circumstances, or in a place, to which that licence would not otherwise apply.'

Section 33 of the Act provides:

(1) Subject to this Act, the licensing authority has an absolute discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers in the public interest.

(2) An application -

(a) may be refused, even if the applicant meets all the requirements of this Act; or

(b) may be granted, even if a valid ground of objection is made out, but is required to be dealt with on its merits, after such inquiry as the licensing authority thinks fit.

Section 38 provides that an applicant must satisfy the licensing authority that the granting of the application is in the public interest.

Public interest requirement

In May 2007, amendments to Section 38 of the Act introduced the requirement that applicants satisfy the licensing authority that the granting of an application is in the public interest. Section 38(1)(b) and regulation 9F(b) prescribe that an application for an extended trading permit for the purposes referred to in section 60(4)(g) is a relevant application. In this regard section 38(4) of the Act provides:

Without limiting subsection (2), the matters the licensing authority may have regard to in determining whether an application is in the public interest include:

- (a) the harm or ill-health that may be caused to people, or any group of people, due to the use of liquor; and*
- (b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and*
- (c) whether offence, annoyance, disturbance or inconvenience may be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premise; and*
- (d) any other prescribed matter.*

Therefore, pursuant to sections 33(1) and 38 of the Act, applicants bear the onus of satisfying the licensing authority that granting the application is in the public interest.

Significant amendments were made to the Act in 2006 in respect of the introduction of a public interest test and the differentiation between metropolitan and country liquor stores in respect of selling liquor on Sunday.

Section 19 of the *Interpretation Act 1984* provides that regard may be had to extrinsic material to confirm that the ordinary meaning of a provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose and object underlying the written law.

In his Second Reading Speech on the *Liquor and Gaming Legislation Amendment Bill 2006*, which introduced amendments to section 97(1), then Minister for Racing and Gaming, the Hon. Mr. Mark McGowan, stated:

“... the public interest test will involve considerations of the amenity of a locality in the context of facilities and services provided for consumer...It should be noted, however, that the Government does not consider

proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported in the public interest test.

When considering the public interest, the licensing authority is bound by the objects of the Act as set out in Section 5. Members would appreciate that at times, tension may arise between the objects. The resolution of any tension that arises will depend on the weight that is to be attributed to each of the relevant factors in relation to an application.

When determining an application, therefore, the licensing authority will have to weigh and balance any competing arguments about the public interest, first against the primary objects, and then the secondary objects, with a view to achieving the best possible outcome.”

The Minister further stated:

“In terms of the packaged liquor market, the bill permits metropolitan liquor stores to trade on Sundays between the hours of 10.00 am and 10.00 pm - the same trading hours as hotels. In country areas the status quo will continue, whereby liquor stores are not explicitly able to trade on Sundays. However, the Director of Liquor Licensing is able to grant extended trading permits to liquor stores to trade on a Sunday in certain circumstances.”

‘Certain circumstances’ is a reference to the licensing authority’s statutory powers to grant ETPs in its absolute discretion subject to the applicant overcoming the public interest threshold. By implication, the granting of any ETP must also be consistent with the objects of the Act.

The Commission notes these matters and discerns an intention and expectation that each application must be carefully assessed on its merits.

Objects of the Act

The objects of the Act are set out in section 5. The Act’s primary objects, each of equal importance, are:

“Section 5 (1)

(a) to regulate the sale, supply and consumption of liquor; and

- (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 of liquor and related services, with regard to the proper development of the liquor industry, tourism industry and other hospitality industries in the State.¹*

The secondary objects are set out in section 5(2).

In *Executive Director of Health v Lily Creek International Pty Ltd and Ors* [2000] WASCA 258, Ipp J referred to tension between the object of minimising harm or ill health caused to people and the secondary objects contained in section 5(2). At [19]:

“There will be occasions when s 5(2) objects could only be achieved by the grant of licences for the sale and supply of liquor in circumstances under which such grants may tend to cause harm or ill-health to people.

Section 5 makes it plain that the Licensing Authority is required to bear s5(2) objects in mind as well as the primary objects when fulfilling its functions. This indicates that the licensing authority must undertake a weighing and balancing exercise when conflict between objects arises.

It is significant that the primary object in s 5(1)(b) is to “minimise” harm or ill health, not to prevent harm or ill-health absolutely. The word “minimise” is consistent with the need to weigh and balance all relevant considerations.”

In *Executive Director of Health v Lily Creek International Pty Ltd and Ors* [2001] WASCA 410 at [59] Wheeler J considered the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application:

“This does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather, it seems to me that must necessarily be assessed against any existing harm or ill health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be

¹ Section 5(1)(c) added by amendment to the Act No. 73 of 2006.

commonly accepted in the community, the distinction is probably not significant.

However, where there is already a very high and serious level of alcohol related harm in a community, it may be that the Court would find a relatively small risk of increase in that level of harm to be unacceptable. In other words, it is not the "risk" of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made."

Departmental Policy

The Department of Racing Gaming and Liquor published its policy, *Extended Trading Permits – Sunday Trading: Non-metro Liquor Stores*, on 7 May 2007:

"Factors involved in assessing applications

Ongoing Extended Trading Permits

In considering a permit under section 60(4)(g), the licensing authority must give consideration to the requirements of section 97(1), section 98D, section 60(4) and section 76, as well as the overall merits of the particular application, and most importantly, the objects of the Act as set out in section 5.

In support of their application on ongoing Sunday trading, licensees of liquor stores seeking an extended trading permit will be expected to demonstrate that the grant of the permit is in the public interest. Therefore, applications are subject to the public interest test set out in section 38 of the Act. For guidance on the public interest test, please refer to the Director's policy titled "Public Interest Assessment".

In terms of the public interest, under section 33(1) of the Act, the licensing authority has an absolute discretion to grant or refuse an application under the Act, on any ground or for any reason that the licensing authority considers to be in the public interest.

Given that section 98D does not authorise non-metropolitan liquor stores to trade on a Sunday, and that many country communities already have access to packaged liquor from a number of different outlets, travelling distance to the nearest outlet will be one of the circumstances of particular relevance. In this regard, it may not be unreasonable for the public to have to travel a total distance of approximately 20 kilometres to/from the nearest licensed premises that sells packaged liquor.”

24. The appropriateness of the Director considering a departmental policy in the decision-making process was considered by McLure J in *Re Romato; Ex parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286 at [27]:

“Although the decision-makers may have regard to a relevant policy, it cannot be treated as a fixed determinative rule regardless of the merits of an individual case...

A policy which fetters all or part of discretion is unlawful. However, where a decision-maker adopts a policy, it is entitled to apply that policy provided applicants are given an opportunity to show that there are exceptional reasons why it should not be applied in their case.”

Discretion vested in licensing authority

25. The meaning of ‘absolute discretion’ in section 33(1) of the Act was considered by Wallwork J in *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 at [6], citing Malcom CJ in *Palace Securities v Liquor Licensing* [1992] 7 WAR 241:

“... the discretion in that subsection was an “absolute discretion” to grant or refuse an application on any ground or for any reason that the licensing authority considers in the public interest... the discretion was confined to the scope and subject of the Act and was not arbitrary and unlimited.”

26. *Re Romato; Ex parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286 at [38]:

“Firstly, it is wrong to focus on the ETP provisions of the Act. Regard must be had to the Act as a whole. Secondly, it fails to take due account of the nature and scope of the Directors’s discretion. 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). Thirdly, the ETP provisions of the Act do not require the Director to treat Sunday in the same way as other days of the week”.

Guidance as to the scope of the discretion can therefore be gleaned from the primary and secondary objects of the Act set out in section 5 and the provisions of section 38 relating to public interest considerations.

There is no requirement for the applicant to demonstrate the existence of exceptional circumstances, except in relation to a submission that a Departmental policy should not apply.

In *Hermal Pty Ltd v Director of Liquor Licensing* Templeman J declared at [37]:

“The only question is whether, having regard to all the circumstances and the legislative intention, an extended trading permit is justified. In answering that 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.”

4. Findings

27. Having conducted a full review of all the materials before the Director we make the following observations and findings.
28. Section 98D of the Act is specific in relation to the permitted hours of trading under a liquor store licence: section 98D(2) excludes Sunday trading outside of the metropolitan area.
29. O’Connor Cellars is located in Kalgoorlie, outside of the metropolitan area.
30. The applicant has the right to apply for an ETP to trade on Sundays in this location, and bears the onus of satisfying the Commission that granting the application is in the public interest.

31. In considering whether or not the ETP is in the public interest the Commission has regard to section 38(4), the objects of the Act, Departmental policy and all relevant factors.
32. The Departmental policy states that one relevant factor is the distance from other liquor outlets, and that 20 km may not be an unreasonable distance to travel.
33. Packaged liquor is authorised for sale on Sundays from 21 outlets within 5km of O'Connor Cellars, and 6 outlets within 3 km. This ETP application therefore falls outside of the Departmental policy.
34. In considering whether to depart from the Department's policy in this application, the Commission has regard to whether or not exceptional reasons exist as to why it should not be applied in this case: *Re Romato; Ex parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286.
35. We are not satisfied that O'Connor Cellars is an exclusive outlet offering liquor which cannot be conveniently sourced elsewhere in Kalgoorlie. We find that the relevant distances do not pose an unreasonable imposition on members of the public intending to purchase packaged liquor on Sundays. Having considered all of the evidence, we find that the applicant has failed to provide any exceptional reasons as to why the policy should not apply to this application.
36. Turning to the other public interest arguments put forward in support of the application, including:
 - Somerville is an affluent area with less alcohol related issues than the broader Kalgoorlie area;
 - The liquor store is a high end outlet providing convenience by selling premium wines on Sundays under the ETP;
 - Residents of Somerville should not be inconvenienced by having to travel to less salubrious or possibly dangerous parts of town to purchase packaged liquor on Sundays.

- The adjoining supermarket is also a high end enterprise, and it is convenient for residents to also purchase alcohol in this location when they shop on Sundays.
 - Kalgoorlie should be considered a metropolitan area and Sunday just any other shopping day due to the prevalence of shift work.
37. There is no evidence that persons from outside Somerville will not purchase liquor from this store on Sundays if the ETP is allowed. The Applicant's supporting statutory declarations include those of individuals living outside the area of O'Connor.
38. In any event, assuming that Somerville is more affluent than the broader Kalgoorlie area, there is no evidence that this equates to less likelihood of alcohol related harm or ill health in that area. The information before us demonstrates that Kalgoorlie has a higher average income than the rest of Western Australia, yet suffers far greater alcohol related harm.
39. The Commission rejects the Applicant's arguments that Sunday in Kalgoorlie should be treated as any other day of the week due to the nature of shift work in the town, or, alternatively, that Kalgoorlie should be treated as a metropolitan town due to its size. Section 98D clearly states that only metropolitan liquor stores may trade on Sundays and we have no discretion to interpret its terms in the manner suggested by the applicant.
40. O'Connor Cellars trades under the Cellarbrations banner and generally does not provide liquor which is unavailable elsewhere in Kalgoorlie. We consider any convenience to be marginal. Residents of Somerville and the broader Kalgoorlie area are already well served by liquor outlets operating on Sundays. The granting of the ETP would not provide a service otherwise unavailable to Kalgoorlie residents.

Harm arguments

In considering whether or not public interest is served by granting this application, we have regard to the factors set out in section 38, including whether or not harm might be caused to people through the use of liquor: section 38(a).

The submissions concerning general alcohol issues in the Kalgoorlie region are not specific to Somerville or this particular application but are of relevance to our consideration of the public interest issues. The relevant 'public interest' is the interest of the public of Kalgoorlie, which is statistically demonstrated to suffer greater harm from alcohol than average in Western Australia.

We accept the Interveners submission that full strength beer and spirits are included in the O'Connor Cellars stock list, both of which present a risk to the community which already suffers alcohol related harm.

We also accept the submission that Sunday trading from O'Connor Cellars may create impulse buying of liquor by Sunday shoppers at the adjacent supermarket.

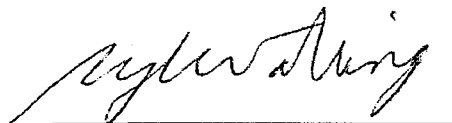
There is clear evidence of harm being caused to the Kalgoorlie community through the use of liquor. Allowing the ETP will increase the availability of liquor, presenting a small but real risk of further harm to the community. We consider that this is unacceptable, given the existing level of alcohol related harm in Kalgoorlie.

The Commission considers that any convenience to residents flowing from the granting of the ETP is outweighed by this risk.

5. Conclusion

The Commission has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that it considers in the public interest, provided that the application is dealt with on its merits. For all of the reasons outlined above, the Commission is not satisfied that granting the ETP in this application is in the public interest.

The Commission affirms the decision of the Director to refuse the ETP application.



**MR EDDIE WATLING
DEPUTY CHAIRPERSON**