

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

Applicant: Queens Supermarket (WA) Pty Ltd
(represented by Mr Phil Cockman of Canford Hospitality Consultants Pty Ltd)

Intervener: Director of Liquor Licensing
(represented by Mr Andrew Mason of State Solicitor's Office)

Objectors: Ms Jennifer Clarkson
Ms Ann Coral Hawke
Ms Laurel Lete
Mr Robert James McDonald
Ms Thelma Claydon
Ms Laurel Elizabeth Hadley
Ms Jacqueline Puzey
Mr Stanley Gordon Gratte
Ms Betty Clarkson

Commission: Ms Emma Power (Presiding Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of a decision by the delegate of the Director of Liquor Licensing to refuse an application for an extended trading permit to allow Sunday trading from the Premises.

Premises: Wonthella Supa IGA Supermarket
& Cellarbrations Liquor Store,
244-252 Fifth Street, Wonthella

Date of Application : 28 November 2017

**Date of Determination:
(on papers)** 13 March 2018

Determination The application for an extended trading permit is refused.

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health [2008] WASC 224*
- *O'Sullivan v Farrer [1989] HCA 61*
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*
- *Hermal Pty Ltd v Director of Liquor Licencing [2001] WASCA 356*
- *Busswater Pty Ltd v Director of Liquor Licensing LC 17/2010*
- *Re Romato; ex parte Mitchell James Holdings Pty Ltd [2001] WASC 286*
- *Redport Enterprises Pty Ltd v Executive Director of Public Health LC 01/2016*
- *Liquorland (Australia) Pty Ltd v Commissioner of Police and Others LC18/2015*
- *PDG Geraldton Pty Ltd v Executive Director of Public Health & Others 14 June 2016 (LC12/2016)*
- *Cellarbrations Liquor Store, Harvey (A000191694)*

Background

- 1 On 20 March 2017, Queens Supermarket (WA) Pty Ltd (“the Applicant”) made an application (“the Application”) pursuant to section 60(4)(g) of the *Liquor Control Act 1988* (“the Act”) to the Director of Liquor Licensing (“the Director”), for a grant of an extended trading permit (“ETP”) for the premises known as Wonthella Supa IGA Supermarket & Cellarbrations Liquor Store, 244-252 Fifth Street, Wonthella (“the Premises”) for the hours being 10.00 am until 10.00 pm on Sundays.
- 2 The applicant complied with the statutory requirements prescribed by the Act and lodged documentation in support of the application including a Public Interest Assessment Submission (“PIA”).
- 3 The application was advertised in accordance with the requirements of the Director and 9 notices of objection were received from members of the public (“the Objectors”).
- 4 The Director determined the application on the papers. The application for the ETP was refused. The decision was published on 2 November 2017 (decision reference: A230106).
- 5 The applicant lodged an application pursuant to section 25 of the Act seeking a review of the Director’s decision on 28th November 2017, such decision also to be determined on papers.
- 6 The Director of Liquor Licensing has elected to intervene in this matter and provide reasons as to why the application and ETP should not be granted.

Submissions on behalf of the applicant

- 7 In its PIA and original submissions, the applicant submits that the extended trading permit is in the public interest and should be granted due to the following factors:
 - a the application is not for a new premises but only for an extension of the trading hours of an existing premises. The Premises is operated by an experienced licensee and there will be no change in the current style of operation which is also in accordance with the Geraldton Liquor Accord;
 - b the grant of an ETP reflects the State Government’s 2014 response to a review of the Act which occurred in 2012 to extend Sunday trading hours to all liquor store licences;
 - c Geraldton is a major regional centre with a growing population;
 - d although the locality contains some priority population groups, the area of Wonthella is of less concern than other areas where liquor licences have been previously granted;
 - e the only other premises selling packaged liquor on a Sunday are located in the Geraldton town centre which is inconvenient for consumers;

- f the questionnaire undertaken by the applicant shows consumer support for the ETP;
 - g the grant of the ETP would:
 - i have a positive impact on the amenity of the locality; and
 - ii would not cause any offence, annoyance, disturbance to inconvenience to any people or group in the locality.
 - h the amount of likely harm or ill health that would occur upon granting the application is minimal;
 - i the sales data for the IGA Supermarket premises on a Sunday indicates consumers undertake a significant shop on Sundays and would prefer to shop for their packaged liquor requirements on the same day;
 - j the IGA Supermarket is award winning and operated to a very high standard;
 - k no liquor infringements have ever been issued in respect to the Premises; and
 - l the local council, Geraldton Golf Club, Towns Football Club and the Geraldton Amateur Basketball Association all actively support the Sunday trading hours and many other sporting clubs hold accounts at the Premises.
- 8 The applicant has appealed the Director's decision stating that:
- a As in the decision of the Director regarding Cellabrations at Harvey (Decision No. A000191694) the Director should have taken into account the relevant "other factors" involved including:
 - i promotion of local liquor products; and
 - ii the requirement to travel into the city centre on a Sunday to purchase liquor products;
 - b the Director's policy regarding geographical spread of the liquor stores trading on Sunday in the locality should have been applied differently;
 - c the Director based his decision on only one primary object of the Act being "to regulate the sale, supply and consumption of liquor" and the other objects must be taken into account;
 - d the applicant's evidence that Wonthella is not a disadvantaged suburb is reflected in the Commission's decision regarding Con's Liquor Geraldton (decision No. LC 12/2016) and should be given more weight;
 - e the applicant is very experienced and the substantial renovations to the liquor store and the fact the IGA has won awards should be taken into account;

- f the fact that there is currently no packaged liquor facility outside the city centre that operates on Sundays is highly relevant to catering for consumer requirements;
- g the results of the questionnaire undertaken by the applicant and the sales figures for the IGA on Sunday indicate that consumers requirements would be met by permitting trading on Sunday.

Submissions on behalf of the objectors

- 9 9 objections were received to the applicant's original application on various grounds under the Act.
- 10 In particular, it was asserted that:
 - a there are currently enough liquor outlets in the area and additional Sunday trading is not required;
 - b the demographic of the suburb is mainly residential with many elderly retired residents and young families;
 - c there is a park in Fourth Street frequently used by families which would be negatively affected;
 - d there is a church and a prevalence of sporting and other clubs in the vicinity of the Premises that would be negatively affected by the additional trading hours; and
 - e there will be undesirable outcomes for the community including behaviours such as assault, stealing and burglary.

Submissions on behalf of Director

- 11 The Director of Liquor Licensing has made submissions regarding the Application as Intervener. The Director asserts:
 - a the Director properly applied *the Extended Trading Permits – Sunday Trading: Non-metro Liquor Store Policy* established by the Director and the applicant failed to substantively address this policy;
 - b the applicant's reliance on the Government's 2014 response to a review of the Act which occurred in 2012 to extend Sunday trading hours is erroneous;
 - c the only benefit of the application is increased convenience to customers and any other relevant considerations are not supported by the applicant's PIA;
 - d the proximity of other liquor stores is relevant and the reliance the applicant has placed on the decision of the Director relating to Cellarbrations at Harvey (decision A000191694) is misconceived;

- e the applicant has not discharged its onus to show that the application fulfils the objects of the Act:
 - i to minimise harm of ill health to people, or any class of people due to the use of liquor; or
 - ii to demonstrate that the application will satisfy a relevant consumer requirement; and
- f the applicant has generally not supplied sufficient evidence to demonstrate that the grant of the application is in the public interest.

Legal and Statutory Framework

- 12 The Commission is not required to find error on the part of the Director, but rather undertakes a full review and makes a determination on the basis of the same materials as before the Director when the decision was made (*Hancock v Executive Director of Public Health [2008] WASC 224*).
- 13 On a review under section 25 of the Act, the Commission may:
- a affirm, vary or quash the decision subject to the review; and
 - b 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
 - c give directions:
 - i as to any question of law, reviewed; or
 - ii to the Director, to which effect shall be given; and
 - d make any incidental or ancillary order.
- 14 When considering a review of a decision made by the Director, the Commission is required to have regard to only the material that was before the Director at first instance (section 25(2c) of the Act).
- 15 Section 16 of the Act prescribes that the Commission:
- a may make its determinations on the balance of probabilities [sub section(1)(b)(ii)]; and
 - b is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply [subsection (7)(a)]; and
 - c is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; [subsection (7)(b)];

- 16 When determining whether an application is in the public interest the Commission must take into account:
- a the primary objects of the Act set out in section 5(1):
 - i to regulate the sale, supply and consumption of liquor; and
 - ii to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - iii 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; and
 - b the secondary objects of the Act set out in section 5(2):
 - i to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and
 - ii to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - iii to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
- 17 The matters which the Commission may also take into account in determining whether granting of an application is in the public interest are set out in section 38(4) of the Act as follows:
- a the harm or ill-health that might 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 might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and
 - d any other prescribed matter.
- 18 Liquor stores outside the metropolitan area are not permitted to sell liquor on a Sunday by virtue of subsections 98D(1)(b) and 98D(2) of the Act, however, may apply for an ETP to sell liquor on a Sunday in accordance with subsections 60(1) and 60(4)(g) of the Act.
- 19 Section 38(2) of the Act requires an applicant to satisfy the Commission that the granting of an application is in the public interest. The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer [1989] HCA 61*).

- 20 The decision by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208* sets out the Commission’s function in reviewing a decision of the Director pursuant to section 25 of the Act as follows:
- a make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - b make findings about the likely degree of harm to result from the grant of the application;
 - c assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - d weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether it is in the public interest to grant the application.
- 21 The failure to refer to any specific evidence in written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others (LC 01/2017)*).

Determination

- 22 The Commission has undertaken a full review and now makes a determination on the basis of the same materials as before the Director when the decision was made. This is the correct and established procedure as referred to in *Hancock v Executive Director of Public Health [2008] WASC 224*.
- 23 The relevant questions to be considered are:
- a whether, having regard to all the circumstances and legislative intention, an extended trading permit is justified (*Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356 at 37*); and
 - b whether the evidence provided by the Applicant satisfies the licencing authority that the grant of the Application is in the public interest.
- 24 The expression “the public interest” imports a discretionary value judgment, confined only by the scope and purposes of the statute (*Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*).
- 25 Subsections 38(1)(b) and (2) of the Act, and regulation 9F(b) of the Regulations, place the onus on the applicant to satisfy the Commission that the grant of the application is in the public interest. To discharge its onus under section 38(2) of the Act, the applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
- 26 The evidence provided by the applicant (or any other party) must be “relevant, reliable, and logically probative to assist the decision maker in assessing the probability of the existence of the facts asserted in each case” (*Busswater Pty Ltd v Director of Liquor Licensing (LC 17 of 2010)*).

Sunday Trading Outside the Metropolitan Area

- 27 The applicant asserts that the Government's 2014 review of the Act supports a position that Sunday trading in major regional centres will be implemented in the future. However, this is not reflected in the current Act which must be applied by the Director and the Commission.
- 28 The Act clearly distinguishes between liquor stores outside of the metropolitan area and those within it. Nothing requires Director or the Commission to treat Sunday the same as other days of the week (*Re Romato; ex parte Mitchell James Holdings Pty Ltd [2001] WASC 286*).
- 29 The prohibition of Sunday trading outside of the metropolitan area is clearly a key regulatory consideration that must be taken into account by the licencing authority. The applicant must show sufficient reason that such regulation not be applied in this case.
- 30 The applicant refers to the *Extended Trading Permits – Sunday Trading: Non-metro Liquor Store Policy* established by the Director. However, although the applicant sets out the policy, there is no evidence provided that indicates:
- a the liquor stores in the locality that do trade on a Sunday are not located within a reasonable distance (all being within a 9 minute drive);
 - b any additional travel time or the “city” location of the other liquor stores trading on Sundays constitutes anything but a mere inconvenience to customers; or
 - c the Premises would offer unmet consumer requirements, other than the convenience of “one trolley shopping” or ample parking, by trading on Sundays.
- 31 It is established that mere convenience to shoppers is not enough to satisfy the public interest test as noted at 73 in the decision of *Redport Enterprises Pty Ltd v Executive Director of Public Health (LC 01/2016)*:

“ With respect to members of the local community, the Commission is of the view that the added convenience to local shoppers at the IGA supermarket and other retail outlets in the West Busselton Shopping Centre is not sufficient reason to grant the application. As the Commission has commented in other decisions (for example, Liquorland (Australia) Pty Ltd v Commissioner of Police and Others (LC18/2015)), convenience, of itself, is not a basis upon which to grant an application which is required to satisfy the public interest. The public interest involves much broader considerations. ”

Proper Development of the Liquor Industry

- 32 There is no compelling evidence provided by the applicant that to allow trading on Sunday in this case would promote the proper development of the liquor industry in the State. In particular:
- a there is no specific material presented that the particular range and diversity of products provided at the Premises (including the specific local products referred to in the PIA) or in-store tastings are not available at other liquor stores in the area;

- b the fact that the IGA Supermarket has demonstrated high operational capabilities is of limited probative value when considering the public interest of Sunday trading of the liquor store Premises;
 - c there is no assertion that the Premises particularly services tourists or any demographic other than the immediate local community; and
 - d although there is some support provided by local sporting clubs, there is no specific support provided by any local commercial organisations or local producers that would indicate the PIA would add to the proper development of the liquor industry.
- 33 The applicant has provided 76 witness questionnaires in support of its application. It is clear from the majority of these that Sunday trading would be more convenient for a section of the local community. However, the weight these surveys is given is otherwise to be treated with caution.
- 34 Although convenience of consumers may be a relevant factor in determining consumer requirements, it alone is not enough to outweigh the established legislative intent that, except in exceptional circumstances, Sunday trading is not permitted outside of the metropolitan area.

Harm Minimisation

- 35 In respect to harm minimisation, the applicant infers that all evidence as to the demographics of the locality should be taken from comments made in the Commission's decision regarding Con's Liquor Geraldton (*PDG Geraldton Pty Ltd v Executive Director of Public Health & Others 14 June 2016 (LC12/2016)*). With all due respect to the applicant, this is not enough to demonstrate any current or possible future harm, or ill health related to the Premises and this particular application. In the Con's Liquor case, it is clear that substantial evidence and supporting documentation was provided to allow the Director and the Commission to come to the relevant conclusions. No such evidence is presented for consideration here.
- 36 The issue of the possible harm and ill health and impacts on amenity, offence, annoyance, disturbance or inconvenience have also not been adequately addressed. It is difficult for the Director or Commission to apply the test set out in *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015]* (see paragraph 20 above) without sufficient current evidence as to the existing level of harm, or evidence which assists in assessing the likely degree of harm to result from the grant of the ETP.
- 37 In addition, no compelling examples have been presented as to the specific harm minimisation measures that will be adopted by the Premises save that the licensee's experience is sufficient to minimise potential harm. Other mentioned measures, such as accreditation of staff in accordance with the Act, are to be expected.
- 38 It is not enough to simply assert that because the Premises is an existing liquor store and has been renovated, little or no negative impact will occur by adding additional trading hours.

Other Decisions of the Director and Commission

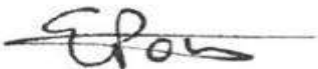
- 39 The applicant draws parallels between this Application and the decision of the Director made with regard to the extended trading permit application for Cellarbrations at Harvey (decision

A000191694). However, not only are the relevant facts and circumstances quite different, there was clearly extensive evidence provided to the Director and Commission to support that application.

- 40 It is not sufficient to point to a prior decision by the Director or Commission as a “precedent” when:
- a the facts and evidence in that prior decision are not before the Director or Commission to consider; and
 - b the onus is on the applicant to provide “*relevant, reliable, and logically probative*” evidence relating to the substantial merits of the current Application.
- 41 The Commission must undertake a balancing exercise which is based on the particular facts and circumstances of the relevant application and must decide what weight it will give to the competing interests and other relevant considerations.
- 42 In this case the applicant has not provided sufficient material to support its reasoning that there are special circumstances that support the ETP being granted.

Decision

- 43 The Commission finds that the applicant has not:
- a established that, in the circumstances (and on the balance of probabilities) it meets the criteria set out in the *Extended Trading Permits – Sunday Trading: Non-metro Liquor Store Policy* established by the Director to a sufficient degree to demonstrate that the normal legislative standard regarding Sunday trading outside of the metropolitan area should be disregarded and that an ETP is justified; and
 - b discharged its onus pursuant to section 38(2) of the Act to show that the application to grant the ETP would be in the public interest.
- 44 As the applicant has not discharged its onus, the objections are not required to be further discussed in any detail.
- 45 The decision of the Director is affirmed and the application is dismissed.



EMMA POWER
PRESIDING MEMBER