

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

Applicant: Springmist Pty Ltd
*(represented by Mr John Prior under instructions from
Mr Richard Barsden of Williams Ellison Pty Ltd)*

Other Parties: Director of Liquor Licensing, Intervener
(represented by Hugo Leith of State Solicitor's Office)

Observers Mr Barrie Lepley
(Director, Springmist Pty Ltd)

Ms Anne Bradley
(Company Secretary, Springmist Pty Ltd)

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

Date of Hearing: 17 July 2009

Date of Determination: 31 July 2009

Premises: Constellation Apartments

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

Determination: The Director's decision is quashed and the Application
for a Special Facility (Tourism) Licence granted.

Pursuant to section 25(4)(b) of the Act approve the
Application for a Special Facilities (Tourism) Licence

for the purposes of providing up to 16 bottles of wine, stocked in a Vintec bar refrigerator in each of two apartments, known as Constellation Apartments, Margaret River, for consumption by guests of those apartments in those apartments.

Authorities referred to by the Applicant:

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

Authorities referred to by the Intervener:

- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Palace Securities v Liquor Licensing* [1992] 7 WAR 241
- *Hancock v Executive Director of Public Health* [2008] WASC 224

Background

1. On 21 November 2008, pursuant to section 46 of the *Liquor Control Act 1988* ("the Act") the Applicant applied for grant of a Special Facility (Tourism) Licence in respect of premises situated at 139 Bussell Highway, Margaret River, known as the Constellation Apartments.
2. On 30 March 2009, by way of Decision No. A192633, the Director of Liquor Licensing ("the Director"), by his delegate, refused the Application for grant of a Special Facility Licence ("the Decision").
3. On 16 April 2009, the Applicant lodged an application, pursuant to section 25(1) of the Act, for review of the Decision with the Liquor Commission of Western Australia ("the Commission").
4. On 24 April 2009, the Director of Liquor Licensing ("the intervener") intervened in the review proceedings.

Legal Principles

5. Grants of Special Facility Licences are provided for in section 46 of the Act. Pursuant to section 46(1), the licensing authority shall not grant a special facility licence, except for a prescribed purpose.
6. The *Liquor Control Regulations 1989* (WA) in r 9A prescribe several purposes for which a Special Facility Licence may be granted. Relevantly, r 9A (7)-(9) provides for a grant of such a licence for tourism purposes. Sub-regulation (7) states:

A Special Facility Licence may be granted for the purpose of allowing the sale of liquor to persons likely to be attracted to, or present at, a place that, in the opinion of the licensing authority, is or will become-

- (a) *an attraction for tourists; or*

- (b) a facility that enhances the State's tourist industry.*
7. The Director has an absolute discretion to grant or refuse an application on any ground, or for any reason which he considers to be in the public interest (s 33(1) of the Act).
 8. The Director may refuse an application in the public interest even where an applicant has otherwise met the requirements of the Act (section 33(2)(a) of the Act).
 9. An applicant who makes an application for a grant of a Special Facility Licence must satisfy the licensing authority that granting the application is in the public interest (section 38(2) of the Act).
 10. Section 38(4) provides as follows:
 - (4) Without limiting subsection (2), the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include-*
 - (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.*
 11. The discretion of the Director in section 33(1) of the Act is an “absolute discretion” to grant or refuse an application on any ground or for any reason that the Director considers in the public interest; the discretion being only confined by the scope and purpose of the Act.

12. The objects of the Act are set out at section 5:

5 (1) The primary objects of this Act are-

(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 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.

(2) In carrying out its functions under this Act, the licensing authority shall have regard to the primary objects of this Act and also to the following secondary objects –

(a) 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

[(b), (c), deleted]

(d) to provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor; and

(e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

13. The reference to “public interest” in section 33(1) of the Act indicates that both sections 5 and 38 of the Act are relevant when making a decision.

14. The importance of the objects in section 5 of the Act is confirmed by the legislative history of the Act.

15. The *Liquor and Gaming Legislation Amendment Bill 2006* introduced several important amendments to the Act, including:
- (i) A public interest test in section 38 of the Act was inserted in order to replace the previous “needs test” (which required that the competitive impact on other businesses in the area to be considered).
 - (ii) Section 5 of the Act was amended to elevate the objects of the former *Liquor Licensing Act 1988* to the primary objects of the Act;
 - (iii) Section 5 of the Act was amended to include object 5(c) as a primary object of the Act (prior to the amendment, the content of object (c) was generally reflected in the secondary objects of the Act only).
16. Section 19 of the *Interpretation Act 1984* provides that regard may be had to extrinsic material (including the Second Reading Speech to a Bill) to confirm that the 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 of object underlying the written law.
17. During the Second Reading Speech to the Bill in the Legislative Assembly on 20 September 2006 (see Parliamentary Debates, WA Parliament, vol 409, p 6342), the then Minister for Racing and Gaming, the Hon. Mr Mark McGowan, stated as follows:

“A key reform is the creation of the public interest test.... Under the public interest test, all applicants will be required to demonstrate that the application is in the public interest and the licensing authority will be required to consider the application based on the positive and negative social, economic and health impacts of the community... 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 by 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.”

Application for Review

18. The function of the Commission in relation to an application for review is to undertake a review of the decision of the Director on its merits, as and by way of a rehearing.
19. The only question is whether, having regard to all the circumstances and legislative intention, a grant of a licence is justified. In answering that question, the Commission has a wide discretion (equivalent to that of the Director). It is a matter for it to decide what weight to give to the competing interests and other relevant considerations.
20. When conducting 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: section 25(2c).
21. The materials before the Director's delegate were:
 1. Williams Ellison correspondence dated 21 November 2008
 2. Notice of Application Form 2 lodged 21 November 2008
 3. Public Interest Assessment ('PIA') submissions lodged 21 November 2008
 4. Section 46 submission lodged 21 November 2008
 5. House Management Policy and Code of Conduct lodged 21 November 2008
 6. Section 39 Certificate dated 29 October 2008
 7. Section 40 Certificate dated 22 October 2008
 8. Letters of support lodged 21 November 2008
22. The business for which the Application for a Special Facility Licence is sought is described in the Application and Submission lodged by the Applicant's Solicitors, dated 21 November 2008, and the Applicant's further letter of 13 March 2009. The licence would apply in respect of two adjacent apartments, which are used for the purpose of providing short term accommodation to tourists. The apartments are situated in a mixed use development.

23. The Special Facility Licence is sought in order to permit the provision of packaged alcohol (bottles of wine) to the guests of the apartments for consumption in the apartments.
24. The wine would be stocked in a Vintec bar refrigerator located in each apartment. Each refrigerator would contain up to 16 bottles of wine.
25. The Applicant advises that the apartments would be managed through the following arrangement extracted from the Applicant's letter of 13 March 2009:

"[T]he proposed approved manager will be available-

- *On site to introduce guests to the premises and its facilities including the House Management Policy and Code of Conduct, Tenancy Agreement and Wine List with Notice;*
- *On site daily to re-supply premises with food and wine;*
- *On site to complete an inventory at the end of each guest's stay;*
- *On site from the Gallery (adjacent to the proposed licensed premises, in the same building and on the same floor).... 10 am – 5 pm Monday to Friday inclusive; and*
- *By telephone, 24 hours per day, 7 days per week.*

The approved manager resides at Cowaramup, no more than 15 minutes drive from the proposed licensed premises."

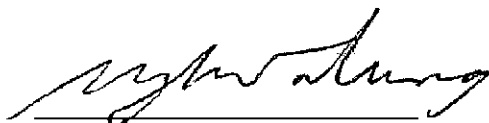
26. There were no objections to the Special Facilities Application and neither the Commissioner of Police nor the Executive Director of Public Health exercised their statutory rights under the Act to intervene.
27. The Director of Liquor Licensing intervened in these proceedings. Written submissions were filed on 3 and 10 July 2009. The Intervener's basic submission may be summarised as follows:

1. The Application does not comply with the requirement for personal supervision and management of the premises, as required by section 100 of the Act.
2. Approval of the Application would not serve the public interest or the objects and purposes of the Act.

Conclusion

28. Having considered all of the materials that were before the Director's delegate, the written submissions and having heard the parties at the review hearing of 17 July 2009, the Commission is satisfied that the Applicant has met all the necessary statutory criteria, requirements and conditions precedent to the Application being considered.
29. The primary business of the Applicant is the provision of upmarket tourist accommodation, limited to two one bedroom apartments to which the general public does not have unrestricted access. The Applicant seeks a Special Facility Licence in order to provide 16 bottles of premium locally produced wine to guests in both apartments for consumption onsite.
30. The Margaret River wine region is a major tourism attraction and the Commission is satisfied that the public interest is served in granting the Applicant a Special Facilities (Tourism) Licence. The provision of local premium wines in exclusive short stay accommodation, as operated by the Applicant, is consistent with section 5(1)(c) of the Act to cater for the proper development of the tourism industry in the state.
31. The Commission is further satisfied that the provision of a small number of locally produced premium wines to the Applicant's short stay tenants will both enhance local tourism and promote wine produced in the Margaret River region.
32. Having considered all factors relevant to the public interest, including the matters set out in section 38(4) of the Act, the Commission finds no evidence of any detriment likely to arise from the grant of this licence.

33. The section 100 requirement for supervision and management must be considered in the context of each application. The Act does not require personal management and supervision of short stay tenants consuming alcohol in the privacy of a one bedroom rental apartment to the same extent as licensed premises that are open to the general public. Such an interpretation of the Act would be unreasonable, impractical and inconsistent with section 5(2)(e) of the Act.
34. There is no realistic risk of juveniles or uninvited members of the public either gaining access to these premises or consuming alcohol therein. The Commission considers that the risk of disorderly behaviour, or other conduct proscribed by section 115 of the Act, to be remote, given the very small scale and character of the enterprise. The Commission therefore concludes that the supervision and management proposed by the Applicant is satisfactory and complies with section 100 of the Act.
35. Having considered all of the relevant materials and the submissions of the Applicant and the Intervener, the Commission is satisfied that the granting of this Special Facilities Licence is clearly in accordance with the primary and secondary objects of the Act and the public interest. In particular, the primary object at section 5(1)(c) of the Act is achieved by the granting of this Application, which is in no way inconsistent with the other objects of the Act.
36. The Commission is satisfied on the available evidence that with the granting of the Application, the business of the Applicant will become a facility that enhances the State's tourist industry.
37. The Commission hereby quashes the Director's decision and grants the Application for the Special Facility (Tourism) Licence.



EDDIE WATLING
DEPUTY CHAIRPERSON