

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

- Applicant:** Chief Health Officer
(represented by Mr John Carroll of State Solicitor's Office)
- Respondent:** Sodexo Remote Sites Australia Pty Ltd
(represented by Ms Meloney King of Sodexo Australia)
- Commission:** Mr Seamus Rafferty (Chairperson)
Ms Pamela Hass (Member)
Ms Elanor Rowe (Member)
- Premises:** Big Bell Accommodation Village, situated 25 km from Big Bell-Wyah Pool Road, Weld Range
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the Director of Liquor Licensing to grant an application to vary a condition of licence pursuant to s64 and s68 of the *Liquor Control Act 1988*.
- Date of Hearing:** On the papers
- Date of Determination:** 26 November 2020
- Determination:** The decision of the Delegate of the Director of Liquor Licensing is affirmed.

Authorities referred to in determination:

- *Woolworths v Director of Liquor Licensing [2013] WASCA 227*
- *O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ)*

Background

1. On 15 January 2020, Sodexo Remote Sites Australia Pty Ltd (“the Respondent”) lodged an application to vary a condition of a licence pursuant to sections 64 and 68 of the *Liquor Control Act 1988* (“the Act”). On 13 March 2020, a Delegate of the Director of Liquor Licensing approved the application by varying the licence as requested.
2. In his reasons for decision, the Delegate observed that, ‘[T]he application was referred to WA Police and Mental Health Commission. No response was received.’ The Delegate’s reasons for decision made no reference to an intervention lodged on behalf of the Chief Health Officer (“the Applicant”) dated 27 February 2020.
3. For reasons which have not been adequately explained and of which themselves are inexplicable, the Delegate did not take into account the intervention of the Chief Health Officer in arriving at his decision.
4. By way of an application dated 5 May 2020, the Chief Health Officer has sought a review of the decision of the Delegate of the Director of Liquor Licensing pursuant to section 25 of the Act and submitted that the original decision should be quashed and remitted back to the Director to be heard and determined afresh.
5. Before the Commission can consider the merits of the review application, two preliminary issues arise. The first is whether the application is made out of time having regard to s.25(2) of the Act. The second is whether the position of the Respondent is prejudiced in these proceedings due to the fact that no responsive materials were filed in respect to the intervention at first instance.

Preliminary issue as to timing of application

6. Section 25(2) of the Act prescribes that, ‘an application under subsection (1) must be made within a month after the Applicant receives written reasons for the decision or such longer period as the Commission may allow.’ [emphasis added]
7. In this case, the variation of licence conditions was granted on 13 March 2020 and the decision was sent to the Respondent on the same day. However, the Applicant, being the Chief Health Officer, did not receive the written reasons for decision until 20 April 2020. The Commission is of the view that any application for review needed to be made before 20 May 2020. In this case, the application was lodged on 5 May 2020, therefore being within the prescribed period.
8. The Respondent was given the opportunity to make submissions in respect to this issue. A response was received from Ms Meloney King, National Licensing & Compliance Manager for Sodexo in an e-mail dated 12 May 2020. In summary, it was submitted that the Commission should decline the application for review, but there was no specific submission as to the issue as to whether the application was made out of time.

9. If the Commission is wrong in its interpretation of when the time period for the lodging of a s.25 review application commences, the Commission would still have granted leave to the Applicant for an extension of time within which to commence the proceedings, given that the Delegate did not consider material that had been lodged prior to the determination of the matter and that required consideration at first instance, consistent with principles of fairness in proceedings of this type.
10. Accordingly, the Commission considers that the application was made within the prescribed period and that the matter can be considered on its merits.

Preliminary issue as to potential prejudice to the Respondent

11. A further preliminary issue arises as a result of the Delegate's failure to consider the material lodged by the Applicant at first instance. S.25(2c) of the Act prescribes that, 'when conducting a review of a decision by the Director, the Commission may have regard only to the material that was before the Director when making the decision.'
12. Two discrete issues arise in this case, they being:
 - a) Was the material provided by the Applicant before the Director at first instance?
 - b) If such material was before the Director, is the Respondent's position before the Commission prejudiced by virtue of the fact that no responsive material was placed before the Director and the Respondent cannot file any further material in these proceedings by virtue of the operation of s.25(2c) of the Act?
13. The Commission has concluded that the material was before the Director at first instance, however his Delegate for reasons unknown failed to take it into account. The basis for that decision is that the material relied upon by the Applicant was lodged in accordance with the requirements of the Act on or about 27 February 2020.
14. As to the issue of prejudice to the Respondent, for reasons which will be self-evident from the ultimate determination of this application, the position of the Respondent has not been prejudiced by the inability to respond to the materials lodged on behalf of the Applicant in this matter at first instance.

Statutory framework

15. In *Woolworths v Director of Liquor Licensing*¹ His Honour Buss JA set out the statutory framework for a determination of an application pursuant to section 25 of the Act in the following terms, namely:
 - a) by s.38(2) of the Act, an Applicant has to satisfy the Commission that the granting of an application is in the public interest;

¹ [2013] WASCA 227

- b) the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;²
- c) the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act, as set out in s.5(2) of the Act;
- d) the factual matters which the Commission is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those set out in s.38(4) of the Act;
- e) s.5(2) is mandatory whereas s.38(4) is permissive;
- f) on the proper construction of the Act (in particular, s.5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and
 - facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

Material filed on behalf of the Applicant

16. The material relied upon by the Intervenor, that being the Applicant in these proceedings is a letter from Dr Revle Bangor-Jones, Delegate of the Chief Health Officer dated 27 February 2020. The material identifies the following salient issues:
- a) The nature of the application, which is an increase of trading hours on each Wednesday of 5 hours;
 - b) Potential for the proposed extension of trading hours to further increase harm;
 - c) Information as to high alcohol consumption and risky drinking behaviours amongst mining industry and FIFO workers;
 - d) Links between alcohol consumption, mental health and suicide.
17. It is submitted that the material relied upon leads to the following conclusions:
- a) There are residents of the mine site who are already experiencing alcohol-related harm and ill-health, and are likely to be further adversely impacted by additional hours of trade, particularly if packaged liquor can continue to be stockpiled;
 - b) The licensee should give consideration to activities which do not involve alcohol sales which may be beneficial in addressing concerns that were outlined in the original application;

² *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute. See *O'Sullivan* (216).

- c) If not already being implemented, recommendations within the FIFO Report regarding mitigating and preventing mental health risks associated with the FIFO work arrangements may be of benefit.

Materials relied on by the Respondent

- 18. The materials relied on by the Respondent at first instance included:
 - a) Submissions from the licensee;
 - b) Letter of support from the mining operator, Big Bell Operations Pty Ltd.
- 19. The primary issue identified in support of the application was that Wednesday was a shift change day, with the licensed premises closed between 8.00am and 5.30pm. Some of the residents on site would stockpile packaged liquor that would then be consumed to excess on those dates resulting in anti-social behaviour, depression and isolation.
- 20. The purpose of the application was not to be able to sell more alcohol, but to be able to provide a service to those who were not working on the remote site on shift change days and to supervise and control the sale and consumption of liquor on those days to avoid the problems that had arisen as a result of the licensed premises being closed for a period of 9.5 hours on Wednesdays.

Conclusion

- 21. In determining this application, the predominant issue for consideration is the primary object of the Act set out in s.5(1)(b) that being, 'to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor.'
- 22. The material filed on behalf of the Intervenor raised a number of relevant issues as to harm and ill-health specific to those who work in the mining industry and particularly those who work on a fly-in/fly-out basis. That material is general in nature and not specific to the operation of the licensed premises the subject of the application. The Commission accepts without reservation the material referred to in respect to the links between alcohol consumption, mental health and suicide, however is not prepared to accept any suggestion that the granting of the application would have a potential to exacerbate issues relating to harm and ill-health that already exist in the location in which the licensed premises operate.
- 23. It is entirely appropriate for the Chief Health Officer to bring matters to the attention of the licensing authority and for those matters to be given due weight where appropriate in the decision-making process. However, in this case the Commission also needs to give due weight to the following matters identified by the Respondent, they being:
 - a) The application for variation relates to an extra five hours of operation on one day of the week;
 - b) The day on which the variation is sought is a shift change day, which results in residents at the mine site who are not working being left with very little to do;

- c) The purpose of the application is to avoid residents stockpiling packaged alcohol and consuming it on the change of shift day in locations where they are not supervised, resulting in depression, isolation and boredom to some residents;
- d) The granting of the application will likely reduce the consumption of alcohol on the basis that the Applicant proposes, 'that if we took the need away for residents to stockpile, open the bar for the shift change day, have an approved manager to supervise the consumption of liquor, interact with residents in the shady airconditioned area and provide other activities and food such as pool tables, games groups with common interests, sporting activities, BBQ's, it would likely reduce the amount of liquor consumed, slow down the consumption before beer gets warm and reduce the feelings of isolation as residents have others to socialise with etc.'

24. Having regard to all of the materials before the Commission, we are positively satisfied that the granting of the application for a variation of the licence is in the public interest. The basis for that finding is:

- a) The application relates to one day of the week for a period of five hours;
- b) The day on which the application for variation is sought, is a unique day in the operation of the mine site, that being change of shift day;
- c) Some residents are engaging in inappropriate drinking practices by virtue of the fact that the licensed premises are closed for 9.5 hours on the change of shift day, that being the consumption of large amounts of alcohol in a non-controlled environment away from the licensed premises;
- d) The allowing of five further hours of trade will allow residents to consume alcohol in a supervised environment, which would not tolerate the excessive consumption of alcohol thus resulting in anti-social behaviour;
- e) The allowing of five further hours of trade will also allow residents to interact on a social basis, thus potentially avoiding issues of social isolation and depression.

25. Accordingly, the decision of the Delegate at first instance is affirmed pursuant to s.25(4)(a) of the Act. The variation of licence number 609213076219 is granted to the extent that the permitted trading hours on each Wednesday are amended from 6.30am to 8.00am to 6.30am to 1.00pm.



Seamus Rafferty
Chairperson