

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

- Applicant:** Jun Chul Seo  
(represented by Mr Raymond Tan of Tan and Tan Lawyers)
- Intervener:** Director of Liquor Licensing  
(represented by Mr Ian Repper of State Solicitors Office)
- Commission:** Mr Jim Freemantle (Chairperson)  
Mr Eddie Watling  
Ms Helen Cogan
- Premises:** Hi Mart Victoria Park  
Shop 3/15b 342 Albany Highway  
Victoria Park
- Observers:** Mr Peter Spragg, State Solicitors Office  
Ms Margaret Au, Tan & Tan
- Date of Hearing:** 8 July 2011
- Date of Determination:** 9 August 2011
- Matter:** Application pursuant to Section 25 of the *Liquor Control Act 1988* for a review of decision A217732 of the Director of Liquor Licensing dated 18 March 2011.

**Determination:**

The decision of the Director of Liquor Licensing is affirmed and the application is refused.

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**Authorities referred to in the Determination**

- *Charlie Carter Pty Ltd v Streeter and Male & Anor*, unreported; FCt SCt of WA; Library No 8929; 21 June 1991
- *Busswater Pty Ltd v Director of Liquor Licensing* LC 17/2010
- *Element WA Pty Ltd v Director of Liquor Licensing* LC 32/2010
- *Harold Thomas James Blakely v Director of Liquor Licensing* LC 44/2010
- *Shallcross Investments Pty Ltd v Director of Liquor Licensing* LC 26/2010

- *Paul Kontinorinis and Maria Kontinorinis v Director of Liquor Licensing LC 23/2010*
  - *Hancock v Executive Director of Public Health [2008] WASC224*
  - *O'Sullivan v Farrer (1989) 168CLR210*
  - *Palace Securities Pty Ltd v Director of Liquor Licensing [1992] WAR241*
  - *McKinnon v Secretary, Department of Treasury [2005] FCAFC142*
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## **Background**

- 1 An application was lodged on 29 October 2010 pursuant to section 47 of the Liquor Control Act 1988 for the grant of a liquor store licence for the subject premises.
- 2 On 1 December 2010, the Director of Liquor Licensing wrote to the Applicant seeking more information in respect of the Applicants Public Interest Assessment to which the Applicant responded on 8 December 2010 which response was received by the Director on 9 December 2010.
- 3 The Commission notes that no objections were lodged in respect of the Application.
- 4 Decision A217732 dated 18 March 2011 the application was refused by the Director of Liquor Licensing.
- 5 On 15 April 2011 the Applicant sought a review of the Director's decision pursuant to section 25 of the Act.
- 6 A notice of intervention was lodged on 21 April 2011 by the Director pursuant to section 69(11) of the Act.
- 7 A hearing before the Liquor Commission was convened on 8 July 2011.

## **Applicant's Submissions**

- 8 The Applicant has submitted a Public Interest Assessment ("PIA") that meets the requirements of the Act and the Directors Policy guidelines.
- 9 The Applicant reviewed the PIA in light of a number of decisions made by the Director when granting licences including Meridian Regional Community & Leisure Centre and Madoon Brewery and has also relied on the form of PIA previously submitted by the Applicant's solicitors Tan & Tan in respect of Tong 86 Restaurant and Hi Mart City both of which licence applications were successful.
- 10 A finding that the proposed licence would provide a convenient service to a significant section of the public is, of itself capable of demonstrating the reasonable requirements of the public.

*(Charlie Carter Pty Ltd v Streeter and Male & Anor, unreported; FCt SCt of WA; Library No 8929; 21 June 1991)*

Thus the mere fact the Applicant has made reference in its PIA to convenience of patrons purchasing liquor and groceries are sufficient to satisfy the requirements of section 38 of the Act.

- 11 The Applicant has provided an appropriate level of evidence to support its application and thus the facts of this application differ from those in *Busswater Pty Ltd v Director*

of *Liquor Licensing LC 17/2010* where the application under section 25 was refused for lack of supporting evidence.

- 12 The Applicant has been denied procedural fairness as the standard of supporting evidence required varies from case to case and the Director's decisions are discretionary and subjective.
- 13 The requirements to be met under a PIA are unclear and there is apparent confusion as to what a PIA should include. This contention by the Applicant is illustrated by the Commission's determinations in *Busswater Pty Ltd (supra)*, *Element WA Pty Ltd v Director of Liquor Licensing LC 32/2010*, *Harold Thomas James Blakely v Director of Liquor Licensing LC 44/2010*, *Shallcross Investments Pty Ltd v Director of Liquor Licensing LC 26/2010* and *Paul Kontinorinis and Maria Kontinorinis v Director of Liquor Licensing LC 23/2010*.

Thus the Applicant is entitled to have the decision of the Director quashed and the matter remitted to the Director for determination with fresh evidence (*Martin CJ, Hancock v Executive Director of Public Health [2008] WASC 224 at 45*).

#### **Intervener's submissions**

- 14 Section 38(2) of the Act requires that the Applicant must satisfy the licensing authority that the granting of the licence is in the public interest. This is a positive obligation and the Applicant must supply adequate evidence to convince the licensing authority of its case under the PIA.
- 15 The Liquor Commission in its determination has maintained a consistent position in respect of requiring sufficient evidence and not accepting opinions and assertions as adequate evidence.
- 16 In addition to satisfying the requirements of section 38 the application must satisfy the objects of the Act as set out in section 5.
- 17 The public interest is a broad concept and reflects a discretionary element and need to make value judgements.

(*O'Sullivan v Farrer (1989) 168CLR 210 at 216 and 217*)

- 18 The licensing authority has a very wide discretion to decide what weight to give to all relevant considerations.
- 19 The Applicant has not supplied adequate evidence to support its application and satisfy the requirements of the Act.

#### **Determination**

- 20 Pursuant to section 38(2) of the Act, an Applicant for the grant of a liquor store

licence must satisfy the licensing authority that granting the application is in the public interest.

- 21 Furthermore, pursuant to section 33(1) of the Act, the licensing authority has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest; the discretion being confined only by the scope and purpose of the Act (refer *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR241).
- 22 When considering the public interest, the licensing authority is bound by the objects of the Act as set out in section 5 and complying with these objects is relevant to determining the public interest.

*(Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7WAR241 at 250)*

- 23 In determining the application for review
- a) Section 25(2c) of the Act, prescribes that the Commission may take into account only that material which was before the Director when making the decision;
  - b) Section 25(4) prescribes the actions open to the Commission.
- 24 In determining what constitutes the public interest, the Commission also notes the following precedents in addition to *Palace Securities Pty Ltd (supra)* to which the Applicant refers:

“The expression “in the public interest”, when used as the criterion for the exercise of a statutory discretion, usually imports a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation”

*O’Sullivan v Farrer (1989) 168CLR210*

*In McKinnon v Secretary, Department of Treasury [2005] FCAFC142, Tamberlin J stated:*

“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression “in the public interest” directs attention to that conclusion or

determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”

- 25 Section 38(2) is clear in its imposition of an affirmative or positive obligation to demonstrate to the licensing authority that granting a licence application is in the public interest. It is insufficient to demonstrate that the grant of the licence is not contrary to the public interest.
- 26 The Applicant argues that it has provided a sufficient level of evidence to support its application however the Commission found there was in fact little, if any, substantiation of a requirement by a significant section of the public for the convenience of one stop shopping. Indeed there was no evidence provided to substantiate a requirement or market for the supply of the specialised range of liquor the Applicant intended to sell.
- 27 The Applicant further argued that the level of information and quality of evidence to support this application was effectively the same as that provided in previous successful applications which its counsel had made to the licensing authority. The Commission does not accept this argument as each application turns on the facts of the specific application.
- 28 It follows that there will be, and it would be expected that, the PIA requirements would vary from application to application. This, of itself, does not lead to any reasonable conclusion that such variation amounts to, or contributes to a lack of procedural fairness.
- 29 Whilst the Commission found in *Shallcross Investments Pty Ltd (supra)* that “it would be helpful to Applicants if the Director’s policy in respect of the PIA could perhaps highlight more clearly the requirement for Applicants to adequately demonstrate the positive aspects of their application and provide evidence of their claims”, this does not imply, nor should it be inferred that the policy guidance in respect of PIA submissions does not require proper supporting evidence of contentions made in a PIA.
- 30 Furthermore there is now a consistent and carefully enunciated position of the Liquor Commission confirming the requirement for sound (wherever possible, objective) evidence supporting assertions made in a PIA and further, confirming that mere conjecture, supposition and assumptions were not enough. See:

*Busswater Pty Ltd (supra)*

*Shallcross Investments Pty Ltd (supra)*

*Paul Kontinorinis and Maria Kontinorinis (supra)*

- 31 On 1 December 2010 the Director wrote to the Applicant providing an opportunity for

the Applicant to further support its PLA which it did not do. The Commission therefore considers that there has been no denial of procedural fairness to the Applicant.

32 The Commission reviewed and considered all of the material before the Director when making the decision and conducted a rehearing of the material (*Hancock (supra)*). The Commission is not satisfied that the Applicant has demonstrated that granting the licence is in the public interest.

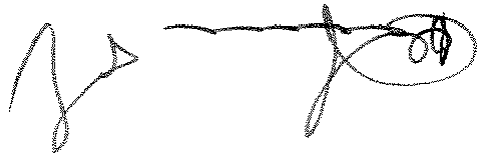
33 In its letter dated 8 December 2010 and its Harm Minimization Management Plan dated August 2010 the Applicant refers to juveniles and prevention of "their exposure to any problems". The Applicant clearly accepts that juveniles will be on the premises (but will not be sold liquor).

On questioning by the Commission, the Applicant in his response gave the impression he was unaware that unaccompanied minors could not be on licensed premises.

34 The design of the premises submitted makes it very difficult indeed to regulate the licensed area adequately. The applicant admitted this would need to be addressed as a next step.

Whilst the Application failed on other grounds this issue would need to have been satisfactorily resolved prior to any licence being granted.

35 The decision of the Director of Liquor Licensing is affirmed and the application is refused.



**JIM FREEMANTLE**  
**CHAIRPERSON**