

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** McKail's Investments Pty Ltd
(represented by Mr John Prior, instructed by Mr Jarrod Ryan of Murfett Legal)
- Intervener:** Commissioner of Police
(represented by Mr James Bennett, State Solicitor's Office)
- Commission:** Mr Seamus Rafferty (Deputy Chairperson)
Mr Eddie Watling (Member)
Dr Eric Isaachsen (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the Delegate of the Director of Liquor Licensing to refuse an application for an extended trading permit
- Premises:** McKail's General Store, 557 Albany Highway, Albany
- Date of Hearing:** 22 October 2013
- Date of Determination:** 22 October 2013
- Date of Reasons of Determination:** 17 November 2014
- Determination:** The decision of the delegate of the Director of Liquor Licensing is quashed and the application for an extended trading permit is granted.

Authorities referred to in the determination

- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258
- *Hancock v Executive Director of Public Health* (2008) WASC 224
- *Hermal Pty Ltd v The Director of Liquor Licensing* [2001] WASCA 356
- *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227

Background

- 1 On 18 January 2013, an application was lodged by McKail's Investments Pty Ltd ("the applicant") for the grant of an extended trading permit in respect of premises situated at 557 Albany Highway, Albany. The application was made pursuant to section 60(4)(g) of the *Liquor Control Act 1988* ("the Act").
- 2 On 13 March 2013, the Commissioner of Police ("the Police") lodged a notice of intervention pursuant to sections 3(6) and 69(6)(c) of the Act.
- 3 The application was determined on the papers. On 16 July 2013 the delegate of the Director of Liquor Licensing ("the Director") refused the application.
- 4 On 19 July 2013, the applicant lodged an application with the Liquor Commission ("the Commission") for a review of the decision of the Director pursuant to section 25 of the Act.
- 5 The hearing of the section 25 application was conducted on 22 October 2013.

Legal principles

- 6 The Commission is not constrained by the need to find error at first instance but is to undertake a full review of the materials before the Director by way of a rehearing. The Commission is to make its own determination of the merits of the application based solely on the materials before the Director at first instance, refer *Hancock v Executive Director of Public Health (2008) WASC 224 at [53]*.
- 7 In determining the review pursuant to section 25(4) of the Act, the Commission may do any of the following, namely:
 - 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 as to any question of law, reviewed or to the Director, to which effect shall be given; and
 - d) make any incidental or ancillary order.
- 8 Section 38(1) of the Act applies to this application and therefore the applicant must satisfy the licensing authority that granting the application is in the public interest pursuant to section 38(2) of the Act.
- 9 The expression "in the public interest", when used in a statute, imports a discretionary value judgment. Refer *O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210, 216*

(*Mason CJ, Brennan, Dawson & Gaudron JJ*). Buss JA stated in *Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227* that, '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' (at 48).

Buss JA further stated that the factual matters which the Commission is bound to take into account, in determining whether it was satisfied that the granting of an application was in the public interest are those relevant to the objects of the Act, as set out in section 5(2) of the Act. Those matters which the Commission is entitled to take into account are those matters set out in section 38(4) of the Act (at 48-49).

- 10 In determining an application for an extended trading permit pursuant to section 60(4)(g) of the Act, there is a wide discretion conferred on the licensing authority in determining what weight to give to competing interests and other relevant considerations. The ultimate question is whether, having regard to all the circumstances and the legislative intent, an extended trading permit is justified. (Refer *Hermal Pty Ltd v Director Liquor Licensing [2001] WASCA 356 per Templeman J at 34 and 36-37.*)

Basis for refusal at first instance

- 11 Having regard to the decision of the Director's Delegate at first instance, it is apparent that the following matters were of relevance to the decision to refuse the application, namely:
- a) The evidence established that people in the area already had access to another licensed premises in close proximity to the applicant's premises; refer paragraph 28, decision A222614
 - b) Concerns regarding drink driving and impulse purchases of liquor at petrol stations, refer paragraph 32, decision A222614.
- 12 Further, the Director's Delegate was not prepared to 'treat Sunday in the same way as other days of the week' for the reasons articulated at paragraph 33 of the decision.

Evidence in support of the application

- 13 The applicant relies on the following evidence in support of the application, namely:
- a) Public Interest Assessment document and annexures ("PIA");
 - b) House Management Policy, Code of Conduct and Management Plan;
 - c) Questionnaire;
 - d) Petition;
 - e) Four letters in support.

- 14 Whilst not a lengthy document, the PIA addressed all of the relevant matters set out in the Act.

Submissions on behalf of the Commissioner of Police

- 15 The submissions of the Police predominantly focussed on the evidence provided in support of the application. It was effectively submitted that the evidence lacked cogency and that the PIA contained assertions as opposed to evidence.
- 16 It was further submitted that the Commission should treat the submissions of the applicant in respect to the concept of “one-stop shopping” with caution.

Determination

- 17 Whilst the concerns set out in the decision at first instance are legitimate, the application is for an extended trading permit for premises that currently trade six days per week. That is a significant factor in the determination of this application combined with the fact that there is only one other licensed premise able to sell packaged liquor on a Sunday, that being the Amity Tavern which has a drive thru facility as opposed to a store in which a consumer may browse (page 14 of the public interest submissions).
- 18 Being mindful of section 5(1)(c) of the Act, the Commission considers that it is in the public interest to cater for the requirements of consumers of liquor in Albany by providing them with the ability to purchase a wider range of product on Sundays. There is nothing before the Commission that would suggest that the granting of the extended trading permit would increase the harm or ill-health caused to people, or any group of people, due to the use of liquor.
- 19 There are no other public interest considerations that would suggest that it would be contrary to the public interest in the granting of the application.
- 20 Given that this is an application for the grant of an extended trading permit for existing licensed premises, sections 36A and 65A of the Act have no application.
- 21 It should be noted that the written and oral submissions of the Police were unhelpful in this application. They amounted to nothing more than a critique of the application and the material in support of the application. Contrary to the written submissions dated 8 October 2013, pursuant to section 69(6)(c) of the Act (as opposed to section 69(11) as stated in the submissions), the Commissioner of Police may intervene in proceedings before the Commission for the purpose of introducing evidence or making representations:
 - a) as to whether or not any person is a fit and proper person; or

- b) on the question of whether, if a particular application were granted, public disorder or disturbance would be likely to result; or
 - c) as to the interest that any person may have in a licence; or
 - d) any other matter relevant to the public interest.
- 22 The Commission is usually greatly assisted by submissions made on behalf of the Commissioner of Police. However, this was not such a matter in which the submissions were of any assistance. To the contrary, the submissions made a simple application unnecessarily difficult.
- 23 The Commission was also provided with correspondence from the solicitors for the applicant dated 19 July 2013. That correspondence submitted that there were nine discrete errors made at first instance. As already noted, the Commission does not need to find error at first instance in reviewing a decision pursuant to section 25 of the Act. Accordingly, applicants are not required to provide the Commission with submissions as to why it is contended that a particular decision is incorrect. It is simply a task of persuading the Commission that it is in the public interest to grant the particular application.
- 24 The decision of the delegate of the Director at first instance is quashed and the application for an extended trading permit is granted.



SEAMUS RAFFERTY
DEPUTY CHAIRPERSON