

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

- Applicant:** West Valley 2000 Pty Ltd
(represented by Mr Peter Fraser of Dwyer Durack
Lawyers)
- Intervener:** Director of Liquor Licensing
(represented by Ms Rosie Phillips of State
Solicitor's Office)
- Commission:** Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan (Member)
Dr Eric Isaachsen (Member)
- Date of Hearing:** 10 November 2011
- Date of Determination:** 22 February 2012
- Premises:** Vintage Wine Sales, 10 Somerville Street, Perth
- Matter:** Application for a review of a decision of the
Delegate of Director of Liquor Licensing ("the
Director") pursuant to section 25 of the *Liquor
Control Act 1988*
- Determination:** The application is upheld and the matter referred
back to the Director to allow for a
recommencement of the application process.

Authorities referred to and considered in the determination:

- *Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356*
- *Hancock v Executive Director of Public Health [2008] WASCA 224*
- *Fletcher International Exports Pty Ltd v Barrow [2007] New South Wales Court of Appeal 244*
- *Minister for Immigration and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1*

Introduction and Background

- 1 On 30 December 2010, an application was lodged by West Valley 2000 Pty Ltd (“the applicant”) for the grant of a liquor store licence for premises to trade as Vintage Wine Sales at 10 Somerville Street Perth (“the premises”).
- 2 On 28 January 2011 an Officer of the Department of Racing, Gaming and Liquor (“the Department”) wrote to the applicant’s solicitors acknowledging receipt of the application, referring to the *Public Interest Assessment* policy guideline and advising that “*The assessment you have submitted does not adequately address the requirements outlined in this policy guideline.*” The applicant was invited to address this situation and submit additional information.

In the same Departmental letter the applicant was advised “*Please be aware that a minimum period of seven (7) days may elapse between the lodgement of all final outstanding documentation and the determination of the application.*”

- 3 On 28 February 2011, the Department received a letter from the applicant’s solicitors enclosing a copy of the advertised public notice of the application.
- 4 On 11 March 2011, a notice of objection was lodged by Youth with a Mission (Perth) Inc.
- 5 On 18 March 2011, the Department received a letter from the applicant’s solicitors enclosing a signed declaration relating to advertising requirements.
- 6 On 25 March 2011, the Department received a faxed letter from the applicant’s solicitors advising that the advertising period had now expired (15 March 2011) and enquiring as to the current status of the matter.
- 7 On 9 May 2011, the Department wrote to the applicant advising that an inspector of licensed premises had assessed the plans and specifications lodged and enclosed a “schedule” outlining the requirements necessary for compliance. The applicant was given ten (10) days to respond.
- 8 On 31 May 2011, the applicant’s solicitors wrote to the Department seeking an update as to the current status of the matter – this letter was almost identical to that written by the applicant’s solicitors and referred to in paragraph 6 above.
- 9 On 14 June 2011, the applicant’s solicitors wrote to the Department confirming a recent request for the date of birth of Mr Ian Love (Director of Applicant Company).
- 10 On 15 June 2011, the Department sent a faxed letter to the applicant’s solicitors and advised that “*All we require now is confirmation that there is no Trust fund involved with this application... Once we receive that confirmation, we can proceed with dealings.*”
- 11 On 15 June 2011, the applicant’s solicitors advised the Department by fax that “*Confirmation from applicant provided below confirming no trusts involved. We trust the matter can now proceed to determination at the earliest opportunity, bearing in mind the delays which have occurred.*”

- 12 On 28 June 2011 the Department wrote to Youth with a Mission (Perth) Inc advising that the objection lodged by that organisation would not be heard.
- 13 On 3 October 2011, the Delegate of Director of Liquor Licensing (“the Director”) determined the application on the papers and refused the grant of a liquor store licence.
- 14 On 5 October 2011, pursuant to section 25 of the Act the applicant lodged an application for review of the decision of the Director. The grounds for the application for review were that the applicant was denied natural justice in that:
 - a) the Director determined that the application would be determined “upon the papers” filed as at the date of the decision;
 - b) the applicant was not informed of this decision;
 - c) the applicant was denied the opportunity to file further submissions and evidence in support of the application.
- 15 On 10 October 2011, a notice of intervention was lodged by the Director.
- 16 A hearing before the Liquor Commission (“the Commission”) was held on 10 November 2011.

Submissions on behalf of the applicant

- 17 The applicant’s submissions in relation to the chronology of events in this matter were:
 - 17.1 On 30 December 2010, the application for a liquor store licence was lodged for premises to be known as Vintage Wine Sales, 10 Somerville Street Perth.
 - 17.2 On 28 January 2011, solicitors for the applicant were contacted by an Officer of the Department advising that the applicant’s Public Interest Assessment (“PIA”) was defective as it contained no objective evidence with respect to consumer requirements. The relevant Officer was advised that it was the applicant’s intention to file further evidence in relation to the requirements of consumers once the matter reached the point of determination.
 - 17.3 On 22 March 2011, an Officer of the Department advised the applicant’s solicitors by telephone that a notice of objection had been lodged to the application and that the applicant would receive notification in writing in due course, together with advice on how the matter would be determined.
 - 17.4 No such advice or notification was received by the applicant.
 - 17.5 On 21 September 2011, advice was received from the same Officer that the application was with a premises inspector and Mr Love, a director of the applicant company, was required to arrange for an inspection of the premises to be undertaken.

- 17.6 Notwithstanding that an inspection of the premises had already occurred, Mr Love contacted the Department and arranged to meet with an inspector on 29 September 2011 at the offices of the Department. The meeting occurred; however, it subsequently transpired that the meeting was unrelated to the application.
- 17.7 On 3 October 2011, the Director handed down the decision refusing the application.
- 18 At no time was the applicant advised that:
- 18.1 the objection by Youth with a Mission (Perth) had been assessed by the Director, and the decision reached that the objection would not be heard therefore the applicant was not required to respond to the objection;
- 18.2 that the Director had determined that the matter would be heard “on the papers”.
- 19 The applicant made further thorough submissions as to the legal issues involved, summarised as follows:
- 19.1 The Director is required to comply with the following provisions of the Act:
- section 16(7)(b) – act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms;
 - section 16(11) – ensure each party is given a reasonable opportunity to present its case, and in particular, to inspect any documents to which the licensing authority proposes to have regard in making a determination in the proceedings and to make submissions in relation to those documents.
- 19.2 The Director is obliged to comply with the requirements of procedural fairness when exercising the powers conferred by the Act - *Hermal Pty Ltd v Director of Liquor Licensing [2001] WA SCA 356*; and *Hancock v Executive Director of Public Health [2008] WASCA 224*.
- 19.3 The rules of natural justice require that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed so they may be in a position to:
- make representations on their own behalf; or
 - appear at a hearing or enquiry (if one is to be held); and
 - effectively prepare their own case and answer the case (if any) they have to meet.
- 19.4 In cases where the power to make a decision under the Act without a hearing is to be exercised, it is essential that the procedures adopted ensure compliance with the requirements of procedural

fairness and the specific provisions of section 16(11) of the Act (refer *Hancock v Executive Director of Public Health at para 43*).

- 20 Reference was made to the document issued by the Department entitled "Licensing Process for the Grant of a Liquor Licence" and in particular to steps 2, 3 and 5 noted in that document.
- 21 The question that arises is whether the procedures adopted by the Director ensured that the applicant had "*a reasonable opportunity to present its case.*" The applicant submits that the Director failed to ensure that the applicant had a reasonable opportunity to present its case:
- by not providing a copy of the notice of objection;
 - by failing to advise the applicant that the notice of objection would not be heard; and
 - by proceeding to determine the application on papers without advising the applicant.
- 22 The applicant was denied procedural fairness as:
- the applicant was not advised of the procedure to be followed in relation to the determination of the application; and
 - the applicant was not provided with an opportunity to present its case in its entirety.
- 23 The applicant presented to the Commission, an affidavit sworn on 5 October 2011 by Ms Leanne Margaret Borbely, to which was annexed a summary of the evidence that would have been relied on by the applicant, and which had been compiled to establish that consumers had a requirement for the services proposed to be offered by the applicant. This evidence was significant and the loss of opportunity to file such evidence ultimately resulted in the application being refused, an outcome which would have been avoided if the applicant had been:
- advised that the application was being determined on the papers; and
 - provided with an opportunity to lodge further submissions.

Responsive submissions on behalf of the applicant

- 24 The applicant's responsive submissions in respect of the Director's submissions can be summarised as follows:
- 24.1 The objection lodged by Youth with a Mission (Perth) Inc was not received by the applicant (notwithstanding the objection contained a declaration that it was served) but was brought to the attention of the applicant during the course of a telephone conversation on 22 March 2011 (see paragraph 17.3 above).
- 24.2 The applicant does not seek to challenge the following propositions:
- the Director is not obliged to determine what evidence the applicant should ultimately submit;

- it is not the obligation of the licensing authority to “run” an application, objection or intervention on behalf of a particular party;
- the Director has no obligation to seek further information from an applicant if its PIA is inadequate, but submits that these propositions are not relevant to the present review.

24.3 By giving notice (by telephone) that an objection had been received it was the expectation of the applicant that the application would be determined on a contested basis and that:

- it was reasonable for the applicant to assume (in accordance with the principles of natural justice) that an opportunity would be provided to the applicant to respond to any adverse allegations and this expectation was reasonable in all the circumstances;
- it was reasonable for the applicant to assume that some direction would be received from the Director in relation to the manner in which the application would be determined – i.e. “on the papers” or by way of a formal hearing.

24.4 The applicant:

- acknowledges that if the Director did determine that an objection would not be heard, it necessarily follows that there is no necessity for the applicant to be provided with an opportunity to respond to that objection;
- states that section 74(4) of the Act provides that where the Director determines that the objection shall not be heard notice of that determination shall be given to the objector not later than 7 days before the day appointed for the hearing;
- states that it does not however necessarily follow that the Director has no obligation to tell the applicant of this decision. Whilst not stipulated in the Act, as a matter of practice, when a contested application is being determined by way of a hearing, it would be extremely unusual for an applicant not to be given notice that an objection would not be heard;
- states that by being placed on notice that an objection had been received, the applicant delayed filing the evidence upon which it sought to rely in relation to the application in its entirety, until such time as it knew:
 - the nature of the objection to which it would be required to respond; and
 - the manner in which the determination of the application would be conducted.

24.5 The provisions of section 16(11) of the Act require the Director to ensure that the applicant has filed its case prior to determination, notwithstanding a finding of the Director that the objection would not be heard.

- 24.6 In the present case the applicant had refrained from filing the evidence it sought to rely upon to support its application, due to oral advice from an Officer of the Department that an objection had been received to the application and this advice gave rise to a legitimate expectation on the part of the applicant that the application would be contested and that the applicant would be provided with an opportunity to present its case and respond to the objection lodged.
- 24.7 It was submitted that the case *Fletcher International Exports Pty Ltd v Barrow [2007] New South Wales Court of Appeal 244*, referred to by the Director, is distinguishable from the present proceedings by virtue of the programming orders issued by both the Workers Compensation Commission, and at an earlier stage by the Arbitrator.
- 24.8 Under the Act, in the event that insufficient information or evidence has been lodged, the Director is free to determine the application on the papers, notwithstanding that it is deficient, necessarily resulting in an application failing. For this reason it is important that the applicant has an adequate opportunity to present its case prior to determination and when the Director, through its Officers, is put on notice that further evidence would be lodged, such notice gives rise to a legitimate expectation by the applicant that they will be provided with an opportunity to file such evidence when the matter proceeds to determination.
- 24.9 As to the effect of representations by the Department that it will follow a procedure, the relevant procedure identified by the applicant is annexed (LBI) to the affidavit of Ms Borbely sworn 5 October 2011.
- 24.10 The statement by the relevant Officer that “an objection has been filed” is not ambiguous, rather the applicant was clearly placed on notice that the application was contested.
- 24.11 The applicant made efforts to determine the progress of the application and as a result of its enquiries formed the reasonable conclusion that the matter was still being assessed by the premises Officers.
- 24.12 The guide (refer 20) issued by the licensing authority suggests the inspection of premises (step 2) precedes the distribution of objections to the applicant (step 3).
- 24.13 The declaration signed by the applicant on 16 March 2011 goes no further than stating that the application has been advertised in accordance with directions and the information contained in the PIA is true and correct. The applicant denies that the execution of the declaration in any way signifies that the applicant’s case is complete.
- 24.14 Letters forwarded to the Director seeking to have the matters proceed to determination constitute a request that the matter proceed to the final stage in the process whereby a formal hearing is programmed or alternatively programming orders are made in relation to the filing of final evidence and submissions.

24.15 The failure by the Director to advise the applicant that the objection would not be heard and that the matter would be determined on the papers had the following effect:

- the applicant believed the application would be contested;
- the applicant believed that the application was not yet ready for determination; and
- the applicant believed that it would be advised of the manner in which the contested application would be determined.

24.16 As a result of these failures, at the date of determination the applicant had not filed the evidence it sought to rely upon in support of the application and in all the circumstances the applicant was denied procedural fairness.

Submissions on behalf of the Director

25 On 28 January 2011, following lodgement of the application for a liquor store licence for the premises the Department wrote to the applicant's solicitors stating, inter alia

"Please refer to the attached policy guideline "Public Interest Assessment" for further information. The assessment you have submitted does not adequately address the requirements outlined in this policy guideline. Accordingly please also address the following areas:-

In considering the public interest, the licensing authority will take into account, among other matters, the purpose and objects of the Liquor Control Act 1988 ("the Act") as provided in section 5 and the matters set out in section 38(4).

While your Public Interest Assessment (PIA) would appear to address those matters prescribed in section 38(4) of the Act, you may also wish to give consideration to section 5 and recent precedent decisions of the Liquor Commission, where it was determined that the PIA must be supported by objective evidence. The Commission has found that assumptions, opinions, speculation and generalised statements alone will not demonstrate that the application is in the public interest. In this respect you may wish to consider providing sufficient supporting evidence that is objective, accurate and relevant to the application to support the claims made in your PIA.

Objective evidence could include marketing research findings; a feasibility study; target market survey or letters of support. Ultimately, what objective evidence is provided in support of the application is a matter for the applicant to consider."

26 The Director submitted that:

26.1 With regard to the applicant's reference to section 16(11) of the Act and the remarks of Martin CJ in *Hancock* (supra at 19.2) at para 43, these remarks were qualified by the comment in the preceding para 42:

“Sometimes the nature of proceedings themselves will be sufficient to provide adequate notice of the prospect of an adverse finding”

- 26.2 The requirements of procedural fairness are flexible and depend upon the circumstances of the case, the nature of the enquiry, the rules under which the decision maker is acting and the subject matter being dealt with.
- 26.3 The nature and extent of procedural fairness required will vary according to the particular circumstances of the decision to be made.
- 26.4 Pursuant to section 38(2) of the Act, there is a positive obligation upon the applicant to satisfy the licensing authority that granting the application is in the public interest.
- 26.5 It is not incumbent on the Director to determine what evidence an applicant should ultimately submit in order to discharge its obligation under section 38(2). The licensing authority, however constituted, cannot run an application, objection or intervention on behalf of a particular party.
- 26.6 The Department’s policy guideline “Public Interest Assessment” which is publicly available, provides detailed guidance in respect of the possible content of public interest assessment submissions.
- 26.7 The Director has no obligation to seek further information from an applicant if its PIA is inadequate.
- 26.8 In reference to section 74(4) of the Act which provides that where the *“...Director determines that for any reason an objection should not be heard the Director shall give notice to the objector...”*... that where a statute specifies the parties to whom notice must be given the courts are reluctant to imply an obligation to provide notice to additional parties.
- 26.9 The Department’s “Licensing Process for the Grant of a Liquor Licence” (LBI to Ms Borbely’s affidavit sworn 5 October 2011) indicates at step 3- *“Applicant is sent a copy of any objections/interventions following the expiry of the period”*. However, the Department does not send an objection to the applicant if it has been determined that it will not be heard. The effect of a determination that the objection will not be heard is that the objection will not be taken into account by the Director. Therefore as a matter of fairness it is not necessary to give an applicant an opportunity to respond to the objection, but as noted (see paragraph 27.3 above) the nature and extent of procedural fairness required will vary according to the particular circumstances of the case.
- 26.10 Section 13(5) of the Act establishes that it is beyond argument that the rules of procedural fairness do not mandate in all cases, an oral hearing for the person affected.
- 26.11 There is case law indicating that:

- failure to notify a party that a matter will be determined on the papers does not constitute a breach of procedural fairness unless the party has an entitlement to be notified or legitimate expectation that he or she will be notified (Refer *Fletcher International Exports Pty Ltd v Barrow* [2007] NSWCA 244);
- if a person has a legitimate expectation that a particular procedure will be followed, failure to follow that procedure may constitute a breach of procedural fairness if it results in unfairness to the person(s) (Refer *Minister for Immigration and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1);
- in the particular circumstances of *Fletcher*, the fact that a party had requested an oral hearing and flagged its intention to make further submissions at a hearing was insufficient, in that case, to give the party a legitimate expectation that it would be notified if the matter was to be determined on the papers (Refer *Fletcher Supra*).

26.12 When a public authority represents that a particular procedure will be followed, failure to follow that procedure may constitute a breach of procedural fairness if it results in unfairness. The requirements of procedural fairness are flexible and depend upon the circumstances of the case and in this case it is relevant to take into account the following:

- it is arguable that the oral representation made by the Officer of the Department on 22 March 2011 was ambiguous, however the applicant made no attempt to clarify the situation;
- the filing by the applicant of the declaration appears to suggest that the applicant was relying on the submissions in the PIA which had previously been filed;
- on two occasions the applicant stated in writing that the matter may now proceed to determination.

Determination

- 27 The parties to the proceeding acknowledged that the application for review was not for a review of the Director's decision as usually understood, but a review of the process by which the Director reached the decision.
- 28 The submissions by the applicant and the Director have been summarised above in greater detail than usual, as the Commission considers those submissions illustrate the issues which go to the basis for the application for review of the process leading to the Director's decision.
- 29 The Commission has analysed the application processes in chronological order as they appear in paragraphs 1 to 17 above.
- 30 Whilst paragraphs 1 to 17 above list the process followed by way of correspondence, subsequent information provided in the applicant's submissions lists a number of oral communications that are relevant to the basis of this review. They are:

- 30.1 Both the applicant's submissions and the affidavit of Leanne Margaret Borbely sworn 5 October 2011 state that, on 28 January 2011 a Customer Services Officer of the Department was advised that it was the applicant's intention, as was the firm's normal procedure, to file further evidence in relation to the requirements of consumers, once this matter reached the point of determination.

The Commission finds the position proposed in this advice to be inconsistent with the established and clearly documented processes for an application of this nature. All applications are required to have full documentation at the time of lodging with no ad hoc submissions throughout the process (emphasis added). The fact that the Department invited further submissions (refer para 2 above) does not change this fact and it would be expected that the additional information would be forthcoming as a matter of priority in accordance with the other documentation sought, and which was confirmed as lodged on 18 March 2011 (refer para 3 above). At this time, the applicant's solicitors were not aware that an objection had been lodged, therefore there should have been no reason to expect that the application could not go to determination after the prescribed minimum period of seven (7) days had elapsed i.e. after 25 March 2011.

- 30.2 Both the applicant's submission and the affidavit of Leanne Margaret Borbely sworn 5 October 2011 state that on 22 March 2011, Ms Borbely contacted an Officer of the Department by telephone and was advised that a notice of objection had been filed and that the applicant would receive notification in writing in due course, together with advice on how the matter would be determined.

The Commission recognises that this was a critical exchange in that, as a result of Ms. Borbely's enquiring as to the status of the application, oral advice was given that an objection had been lodged. This advice was not followed up by written confirmation by the Department and the applicant stated that it did not receive a copy of the objection as declared by the objector. However, despite these communication breakdowns the applicant was aware that an objection had been lodged and therefore was entitled to consider that the following processes would include the preparation of a submission in response to that objection. The oral advice of the objection was received between the lodgement of documentation on 18 March 2011 and the expiration of the seven (7) days minimum period before the application could go to determination i.e 25 March 2011. It is noted, however, that there was no reference in subsequent correspondence (refer paras 6 and 8 above) from the applicant to the Department to the matter of the objection. Terms such as "*... the current status of the matter*" and "*... we trust the matter can now proceed to determination*" are not specific enough to indicate any awareness of, or concern for the notice of objection.

- 30.3 The affidavit of Leanne Margaret Borbely sworn 5 October 2011 further states that on 14 April 2011 Ms. Borbely telephoned the Department seeking a response to the applicant's faxed letter received 25 March 2011 (refer para 6 above) and was advised that a decision was yet to be made with respect to how the matter would be determined. The affidavit states that there were subsequent telephone contacts on 7 June 2011, 15 June 2011, 5 August 2011 and 21

September 2011 when enquiries were made as to the status of the matter.

The Commission accepts that there were a number of written and telephone enquiries from the applicant to the Department between 25 March 2011 and 21 September 2011 as to the “status of the matter”. The Department’s responses were generally “that a decision was yet to be made in respect to how the matter would be determined” with advice on 15 June 2011 (refer para 10 above) that “*All we require now is confirmation that there is no Trust fund involved with this application.... Once we receive that confirmation, we can proceed with dealings*”;

The use of the term “dealings” is ambiguous and has not contributed to clarity in advising the process that will apply.

- 31 It is apparent from the above analysis of events that both the applicant and the Department have contributed to the uncertainty associated with this application.
- 32 The Department should have:
- provided written advice as to the lodged notice of objection as a consequence of the telephone advice;
 - responded in writing to the applicant’s letter of 25 May 2011 (and/or subsequent requests) and advised the status of the application; and
 - advised the applicant that the objection would not be heard.
- 33 The applicant should have:
- provided all of the relevant material with the lodgement of the application;
 - as a matter of priority responded to the Department’s advice that “*the assessment you have submitted does not adequately address the requirements outlined in this policy guideline.*”;
 - taken the approach that the Public Interest Assessment requirement was a separate matter to the notice of objection;
 - been more specific in its reference to “*...this matter can now proceed to determination at the earliest opportunity.*” if there were concerns relevant to additional submissions;
 - not allowed 110 days to pass between the lodgement of what was considered by the Department to be final documentation (refer para 11 above) and the Director’s determination without requesting written confirmation as to the circumstances of the objection and the processes to be followed.
- 34 Having considered the submissions by the applicant and the Director the Commission is of the view:
- that the failure of the Department to notify the applicant in writing of the notice of objection or the fact that the Director had determined that the

notice of objection would not be heard does not constitute a flaw in the process;

- that the failure of the Department to notify the applicant as to whether the matter would be heard on the papers or by way of a hearing does not constitute a flaw in the process;
- that the issues associated with this application have been created by a series of communication shortcomings by both parties, particularly the lack of written confirmation of telephone advice and the ambiguity that exists in some of the terminology in correspondence between the parties;

35 Whilst being of the view that the lack of notice as to the objection and the manner in which the matter would be heard, does not constitute a flaw in the process, there is evidence that the extended and sometimes ambiguous communications between the parties contributed to a high degree of misunderstanding.

36 The extent to which this might have contributed to a breakdown in procedural fairness cannot be assessed with certainty, however, it is the Commission's view that there is sufficient evidence to warrant a re-opening of the application process in order to be certain that there has been no breach of section 16(11) of the Act.

37 The application for review is upheld and the matter referred back to the Director to allow for a recommencement of the application process.



EDDIE WATLING
DEPUTY CHAIRMAN