

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Commissioner of Police
(represented by Ms Rosie Hill of State Solicitor's Office)

Respondent: Champagne Alley Pty Ltd
(represented by Mr Peter Fraser of Dwyer Durack)

Objectors: Mr Graeme Hart and Mrs Jennifer Hart
(present at hearing)
Ms Carol Merrison
Mr Brian Page and Ms Sheila Binns

Commission: Mr Jim Freemantle (Chairperson)
Mr Alex Zilkens (Member)
Mr Michael Egan (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 grant an extended trading permit for premises known as Elba Cottesloe.

Premises: Elba Cottesloe, 29 Napoleon Street, Cottesloe.

Date of Hearing: 19 February 2015

Date of Determination: 18 March 2015

Determination The application for an extended trading permit to operate from midnight on each Friday and Saturday to 1 a.m. the next morning is refused.

Authorities referred to in determination:

- *Coles Myer Ltd v Liquorland* unrep. Supreme Court of WA, Library H267, 28 May 1990
- *Re David Jones Department Store; Aherns (Suburban) Pty Ltd v Woolworths Ltd and Anor* [2001] WALLC
- *Hay Properties Pty Ltd and Anor v Roshel Pty Ltd* (Appeal FUL 173 of 1997)
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Busswater Pty Ltd v Director of Liquor Licensing* LC 17/2010
- *Paul Kontorinis and Maria Kontorinis v Director of Liquor Licensing* LC 23/2010
- *Harold Thomas James Blakely v Director of Liquor Licensing* LC 44/2010

Background

- 1 This matter comes before the Liquor Commission (“the Commission”) by way of an application by the Commissioner of Police (“the Police”) for a review of the decision by the delegate of the Director of Liquor Licensing (“the Director”) to grant an extended trading permit (“ETP”) to premises known as “Elba Cottlesloe”.
- 2 Champagne Alley Pty Ltd (“the licensee”), applied for, and was granted by the Director (A223871), an ETP to operate from midnight on each Friday and Saturday to 1 a.m. the next morning.
- 3 The Police intervened in, and objected to, the application for an ETP and objections were lodged by a small number of residents (“residential objectors”) and one business owner/operator (“business objector”). One of the residential objectors, Mr Hart, appeared at the review hearing.
- 4 The Police have sought a review of the Director’s decision on the following grounds:
 - 1) the Director erred by reversing the onus imposed by section 38(2) of the *Liquor Control Act 1988* (“the Act”) and by finding, in effect, that the ETP should be granted if the objections did not satisfy him that the grant of the ETP would not be in the public interest; and
 - 2) in any event, the evidence submitted by the applicant was insufficient to discharge the onus imposed by section 38(2) of the Act, and accordingly, it was not open to the Director to grant the application.
- 5 The Commission indicated at the outset of the review hearing that it was not satisfied on the written submissions received from the Police that the Director had reversed the onus of proof as maintained in ground 1 of the application for review and that, in any event, the purpose of the review is not to find error with the Director’s decision, but to determine whether there is sufficient evidence to support a finding that the grant of the ETP to the licensee is in the public interest.
- 6 Counsel for the Police did not wish to make oral submissions on the first ground of review.

Submissions on behalf of the Commissioner of Police

- 7 Essentially, the Police submit that there was insufficient evidence before the Director, and there is, therefore, insufficient evidence before the Commission to demonstrate that the grant of the ETP applied for is in the public interest.
- 8 More specifically, the Police contend that the licensee’s evidence, in the form of a Public Interest Assessment (“PIA”) and accompanying documentation,

including five (5) letters of support, a Management Plan, House Policy and Code of Conduct, is not capable of supporting the public interest test required under section 38(2) of the Act, as the evidence is primarily assertive in nature and contains minimal direct evidence.

- 9 Further, the Police submit the comments from patrons in the letters of support for the application are generally supportive of the premises and those instances where the licensee has been granted a “one-off” ETP to trade beyond midnight.
- 10 The Police contend that neither the five letters of support nor any of the other evidence “express a clear and consistent demand for extended trading hours of a more permanent nature at the premises”. As such, the Police submit the PIA and accompanying material can only have minimal probative value in canvassing the target audience sought by the licensee and certainly does not affirm a high demand for extended trading hours across the community.
- 11 The Police also have raised concerns about the failure of the licensee to mention in the PIA two infringement notices issued to the licensee in August 2012, and July 2013, as these are evidence that the licensee has not always been able to maintain control over the premises.
- 12 The Police submitted that the House Management Plan submitted with the application contained a reference to another venue, reflecting that it had been prepared by reference to documentation from the other venue, thereby indicating a casual attitude in preparing the PIA.
- 13 Whilst the failure to mention the infringement notices may have been an oversight, the Police, nevertheless, contend that the failure demonstrates a lack of rigour in submitting the ETP application necessitating a degree of caution to be taken in assessing the evidence as a whole. This same point is made in respect of an error in the Management Plan.
- 14 In contrast to the claim by the licensee that the additional hour of trading will not adversely impact the amenity of the area, the Police submit that the additional trading hours will result in the premises being a place to congregate and consume alcohol after midnight. Based on the experience of Police and research to the effect reducing trading hours reduces violence and road crashes (Professor Tanya Chikritzhs, National Drug Research Institute Alcohol Policy Team), the Police contend they are qualified to make the comment that venues enjoying extended trading hours almost always inherently attract an element of anti-social behaviour requiring police intervention.
- 15 The Police also point to the fact that the two taverns and four restaurants within 300 metres of the licensee’s premises operate without an ETP as support a finding that there is no public demand for extended trading hours in the area.

Submissions on behalf of the licensee

- 16 The licensee submits that the application for an ETP for additional trading hours on Friday and Saturday night is a “very modest application” and is supportable on the basis of the success of the previous “one-off” ETPs and the “feedback from customers that they want to sometimes stay out beyond midnight but do not want to travel to do so and do not wish to go to a night club” (page 3 of PIA).
- 17 The licensee’s venue is licensed to cater for 95 persons only, is located in a commercial precinct and caters to a mature patron demographic of 35 to 65 years of age.
- 18 The licensee submits that the research referred to by the Police, to the effect that reducing the trading hours of licensed premises by even an hour or two will reduce violence and road crashes, is not applicable in this case and that there is no evidence to suggest that the licensee’s venue is currently associated with either violence or road crashes.
- 19 The licensee further submits that the grant of the ETP will not result in harm or ill-health due to the consumption of liquor, will not give rise to an adverse impact on the amenity of the locality and will not result in any anti-social behaviour, noise or disturbance due to the operation of the venue.
- 20 The licensee maintains the PIA and accompanying evidence, including the five letters of support, is “comprehensive, cogent and reliable, and demonstrates that the relevant section of the public has a requirement for the liquor and related services that the licensee proposes to provide during the extended trading hours sought”.
- 21 In determining whether there is a requirement of consumers for the proposed additional hours of trading within the meaning of the Act, the licensee points to a number of Supreme Court determinations in support of a number of propositions relevant to the application under consideration. In summary, those propositions (and decisions) are:
 - 1) the requirements of the public for particular licensed facilities may be proved by inference from the evidence of a representative sample of the relevant section of the population in the locality (*Coles Myer Ltd v Liquorland* unrep. Supreme Court of WA, Library H267, 28 May 1990, per Rowland J at 8; per Nicholson J at 5; *re David Jones Department Store; Aherns (Suburban) Pty Ltd v Woolworths Ltd and Anor* [2001] WALLC at pa 30);
 - 2) it has long been accepted that an applicant is not required to lodge evidence of consumer demand in any specific format (*Hay Properties Pty Ltd and Anor v Roshel Pty Ltd*, Appeal FUL 173 of 1997 per Malcolm CJ (“Hay Properties Decision”)); and

- 3) *while survey evidence may be extremely helpful in providing evidence of subjective requirements of a significant section of the public, it is not possible to say that such evidence is essential (Hay Properties supra).*
- 22 The licensee also referred to the Hay Properties Decision as an example of the level and extent of evidence considered necessary to constitute a representative sample of the public to demonstrate that the grant of a licence will cater to the requirements of consumers under section 5(1)(c) of the Act.
- 23 Further, the licensee relied on *Hancock v Executive Director of Public Health* [2008] WASC 224 in support of the proposition that the nature of the licence and the conditions to which the licence is subject are matters which must be taken into account.
- 24 Having regard to these authorities, the licensee submits:
 - 1) the level of consumer requirement evidence in support of the grant of a full licence will be necessarily greater than that required in the present case as the licensee is “merely seeking to trade for an additional hour” on a Friday and Saturday night; and
 - 2) the evidence relied upon by the licensee is sufficient for the purposes of determining whether or not the application is in the public interest viewed in the context of the limited additional hours sought, the category of licence and the number of patrons permitted on the premises.
- 25 The licensee also refers to Martin CJ’s comments in *Woolworths Ltd v Director of Liquor Licensing* [2013] WASC 227 at paragraph 8 that the licensing authority should not revert to applying a needs test which was repealed in 2006 (while recognising that section 5(1)(c) requires the licensing authority to be satisfied the grant of a licence or permit of the type under consideration caters for the requirements of consumers).
- 26 In summary, the licensee contends that the principal issue to be determined by the Commission is whether patrons frequenting the licensee’s premises want to stay and socialise beyond midnight and that the PIA and five letters of support demonstrate this requirement.
- 27 The licensee submits that the error in the Management Plan was simply an oversight and that the two infringement notices were for minor breaches of the alfresco dining permit (which the licensee previously operated under) and has little relevance to the present application.

Submissions from business and residential objectors

- 28 The particulars of the objection from the business objector, whose premises are in close proximity to the licensee's premises, are that "Management cannot control or manage the bar" and that "street drinking, overcrowding and possible drug dealing" may result from the grant of the application.
- 29 The particulars of the residential objections relate to noise emanating from the licensed premises at and after midnight.
- 30 Mr Hart, who attended the review hearing, best describes the objection of the residential objectors – he states that whilst he and his wife are resigned to putting up with the noise associated with closure of the premises at midnight, their objection is in respect of the noise and disturbance that will, in the objector's view, result from an additional hour of trading.

Determination

- 31 The Police, as a party to the proceedings before the Director, are entitled to seek a review of the Director's decision to grant the ETP by virtue of section 25(5c) of the Act and regulation 9AB of the *Liquor Control Regulations 1989*, as the ETP applied for under section 60(4)(g) of the Act is for a period exceeding three years ("prescribed ETP").
- 32 The Commission is not confined to finding fault with the decision of the Director but is required to undertake a full review of the Director's decision on the merits of the application having regard only to the material that was before the Director (*Hancock v Executive Director of Public Health* [2008] WASC 224).
- 33 As the ETP applied for is a prescribed ETP, the Commission must be satisfied that the grant of the application is in the public interest (section 38(2) of the Act).
- 34 To discharge its onus under section 38(2) of the Act, the Licensee must address the positive and negative impacts that the grant of the application will have on the local community.
- 35 Determining whether the grant of an application is "in the public interest" requires the Commission to exercise a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175 and *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241).
- 36 The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 where he said:

"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.”

37 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities Ltd v Director of Liquor Licensing* (1992) 7 WAR 241). The primary objects of the 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 of liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*

38 Section 33(1) of the Act gives the Commission an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was recently considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [32]:

“[Section] 33(1) is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole. Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest to make those objects the exclusive consideration nor the sole determinants of the public interest”.

39 The licensee has relied upon the following evidence in support of its application:

- 1) the PIA;
- 2) a Management Plan, House Policy and Code of Conduct for the premises; and
- 3) five letters of support.

40 In the PIA, the licensee has stated:

- 1) “the venue continues to hear feedback from customers that they want to sometimes stay out beyond midnight but do not want to travel to do so and do not wish to go to a night club” – in support of this contention, the licensee refers to the comments in one of the letters of support to the effect the options for a relaxed drink after midnight in Cottesloe after midnight are limited;
- 2) “most weeks the venue hosts functions for both corporate and private clients and is regularly asked of the possibility of extending the function finish time” – again, in support of this contention, the licensee points to comments in two of the letters of support that it would be “a real advantage” and “great to have” an additional hour of trading for future corporate and Christmas functions (which have been held previously by the authors of the letters); and
- 3) “All the licensed venues in Cottesloe close at midnight on weekends resulting in a huge demand on taxi services with no dedicated taxi rank” – in support of this contention, the licensee highlights a comment in one of the letters of support that the author of the letter “waited outside the Elba until well after 1am for a taxi” and that “the taxis all seem to pick up people from Stirling Highway.”

41 In respect of the history of the “one-off” ETPs granted for the premises, the licensee states in the PIA that it has successfully utilised “one-off” ETPs for “several function events” and highlights comments in two of the letters of support that the ETP and the additional hour of trading had “worked very well” and had “made the night for my birthday party”.

42 No evidence has been presented:

- 1) to suggest the licensee has experienced any difficulty in obtaining “one-off” ETPs – on the contrary, it appears no difficulty has been experienced in this respect;

- 2) as to the number of ETPs applied for over the past three years, beyond the statement there have been “several” (in the PIA) and “numerous” (in the submissions before the review); or
 - 3) as to why the “one-off” ETPs are not adequate or sufficient to meet the requirements of the premises and the licensee’s clientele, other than the assertions from the licensee and the letters of support, which appear to represent an expression of support for the additional hour of trading for special functions (which have been well accommodated in the past with “one-off” ETPs).
- 43 Further, it is not apparent how many patrons frequent the licensed premises at any particular time, including around midnight on Friday and Saturday night. In the absence of this evidence, it is difficult to assess the number of patrons who have, or why they may have, a requirement for the additional hour of trading.
- 44 The extent to which patrons experience a difficulty obtaining a taxi on a regular basis is also difficult to assess. One letter of support highlights one example of where a patron had some difficulty, but there is no evidence about the extent of this problem, if indeed it is a serious and persistent problem or what, if any, steps have been taken by the licensee or licensees in the area to alleviate such a problem, and whether those steps have been unsuccessful or are impractical.
- 45 The PIA makes reference to the relative low incidence of alcohol related offences in the defined area of the licensee’s premises, the commercial nature of the precinct and the absence of any reported anti-social behaviour. The licensee also maintains it has “forged strong relations with business neighbours” and has “become a valued member of the local Cottesloe business community”.
- 46 Evidence of the business relationship between the licensee and the other businesses in the precinct is limited. Two of the letters of support are from businesses in the area, but their support seems to relate more to the Christmas and corporate functions each has held at the premises and seems not to be based on a consideration of the positive and negative impacts that an application of this nature may have on the precinct and the community. The business objector has provided little or no evidence to support the concerns outlined in her objection.
- 47 The House Management Plan, House Policy and Code of Conduct (“control documents”) are standard documents reflecting the policies and procedures in place across the industry. This is, of course, evident from the fact the Management Plan submitted with the application contained a reference to another venue. The licensee submitted in reference to this error that licensees should not be expected to “reinvent the wheel” when compiling this type of documentation.

- 48 Whilst this is understandable, it does reflect the fact that the licensee may not have given as much consideration as is warranted to the specific types of risks of anti-social behaviour that may eventuate if the application for an ETP were granted. Certainly, none of the control documents contain any strategies specifically designed to address the risk of, or potential for, the migration of patrons from other licensed venues in the area at midnight should the ETP be granted on an ongoing basis (as distinct from on a “one-off” basis for corporate and social functions).
- 49 Although speculative and although there is no history of anti-social behaviour evident, the possibility of anti-social behaviour in this circumstance could not be ruled out, thereby necessitating, at least, a consideration of a risk or harm minimisation strategy to address the possibility should the circumstance arise.
- 50 The two infringement notices referred to by the Police are of a relatively minor nature; however, the circumstances giving rise to the infringement notices highlight the difficulty in managing a licensed area, part of which includes an alfresco area on the street frontage of the premises.
- 51 However, any application must be supported by cogent evidence, not assumptions, opinions or generalised statements and must demonstrate a real and identifiable requirement of consumers for, in this case, the additional hour of trading on an ongoing basis.
- 52 It is not enough that an applicant express assertions or opinions about the public interest; any assertion or opinion must be supported by an appropriate level of evidence (*Busswater Pty Ltd v Director of Liquor Licensing LC 17/2010*).
- 53 It is also not sufficient to merely demonstrate the grant of the application will not have a negative impact. The applicant must also demonstrate the positive impact that the grant of the application will have (*Paul Kontorinis and Maria Kontorinis v Director of Liquor Licensing LC 23/2010*).
- 54 Furthermore, the private interests of an application do not equate to, and should not be confused with, the public interest (*Harold Thomas James Blakely v Director of Liquor Licensing LC 44/2010*).
- 55 In the Commission’s view, the evidence submitted in support of the application under consideration falls far short of the requisite standard.
- 56 The present case is distinguishable from the Hay Properties Decision if only on the basis the Hay Properties Decision was determined under different legislation and in different circumstances. For example, the presentation of direct evidence from witnesses in that case would have carried considerable weight. In this case, the Commission does not have the benefit of direct, independent and objective evidence of any significant nature.

- 57 In the Commission's view, the test of whether an application is in the public interest does not necessarily depend upon a consideration of the number of letters of support, the number of respondents to a survey or the number of signatories to a petition, although this will be an important consideration in determining the level of demand for a particular service or product. The more important consideration is the relevance, substance and probative value of the supporting evidence.
- 58 The assertions by the licensee and the letters of support do not satisfy the Commission there is a demonstrable requirement of consumers for the additional hour of trading on Friday and Saturday nights on an ongoing basis or which cannot be satisfied by the licensee applying for "one-off" ETPs, as and when required.
- 59 Further, whilst the evidence supports a finding that the grant of the application will present a low risk of harm and ill-health, the research referred to by the Police and the experience of Police that increased hours of trade beyond midnight give rise to increased consumption of liquor and the possibility of anti-social behaviour as a result cannot be entirely ignored.
- 60 Similarly, the risk of an adverse impact on the amenity of the immediate area around the licensee's premises would appear to be low, but the possibility of anti-social behaviour resulting from the migration of patrons from other licensed premises to the licensee's premises, if the ETP is granted on an ongoing basis, cannot be ruled out.
- 61 Under the provisions of section 73(10) of the Act, the burden of establishing the validity of any objection lies on the objector. The Commission considers that the grounds of objections raised by the objectors are not supported by cogent evidence and they have therefore failed to establish the validity of their objections.
- 62 Ultimately, the Commission has formed the view that pursuant to section 38(2) of the Act, the applicant has failed to establish its onus to satisfy the licensing authority that the grant of this application is in public interest. Accordingly, the decision of the Director is set aside and the application for the ETP is refused.



MR JIM FREEMANTLE
CHAIRPERSON