

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

Applicant: TCC Perth Airport Pty Ltd
(represented by Mr Phil Cockman of Canford Hospitality Consultants Pty Ltd)

Intervener: Director of Liquor Licensing
(represented by Ms Caitlyn Rice of State Solicitor's Office)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Member)
Ms Helen Cogan (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* ("the Act") for a review of the decision of the delegate of the Director of Liquor Licensing to grant an application for a special facility licence to TCC Perth Airport Pty Ltd.

Premises: The Coffee Club Perth Airport - Domestic Terminal situated at WG.C.2 – Terminal 2, 40 Sugarbird Lady Road, Perth Airport

Date of Hearing: 23 May 2014

Date of Determination: 16 July 2014

Determination The application is dismissed and the decision of the delegate of the Director of Liquor Licensing is affirmed.

Authorities referred to in this determination:

- *Northbridge Enterprises v Commissioner of Police* (2014) WASC 135
- *ML Liquor Store Pty Ltd v Commissioner of Police*
- *R v Commonwealth Conciliation & Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546
- *Kioa v West* (1985) 159 CLR 550
- *Hancock v Executive Director of Public Health* (2008) WASC 224
- *Gary Ryan v Melville Water Polo Club* (LC36/2013)
- *Macquarie Dictionary* (6th ed, 2013)
- *Harold Thomas James Blakeley and Director of Liquor Licensing* (LC 44/2010)
- *Norbis v Norbis* (1986) 161 CLR 513

Background

- 1 On 1 November 2013, the applicant by its approved representative Canford Hospitality Consultants Pty Ltd lodged an application for a special facility transport category licence and for approval of a profit sharing arrangement in respect of the premises being The Coffee Club Perth Airport at WG.C.2 – New Domestic Terminal (Terminal 2) at 40 Sugarbird Lady Road, Perth Airport.
- 2 The applicant complied with all statutory requirements and lodged all necessary and required documentation in relation to the application including a Public Interest Assessment (PIA).
- 3 On 11 February 2014 the Director of Liquor Licensing by his delegate granted the applicant a special facility licence under section 46 of the *Liquor Control Act 1988* (“the Act”) and 9A(6) of the *Liquor Control Regulations 1989* (“the Regulations”) for the prescribed purpose of transport (“the decision”).
- 4 The terms and conditions of the special facility licence included the following condition:

During the permitted trading hours, the licensee is authorised to sell and supply liquor, for consumption on the licensed premises only, to:

 - *passengers who have travelled on a flight;*
 - *passengers who hold valid tickets and are about to travel on a flight, and*
 - *the bona fide guests of those passengers and passengers to arrive.*
- 5 On 7 March 2014, the applicant lodged the application for review as the applicant was dissatisfied with one aspect of the decision namely;
 - that the applicant had in its application specifically requested the ability to be able to serve liquor to airport staff as well as passengers and their guests and included a further statement (or submission) to the effect that the restriction against serving airport staff was troublesome;
 - the applicant also complained that at no point in the application process was the applicant made aware that the request to be able to serve airport staff was an impossible request under the legislation.
- 6 On 14 March 2014 the Director of Liquor Licensing lodged a notice of intervention in the proceedings pursuant to section 59(1) of the Act and on 23 May 2014 a hearing was conducted before the Liquor Commission (“the Commission”) and the application was refused with reasons to follow at a later date.

Submissions on behalf of the applicant

- 7 The applicant’s submissions essentially related to its dissatisfaction with the condition of the licence which effectively prevents the applicant from serving liquor to airport staff and the fact that the licensing authority had not given the applicant an opportunity to amend its

application and pursue an application for a licence of another class. This amounts to an assertion of a lack of procedural fairness.

Submissions on behalf of the Intervener

- 8 The Intervener lodged comprehensive submissions which, in summary, dealt with the following issues:
- a) Legal principles governing review and the provisions of the Act governing special facility licences. These will be dealt with as necessary later in the determination.
 - b) The application and in particular the “inconsistent” references in the PIA which at times referred only to ‘airport passengers and their guests’ and at other times to ‘airport passengers and their guests and airport staff’ and the reference by the applicant in paragraph 7.4 of the PIA to its opinion that the only class of licence which would be sufficient to meet the applicant’s needs was a special facility licence for the prescribed purpose of transport.
- 9 It is not entirely clear from the grounds listed by the applicant what orders are being sought by the applicant to facilitate its objective of being authorised to sell liquor to airport staff on the premises.
- 10 The Commission’s powers on review are limited to affirming, varying or quashing the decision and if the decision is affirmed, the applicant will continue to hold the special facility licence on its terms and conditions which only authorised the sale of liquor to passengers and their guests. Thus it appears the applicant is seeking to have the decision either varied or quashed in one of the following ways:
- (a) for the decision to be varied by amending the terms and conditions of the licence;
 - (b) for the decision to be varied by granting a licence of another class;
 - (c) for the decision to be quashed on the basis of section 46(2) of the Act; or
 - (d) for the decision to be quashed on the basis that the applicant was denied procedural fairness.
- 11 The intervener submitted that:
- a) whilst the condition of the applicant’s licence restricting the sale and supply of liquor to airport passengers and their guests is not specifically imposed by the Act, the combined effect of section 46(3) and regulation 9A(6) is that the licensing authority is required to impose such a condition on the licence;
 - b) it is beyond the Commission’s power to amend or vary the terms and conditions of the licence in such a manner as to allow the sale of liquor to airport staff on the premises;
 - c) section 46B(1) of the Act only applies if the licensing authority DOES NOT GRANT a special facility licence because section 46(2) of the Act applies if a licence of another class would achieve the purpose for which the special facility licence is sought. Should the applicant be seeking to have the Commission grant a licence of another

class, this does not fall within the Commission's power to vary the decision and instead requires the decision to be quashed.

- 12 In respect of quashing the decision on the basis of section 46(2) of the Act the intervener submitted:
- a) on review the Commission may quash the Director's decision – (section 25(4) of the Act);
 - b) the application for review suggests that the applicant may be proposing that the decision should be quashed on the basis that the special facility licence should not have been granted according to section 46(2) of the Act;
 - c) as the special facility licence sought by the applicant was granted, implicit in the decision is the finding of the Director's delegate that no other class of licence would achieve the purposes for which the special facility licence was sought;
 - d) therefore, it is the intervener's submission that the decision should not be quashed as the precondition in section 46(2) was not met, as in this case there was no other class of licence which would achieve the purposes sought by the applicant.

Determination

- 13 This review is conducted in relation to an application lodged pursuant to section 25 of the Act, thus the Commission may have regard only to the material that was before the Director when he made the decision (section 25(2c) of the Act; *Hancock v Executive Director of Public Health* (2008) WASC 224 at (45)).
- 14 The Commission must undertake a review of a decision of the Director on its merits, and by way of rehearing. The Commission is not constrained by the need to find error on the Director's part but it is to undertake a full review of the materials before the Director and make its own determination on the basis of those materials. (*Hancock supra*)
- 15 In determining the review under section 25(4) of the Act, the Commission may:
- a) affirm, vary or quash the decision;
 - 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
 - c) give directions as to any questions of law reviewed, or give directions to the Director, to which effect will be given; and
 - d) make any incidental or ancillary order.
- 16 Essentially the applicant's argument is that the Commission should quash the Director's decision as it was denied procedural fairness in that it was not given the opportunity to amend its application and pursue a licence of another class or that the decision should be quashed on the basis that a special facility licence should not have been granted in the first place.
- 17 Section 16(11) of the Act requires the applicant be given a 'reasonable opportunity to present its case' and this will vary according to the circumstance of each case before the

licensing authorities. The common law decisions concerning principles of procedural fairness provide some assistance in establishing the contours of the principle to apply to those circumstances. (See *Northbridge Enterprises v Commissioner of Police (2014) WASC 135*).

- 18 The requirements of procedural fairness are flexible and depend upon the circumstances of the case, the nature of the inquiry, the rules under which the decision-maker is acting and the subject matter being dealt with. (See *R v Commonwealth Conciliation & Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546 at 552-553*).
- 19 The nature and extent of procedural fairness required will vary according to the particular circumstances of the decision to be made (*Kioa v West (1985) 159 CLR 550 at 611-612*).
- 20 The principles of procedural fairness 'ultimately involve matters of degree and judgement' and as such are not 'susceptible to hard and fast rules.' (*Northbridge Enterprises v Commissioner of Police (2014) WASC 135; Hancock v Executive Director of Public Health (2008) WASC 224*).
- 21 The fundamental principle that a person be put on notice of potential adverse findings has been applied in the context of the Act (*Northbridge Enterprises (Supra)* at (77); *Hancock (Supra)*).
- 22 The intervener submitted and the Commission agrees that the relevant issue in this case is whether the special facility licence for the prescribed purpose of transport sought by the applicant would be granted. On that basis there was no adverse decision on the relevant issue given the Director's delegate granted the very licence sought by the applicant. The applicant was thus not denied procedural fairness on this ground.
- 23 Furthermore, the applicant's representative who prepared the application is a consultant in the field of hospitality. A consultant is, by definition, 'someone who provides professional or expert advice', *Macquarie Dictionary* (6th ed, 2013).
- 24 It was the applicant which nominated a special facility licence (transport) as the class of licence it was seeking. The Act clearly states that a special facility licence shall only be granted for a prescribed purpose: (section 46(1)). The applicant sought a special facility licence granted for the prescribed purpose of transport under Regulation 9A(6), which expressly states that the licence is granted for the purpose of 'allowing the sale of liquor...at an airport...to passengers and their guests'.
- 25 Therefore, as the intervener pointed out in its submission the nature of the licence for which the applicant applied was sufficient to provide adequate notice of the inevitability that the terms and conditions of the special facility licence for the prescribed purpose of transport would restrict the sale and supply of liquor to passengers at the airport and their guests as the Act and attendant regulations so provide. The applicant's representative, as a consultant in hospitality, would or should have been aware of this outcome, particularly given the Director's delegate, in this respect, relied on the relevant provisions of the Act and the Regulations.

- 26 The licensing authority, however constituted, cannot be expected to run an application on behalf of a particular party as this would place the licensing authority in an unsustainable position (*Harold Thomas James Blakeley and Director of Liquor Licensing* (LC 44/2010) at (49)).
- 27 The application for review also refers to instances in which the Director (or his or her delegate) has invited an applicant for a special facility licence to amend their application to an application for a licence of another class.
- 28 Whilst consistency of treatment is of fundamental importance in any decision making process, including those where discretion has been conferred in general terms *Norbis v Norbis* (1986) 161 CLR 513 as per Mason and Deane JJ, it implies consistency in the nature of the applications themselves.
- 29 In any event an application for a special facility licence may only be treated as an application for a licence of a different class under section 46B(1) of the Act where the Director does not grant a special facility licence.
- 30 Given the special facility licence sought by the applicant was granted, the Director's delegate could not have invited the applicant to amend its application under section 46B(1) of the Act in this instance. It should be noted that by email dated 14 February 2014, the applicant's representative queried with the Director why the condition on the special facility licence did not allow the applicant to sell and supply liquor to airport staff.
- 31 On 26 February 2014, the Director's delegate responded to the applicant's email as follows:
- "The sale of liquor to airport staff was omitted from the decision and licence conditions as it (is) beyond authority under the Liquor Control Act 1988 to grant a special facility (transport) category of licence under regulation 9A(6) the ability to allow the sale of liquor to any person other than that prescribed, which is to passengers and their guests.*
- Additionally, section 63 of the Act cannot be invoked to amend the conditions of the licence as the powers to vary conditions imposed by the Act can only be varied under section 63(e) in such a manner as to become more restrictive.*
- It remains open to your client to either seek review of the decision through the Liquor Commission or consider an alternative licence category, should they seek to trade in a different manner to the conditions of the licence."*
- Thus it could not be said that the applicant was denied procedural fairness on this ground.
- 32 Having dealt with the issue of procedural fairness, the Commission now turns to the specific technical matters at issue. Pursuant to section 46(1), the licensing authority shall not grant a special facility licence except for a prescribed purpose and if a special facility licence is granted, it must be granted only on such terms and conditions as are necessary to ensure that the licence is used only for the prescribed purpose for which it is granted.
- 33 Pursuant to section 46(6) of the Act, the Director may waive part or all of the requirements in either section 37(5) or section 38 of the Act, or both, in respect of an application for a

special facility licence for the prescribed purpose of transport. In this regard, Regulations 9A(6) and 9C are relevant and important.

- 34 In its application, the applicant sought a special facility licence for the premises for the prescribed purpose of transport.
- 35 In its Public Interest Assessment the applicant stated that it has no intention of allowing the public general access to the Premises for the purposes of consuming liquor and specified that the sale of liquor at the Premises would be confined to a limited class of consumers. (The applicant referred to the limited class of consumers inconsistently, at times referring to only 'airport passengers and their guests' and at other times to 'airport passengers and their guests and airport staff').
- 36 Given it did not want to sell liquor to the general public, and only to the specified consumers, the applicants submit that the only class of licence which would adequately meet the applicant's needs was a special facility licence for the prescribed purpose of transport.
- 37 The Director's delegate granted the special facility licence for the prescribed purpose of transport as sought. The special facility licence included a condition which restricted the sale and supply of liquor by the licensee to airport passengers and their guests which he was required to do by virtue of the combined effect of section 46(3) and Regulation 9A(6).
- 38 Pursuant to section 46(3) of the Act, if a special facility licence is granted, it must be granted on such terms and conditions as are necessary to ensure that the licence is used only for the prescribed purpose for which it is granted.
- 39 A special facility licence granted for the prescribed purpose of transport under Regulation 9A(6) is granted for 'the purpose of allowing the sale of liquor....at an airport...to passengers and their guests'.
- 40 Therefore, the terms and conditions which are imposed on a special facility licence for the prescribed purpose of transport for premises at an airport must ensure the licence is used only for the purpose of selling liquor to passengers and their guests.
- 41 Amending the conditions on the special facility licence for the prescribed purpose of transport granted to the applicant to allow the sale of liquor to airport staff would be contrary to section 46(3) of the Act as such a condition would allow the applicant to use the licence for a purpose other than the prescribed purpose of transport.
- 42 To impose a condition under section 64(1) of the Act which allowed the applicant to sell liquor to persons other than airport passengers and their guests would also be inconsistent with the tenor of a special facility licence granted for the prescribed purpose of transport.
- 43 The intervener submitted that it is beyond the Commission's power to amend the terms and conditions on the special facility licence granted to the applicant for the prescribed purpose

of transport in such a manner as to allow the applicant to sell liquor to airport staff on the Premises. The Commission agrees.

- 44 Similarly the Commission does not have power to vary the decision by granting a licence of another class as it is prevented by section 46B(2), but section 46B(1) of the Act allows the licensing authority, with the agreement of the applicant, to treat an application for a special facility licence as an application for the grant of a licence of another class. Section 46(B(1) only applies if the licensing authority does not grant a special facility licence, because section 46(2) of the Act applies (which applies if a licence of another class would achieve the purpose for which the special facility licence is sought).
- 45 The Commission is persuaded, considering the applicant's grounds for review of the decision and the submissions of the intervener (which are accepted by the Commission) and which have been set out in greater detail than is perhaps usual in matters of this nature, that the application should be dismissed and the decision affirmed on the basis that:
- a) the decision granted the applicant the licence for which it applied;
 - b) the terms and conditions imposed on the licence granted are the only terms and conditions which can and must be imposed pursuant to the provisions of the Act (section 46) read with Regulation 9A(6);
 - c) it is beyond the Commission's power to amend the terms and conditions of the licence which was granted;
 - d) there is no evidence to support the applicant's assertion that the applicant was denied procedural fairness in the process of the making of the decision.
- 46 The Commission notes, as was stated in the intervener's submissions that it remains open to the applicant to make an application under section 46B (2) of the Act for the special facility licence to be cancelled and a licence of another class to be granted in respect of the premises.



JIM FREEMANTLE
CHAIRPERSON