

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Mr Walter Lenz

Intervener: Director of Liquor Licensing
*represented by Ms Anna Johnson of State's
Solicitor's Office)*

Commissioner of Police

Executive Director Public Health

Objectors: Emmanuel Catholic College

Parents and Friend's Association, Emmanuel
Catholic College

Commission: Mr Jim Freemantle (Chairperson)
Mr Seamus Rafferty (Deputy Chairperson)
Mr Eddie Watling (Member)

Observer: Mr John Bormolini Principal, Emmanuel Catholic
College

Date of Hearing: 11 September 2012

Date of Determination: 11 September 2012

**Reasons for
Determination:** 8 October 2012

Premises: Last Drop Beeliar, Lot 6 Hammond Road,
Cockburn Central

Matter: Application for a review of decision of the Director
of Liquor Licensing pursuant to section 25 of the
Liquor Control Act 1988

Determination:

The application is referred back to the Director to enable the applicant to lodge evidence in respect of the sale of packaged liquor in his application for a tavern licence

Authorities referred to in Determination:

- *Hancock v Executive Director of Public health [2008] WASC 224 para 45*

Background

- 1 On 25 February 2011 Mr Walter Lenz (“the applicant”) lodged an application for the conditional grant of a tavern licence for premises to be known as Last Drop Beeliar and situated at Lot 6 Hammond Road, Cockburn Central. The applicant also lodged a Public Interest Assessment (“PIA”), Management Plan and Code of Conduct and later, on 25 August 2011, a House Management Policy, in support of the application.
- 2 Incorporated in the PIA were 88 letters of support, many of them endorsed by more than one person. The letters of support were submitted in response to the liquor licence application being advertised by way of public notice in accordance with section 67 of the *Liquor Control Act 1988* (“the Act”).
- 3 On 30 March 2011, an objection was lodged by the Parents and Friends’ Association of Emmanuel Catholic College.
- 4 On 8 April 2011, a notice of intervention was lodged by the Commissioner of Police.
- 5 On 12 April 2011, objections were lodged by both Ms Evelyn Kueh and Mr Peter Meyer.
- 6 On 13 April 2011, an objection supported by 160 signed petitions opposing the application was lodged by Emmanuel Catholic College.
- 7 On 19 April 2011, a notice of intervention was lodged by the Executive Director Public Health (“EDPH”), with follow up submissions lodged on 18 August 2011 and 29 August 2011.
- 8 On 25 August 2011, the applicant lodged responsive submissions to the interventions by the Commissioner of Police and EDPH and to the objections lodged.
- 9 On 4 October 2011, the Director of Liquor Licensing (“the Director”) determined to grant the applicant a tavern restricted licence (decision no. A219260) which prohibited the sale of packaged liquor.

History of review process

- 10 On 22 October 2011, the applicant lodged an application with the Liquor Commission (“the Commission”) for review of the decision of the Director to impose a condition on the licence prohibiting the sale of packaged liquor for consumption off the premises.
- 11 On 14 November 2011, the Commission granted leave to the applicant to withdraw the application for review.
- 12 On 26 March 2012, the applicant lodged a notice of application to add, vary or cancel condition of a licence to allow the sale of package liquor.
- 13 On 19 April 2012, the Director advised the applicant that the application to vary a condition of the conditionally granted tavern licence was refused.

- 14 On 2 May 2012, the applicant lodged with the Commission an application for review of the decision of the Director to refuse to vary the conditional granted liquor licence.
- 15 On 27 June 2012, a review hearing was held and it was determined that the application be refused on the basis that the Commission, should it approve the application, would be ignoring the tenor of the licence originally granted to the applicant which would be in contravention of section 64(1) of the Act.
- 16 However, in reaching that determination the Commission did state that given the unusual circumstances which led to the withdrawal of the application to review the original decision, the applicant was granted leave to lodge an out of time application to seek a review of the decision made by the Director on 4 October 2011 (Decision LC 27/2012).
- 17 An application seeking review of the 4 October 2011 decision of the Director (Decision no. A219260) was lodged on 10 July 2012.
- 18 On 28 August 2012, the Director lodged further submissions and on 29 August 2012 the applicant's outline of submissions was lodged.
- 19 A hearing before the Commission was held on 11 September 2011.

Submissions on behalf of the applicant

- 20 It was submitted by the applicant that there had been a denial of procedural fairness in the process taken by the Director in reaching his determination to place a restrictive condition upon the licence prohibiting the sale of packaged liquor.
- 21 The nature of the proceedings that were applied to processing the application were not such that it could be construed that the applicant was aware that the imposition of such a condition was a possibility given that:
 - in correspondence between the applicant and the Director, the imposition of such a condition was never canvassed;
 - whilst conditions were contemplated and proposed by both the Commissioner of Police and the EDPH, neither intervener proposed a condition restricting the sale of packaged liquor; and
 - none of the objectors proposed or contemplated the imposition of such a condition.
- 22 Therefore there had been a denial of procedural fairness due to:
 - the failure of the Director to advise the applicant that he proposed to exercise his powers under section 64 of the Act and impose a restrictive condition; and
 - the failure of the Director to provide the applicant with an opportunity to lodge evidence and submissions opposing the imposition of such a condition.

- 23 It was submitted that the decision of the Director to impose such a condition resulted in the grant of a licence the “very nature” of which was quite different to that applied for by the applicant.
- 24 Had the applicant been made aware that it was proposed to prohibit the sale of packaged liquor, the matter would have been addressed in the material submitted in support of the application.
- 25 As the ability to sell packaged liquor is generally implicit in an application for a tavern licence, an applicant should not be put into a position, without notice, that requires every single service requirement under the licence to be addressed in exceptional detail. More so, as in this instance it was advised that the business model is based on the operating licence of the Last Drop, Canning Vale which is able to sell packaged liquor and operate a drive-through bottle shop.
- 26 The fact that the granted conditional tavern restricted licence required all development work to be completed in accordance with the lodged plans and specifications is also inconsistent with the determination that the sale of packaged liquor is prohibited, as those plans provide for a drive through bottle shop.
- 27 It was submitted that under the circumstances the application should be referred back to the Director for recommencement of the application process.

Adjournment

- 28 Following the applicant’s presentation, the hearing was adjourned for a short period to enable the Commission to consider the submission that there had been a denial of procedural fairness in the process taken by the Director in reaching his determination.

Determination

- 29 The Commission determined that sufficient evidence had been presented by the applicant to indicate that there had been a denial of procedural fairness in the process which resulted in the granting of a tavern restricted licence prohibiting the sale of packaged liquor.
- 30 The Commission took into account a number of factors in reaching this position:
 - the operational and business model variation between the applied for tavern licence and the granted tavern restricted licence is significant;
 - the material before the Director when making the determination clearly specified that the business model was based on the operating model for Last Drop Canning Vale, which has no restriction on the sale of packaged liquor and operates a drive through bottle shop;

- whilst the Commission accepts that there is not sufficient evidence to address the requirement of packaged liquor, it is of the view that given that the plans approved by the Director provided for a drive through bottle shop and the application referred to the Last Drop Canning Vale business model which includes a drive through bottle shop; any intention to impose a restriction prohibiting sale of packaged liquor should have been advised to the applicant.

31 This approach is consistent with the provisions of section 64(2a) of the Act which states:

“If the licensing authority proposes to impose, vary or cancel a condition under this section, the licensing authority may, by notice in writing, require the licensee to show cause to the licensing authority why the condition should not be imposed, varied or cancelled.”

32 Whilst this section of the Act states “may” in regard to the process the Director might apply in these circumstances, further guidance can be sought from the Director’s Policy Document – “Show Cause Proceedings – Section 64 of the Act (as amended on: 7 May 2007)” which is more specific and applies the word “will”:

“Where the Director is considering the imposition of a more restrictive condition on a licence, other than as a result of a complaint substantiated under section 117 (complaints about noise or behaviour related to the licensed premises), a notice will be served on the licensee outlining the condition proposed and giving the licensee the opportunity to demonstrate why the condition(s) specified in the notice should not be imposed on the licence.”

33 Furthermore, in *Hancock v Executive Director of Public Health [2008] WASC 224* CJ Martin at para 45 stated:

“Because the Commission is unable to receive any material other than that which was before the Director at the time of making the decision, if the Director has denied procedural fairness, it will not ordinarily be possible for that denial to be cured in proceedings before the Commission – at least where that cure requires the provision of an opportunity to present evidentiary material.”

34 The Commission is therefore persuaded that the application should be referred back to the Director to enable the applicant to lodge evidence in respect of the sale of packaged liquor in his application for a tavern licence.



**MR JIM FREEMANTLE
CHAIRPERSON**