

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Ash Promotions Pty Ltd
(represented by Mr Kieran Lyons, Director)
- Intervener:** Director of Liquor Licensing
(represented by Ms Caroline Chapman of State Solicitor's Office)
- Objector:** Commissioner of Police
(represented by Ms Caroline Chapman of State Solicitor's Office)
- Commission:** Mr Eddie Watling (Deputy Chairperson)
Mr Michael Egan (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 not to approve an application for an extended trading permit.
- Premises:** "An Sibin Pub", 147 James Street, Northbridge
- Date of Hearing:** 12 April 2017
- Date of Determination:** 16 May 2017
- Determination:** The application for review is dismissed and the decision of the delegate of the Director of Liquor Licensing is affirmed.

Authorities referred to in the determination

- *Hancock v Executive Director of Public Health [2008] WASC 224*
- *Commissioner of Police v Ash Promotions Pty Ltd (LC 06/2016)*

Background

- 1 On 20 January 2017, Ash Promotions Pty Ltd (“the applicant”) applied, 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 (“the Director”) to refuse an application for an extended trading permit (“ETP”).
- 2 When the tavern licence for the premises was transferred to the applicant in December 2014, it was subject to an ETP for Friday and Saturday night from 12 midnight to 2 a.m. effective from 19 May 2010 to 19 May 2015.
- 3 On 15 March 2015, the applicant sought to renew the ETP seeking to trade on each of Friday and Saturday nights from 12 midnight to 2 a.m. the following morning. Pending determination of the application the Director issued an interim permit due to expire on 19 February 2016.
- 4 On 2 June 2015, the Commissioner of Police (“the Police”) lodged an objection to the application.
- 5 On 23 October 2015, the Police lodged with both the Director and the Liquor Commission a complaint pursuant to section 95 of the Act.
- 6 On 3 November 2015, the applicant requested that the ETP application be held in abeyance pending the decision of the Liquor Commission in relation to the section 95 application.
- 7 On 3 November 2015, the Director informed the applicant that he had reached the view that the interim ETP was no longer appropriate or in the public interest and should be cancelled.
- 8 The applicant lodged submissions in response, and on 8 December 2015, the Director handed down his decision and cancelled the interim ETP.
- 9 On 5 February 2016, the complaint under section 95 was heard and determined by the Liquor Commission (LC 06/2016) with a set of conditions imposed on the licence.
- 10 On 20 July 2016, the applicant advised the Director it was ready to proceed with the ETP application.
- 11 The Director determined the matter on 21 December 2016 refusing the application for an ETP (reference number: A000129210).
- 12 The applicant applied for a review of the decision of the Director on 20 January 2017.
- 13 The Director lodged a notice of intervention pursuant to section 69(11) of the Act in respect of these review proceedings on 31 January 2017.

14 The Commission held a review hearing on 12 April 2017.

Submissions on behalf of the applicant

15 According to the applicant, Northbridge is arguably the busiest nightlife district in Perth and has traditionally been the location where young people congregate to socialise at weekends. The venue previously operated with an ETP and reinstatement is sought to provide a traditional bar environment rather than a nightclub.

16 It was submitted by the applicant that its target base is patrons with an interest in sporting events, especially those connected with Ireland. The grant of the application would enhance the ability of the patrons to watch sport within a safe and sociable environment. Support was submitted by way of consumer surveys conducted on the premises, six statements from witnesses and two letters from external sources.

17 The positive aspects submitted included:

- a) provision of a safe environment for patrons;
- b) the opportunity for patrons to experience the unique hospitality gained from socialising in a traditional style Irish pub;
- c) additional hours of employment for bar staff, management, security, cleaning personnel; and
- d) the ability of an Irish pub to create a home away from home for its patrons, and make this available to the many tourists in the area.

18 The applicant detailed a list of the strategies it has in place to minimise any potential negative impact that the grant of the application may have on the surrounding area. These reflected the conditions imposed on the licence after the section 95 determination as well as the attention of the management to the layout, noise attenuation, provision of food and staff training.

Submissions on behalf of the Police

19 The Police objected on the following grounds:

- a) the grant of the application would not be in the public interest;
- b) the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of alcohol; and

- c) if the application were granted the amenity, quiet or good order of the locality in which the premises are situated would in some other manner be lessened.
- 20 The Police submitted that:
 - a) there is evidence of alcohol related harm and ill-health already occurring at, and in the vicinity of, the premises;
 - b) it is likely that the grant of the ETP will contribute to further public disorder and disturbance at, and in the vicinity of, the premises, increasing the incidence of alcohol related harm and ill-health; and
 - c) there is limited evidence to support the applicant's claim that the grant of the licence will cater for the requirements of consumers for liquor products and related services.
- 21 According to the Police, there is already an unacceptable level of harm resulting from the current hours of trade at the premises, as was also evident during the period (December 2014 – December 2015) when the applicant previously traded under an ETP.
- 22 The Police submitted evidence relating to the on-going management issues at the venue and general patron intoxication, with six incidents between 19 December 2014 and 24 January 2015 and one in May 2015. The evidence was examined in detail during the section 95 proceedings in February 2016.
- 23 CCTV footage of 23 July 2016 showed patrons being admitted without being scanned, as required under the licence conditions, and patrons of the premises were seen to be intoxicated. Also on that date, two directors of the licensee company, and their companions, entered the premises and were not scanned. The directors were noted to consume alcohol whilst also assisting the on-duty staff.
- 24 When the police arrived in the early hours of the morning of 24 July 2016, an interaction occurred outside the premises between the police and one of the directors. The other director present requested that the director move away from the police. The police considered that both directors were intoxicated. Subsequently, when the police moved away from the venue they were followed by the two directors, one of whom was quite close and seen to be attempting to film the police on a mobile phone. The police officers claimed to be uncomfortable and unsettled by these actions.
- 25 The Police submit that it is evident that the premises have experienced a great number of alcohol related issues in its short management period under the current licensee, both in terms of patron intoxication and anti-social behaviour which has had a direct impact on the amenity of the locality and contributed to public disorder, disturbance and harm in the area.

- 26 The Police submit that the applicant has failed to demonstrate, at a most basic level, consumer requirement to support the granting the application, instead simply claiming to provide patrons an “*opportunity (for sporting organisations) to watch their national sport*”. The Police contend there is no relevant evidence of what the granting of an ETP will afford in respect to the public interest, or level of demand that the broadcasting of “national games” will attract.

Further submissions on behalf of the applicant

- 27 The applicant noted that the section 95 complaint had been heard and determined on 5 February 2016 and that the Commission had dismissed the ground put forward by police, in support of disciplinary action, that the premises were not properly managed in accordance with the Act. Two other grounds were conceded by the applicant, as a consequence of which additional conditions were placed on the licence. Accordingly, the applicant’s submissions were directed to events since the Commission’s determination on the section 95 complaint.
- 28 The applicant had obtained copies of all Police incident reports at the premises, recorded on the IMS and CAD data systems for the period 1 October 2015 to 30 April 2016. Of the eight incidents, two related to patrons being refused entry, four related to patrons causing disturbance once removed from the premises, and one related to an intoxicated male refusing to leave. It is submitted by the applicant that for the seven month period this reveals a very low level of incidents in relation to the premises.
- 29 In relation to the incidents on the evening of 23 July and the morning of 24 July 2016, statements were made by the two directors involved, Mr Lyons and Mr Rafter. Mr Lyons acknowledged that he had consumed alcohol, but was not intoxicated. He also acknowledged that it was not an appropriate time to try to engage with members of the Liquor Enforcement Unit (“the LEU”). Mr Rafter had also advised Mr Lyons that it was not the right time to discuss trading conditions. Mr Rafter maintained that he was not intoxicated and that he was merely observing his competitors’ businesses from the streets of Northbridge on the night and not intending to intimidate the LEU officers whom he had met before.

Submissions on behalf of the Director

- 30 As no primary submissions were made by the applicant there was no submission in reply from the Director.

Further submissions on behalf of the Police

- 31 The Police outlined incidents occurring at the premises subsequent to the section 95 determination and submitted that, notwithstanding the conditions on the licence and the cancellation of the ETP, the licensee continues to show that it cannot manage the premises in accordance with the Act and the conditions of its licence.
- 32 In addition, the Police noted the conduct of the individual members of the licensee and cited several events including the evening of the 23 July and morning of the 24 July 2016. The fitness and propriety of the members of the licensee are not the subject of these proceedings; however, it is submitted that the cumulative effect of their actions may call into question the ability of the applicant to properly manage the premises.
- 33 The Police note that the premise is high risk, and that the management and operation is not of a requisite standard to be afforded the privilege of trading extended hours. The grant of the application, based on the management to date, would cause undue harm and ill-health to people due to the use of liquor and would lessen the amenity, quiet and good order of the locality in which the premises are situated.

Determination

- 34 Under section 25(2c) of the Act, when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 35 On a review under section 25 of the Act, the Commission may –
- 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 -*
 - i) *as to any question of law, reviewed; or*
 - ii) *to the Director, to which effect shall be given; and*
 - d) *make any incidental or ancillary order.*
- 36 In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of

those materials (*Hancock v Executive Director of Public Health, [2008] WASC 224*).

- 37 An applicant for the grant of an ETP under section 60(4)(g) of the Act must satisfy the licensing authority that the grant of the application is in the public interest (refer section 38(1)(b) of the Act and regulation 9F(b) of the *Liquor Control Regulations 1989*). In this regard, the licensing authority needs to consider both the positive and negative social, economic and health impacts that the grant of the application will have on the community. Consequently, an applicant must adduce sufficient probative evidence to discharge its obligation under section 38(2).
- 38 The applicant has applied for an ETP to trade from 12 midnight to 2 a.m. the following morning on Friday and Saturday nights. An ETP existed at the time the business commenced in December 2014 through to its cancellation in December 2015. The decision of the Commission following a section 95 hearing in February 2016 was to impose various conditions on the licence.
- 39 The Police have opposed this application to a significant degree based on evidence of the incidents noted on the police CAD and IMS data systems and an examination of the incident reports of the licensed premises maintained by the management. The Police have also noted a range of infringements that continue to occur even after the early weeks of the applicant's business operations where inexperience saw quite a number of incidents. The Police have continued to provide considerable resources for interactions with the directors and management of the applicant's premises and yet incidents involving drunkenness still occur at a worrying level.
- 40 In response, the applicant contends that management has improved its operations and strives to meet the requisite conditions of the licence. Further, the applicant submits that the current level of infringements is low and ought to be considered in light of the location of its premises in a busy entertainment precinct.
- 41 It is evident to the Commission from submissions from the applicant both prior to, and at the Commission hearing, that the directors have been concerned about the ongoing financial performance of the applicant's business and that this has, to an extent, governed some of the decisions made in respect of the operation of the business.
- 42 However, as was indicated by the Chairman at the Commission hearing, the overriding consideration in running the business should be compliance with the Act and the conditions of the licence, and economic considerations are not within the Commission's remit when considering the application.
- 43 A recent example of financial considerations taking precedence over the conditions of the licence (serving beer in jugs) resulted in the issue of an infringement notice.

- 44 Further, in answer to a question from the Commission at the hearing about the apparent difficulty in controlling the entry into, and exit from, the premises (evident from a viewing of the CCTV footage in evidence), the applicant acknowledged the limitations posed by the physical layout of the entrance, but indicated a redesign and modification would not be financially achievable.
- 45 In respect of the entrance, without stipulating any measures that should be taken, the Commission recommends that the applicant consider and implement operational improvements to overcome the shortcomings that are evident in this aspect of the operation.
- 46 Whilst the environment in which the applicant operates its premises poses challenges, it is relevant to consider the impact of the applicant's operation and management practices on the safety and well-being of patrons on its premises.
- 47 The CCTV footage dated 23 July 2016 is an example which shows the staff to be more focused on, and almost fully occupied with, drink service during the busy last hour of operation with limited attention to managing and supervising the operation, and monitoring the level of sobriety of patrons.
- 48 The actions of the two directors concerned in bypassing the scanner certainly set a poor example to the patrons in the queue as well as to the directors' accompanying friends who also bypassed the scanner. However, more significantly, the directors' behavior, when entering the premises and subsequently, demonstrated a lack of appreciation and understanding of their legislative obligations, and seriously compromised, in full view of management and staff on duty, the priority and importance of a culture of regulatory compliance within the applicant's business.
- 49 The behaviour of the two directors on the footpath outside the premises, and later in Northbridge itself, was a serious lapse of judgement that casts doubt over the applicant's management practices and capabilities.
- 50 There are opposing views as to the degree of support which exists for the grant of an ETP. Surveys of current patrons unsurprisingly show support albeit without reference to any specific reason apart from the ability to socialize later into the night. Evidence of support from non-patrons was minimal as was demand, as distinct from the applicant's assertion, from a tourism viewpoint.
- 51 The competing interests in this case are those of the licensee wishing to extend its business hours on two evenings of the week, and the Police who are concerned about the applicant meeting its obligations under the Act and ensuring a secure and safe environment for both the patrons of the premises and the public in general.
- 52 The grant of an ETP is clearly a privilege and not a right. On consideration of the evidence provided, the Commission is of the view that the applicant has not

demonstrated that it would be in the public interest for the requested ETP to be granted at this time.

- 53 Accordingly, the application for review is dismissed and the decision of the Director is affirmed.

A handwritten signature in black ink, appearing to read 'Eddie Watling', written in a cursive style.

EDDIE WATLING
DEPUTY CHAIRPERSON