

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

- Applicants:** Susan Leaver and Gregory Leaver
(represented by Mr Peter Fraser of Dwyer Durack Lawyers)
- Intervener:** Director of Liquor Licensing
(represented by Mr Nick John of State Solicitor's Office)
- Commission:** Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan (Member)
Mr Greg Joyce (Member)
- Date of Hearing:** 6 January 2011
- Date of Determination:** 24 January 2011
- Premises:** Xwray Cafe, Essex Street, Fremantle
- Matter:** Application for review of a decision of the Director of Liquor Licensing under Section 25 of the *Liquor Control Act 1988*.
- Determination:** Decision dated 4 October 2010 of the Director of Liquor Licensing is quashed and the matter referred for redetermination by the Director.

Authorities referred to by parties to proceeding

- *Commissioner of Police v Bloo Moons Pty Ltd* LC 05/2010
- *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASC258; 22 WAR 510
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *O'Sullivan v Farrer* (1989) CLR 210
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *Nippon Inn LLC 08/80*
- *Powell Securities Pty Ltd v The Director of Liquor Licensing* (1992) 7 WAR 241 at 249
- *Mackiewicz v Kal Holdings Pty Ltd and Jay Naree Kemp* [1999] WASCA 84

Background

1. The Applicants are the licensees of premises situated at Lot 4, 3-13 Essex Street, Fremantle, and known as Xwray Cafe ("Premises").
2. The Premises operate pursuant to Restaurant Licence No. 6060119090 ("Licence") issued under section 50 of the *Liquor Control Act 1988* ("Act").
3. The Applicants are also authorised, pursuant to Extended Trading Permit No. 31159 ("ETP") issued under section 60(4)(ca) of the Act, to sell liquor for consumption on the Premises, whether or not ancillary to a meal.
4. By letter dated 30 July 2010 to the Applicants the Director of Liquor Licensing ("the Director") advised the Applicants that due to an alleged breach of conditions 3 and 4 of the ETP, the Director considered that the ETP was no longer appropriate and accordingly afforded the Applicants until close of business on 23 August 2010 an opportunity to provide submissions as to why the Director should not cancel the ETP pursuant to section 60(8a) of the Act.
5. By letter dated 23 August 2010, the Applicants through their solicitors provided submissions to the Director opposing the cancellation of the ETP. The letter also requested clarification as to the basis upon which it was alleged that terms of the ETP had been breached.
6. By letter dated 2 September 2010 to the Applicant's solicitors the Director advised the Applicants that having considered the Applicants submissions dated 23 August 2010, the Director had formed the view that rather than cancel the ETP it was in the public interest to condition the Licence so that liquor may only be consumed by patrons while seated at a table, or a fixed structure used as a table for the eating of food and not elsewhere and the sale and supply of liquor to patrons will be restricted to table service by staff of the licensee. The Director stated that such conditions would avoid any confusion about the circumstances under which patrons may be supplied alcohol and to maintain the ambience of the premises as a restaurant. The Director afforded the Applicants until close of business on 27 September 2010 an opportunity to provide submissions as to why the Director should not so condition the Licence.
7. By letter dated 28 September 2010, the Applicants through their solicitors provided submissions to the Director opposing the imposition of the proposed (additional) conditions on the Licence.
8. On 4 October 2010, the Director handed down his decision (A213133) pursuant to which the following (additional) conditions were imposed on the Licence:
 - Liquor may only be consumed by patrons who are seated at a table or a fixed structure used for the eating of food, and not elsewhere.
 - The sale and supply of liquor to patrons is restricted to table service by staff of the licensees.

The effective date for the imposition of the conditions was 8 October 2010. The Directors decision was forwarded to the applicants solicitors with a letter dated 4 October 2011 from the Director Compliance of the Department of Racing Gaming and Liquor enclosing, in addition to the Director's decision, a copy of the recently amended Directors policy in relation to Extended Trading Permits for restaurants to sell and supply liquor without a meal. The letter stated that the policy provides for the imposition of similar conditions to those that had been imposed on the Licence and went on to state that the conditions were intended to ensure that restaurants do not become de facto bars. The decision was purported to be made pursuant to an enquiry under section 64 of the Act.

9. By application dated 28 October 2010, the Applicants pursuant, to section 25 of the Act, sought a review of the Directors Decision. The ground given for the application was that the imposition of the conditions was not in the public interest.
10. By a notice of intervention dated 9 November 2010, the Director intervened in the review application.
11. A hearing was conducted on 6 January 2011.

The Hearing

12. It was not disputed that the Commission is conducting a review under section 25 of the Act, and accordingly is to undertake a full review, by way of a re-hearing, and make its own determination on the basis of the material before the Director when making the decision.
13. It was not disputed that the Commission should not have any regard to references in the materials before the Director and before the Commission to any alleged infringement by the Licensee other than the infringement notice 244763 issued to the licensee on 31 October 2009 and in respect of which the modified penalty was paid.
14. It was not disputed that copies of the Operations Division Investigation Reports relating to visits to the premises by authorised officers of the Department of Racing Gaming and Liquor on 2 October 2009 and 31 October 2009 respectively were not available to the Applicants at the time the Director wrote to the Applicants on 30 July 2010 and 2 September 2010 and the Applicants wrote to the Director on 23 August 2010 and 28 September 2010 respectively. These reports were subsequently made available to the Applicants prior to the hearing before the Commission.

Submissions on behalf of the Applicant

- 15.1 The Applicants relied on the submissions made in the letters to the Director dated 23 August 2010 and 28 September 2010 respectively and to their written submissions filed with the Commission on 15 December 2010 and to their oral submissions made at the hearing.

15.2 The Applicants written and oral submissions were detailed and thorough and relevantly in essence consisted of the following:

- The proceedings in relation to the matter were initially commenced pursuant to section 60(8a) of the Act but that matter was ultimately resolved by the decision of the Director not to cancel the Extended Trading Permit.
- The proceedings were subsequently continued pursuant to the provisions of section 64 of the Act which relevantly provides-
“Subject to this Act in relation to any licence, or to any permit, the licensing authority may at its discretion impose conditions in addition to the conditions specifically imposed by this Act.”
- The powers of the licensing authority must be exercised in accordance with the public interest, and must be exercised having consideration to the tenor of each licence and the circumstances in relation to which the licensing authority intends that each should operate and must be examined in the context of the public interest and the discretion of the licensing authority is confined to the scope and objects of the Act and is not arbitrary and unlimited.
- The decision of what is in the public interest is a discretionary value judgment confined only by the scope and purpose of the Act.
- The relevant objects of the Act are set out section (5)(1)(a) and 5(2)(a).
- The issue to be determined by the section 64 inquiry was whether the imposition of further conditions upon a restaurant licence was necessary in circumstances where the holder of the restaurant licence also held an ETP pursuant to section 60(4)(ca) of the Act (100% ETP).
- The Licence is subject to the conditions set out in section 50(1), section 50(3)(a), Section 50(b) and Section 50(3)(c) of the Act.
- Where the licensee of a restaurant licence holds an ETP under section 60(4) (ca) of the Act, the ETP authorises the sale of liquor to a person whether or not ancillary to a meal in accordance with section 50(1)(a) of the Act.
- It is apparent from the wording of section 50 of the Act and the explanatory memorandum in relation to the Liquor and Gaming Legislation Amendment Bill 2006 which introduced the provisions of section 50(1)(a) that the licensing authority may impose further conditions upon the ETP. It was not contemplated that conditions would be imposed on the restaurant licence.
- There is no evidence as to confusion being caused or the ambience of the premises (as a restaurant) being eroded, in the absence of the conditions imposed by the Director and the statutory conditions imposed by the Act in

relation to both the Licence and the ETP, which are clear and unambiguous in relation to issues of “confusion” and “ambience”

- The proposed conditions are not necessary to avoid confusion or to maintain the amenity of the business and the interference caused by the conditions to the applicants business is unwarranted and not in the public interest.

Submissions on behalf of the Intervener

16.1 The Liquor Commission is to undertake a review of a decision of the Director on its merits as and by way of a re-hearing. 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 materials before the Director and to make its own determination on the basis of those materials and the Commission may have regard only to the material that was before the Director when making the decision.

16.2 Subject to the Act, the director has a broad discretion to impose conditions on any licence or any permit in addition to the conditions specifically imposed by the Act having regard to the tenor of the licence and the circumstances in relation to which the Director intends it should operate. Conditions may be imposed under section 64(1) of the Act on the Directors own motion.

16.3 Without derogating from the generality of this discretion, the Director may impose conditions on a licence which he considers to be in the public interest or which he considers desirable in order among other things to:

- Limit the manner in which liquor may be sold;
- Otherwise limit the authority conferred under the licence; or
- Ensure compliance with the requirements of the Act.
(section 64(3) of the Act)

16.4 Specifically in relation to a restaurant licence, the Director may, in an appropriate case, reduce the authorisation under the licence by the imposition of conditions requiring, among other things:

- That liquor be served and consumed at a dining table and not elsewhere;
or
- Other conditions which the Director thinks desirable to prevent improper arrangements or practices.
(section 53(1) of the Act)

16.5 Reference was made to the term public interest and to the statement in the second reading speech to the Liquor and Gaming Legislation Amendment Bill 2006 that in considering the public interest the licensing authority is bound by the objects of the Act set out in section 5 of the Act.

- 16.6 Tension may arise in attempting to address competing interests under the objects of the Act. When conflict arises the Director must undertake a weighing and balancing exercise. The decision in each case will depend on the particular circumstances.
- 16.7 The Act clearly details the particular obligations and privileges attached to each class of licence. While there has been a gradual blurring of the distinction between licence classes, this flexibility is not unfettered. An underlying principle of the Act is a system based on different and distinct licence types, as deemed appropriate by Parliament. This fundamental aspect of the Act would be rendered meaningless could a licence of a particular class be distorted beyond all recognition. (Refer *Commissioner of Police v Bloo Moons Pty Ltd* LC 02/2010 at [40]-[45])
- 16.8 Reference was made to the relevant provisions of section 50 of the Act in regard to restaurant licences.
- 16.9 Reference was made to small bar licences and limitations on number of persons on premises with such a licence.
- 16.10 The ETP authorises the sale and supply of liquor in circumstances to which the Licence would not otherwise apply. Where the Licence does apply, the ETP does not. (section 60(1) of the Act)
- 16.11 Prior to the Director's decision, the ETP and the Licence were capable of operating at the same time to impose different conditions on the sale of alcohol to, and consumption of alcohol by, different classes of patrons. The potential for confusion in this situation is clear.
- 16.12 It is in the public interest, and in accordance with the objects of the Act to regulate the sale, supply and consumption of liquor and with regard to the proper development of the liquor industry, that the distinction between licence types under the Act be maintained.

Responsive submissions on behalf of the Applicant

- 17.1 No responsive submissions were lodged by the Applicant.

Responsive submissions on behalf of the Intervener

- 17.2 As noted in paragraph 16.11 of the Intervener's Submissions, the potential for confusion about the circumstances under which patrons may be supplied alcohol due to the simultaneous yet differential operation of the ETP and the Licence is clear.
- 17.3 The Applicants and their staff have no way of knowing whether the ETP or the Licence applies to any particular patron of the Premises who has not ordered a meal other than by asking that patron whether he or she intends to do so.

- 17.4 On 31 October 2009, Inspectors issued the Applicants with an Infringement Notice for breaching the ETP by not providing table service of liquor to patrons who had not ordered a meal and did not intend to do so. The Applicants paid that Infringement Notice (modified penalty).
- 17.5 On this occasion, there was clearly confusion by the Applicants and their staff about the circumstances under which patrons may be supplied alcohol. Such confusion by the Applicants and their staff obviously has the potential to cause confusion among patrons.
- 17.6 Where such confusion exists, there is always the potential for a patron of the Premises to unintentionally commit an offence against section 110(4) of the Act by obtaining, or attempting to obtain, liquor from the Applicants or their staff otherwise than in a manner authorised by the Licence or ETP, as relevant.
- 17.7 Previously, on 2 October 2009, inspectors attended the Premises and warned the Applicants that they had breached the ETP by permitting patrons who had not ordered a meal and did not intend to do so, to consume liquor otherwise than seated at a table and to purchase liquor otherwise than by way of table service.
- 17.8 By letter dated 23 August 2010 and referred to in paragraph 2(b) of the Applicants' Submissions, the Applicants argued that, based on the information provided, these circumstances did not disclose a breach of either the ETP or the Licence.
- 17.9 The above incidents were all raised by the Director in his letter to the Applicants dated 30 July 2010 and referred to in paragraph 2(a) of the Applicants submissions.
- 17.10 In an environment in which it is difficult for the Applicants and their staff, other patrons and inspectors under the Act to determine whether the supply of liquor to a particular patron is subject to the ETP or the Licence, the potential for confusion by all parties is obvious and may in some cases lead to criminal liability. Such a state of affairs is not in the public interest.
- 17.11 This confusion will be eliminated by the conditions imposed by the Decision, which maintain the ambience of the Premises as restaurant rather than a de facto small bar.

Determination

18. The Commission adopts the principle stated by Martin CJ in *Hancock v Executive Director of Public Health [2008] WASC 224* at paragraphs 53 and 54 that "... the Commission undertakes a review of the decisions of the Director on their merits, as and by way of a rehearing." 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 materials before the Director and make its own determination.
19. The background statement above, indicates that prior to the hearing before the Commission, there was a two stage process. Firstly pursuant to section 60(8a) of the Act a process in which the Applicants were asked by the Director on 30 July 2010 why he should not cancel the subject ETP. The second stage involved a request by the Director,

pursuant to his powers under sections 53 and 64 of the Act, of 2 September 2010 (sic) as to why he should not condition the licence to restrict the consumption of liquor supplied to all customers by table service seated at a table.

20. The Deputy Chairperson of the Commission drew to the attention of the parties the provision of section 25(2c) of the Act which excludes evidence being presented at the hearing not before the Director when he made his decision. It was not disputed that the evidence of any infringement notice other than that issued on 31 October 2009, must be disregarded.
21. The Director in making his decision was responding to the inspections carried out by departmental inspectors on Sunday 2 October 2009 (sic) and 31 October 2009 from which it was reported that the Applicants were in breach of the conditions of the ETP. The standard of proof is on the balance of probabilities (section 16 (1)(b)(ii) of the Act), and the onus of proof is reversed (section 52(2) of the Act).
22. At the hearing, counsel for the Applicants objected to the use by the Commission of the inspection reports because of an alleged breach of procedural fairness. The applicants had asked the Director for copies of these reports in correspondence dated 23 August, 2010 but they were not supplied. The Director had, in his correspondence of 30 July and 2 September 2010 to the Applicants, summarised his concerns arising from the inspection reports and the Applicants had paid a fine pursuant to an infringement notice for breach of the ETP issued as a consequence of the inspection of 31 October 2009 although the Applicants stated in their submissions that the modified penalty paid was in relation to the kitchen not being open and not in relation to an alleged breach of condition 4.
23. In addition the reports indicate that inspectors discussed the issues contained in the reports with staff and with Mr Gregory Leaver, one of the applicants and joint licensee. However the Applicants can argue with some force that receipt by them of these reports would have made a difference to the submissions they made to the Director in their letters of 23 August 2010 and 28 September 2010. The reports were made available to the Applicants prior to the current hearing.
24. At paragraph 45 of the Hancock decision Martin CJ said *"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 the cure requires the provision of an opportunity to present evidentiary material. It follows that, in such a case, the only way in which the Commission could uphold the decision of the Director would be if it decided to entirely exclude from consideration the matters upon which the Director relied, and in respect of which procedural fairness was denied. This course could only be followed if the matters to which the Director had regard were irrelevant to the issue under review."*
25. At the hearing and in previous correspondence to the Director, counsel for the Applicants argued that they had not breached the conditions of the ETP and that any

purported breach could be explained by the different types of customers present at the premises. Notwithstanding the applicants did not have access to all the evidence on which the Director based his decisions i.e. the inspectors reports, the Commission cannot exclude these reports because they are essential to the issues at hand. Consequently it would be unfair to penalise the applicants for the lack of procedural fairness due to the failure to supply the Applicant with the Inspectors Reports. However, there is evidence to indicate that there have been management issues relating to the serving of liquor during the operating period of the ETP, therefore it is the decision of the Commission to refer the matter back to the Director for a re-determination. To facilitate this process the decision of the Director dated 4 October 2010 and effective from 8 October 2010 is quashed.

26. During the hearing of this matter, it was submitted by the applicant that the wording of section 50 of the Act and the intention of parliament was that upon the grant of an ETP under section 60(4)(ca) the licensing authority may impose conditions on the ETP, but it was not contemplated that conditions would be imposed upon the restaurant licence. The Commission rejects this submission for the following reasons:

- Section 50(1) of the Act provides inter alia that, **subject to this Act** the licensee of a restaurant licence is authorised to sell and supply liquor for consumption on the premises ancillary to a meal (emphasis added); and
- Section 53(1) of the Act provides that the authorisation conferred by section 50 can be reduced on the grant of the licence [s 53(1)(a)] or **subsequently, by further or other conditions imposed by the Director after giving the licensee a reasonable opportunity to make submissions and to be heard** [s 53(1)(b)] – (emphasis added).

The enabling provisions to then impose conditions are contained in sections 63 and 64 of the Act. The general imposition of conditions on a licence or permit by the licensing authority to ensure that a licensee conducts the business under its licence in accordance with the tenor of its licence and permit and in a manner contemplated by the Act and is clearly reflected in the objects of the Act. The suggestion therefore that the licensing authority has no power to impose conditions is unsustainable as that would tantamount to subverting the intent of the legislation.

27. As an observation, the Commission makes the following comments. When a restaurant licensee obtains an ETP for additional “non dining” customers the Act contemplates the coexistence of two types of customers. Firstly, customers who enter the restaurant with the intention of having a meal are at liberty at least to have preliminary drinks at the bar and subsequently buy drinks at the bar for consumption with and after their meal at the table. The case of *Mackiewicz v. Kal Holdings Pty Ltd and Jay Naree Kemp [1999] WASCA 84* is authority for these matters and in that case the customers consumed liquor for an hour and a half after the completion of the meal. Secondly customers who enter the restaurant who have no intention of having a meal are permitted to consume alcohol pursuant to the conditions of the ETP which require customers to be served and seated at a table. The current ETP also requires the kitchen to be open at all times when liquor is sold to customers during the ETP period of operation.

28. The responsibility for managing these two different types of customers resides with the licensee. The licensee or the manager must know the customers by type and deal with them accordingly. Given the principles in the Mackiewicz case, particularly the fact that

“dining” customers can remain for some time after a meal has been eaten and continue to consume alcohol, evidentiary and practical matters will arise and these must be managed.

29. The responsibility to monitor the types of customers lies with the Department and given a customer can readily fall into either type, evidence as to any breach of any condition(s) must be precise.

30. Section 50(3)(a) of the Act requires that every restaurant is subject to the condition that the business conducted at the licensed premises must consist primarily and predominantly of the regular supply to customers of meals to be eaten at the premises. Condition 1 of the subject ETP provides “In establishing the primary purpose, regard is to be had to whether or not 60 per cent of the business turnover during the operation of the permit is derived from the supply of meals to customers”. The distinction between a restaurant, tavern or small bar licence has a potential, as in the current case, to become blurred if not appropriately supervised and it is the responsibility of all licensees operating within this framework to apply appropriate management structures. The scheme of the Act provides for different types of licenses and these distinctions should be maintained. The public interest test requires the Licensing Authority to have regard to the objects of the Act and in particular the primary object of regulating the sale, supply and consumption of liquor (section 5(1)(a) of the Act). Counsel for the Applicants advised the Commission at the hearing that it is the intention of the Applicants to continue as a restaurant. The licensee should be aware of all the conditions of the Licence and the ETP and ensure these are complied with.



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