
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : AUSTRALIAN LEISURE & HOSPITALITY GROUP
PTY LTD -v- COMMISSIONER OF POLICE
[2016] WASC 40

CORAM : MARTINO J

HEARD : 4 FEBRUARY 2016

DELIVERED : 12 FEBRUARY 2016

FILE NO/S : GDA 10 of 2015

BETWEEN : AUSTRALIAN LEISURE & HOSPITALITY GROUP
PTY LTD
Appellant

AND

COMMISSIONER OF POLICE
First Respondent

DIRECTOR OF LIQUOR LICENSING
Second Respondent

KEVAN JAMES
MAUREEN ANNETTE McGILL
Third Respondents

ANGELA MARGARET BURKE
GREGORY CHARLES CHIDLOW
Fourth Respondents

LOUANNE WAKEFIELD
RODNEY WAKEFIELD
Fifth Respondents

LISA KENRICK
MATTHEW KENRICK

Sixth Respondents

THOMAS HAYWOOD

Seventh Respondent

ASHLEY PALMER

Eighth Respondent

PETER PASSERA

Ninth Respondent

LAURENCE WALTER PASSMORE

BERNADETTE ANNE PASSMORE

Tenth Respondents

LUCY MAY STUART

Eleventh Respondent

BENG DING

Twelfth Respondent

ON APPEAL FROM:

Jurisdiction : THE LIQUOR COMMISSION OF WESTERN AUSTRALIA

Coram : COMMISSIONER J FREEMANTLE (CHAIRMAN)
MR E WATLING (MEMBER)
MR E SHACKLETON (MEMBER)

File No : LC 16 of 2015

Catchwords:

Liquor licensing - Consideration of issues to be determined and evidence before the Commission - Turns on own facts

Legislation:

Liquor Control Act 1998 (WA)

Result:

Appeal allowed
Decision of Liquor Commission quashed
Application remitted to the commission

Category: B

Representation:

Counsel:

Appellant	:	Mr H H Jackson
First Respondent	:	Mr W A Fitt
Second Respondent	:	No appearance
Third Respondents	:	No appearance
Fourth Respondents	:	No appearance
Fifth Respondents	:	No appearance
Sixth Respondents	:	No appearance
Seventh Respondent	:	No appearance
Eighth Respondent	:	No appearance
Ninth Respondent	:	No appearance
Tenth Respondents	:	No appearance
Eleventh Respondent	:	No appearance
Twelfth Respondent	:	No appearance

Solicitors:

Appellant	:	Cullen Macleod
First Respondent	:	State Solicitor for Western Australia
Second Respondent	:	No appearance
Third Respondents	:	No appearance
Fourth Respondents	:	No appearance
Fifth Respondents	:	No appearance
Sixth Respondents	:	No appearance
Seventh Respondent	:	No appearance
Eighth Respondent	:	No appearance
Ninth Respondent	:	No appearance
Tenth Respondents	:	No appearance
Eleventh Respondent	:	No appearance
Twelfth Respondent	:	No appearance

Cases referred to in judgment:

Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police
(LC16/2015)

Executive Director of Health v Lily Creek International Pty Ltd [2000] WASC
258; (2000) 22 WAR 510

Osland v Secretary to the Department of Justice (No 2) [2010] HCA 24; (2010)
241 CLR 320

Woolworths Ltd v Commissioner of Police (LC 12/2013)

Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384

Woolworths Ltd v Director of Liquor Licensing [2013] WASC 227; (2013) 45
WAR 446

1 **MARTINO J:** By an application made to the Director of Liquor
Licensing on 24 October 2013 the appellant, Australian Leisure &
Hospitality Group Pty Ltd (ALH), applied pursuant to ss 68 and 77 of the
Liquor Control Act 1998 (WA) for approval of alteration/redefinition of
its licensed premises the Carine Glades Tavern in Duncraig. The
application sought approval for the refurbishment of the existing tavern
and the replacement of the existing BWS bottle shop with a larger Dan
Murphy's liquor store.

2 The Director decided, pursuant to s 38(1)(c) of the Act, that it was
appropriate that s 38(2) of the Act apply to ALH's application. As a
consequence ALH was required to satisfy the Director that the granting of
the application was in the public interest.

3 On 30 September 2014 a delegate of the Director refused the
application.

4 ALH made application to the Liquor Commission of Western
Australia for review of the decision of the Director's delegate on
15 October 2014. A hearing of the application for review was held by the
Commission constituted by three members on 30 March 2015.

5 By reasons published on 27 July 2015 the Commission refused
ALH's application and thereby affirmed the delegate's decision.

6 ALH appeals against the Commission's decision. On 27 November
2015 the Director, who is second respondent to the appeal, gave notice
that he did not intend to take part in the appeal and that he would abide by
the decision of the court. The third to twelfth respondents, who were
objectors to the application, were served with the appeal but did not give
notice of intention to take part in the appeal.

7 In written submissions filed on 2 November 2015 ALH applied to
amend its appeal notice by substituting five grounds of appeal for the
existing grounds of appeal.

8 In his outline of written submissions filed on 30 November 2015 the
first respondent, the Commissioner, did not oppose the amendment to the
appeal notice. The Commissioner conceded that the appeal should be
allowed on proposed ground 1. The Commissioner submitted that the
remaining proposed grounds of appeal should be dismissed.

9 The appeal was listed to be heard on 8 February 2016. On
27 January 2016 ALH filed a consent notice signed by the solicitors for

ALH and the Commissioner consenting to orders being made in the following terms:

1. The appellant be granted leave to amend its grounds of appeal to reflect grounds 1 to 5 as contained at paragraph 12 of the appellant's written submissions dated 2 November 2015.
2. The appeal be allowed and the decision of the Liquor Commission of Western Australia in LC16/2015 dated 27 July 2015 be quashed.
2. The Appellant's application for the alteration and redefinition of the Carine Glades Tavern lodged 24 October 2013, be remitted to the Liquor Commission for reconsideration by a differently constituted Liquor Commission.
3. There be no order as to costs.

10 In the letter dated 27 January 2016 enclosing the consent notice the solicitors for ALH informed my Associate that the parties had agreed that there was no need for the hearing on 8 February 2015.

11 On 4 February 2016 I heard submissions from counsel for ALH and the Commissioner as to the appropriate course to follow. At that hearing counsel for ALH informed me that ALH no longer sought an order that the application be heard by a differently constituted Commission. This was because it was unlikely that two members of the Commission who made the decision the subject of the appeal would sit on further Commission hearings. Counsel appearing for the Commissioner on 4 February 2016 informed me that for good personal reasons which were provided to me counsel who had been instructed to appear for the Commissioner at the hearing on 8 February 2016 and who had signed the outline of the Commissioner's submissions was not able to appear at the hearing on 8 February 2016.

12 I ordered ALH have leave to amend its grounds of appeal, vacated the hearing on 8 February 2016 and informed counsel for ALH and the Commissioner that I would consider the remaining orders proposed by them and relist the appeal for hearing if I decided that I should not make the orders that had been agreed upon.

13 ALH's grounds of appeal as amended are:

1. The Commission erred in law by failing to apply itself to the real question to be asked, or by misunderstanding the nature of the opinion that it was to form, as to alcohol related harm or ill-health.

PARTICULARS

- (a) the Commission failed to make any finding, when it should have made a finding, about the pre-existing level of alcohol related harm or ill-health in the locality and the level of alcohol related harm or ill-health which was likely to result should it grant the Application;
 - (b) As such, the Commission failed to apply itself to the relevant issue of harm or ill health which was likely to result from the granting of the application before it.
2. The Commission erred in law by concluding that the approval of the Application would result in an adverse impact on the amenity of the locality in that:
- (a) the conclusion was based on findings for which there was no evidence;
 - (b) further or in the alternative, the conclusion was based on findings that were irrational and illogical or otherwise so unreasonable that no reasonable decision maker would have made them;
 - (c) further again and in the alternative, the Commission gave excessive weight to a matter so as to render the Commission's decision irrational, illogical or otherwise unreasonable.

PARTICULARS

- (a) The Commission's conclusion was based on a finding that the Application would result in a "considerable" or "not insignificant" increase in traffic which finding was:
 - (i) directly contradictory of and inconsistent with the expert opinion expressed in the Porter Report which was otherwise uncontradicted and unchallenged; and
 - (ii) further and in the alternative, made despite unchallenged evidence that the additional traffic generated would be about 1% of existing traffic volumes.
 - (b) In reaching its conclusion, the Commission placed excessive weight on the Porter Report's recommendation that certain "access places" ought to be modified.
3. The Commission erred in law by concluding that the additional traffic generated by the Application would cause a "significant

degree of offence, annoyance, disturbance or inconvenience" in that that conclusion was based on findings:

- (a) For which there was no evidence;
- (b) Further or in the alternative, that were irrational and illogical or otherwise unreasonable.

PARTICULARS

- (a) As to the Commission's finding that the proposal, if approved would result in a "considerable" or "not insignificant" increase in traffic, the appellant repeats upon the particulars at 2(a) above;
 - (b) Further and in the alternative, the Commission's conclusion that the increased traffic will "also impact on parking availability" is contrary to and inconsistent with the uncontradicted findings of the opinion expressed by the expert author of the Porter Report that the Application, if granted, would provide more car parking spaces than would be required.
4. The Commission erred in law in its assessment of the extent to which the Application would cater for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in that it:
- (a) in considering the liquor store element, asked itself the wrong question when it applied the former "needs" test;
 - (b) and, otherwise:
 - (i) failed to apply itself to the real question to be asked;
 - (ii) further, or in the alternative, failed to give proper, genuine and realistic consideration to the issue;
 - (iii) further again or in the alternative, reached a conclusion that was manifestly unreasonable.
5. The Commission erred in law by failing to take into account a relevant consideration, namely the secondary object in s.5(2)(a) of the Act.

14 In its reasons the Commission said that its consideration of the application would incorporate an assessment of:¹

¹ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [71].

- 1 the harm and ill-health that might be caused;
- 2 the impact on the amenity of the locality;
- 3 whether offence, annoyance, disturbance or inconvenience might be caused to people who might reside or work in the vicinity; and
- 4 the extent to which the proposal would cater for the requirement of consumers of liquor and related services, with regard to the proper development of the liquor industry.

15 The Commission then proceeded to consider each of those issues. It appeared to find that harm and ill-health might be caused if the application were granted.² It found that approval of the application would result in an adverse impact on the amenity of the locality.³ It found that a significant degree of offence, annoyance, disturbance or inconvenience would result from the approval of the application.⁴ It found that the benefits for consumers were far outweighed by the fact that there would be a reduction in the patron capacity of the tavern, in the circumstances where there was a First Choice liquor store approximately 1.2 km away, a Dan Murphy's liquor store 4 km away and the one shopping trip benefits to consumers in the locality were very limited.⁵ The Commission decided that it was not in the public interest to approve the application.⁶

16 In dealing with those issues the Commission was required to evaluate the evidence, make findings and draw conclusions from the evidence, including by inference. It was bound to apply the public interest criterion to the findings it had made and the conclusions it had drawn.⁷

17 In considering the extent of harm and ill-health that might be caused if the application were granted the Commission referred to ALH's submission that the demographic evidence showed that the surrounding area lacked the presence of at-risk groups and other indicators which might cause concern⁸ and the submissions of the Commissioner that there was already some degree of alcohol related offending in the area, including alcohol related domestic assaults , that it did not follow that there was no risk of increased alcohol related harm associated with the

² *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [72] - [79], [112].

³ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [102].

⁴ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [104].

⁵ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [115].

⁶ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [117].

⁷ *Woolworths Ltd v Director of Liquor Licensing* [2013] WASC 227; (2013) 45 WAR 446 [70] (Buss JA).

⁸ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [72].

application,⁹ and that there were a substantial number of people belonging to 'at risk' groups in the suburbs closest to the premises where thousands of families with children lived.¹⁰

18 The Commission said that there was already evidence before it that an increase in the availability of cheap liquor tends to lead to an increase in alcohol consumption, particularly among young people.¹¹ It said that there was evidence that the existence of a First Choice destination liquor store within 2 km of the tavern and a Dan Murphy's store some 4 km away and that this was a major factor when considering the harm or ill health aspects of the application, as an approval of the application would result in a substantial increase in the liquor retailing footprint within the locality, with the potential to negatively impact on the level of harm or ill-health through the consumption of alcohol.¹² It then referred to Ipp J's reasons in *Executive Director of Health v Lily Creek International Pty Ltd* that the Licensing Authority's task was to minimise harm or ill-health, not to prevent them absolutely, so it was necessary to weigh and balance all relevant considerations.¹³ The Commission referred to its own decision in *Ventorin v Director of Liquor Licensing* in which it pointed to the object of the Act to regulate the sale, supply and consumption of liquor.¹⁴ The Commission then referred to the decision of EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing* in which his Honour said that there is no presumption in favour of granting a licence and that the public interest must be considered when considering an application for larger premises.¹⁵ The Commission then said that the

significant increase in the retail liquor footprint for alcohol products in this locality that would result from the grant of this application does raise harm and ill-health concerns consistent with the established view of the Commission that it is not in the public interest to have large format destination liquor stores in close proximity, in this case a First Choice liquor store within 1.5 km and a Dan Murphy's liquor store at Balga within 4 km.¹⁶

⁹ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [73].

¹⁰ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [74].

¹¹ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [74].

¹² *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [75].

¹³ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [76]

(the Commission), referring to *Executive Director of Health v Lily Creek International Pty Ltd* [2000] WASCA 258; (2000) 22 WAR 510 [19] - [20] (Ipp J).

¹⁴ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [77]

(the Commission), referring to its own decision in *Ventorin v Director of Liquor Licensing* (LC04/2009).

¹⁵ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [78]

(the Commission), referring to *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [41]

(EM Heenan J).

¹⁶ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [79].

19 The Commission referred to its decision in *Woolworths Ltd v Commissioner of Police*, a case in which it took the view that establishing a Dan Murphy's style liquor store was not consistent with the proper development of the liquor industry as there were other large outlets and other convenience liquor stores in the locality.¹⁷ The Commission then moved to consideration of the impact on the amenity of the locality.

20 At no stage in its reasoning process expressed in the reasons is it possible to discern that in considering the issue of harm and ill-health the Commission evaluated the evidence, made findings and drew conclusions from the evidence as it was required to do. In my view the concession by the Commissioner that in this respect the Commission was in error is correct.

21 The Commission said that it had

weighed and balanced between the competing objects of the Act and has reached the conclusion that it is not in the public interest to approve this application.¹⁸

22 I conclude therefore that the error of the Commission was material as it was capable of affecting the Commission's conclusion on the application.

23 Section 28(5) of the Act provides:

(5) On an appeal under this section to the Supreme Court, the Supreme Court may -

- (a) affirm, vary or quash the decision appealed against; or
- (b) make any decision that the Commission could have made instead of the decision appealed against; or
- (c) send the decision back to the Commission for reconsideration in accordance with any directions or recommendations that the Court considers appropriate,

and, in any case, may make any ancillary or incidental order the Supreme Court considers appropriate.

24 At the hearing on 4 February 2016 both counsel submitted to me that I should quash the Commission's decision and send the application back to the Commission for redetermination. They submitted that I should not

¹⁷ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [79] (the Commission), referring to its own decision in *Woolworths Ltd v Commissioner of Police* (LC 12/2013).

¹⁸ *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* (LC16/2015) [117].

review the application and consider affirming, varying or making another decision that the Commission could have made. I have decided that I should accept those submissions. An appeal to this court from the Commission is on a question of law. The Commission is a specialist tribunal. A reconsideration of the application involves considerations of public interest. I should therefore follow the ordinary course of remitting the application to the body established for the purpose of dealing with such applications.¹⁹

25 Both counsel also submitted that it was not necessary or appropriate for me to determine the other grounds of appeal. I accept those submissions.

26 As I have said the Commission is a specialist tribunal and it is desirable for it to use its experience and expertise in finding the facts and determining the application. While it is possible for me to give directions to the Commission as to how it should go about that task but because of the Commission's experience and expertise it is preferable not to do so.

27 Grounds of appeal 2 and 3 concern the Traffic Impact Assessment Report prepared by Porter Consulting which was before the Commission. As the Commission will be considering the application it will be necessary for it to consider the evidence in that report, if it is relied upon. If I were to make a decision about those grounds it would still be necessary for the Commission to make its own assessment of the report.

28 Ground 4 concerns the requirement of consumers of liquor and related services, with regard to the proper development of the liquor industry. ALH contends in ground 4(a) that the Commission applied a test, described as the 'needs' test which was removed by amendments to the Act made by the *Liquor and Gaming Legislation Amendment Act 2006* (WA). Whether or not the Commission applied that test it is clear that when it considers the application following it being sent back to it the Commission cannot apply the 'needs' test.²⁰

29 In ground 4(b) ALH contends that in considering whether the proposed alterations would cater for the requirement of consumers of liquor and related services, with regard to the proper development of the liquor industry the Commission failed to evaluate the evidence. Whether or not it did so it is clear from *Woolworths Ltd v Director of Liquor*

¹⁹ *Osland v Secretary to the Department of Justice (No 2)* [2010] HCA 24; (2010) 241 CLR 320 [20] (French CJ, Gummow & Bell JJ).

²⁰ *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; (2013) 45 WAR 446 [8].

Licensing that when considering the remitted application the Commission will be required to do so.²¹

30 In ground 5 ALH contends that the Commission failed to comply with its obligation in s 5(2)(a) of the Act to have regard to the secondary object of the Act

to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State.

31 Whether or not the Commission failed to do so, when considering the application the Commission will be required to have regard to that secondary object.

32 I accept the submissions of ALH and the Commissioner and I will not determine grounds of appeal 2 to 5. I make the following orders by consent of ALH and the Commissioner:

- 1 The appeal be allowed.
- 2 The decision of the Liquor Commission of Western Australia in LC16/2015 dated 27 July 2015 be quashed.
- 3 The appellant's application for the alteration and redefinition of the Carine Glades Tavern lodged 24 October 2013 be remitted to the Liquor Commission for reconsideration.

²¹ *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; (2013) 45 WAR 446.