

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

Applicant: Charax Pty Ltd
(represented by Ms J Patterson of Lavan Lawyers, Mr R Zahtlia and Mr G Davies, Directors of licensee company)

Respondent: Director of Liquor Licensing

Commission: Mr Seamus Rafferty (Chairperson)
Ms Emma Power (Member)
Ms Elanor Rowe-Harper (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the delegate of the Director of Liquor Licensing to refuse an application for the grant of an extended trading permit for Sunday trading in respect of premises known as "Dunsborough Cellars".

Premises: Dunsborough Cellars, 58 Dunn Bay Road, Dunsborough

Date of Hearing: 1 May 2019

Date of Determination: 1 May 2019

Date of Reasons for Determination: 22 October 2019

Determination: The application is granted.

These reasons were delivered extemporaneously and have been edited from the transcript

1. On 13 August 2018, Charax Pty Ltd trading as Dunsborough Cellars Liquor Store in Dunsborough made an application pursuant to section 60(4)(g) of the *Liquor Control Act 1988* ("the Act") for an extended trading permit allowing the sale of liquor on Sundays.
2. Given the relevant policies of the Director of Liquor Licensing and the fact that this is an application pursuant to section 60 of the Act, the applicant had to satisfy on balance that it is in the public interest to grant the application.
3. The application was supported by a Public Interest Assessment and other materials in which the applicant submitted that the grant of the extended trading permit was in the public interest and should be granted for several reasons, including:
 - it will provide additional services on Sundays for those who consume liquor and improve amenity in the relevant district or locality;
 - the premises had a genuine focus on meeting the needs of the local community;
 - the licensed premises ordered many products from local winemakers and brewers and provided an independent alternative to larger discount national chain liquor stores that currently operate in Dunsborough, those being the Liquorland and BWS stores which already operate on a Sunday;
 - the Dunsborough CBD, where the licensed premises was located supports a seven-day per week trading program and there is an expectation that the businesses would operate in that area seven days per week.
4. In outlining the services and facilities under the extended trading permit, the Applicant submitted that the extended trading permit would allow for the provision of the convenience of local products in one location; service knowledge and convenience for tourists and travellers; a reference point for tourists for a wine and food experience and also provide for last minute purchases of items on weekends for tourists and/or locals.
5. It was also submitted that the proposed amount of trade under the extended trading

permit would allow for the continuation of the existing service and a commitment to promoting the Margaret River wine region.

6. In *Woolworths Ltd v Director of Liquor Licensing*¹ His Honour Buss JA set out the statutory framework for a determination of an application in which an applicant had to satisfy the Commission that the granting of an application was in the public interest in the following terms:
- a. by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;
 - b. the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;²
 - c. the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act, as set out in section 5(2) of the Act;
 - d. the factual matters which the Commission is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act;
 - e. section 5(2) is mandatory whereas section 38(4) is permissive;
 - f. on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - i. catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and
 - ii. facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

¹ [2013] WASCA 227

² *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute.

7. In *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 Her Honour Banks-Smith J noted at [68], 'catering for consumer requirements is not to be considered in isolation. The potential and opportunity for proper development of the industry (including change) is not to be ignored.'
8. Pursuant to section 38(4) of the Act, those matters that the Commission *may* take into account in determining whether an application is in the public interest, include but are not limited to -
 - (a) *The harm or ill-health that might be caused to people, or any group of people, due to the use of liquor.*
 - (b) *whether the amenity, quiet or good order of the locality in which the licensed premises or proposed licensed premises are, or are to be, situated might in some manner be lessened.*
 - (c) *whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises.*
 - (ca) *any effect the granting of the application might have in relation to tourism, or community or cultural matters; and*
 - (d) *any other prescribed matter.*
9. The matters which the Commission must take into account in determining this application are the primary objects of the Act as set out in section 5(1) of the Act including minimisation of harm or ill-health caused to people or any group of people due to the use of liquor.
10. There is nothing in the materials before the Commission which would give rise to harm being a relevant consideration for the purposes of this application. There is nothing in the locality or, indeed, outside the locality that would suggest that there are such levels of harm that would make it inappropriate to grant this application.
11. The Commission is also mindful of the following observation made by His Honour

McGrath J. in the recent decision of *Commissioner of Police v Australian Leisure and Hospitality Group Pty Ltd*³:

*“I consider that on a proper construction of the subject matter, scope and purpose of the Act the Parliament has manifested an intention to forbid the economic benefit considerations from being taken into account in assessing where the public interest lies.”*⁴

12. However, the Commission does take notice of the notorious fact that the licensed premises operates in a tourist area that has a significant emphasis on providing services to tourists in the Dunsborough, Yallingup, Margaret River region.
13. There is a heavy focus in that particular region in relation to wine production and the sale of wines and it is noted from the public interest assessment that the applicant clearly supports wine producers in the region by the sale of a number of different products that are grown in that particular region. They are all available in the one location as opposed to being available in separate locations and that, clearly, in the context of a tourist region is something that the Commission can take into account having regard to section 5(1)(c) of the Act and the fact that the applicant caters for the requirements of consumers for liquor related services with regard to the proper development of the tourism industry in particular.
14. It is clear from previous decisions of the Supreme Court that the needs test no longer applies and the fact that there are other providers who operate on the same day and sell alcohol on the same day, cannot be a relevant consideration for the purposes of this application.
15. In fact, it seems somewhat absurd that there are at least two other licensed premises that are able to sell alcohol or packaged liquor on Sundays and that this particular applicant should the application be refused, would not be able to do so. That would be an absurdity in all the circumstances.
16. The Commission is mindful of section 98D of the Act which prohibits the sale of alcohol in country towns on Sundays. However, in enacting that provision parliament also enacted section 60(4) which allows extended trading permits to be granted in

³ [2019] WASC 114

⁴ *Supra* at [65]

SEAMUS RAFFERTY
CHAIRPERSON



- circumstances where the public interest test has been satisfied.
17. Based on all of the materials that has been provided to the Commission by the applicant which includes a survey including in excess of 500 responses which, it is evident to the Commission that there are a number of people within the locality and tourists outside the locality who consider the applicant's services to be excellent and who support the granting of the application.
18. Having regard to all of the evidence, the Commission is of the opinion that there shall be no detriment to the amenity, quiet or good order of the community or by way of an increase in harm or ill-health within the relevant locality or, indeed, outside the locality by the grant of this application.
19. The Commission is therefore satisfied on the balance of probabilities that the applicant has satisfied the public interest test and that the granting of this application would be consistent with the object of the Act set out in section 5(1)(c) of the Act. Accordingly, the Commission grants the application for an extended trading permit for a period of 10 years, allowing the operation of the licensed premises on Sundays, between the hours of 10am and 10pm with the same conditions if any, that are on the existing licence.