

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Chief Health Officer
(represented by Mr SA Smith of State Solicitor's Office)

Respondent: Mellen Promotions Theatre Pty Ltd

Commission: Ms Emma Power (Acting Chairman)
Mr Paul Shanahan
Mr Nicholas van Hattem

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of a decision by the delegate of the Director of Liquor Licensing to grant an application for the conditional grant of a special facility licence at the Premises.

Premises: **The Piccadilly**
700-704 Hay Street Mall
Perth WA 6000

Date of Determination: 22 March 2021
(on papers)

Determination The application is allowed, the decision of the delegate of the Director is varied and the application to conditionally grant a special facility licence in respect of the premises known as The Piccadilly is approved subject to the replacement of Trading Condition 8 imposed by the Director with the following Trading Condition 8:

"8. Pursuant to section 120(1)(e) of the Act, unaccompanied juveniles are permitted to enter and remain on the parts of the licensed premises that are designated for access by the public PROVIDED THAT:

- (a) *the unaccompanied juvenile is present on the licensed premises for the purpose of attending a performance or event;*
- (b) *the unaccompanied juvenile must possess a ticket that is valid for the performance or event at The Piccadilly on that day;*
- (c) *unaccompanied juveniles are not permitted within any area that has been set aside or designated as an 18+ area from time to time or within a 3 metre radius of any bar area serving alcohol;*
- (d) *staff will be stationed inside the theatre to check and monitor unaccompanied juveniles;*
- (e) *for any category 3 performance (being any standing live music events):*
 - (i) *the licensee must provide designated alcohol-free areas of the venue for the use of unaccompanied juveniles;*
 - (ii) *the licensee must ensure that all unaccompanied juveniles remain in the designated alcohol free areas;*
 - (iii) *the designated alcohol free area shall be managed by crowd controllers or approved managers of the licensee;*
 - (iv) *crowd controllers of the licensee must check all bags of unaccompanied juveniles for liquor, and confiscate any liquor, prior to entrance to the designated alcohol free areas; and*
 - (v) *the licensee must provide a designated area for the purchase and consumption of alcohol that unaccompanied juveniles are not permitted to enter.”*

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning Commission* [2002] WASCA 27
- *Executive Director of Public Health v Lily Creek International Et Ors* [2001] WASCA 410
- Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208

- 1 On 14 February 2020, Mellen Promotions Theatre Pty Ltd (“**Mellen**”) applied to the Director of Liquor Licensing (“**the Director**”) for the conditional grant of a special facility licence pursuant to section 46 and section 62 of the *Liquor Control Act 1988* (WA) (“**the Act**”) (“**the Application**”).
- 2 The Application is in respect of premises to be known as The Piccadilly situated at 700-704 Hay Street Mall, Perth (“**the Premises**”).
- 3 The special facility licence was sought:
 - a for the prescribed purposes of a theatre and also a reception or function centre under regulation 9A(4) and regulation (5) of the *Liquor Control Regulations 1989* (WA);
 - b to encompass the whole of the venue, permitting 1,100 patrons at any one time; and
 - c for the trading hours of 6.00am to 1.00am from Monday to Sunday.
- 4 The Premises is to be used for musical theatre, comedy acts, music concerts, children’s shows and matinees, classical theatre, ballet and Perth International Arts Festival events.
- 5 On 30 March 2020, the Chief Health Officer (“**CHO**”) submitted a written intervention (“**the Intervention**”) in relation to the Application pursuant to s 69(8a)(b) of the Act.
- 6 By the Intervention, the CHO did not oppose the grant of the licence but sought to place conditions on the licence to ameliorate certain harm or ill-health concerns as follows:
 - a liquor may not be sold, supplied or consumed at child-focussed performances (i.e. children's shows and matinees) (“**Proposed Condition 1**”);
 - b no unaccompanied juveniles are permitted at the premises past 8.00pm on any day (“**Proposed Condition 2**”); and
 - c food is to be available at all times (“**Proposed Condition 3**”).
- 7 On 20 May 2020, a Delegate of the Director (“**the Director**”) granted the Application for a conditional special facility licence subject to several conditions (“**the Director’s Decision**”) including Proposed Condition 3 (Decision A701138976).

8 The conditional licence also included the following Condition 8:

“8. Pursuant to section 120(1)(e) of the Act, unaccompanied juveniles are permitted to enter and remain on the licensed premises where the juvenile is present on the licensed premises for the purpose of attending a performance or film and who possess a ticket that is valid for the performance or film screening at The Piccadilly on that day; and if juveniles are present, an employee of the licensee must check each cinema every 15 minutes to ensure compliance with the Act.”

9 Pursuant to section 25 of the Act, the CHO applied for a review of the decision of the Director on 19 June 2020.

10 CHO provided submissions. However, Mellen elected not to participate further in respect to the section 25 review proceedings and did not provide any written submissions. The review duly proceeded on papers.

Submission by the CHO as Applicant

11 The CHO lodged the Intervention on 30 March 2020 in respect to the following harm or ill-health concerns:

- a permitting adult alcohol consumption during child focussed entertainment would create a favourable social and cultural association for children between alcohol and entertainment;
- b the Application to licence the entire venue, which is a large and dark environment with a capacity of 1,100 patrons at any one time, would mean that staff would have limited ability to effectively monitor levels of drunkenness of patrons and would create a risk that staff could not effectively monitor the safety of, and secondary supply of alcohol to, unaccompanied juveniles;
- c allowing unaccompanied juveniles to attend the venue during all trading hours (6.00am to 1.00am every day) would lead them to exit into a locality within which violence consistently occurs; evidence establishes such violence begins to increase from 9.00pm and reaches a peak between 1.00am and 2.00am;

- d allowing unaccompanied juveniles in all areas of the venue where alcohol is permitted for category A events (which includes family shows, seated ballet, seated theatre shows and public speakers) and for category B events (which includes seated live music and seated comedy shows) would contribute to the risk articulated above at (b); and
 - e though an alcohol free area of the venue would be designated for unaccompanied juveniles attending category C events (which are any standing live music events), it remains unclear whether unaccompanied juveniles would be permitted in the licensed areas during category C events which would contribute to the risk articulated above at (b).
- 12 The CHO proposed the inclusion of the Proposed Conditions set out in paragraph 6 to ameliorate the above risks.
- 13 On 5 May 2020, the CHO provided closing submissions to the Director. The CHO reiterated its submissions made in the Intervention and made the following additional submissions:
- a the CHO's Proposed Conditions 1, 2 and 3 are not intended to undermine the cultural and tourism benefits of the Application, but rather to support those benefits while also protecting children and young people;
 - b though the provision of alcohol is required to be ancillary to the primary purpose of patrons attending a show or function at the premises, alcohol will be a prominent feature of the premises;
 - c Mellen has not responded to the CHO's concerns regarding to the availability and visibility of alcohol to children and young people at the venue;
 - d Mellen has not addressed the data submitted in the Intervention regarding the level of alcohol related harm occurring for young people, nor the child safety concerns raised in respect of the presence of unaccompanied juveniles in an environment in which adults are drinking while at the premises;
 - e Mellen has not outlined how it will achieve its strategy of keeping unaccompanied juveniles in an alcohol free area for category C events, or, specifically, how Mellen will identify the unaccompanied juveniles and keep them in the area during large music events within a dark environment;

- f Mellen has not set out how they propose to manage the potential for secondary supply of alcohol to juveniles at the premises;
- g Mellen has not addressed the harm that could be potentially caused to unaccompanied juveniles exiting the premises into the Perth CBD late at night, which is a locality within which violence regularly occurs; and
- h contrary to Mellen's submissions, the absence of intervention by the Commissioner of Police does not dismiss, invalidate or reduce the weight which ought to be attributed to the CHO's submissions.

14 The basis of the application for review by the CHO is as follows:

- a **Ground 1** – The Delegate erred in paying insufficient regard to the harmful effect of allowing adults to consume alcohol during child-focussed entertainment at the premises, by creating a favourable association for children between alcohol and entertainment and an additional risk of harm to children unaccompanied by adults in such a setting.
- b **Ground 2** - The Delegate's decision to grant the licence together with an approval for unaccompanied juveniles to enter and remain on the licensed premises at any time of the day, and up until 1am, in a night-time entertainment precinct where alcohol-related harm occurs, was irrational or unreasonable in circumstances where such approval is inconsistent with the premise of the Director's *“Juveniles present on licensed premises for reasons other than work/training policy”*, and no rationale or reasoning was provided as to why that policy was departed from.
- c **Ground 3** - The Delegate erred in purporting to grant an approval under section 120(1)(e) of the Act that is beyond power. In particular, condition 8 purports to allow unaccompanied juveniles to enter and remain on the whole of the licensed premises, whereas on the proper construction of s 120(1)(e) of the Act, such approvals may only be given for a “part” of licensed premises, and not the whole of a licensed premises. Such error infected the whole of the decision to grant the licence on the conditions upon which it was granted.

d **Ground 4** - The Delegate erred in granting the licence subject to a condition which is irrational or without an intelligible justification, and the imposition of such condition infected the whole of the decision to grant the licence on the conditions upon which it was granted. In particular:

i the rational justification for the imposition of condition 8, which requires an employee of the licensee to check each cinema every 15 minutes, is an acknowledgement that there is risk of harm arising by virtue of unaccompanied juveniles being present on a licensed premises which is difficult to monitor, due to the nature of the entertainment provided at the premises; and

ii the protective mechanism imposed to minimise harm is ineffective because it would not be reasonably possible or practicable for an employee of the licensee to:

1. identify unaccompanied juveniles in a dark cinema,
2. identify if any such unaccompanied juvenile is in possession of and/or consuming an alcoholic drink, and
3. otherwise ensure compliance with the Act as required by Condition 8.

15 In respect to Grounds 1 and 2, the CHO seeks review of the Delegate's failure to impose Proposed Conditions 1 and 2 which were sought to ameliorate the harm or ill health concerns for children and unaccompanied juveniles resulting from the Application.

16 In respect to grounds 3 and 4, the CHO seeks review of Condition 8 which was imposed by the Delegate beyond power and which, in any event, is irrational or without intelligible justification.

Ground 1

17 The starting position under Division 9 of the Act is that juveniles are prohibited from being permitted entry to, or remaining on, a place where the sale or supply of liquor is authorised except as authorised under sections 120(1)(a) to (f) or sections 126A or 126B of the Act.

- 18 Only section 120(1)(e) is relevant in these proceedings.
- 19 The Director has also issued a policy entitled “*Juveniles present on licensed premises for reasons other than work/training policy*” (“**the Juveniles Policy**”).
- 20 The Director’s Public Interest Assessment Policy defines children and young people as an at-risk group for alcohol related harm.
- 21 Medical and behavioural research shows that the availability and visibility of alcohol at child-focussed entertainment creates a favourable association for children between alcohol and entertainment which can increase a child's risk of harm by influencing their attitudes towards alcohol and future drinking attitudes, behaviours and related harms.
- 22 The provision of alcohol at child-focussed events is not supportive of efforts to reduce the risky drinking culture in the community.
- 23 In failing to impose any condition preventing the sale, supply of alcohol during child focussed performances, the Delegate erred in paying insufficient regard to the harmful effect of allowing adults to consume alcohol during child-focussed entertainment at the premises.
- 24 The Conditions imposed on the licence do not reflect the requirements under the Act. In particular, the primary object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor, and the secondary object of encouraging responsible attitudes and practices towards the consumption of liquor that are consistent with the interests of the community.
- 25 Proposed Condition 1 is an effective mechanism to ameliorate the risk of the harm to children and young people and furthers primary and secondary obligations under the Act.
- 26 Similar conditions have been imposed in relation to special facility licences granted for the purposes of theatre or cinemas and for special facility licences for the purposes of amusement venues.

Ground 2

- 27 If the Commission is minded to grant an exemption under section 120(1)(e) of the Act, the CHO submits that such approval should also be subject to Proposed Condition 2.

- 28 The Director's Decision to grant the licence together with an approval under s 120(1)(e) for unaccompanied juveniles to enter and remain on the licensed premises up until 1am, and in a night-time entertainment precinct where alcohol-related harm occurs, was irrational or unreasonable in circumstances where such approval is inconsistent with the premise of the Director's Juveniles Policy, and no rationale or reasoning was provided as to why that policy was departed from.
- 29 Departures from government policy should be 'cautious and sparing', occurring only where there were 'cogent reasons' (*Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning Commission* [2002] WASCA 276 at [24]-[26])
- 30 The Juveniles Policy relevantly states that: "*due to the increase in anti-social behaviour occurring in the vicinity of the central Perth CBD, including Northbridge, the Director of Liquor Licensing has determined that it is not in the public interest to approve functions in licensed premises that attract juveniles to those areas*".
- 31 This is an acknowledgment by the Director that juveniles are an "at risk" group for alcohol related harm, and that they ought to be kept away from the anti-social behaviour occurring in the vicinity of central Perth CBD to minimise the risk of alcohol related harm being caused.
- 32 Although this aspect of the policy is stated in the context of approvals under section 126B, the rationale underlying the policy is sound and is more broadly relevant to all decisions made under the Act which affect juveniles.
- 33 Although the Director expressly stated in the Decision that he had considered this aspect of the policy in reaching his Decision, he departed from the policy and provided no rationale or reason for doing so.
- 34 The Director's Decision was manifestly unreasonable because he gave little weight, or no weight, to the risk of harm to juveniles however, this warranted great importance in the context of the objects and purpose of the Act.
- 35 The Application permits unaccompanied juveniles to be on the premises during all trading hours, including until 1.00am, and that there is potential for young people to be exiting into the Perth CBD where there is identified alcohol related harm occurring, which the evidence established begins to increase from 9.00pm and peaks between 1.00am and 2.00am when patrons are likely to be leaving the premises.

36 Proposed Condition 2 does address the policy and is an effective protective mechanism to minimise the risk to juveniles caused by granting the Application and the approval under s 120(1)(e).

Ground 3

37 In imposing Condition 8, the Delegate erred in purporting to grant an approval under s 120(1)(e) of the Act that is beyond power.

38 Section 120(1)(e) permits juveniles to enter or remain on a place where the sale or supply of liquor is authorised if *“the place is on a part of licensed premises or of regulated premises...”*.

39 When construed in accordance with the ordinary and natural meaning of the language of the provision the Director only has power to approve an application for juveniles to be permitted entry to, or to remain *“on a part of licensed premises”* not the whole of a licensed premises.

40 It is rational, however, that where juveniles are permitted to be on licensed premises, they must be confined to a particular area of the premises so that they can be supervised and managed appropriately or are subject to other appropriate conditions.

41 If, contrary to the CHO's submissions, the Commission is minded to grant the approval under s 120(1)(e) of the Act (in addition to imposing the conditions and limitations outlined above), the Commission should limit the s 120(1)(e) approval so that unaccompanied juveniles may only attend specified parts of the premises, for example, specified cinemas, and excluding a dedicated service area for liquor.

Ground 4

42 The Delegate erred in granting the licence subject to Condition 8, which is irrational or without intelligible justification as it is not based on findings or inferences of facts supported on logical grounds.

43 Alcohol in the cinema setting presents several risk factors for harm to unaccompanied juveniles including:

- a secondary supply of liquor to unaccompanied juveniles in dark cinemas with a large number of occupants where there is no, or no effective, way to identify and monitor such unaccompanied juveniles; and

- b the potential interaction between unaccompanied juveniles and adults not known to them who have been consuming alcohol.
- 44 Any condition which grants approval under s 120(1)(e) for unaccompanied juveniles to enter and remain in cinemas where alcohol is permitted should also impose a rational and effective protective mechanism which sensibly ameliorates the risk of harm to unaccompanied juveniles.
- 45 Condition 8 is ineffective because it would not be reasonably possible or practicable for an employee of the licensee to identify unaccompanied juveniles in a dark cinema or identify if any such unaccompanied juvenile is in possession of, and/or consuming, an alcohol drink.
- 46 Accordingly, Condition 8 is futile and without intelligible justification and ought not to be imposed on the licence.
- 47 Paragraph 36 of the Decision suggests that it is a replication of a condition which was (purportedly) imposed by the Director on a special facility licence for the purpose of a theatre or cinema in relation to premises known as 'Raine Square'.
- 48 The fact that Raine Square had such condition:
- a does not provide a rational justification for an irrational condition to be imposed in the present case; and
 - b appears to be a mistake due to the commentary in paragraph 40 of the decision for the Raine Square matter published on 13 June 2018.

Requested Remedy

- 49 The CHO seeks that the Commission quash the Decision and make its own decision on the Application:
- a to grant the licence subject to the conditions in the Decision without Condition 8; and
 - b to impose a condition directed to preventing the sale, supply and consumption of liquor on the premises during child-focussed performances or shows (Proposed Condition 1).

50 Alternatively, the CHO submits that it would be reasonable and appropriate for the Condition 8 approval to:

- a limit the s 120(1)(e) approval so that unaccompanied juveniles may only attend specified parts of the premises (for example, specified cinemas, and excluding a dedicated service area for liquor);
- b prevent unaccompanied juveniles from entering and remaining at the premises after 8.00pm (Proposed Condition 2); and
- c include a rational and effective measure to sensibly ameliorate the risk of harm to unaccompanied juveniles by way of an effective method which would enable the licensee to:
 - i identify unaccompanied juveniles in a dark cinema and whether such unaccompanied juvenile is in possession of, and/or consuming, an alcohol drink;
 - ii identify whether or not an unaccompanied child is at risk from an adult not known to them who has been consuming alcohol; and
 - iii otherwise ensure compliance with the Act as required by condition 8.

Submissions on behalf of Mellen as Respondent

51 As noted above, Mellen did not participate in the section 25 application process. As such, Mellen's submissions are based upon:

- a the contents of the Application, particularly part 8 (Risk Assessment with respect to Harm or Ill-Health) and Part 9 (Juvenile Submissions) of the Public Interest Assessment prepared by Canford Hospitality Consultants Pty Ltd ("**the PIA**");
- b Mellen's further submissions dated 28 April 2020; and
- c Mellen's closing submissions dated 5 May 2020.

52 In the PIA it was asserted that any potential ill-health or harm factors will be mitigated by the following circumstances and trading conditions:

- a The Piccadilly is intended to be a sophisticated theatre venue;
- b The Piccadilly is performance and function based only;

- c Mellen will not serve liquor to members of the public off the street, only to people who are attending or participating in performances, concerts or event, receptions or functions, rehearsals and workshops.
- d staff will be stationed inside the theatre to check and monitor unaccompanied juveniles when underage concerts are held;
- e there will be no “ in seat “ alcohol service in the theatre;
- f the main attraction of the proposed licensed venue is the performance/ event/ function and not alcohol, therefore the anticipated volume of liquor to be supplied will be a relatively small;
- g the area where the liquor will be sold and supplied will be a controlled one, and easily monitored;
- h food will be available during all operational hours, with orders for meals accepted up to one hour before closing;
- i the directors and representative of the applicant company are respected and very experienced operators of events in WA and Australia;
- j Closed Circuit TV (CCTV) will be installed at licensed premises, images will be retained for twenty- eight days in accordance with the Director’s policy; and
- k strong harm minimisation strategies will be in place.

53 In respect of dispersal of patrons late at night the following strategies will be employed (adjusted to suit the type of event or show taking place):

- a crowd controllers and ushers will be used to assist with the dispersal of patrons;
- b the theatre's bars will remain open for one hour after each show, to encourage a more gradual dispersal of patrons; and
- c there are many transport options for patrons.

54 The lighting in the Hay Street Mall is also ample for parties leaving the venue late at night.

55 In respect to the particular issue of unaccompanied juveniles attend the venue the following matters are relevant:

- a liquor will be a secondary service to the stage shows and functions;
 - b Mellen has extensive experience in managing large quality events and has shown itself to be very capable and responsible in relation to liquor supply and service;
 - c Mellen's staff will be experienced, and will maintain constant checks in all areas of the theatre and function rooms, as this is imperative to brand and image, as well as the health and safety of staff and patrons alike;
- 56 Pursuant to section 120(1)(e) of the Act, Mellen wishes that unaccompanied juveniles are permitted to enter and remain on the licensed premises:
- a if they are attending or participating in a performance; a live concert or event; a reception or function; a rehearsal for a performance; or a workshop at the theatre; and
 - b if attending a performance or concert they must be the holder of a valid ticket for that performance on that day.
- 57 Staff will be stationed inside the theatre to check and monitor unaccompanied juveniles.
- 58 Should unaccompanied juveniles try to purchase alcohol it would be prevented at the point of purchase. This is achieved through:
- a continuous and comprehensive staff training and development; and
 - b strict patron proof of age check.
- 59 Mellen has a strong harm minimisation plan which will be in place for the proposed Piccadilly should the application be granted.
- 60 On 28 April 2020, Mellen provided further submissions to the Director including the following particular additional submissions in respect to the issues of harm and ill-health and juveniles:
- a the primary object in section 5(1)(c) is to minimise harm and ill health, not prevent harm or ill health absolutely from the grant of the application. (*Executive Director of Public Health v Lily Creek International Et Ors [2001] WASCA 410*). As such the licensing authority is bound to give equal weight to proper regulation, proper

development of the liquor industry, and equal weight to catering to the requirements of consumers.

- b The Piccadilly will not host family and child-focused events exclusively, nor is it even a main or dominant component of the product mix.
- c Unaccompanied juveniles would be kept in the alcohol free area for Category C events.
- d The assertion by the CHO that "*The proposed manner of trade at the premises suggests that the visibility of alcohol will be a core feature of the premises*" is refuted by the contents of the PIA, particularly, Paragraph 1.15.4, Paragraph 4.14, Paragraph 6, Paragraph 6.9 and Paragraph 8.3.5.
- e Section 8 of the PIA deals, in detail, with the potential for harm, and strategies and mitigating factors relation to potential secondary supply of alcohol.
- f The issue of dispersal of patrons in the late evening is a complex issue which has been considered very carefully in section 8 of the PIA and in paragraph 8.4 in particular.
- g Paragraphs 8.7 and 8.8 of Mellen's PIA produce evidence of and conclude that rates of alcohol consumption are dropping, particularly amongst young people.
- h In respect to the Proposed Conditions:
 - i Proposed Condition 1 - The Applicant does not wish this condition to be imposed. Whilst some shows could be clearly and easily classified as children's shows, the distinction may not always be obvious. Matinees are not purely for juveniles, matinees are very often targeted at adults, including retirees.
 - ii Proposed Condition 2 - The applicant does not wish this condition to be imposed.
 - iii Proposed Condition 3 - The Applicant accepts this trading condition, in line with its stated intent in the PIA.

61 On 5 May 2020, Mellen provided additional closing submissions to the Director however did not further discuss the issues of harm and ill-health or juveniles in those submissions.

Legal and Statutory Framework

- 62 The Commission is not required to find error on the part of the Director, but rather undertakes a full review and makes a determination on the basis of the same materials as before the Director when the decision was made (*Hancock v Executive Director of Public Health* [2008] WASC 224).
- 63 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.
- 64 When considering a review of a decision made by the Director, the Commission is required to have regard to only the material that was before the Director at first instance [section 25(2c) of the Act].
- 65 Section 16 of the Act provides that the Commission:
- a may make its determinations on the balance of probabilities [subsection(1)(b)(ii)];
 - b is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply [subsection (7)(a)]; and
 - c is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; [subsection (7)(b)];”
- 66 In addition, the Director is obliged to comply with the requirements of procedural fairness when exercising the powers conferred by the Act (*Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356).

- 67 The decision by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 sets out the Commission's function in reviewing a decision of the Director pursuant to section 25 of the Act as follows:
- a make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - b make findings about the likely degree of harm to result from the grant of the application;
 - c assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - d weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether it is in the public interest to grant the application.
- 68 The Director and Commission also:
- a must take into account those matters relevant to the objects of the Act; and
 - b may take into account the matters set out in section 38(4) of the Act.

Relevant Issues

- 69 The Commission has undertaken a full review and now makes a determination on the basis of the same materials as before the Director when the decision was made.
- 70 Section 38(1)(a) does not apply to the type of licence being sought by the Respondent and there is no onus on the Respondent to satisfy the Commission that the grant of the Application is in the public interest.
- 71 Therefore, the relevant questions to be considered are the conditions to be imposed on the special facility licence and, in particular, the following:
- a First Issue – CHO's Ground One: The Delegate erred in paying insufficient regard to the harmful effect of allowing adults to consume alcohol during child-focussed entertainment at the premises.
 - b Second Issue – CHO's Grounds Two and Four: The Delegate's decision to grant the licence together with an approval for unaccompanied juveniles to enter and remain on the licenced premises, and subject to condition 8, was irrational and unreasonable.

- c Third Issue – CHO’s Ground 3 - The Delegate erred in purporting to grant an approval under s 120(1)(e) of Act that is beyond power.

First Issue: Consumption of alcohol during child-focussed entertainment (Ground 1)

- 72 In its Notice of Intervention, the CHO referred to a publication of the National Health and Medical Research Council, and other publications in support of its contention that there are health and safety concerns for juveniles attending the premises given, on occasion, large numbers of children and young people will be in an environment where adult patrons will be consuming alcohol.
- 73 The Commission accepts that there is evidence that suggests that children and young people are susceptible to the influence of the environments that they are exposed to.
- 74 The CHO has recommended Proposed Condition 1 be imposed “*preventing the sale, supply and consumption of liquor on the premises during child-focused performances or shows*”.
- 75 The Commission accepts, as Mellen submits, that “child focused entertainment” is not a term of art, and it would be difficult in some instances to determine whether a particular event was child focused.
- 76 There is a distinction to be made as to whether an event is:
 - a in fact focused on younger children as primary audience members, who will be accompanied by adults; or
 - b may be suitable for, but not specifically aimed or marketed to, children; or
 - c intended to be, or likely, to be attended by slightly older juveniles that are unaccompanied.
- 77 The classification of being “child focused” may exclude events that are not ordinarily considered to be “child focused” (i.e. ballet, live music or comedy) but may well attract an audience of unaccompanied juveniles. The Commission notes that at what may be traditionally considered to be “child focused” events, the intended audience is substantially intended to be juveniles of a younger age that are accompanied by responsible adults.

- 78 The Commission recognises that in the case of juveniles accompanied by responsible adults, it may be that some adults would prefer to be in an area where no alcohol is consumed.
- 79 Despite this, it is noted that there is no “in seat” service of alcohol and that alcohol is limited to sale in fairly limited designated bar areas for consumption at the Premises.
- 80 Further, the style of operation does not permit members of the public not attending a show or event to access the bar or drink alcohol at the venue (i.e. it is not a public bar) and it is an existing condition of the licence that food will be available for all trading hours.
- 81 Given the above, the Commission considers that the CHO argument that the venue is “alcohol focused” is not compelling and that there is only very limited risk in respect to alcohol being present for consumption by adults and in view of what are considered to be “child focused” shows.
- 82 The Commission further considers that the proposed condition does not sufficiently address the issue of unaccompanied juveniles who are more likely to be present at category 3 type shows (being standing live music events).
- 83 In light of these factors, although it is appropriate for some harm restriction measures to be in place, the Commission finds that the CHO’s Proposed Condition 1 is not appropriate.
- 84 On 13 February 2020, Mellen also wrote to WA Police with some proposed trading conditions, including:
- a 4.2 *“Staff will be stationed inside the theatre to check and monitor unaccompanied juveniles”*; and
 - b 5.1.3.2 ... *“at any standing live music shows, where there are unaccompanied juveniles in attendance, there will be a designated area of the venue which would be an alcohol-free area, managed by approved managers or crowd controllers.”*
- 85 It is noted that while Mellen’s Harm Minimisation Plan lodged with the licensing authority contains strict requirements as to juveniles, , there were no further conditions imposed in respect to the stationing of staff or in relation to live entertainment (Category 3 shows) in the Delegate’s decision.

- 86 The Commission is of the view that:
- a the above trading conditions proposed by Mellen on 13 February 2020 are generally suitable and has incorporated them into the New Condition 8 (as discussed below); and
 - b the New Condition 8 addresses and meets the primary object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor, and the secondary object of encouraging responsible attitudes and practices towards the consumption of liquor that are consistent with the interests of the community.

Second Issue: The decision was irrational and unreasonable and inconsistent with policy (Grounds 2 and 4)

- 87 The CHO has referenced the following part of the Juveniles Policy:

“ ...due to the increase in anti-social behaviour occurring in the vicinity of the central Perth CBD, including Northbridge, the Director of Liquor Licensing has determined that it is not in the public interest to approve functions in licensed premises that attract juveniles to those areas”.

- 88 The CHO further argues although such part of the Juveniles Policy is directly concerned with section 126B of the Act, the rationale underlying the policy is sound and is more broadly relevant to all decisions made under the Act which affect juveniles.

- 89 With due respect to the CHO, the intended reach and effect of such policy is clearly stated therein. Sections 126A and 126B are solely concerned with one-off functions that are held solely for juveniles between 13 and 17 years of age.

- 90 By contrast:

- a the Premises will be providing continual event services, and will therefore have continual crowd management policies in place;
- b for “child focused” events the majority of juveniles will be accompanied by a responsible adult; and
- c nothing in the PIA for the Premises indicates that Mellen intends to hold events solely focussed on 13-17 year olds.

91 As such, the public policy concerns which have informed the Juveniles Policy are either not present, or are ameliorated by the nature of the business and venue to be operated by Mellen.

92 Despite this finding, the Commission does recognise there will be, from time to time unaccompanied juveniles present and consider that it is appropriate to have particular conditions in place to address instances where unaccompanied juveniles may be present on the Premises.

93 The Applicant has put forward Proposed Condition 2 being:

“No unaccompanied juveniles are permitted at the premises past 8.00pm on any day”

94 Although this condition may address the issue of unaccompanied juveniles leaving the Premises into the CBD at night, it is not relevant to preventing access to alcohol by juveniles at the Premises, which would appear to be of greater concern.

95 In considering this matter, the Commission considers that the issues to address are:

- a the general manner in which the Premises should prevent unaccompanied juveniles having access to alcohol; and
- b the specific precautions and conditions to be in place for events where it is more likely to be unaccompanied juveniles present.

96 Given the above, the Commission intends to remove the existing Condition 8 and impose a new Condition 8 (“**the New Condition 8**”) to specifically address these issues as follows:

“8. Pursuant to section 120(1)(e) of the Act, unaccompanied juveniles are permitted to enter and remain on the parts of the licensed premises that are designated for access by the public PROVIDED THAT:

- (a) the unaccompanied juvenile is present on the licensed premises for the purpose of attending a performance or event;*
- (b) the unaccompanied juvenile must possess a ticket that is valid for the performance or event at The Piccadilly on that day;*

- (c) *unaccompanied juveniles are not permitted within any area that has been set aside or designated as an 18+ area from time to time or within a 3 metre radius of any bar area serving alcohol;*
- (d) *staff will be stationed inside the theatre to check and monitor unaccompanied juveniles;*
- (e) *for any category 3 performance (being any standing live music events):*
 - (i) *the licensee must provide designated alcohol-free areas of the venue for the use of unaccompanied juveniles;*
 - (ii) *the licensee must ensure that all unaccompanied juveniles remain in the designated alcohol free areas;*
 - (iii) *the designated alcohol free area shall be managed by crowd controllers or approved managers of the licensee;*
 - (iv) *crowd controllers of the licensee must check all bags of unaccompanied juveniles for liquor, and confiscate any liquor, prior to entrance to the designated alcohol free areas; and*
 - (v) *the licensee must provide a designated area for the purchase and consumption of alcohol that unaccompanied juveniles are not permitted to enter.”*

97 The New Condition 8 will ensure that general conditions exist to separate bar areas from juveniles and allow for easy monitoring as well as adding further special conditions for “high risk” category 3 events where there are more likely to be a greater number of unaccompanied juveniles who may be able to move more freely throughout the venue.

98 In considering this condition, the Commission has also taken into account the following factors:

- a the bar area serving alcohol will be able to be clearly defined and monitored;
- b in the case of this particular Premise:
 - i there are limited entrances to the Premises itself as well as the theatre portion of the venue; and

- ii the lobby areas have open and clear sight lines to most areas; which allow easy monitoring of juveniles by staff as well as crowd controllers; and
 - c there is no "in seat" service of alcohol and all purchases must be made at a monitored bar area.
- 99 In respect to Ground 4, the CHO has raised arguments as to the difficulty of enforcing the current Condition 8 regarding checks of each cinema every 15 minutes.
- 100 In relation to this issue, both the original decision, and the submissions of the CHO, are premised on the basis that Mellen seeks approval to operate as a cinema.
- 101 While regulation 9A(4) contemplates a venue being classified as a "*theatre or cinema*", and the venue has previously been operated as a cinema, nothing in the Application and proposed use indicates any intention by Mellen for the premises to be used as a cinema. Rather, it is intended to be used as a theatre with live shows and the theatre is comprised of one large (multi storey) seated venue with a single stage area.
- 102 In that regard, it appears that the Delegate erred in imposing a condition specific to a cinema and that such condition has no relevance to this particular Premises and would not be able to be managed appropriately given the large size of the seating/audience area.
- 103 In imposing the New Condition 8 the Commission contemplates that:
- a the separate bar areas (along with the usual identification checks) will prevent juveniles from access in any bar area or purchasing drinks in such area;
 - b the designated alcohol free areas inside the audience area will limit the opportunity for juveniles to source alcohol from other adults;
 - c the additional checks of bags will prevent bringing in of unauthorised alcohol;
 - d the limited entrances to the Premises and the audience portion of the venue provide adequate opportunities to undertake staff and crowd controller checks of unaccompanied juveniles; and
 - e staff will be present in the theatre area at all times during performances.

104 As such, the Commission considers that imposing the additional New Condition 8 as set out above for live entertainment sufficiently addresses the Applicant's fourth ground.

Third issue: Whether an approval under s 120(1)(e) of the Act was beyond power (Ground 3)

105 This issue requires consideration of the proper construction of s 120(1)(e) of the Act.

106 The CHO contends that, on the proper construction of the power under s 120(1)(e), an approval may be given for a "part" of licensed premises and that the Director erred by allowing access to the "whole" of the Premises (being the entire building).

107 Section 120(1)(e) is in the following terms:

"120. When juveniles permitted on licensed premises

(1) This Division does not prohibit juveniles from being permitted entry to, or remaining on, a place where the sale or supply of liquor is authorised if —

...

(e) the place is on a part of licensed premises or of regulated premises which, on application by an authorised person, the Director has for the time being approved for the purposes of this subsection, where no condition to which that approval is subject is contravened."

108 "Regulated premises" is defined in s 3(1) to mean premises to which s 122 applies.

109 Section 122(1)(f) provides that premises may be prescribed for the purposes of this section and r 18(a) provides that, for the purposes of s 122, a theatre is a regulated premises.

110 The Commission considers that the proper construction provides that although the section expressly refers to a "part" of licensed or regulated premises in the case of the Premises, being a theatre, it was required that the juveniles were there for the "purpose of viewing a film or performance" and be the holder of "a valid ticket". On a practical level, this implies that unaccompanied Juveniles may only attend the Premises as patrons and therefore may only access those portions of the Premises that are

normally intended to be accessed by members of the public, which, ordinarily, excludes staff, storage, office, backstage areas and other operational areas.

- 111 Accordingly, the approval was not beyond power when considering the practical application of the approval.
- 112 In addition, in contemplating suitable variations to Condition 8 as discussed above, the Commission notes that unaccompanied juveniles will be expressly prohibited from accessing the area being a radius of 3 metres from any bar area serving alcohol and thereby are only permitted to access “part” of the licensed premises (in exclusion of that area) as specified by s 120(1)(e).

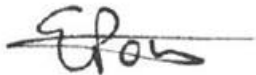
Final Determination

- 113 The Commission is satisfied that the grant of the Application is consistent with the objects contained in s 5(1)(c) of the Act to cater for the requirements of consumers for liquor and related services and s 5(2) of the Act to facilitate the use and development of licensed premises reflecting the diversity of the requirements of consumers.
- 114 There is no ground to consider refusal of the Application on the basis of public interest.
- 115 The discretion of the Commission under s 33 is exercised and the application is allowed.
- 116 The decision of the delegate of the Director is varied and the application to conditionally grant a special facility licence in respect of the premises known as The Piccadilly is approved subject to the replacement of Trading Condition 8 imposed by the Director with the following Trading Condition 8:

“8. Pursuant to section 120(1)(e) of the Act, unaccompanied juveniles are permitted to enter and remain on the parts of the licensed premises that are designated for access by the public PROVIDED THAT:

- (a) the unaccompanied juvenile is present on the licensed premises for the purpose of attending a performance or event;*
- (b) the unaccompanied juvenile must possess a ticket that is valid for the performance or event at The Piccadilly on that day;*
- (c) unaccompanied juveniles are not permitted within any area that has been set aside or designated as an 18+ area from time to time or within a 3 metre radius of any bar area serving alcohol;*

- (d) *staff will be stationed inside the theatre to check and monitor unaccompanied juveniles;*
- (e) *for any category 3 performance (being any standing live music events):*
 - (i) *the licensee must provide designated alcohol-free areas of the venue for the use of unaccompanied juveniles;*
 - (ii) *the licensee must ensure that all unaccompanied juveniles remain in the designated alcohol free areas;*
 - (iii) *the designated alcohol free area shall be managed by crowd controllers or approved managers of the licensee;*
 - (iv) *crowd controllers of the licensee must check all bags of unaccompanied juveniles for liquor, and confiscate any liquor, prior to entrance to the designated alcohol free areas; and*
 - (v) *the licensee must provide a designated area for the purchase and consumption of alcohol that unaccompanied juveniles are not permitted to enter.”*



Emma Power
Acting Chairperson



Mr Paul Shanahan
Commissioner



Mr Nicholas van Hattem
Commissioner