

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

Applicant: Ventorin Pty Ltd
(represented by Mr Dan Mossenson of Lavan Legal)

Other Parties: Director of Liquor Licensing, Intervener
(represented by Ms Naomi Eagling of State Solicitor's Office)

Commission: Mr Jim Freemantle (Chair)
Ms Helen Cogan
Mr Greg Joyce

Date of Hearing: 10 March 2009

Date of Determination: 8 May 2009

Premises: Pemberton Cellars (Liquor Store)

Matter: Application for Review, Section 25 of the *Liquor Control Act 1988* ("the Act")

Determination: The Application for an Extended Trading Permit is refused.

Authorities referred to by the Applicant:

- *Executive Director, Public Health v Meers* [2007] WASCA 187
- *Hancock v Executive Director of Public Health* [2008] WASC 224

Authorities referred to by the Intervener:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Palace Securities v Liquor Licensing* (1992) 7 WAR 241

- *Re Romato; Ex Parte Mitchell James Holdings Pty Ltd* (2001) WASCA 286
- *Executive Director, Public Health v Meers* [2007] WASCA 187
- *Public Services Board of NSW v Osmond* (1986) 159 CLR 656
- *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259
- *Re Goser; Ex parte Rutherford* [2001] WASCA 422; (2001) 25 WAR 170

Authorities referred to in the Commission's Decision:

- *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74CLR 492
- *Palace Securities v Liquor Licensing* (1992) 7 WAR 241
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *O'Sullivan v Farrer* (1989) 168 CLR 210
- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR 380
- *Re Romato; Ex Parte Mitchell James Holdings Pty Ltd* (2001) WASCA 286

1. Background

- 1.1 On 21 November 2007, an application was lodged on behalf of Venterin Pty Ltd ("The Applicant") for:
 - 1.1.1 the conditional grant of a liquor store licence for the premises known as Pemberton Cellars situated at the junction of Brockman and Dean streets Pemberton (Lot 1, 38 Brockman St, Pemberton) ("the Premises"); and
 - 1.1.2 an Extended Trading Permit (ETP) to authorise trading at the Premises on Sundays pursuant to Section 60(4)(g) of the Act.
- 1.2 The application for an ETP for the Premises was deferred pending determination of the application for the liquor store licence.
- 1.3 On 19 September 2008, the Director of Liquor Licensing granted a conditional liquor store licence for the Premises (Decision A190334).
- 1.4 On 16 December 2008, the Director of liquor Licensing refused the application for an ETP (Decision A190813).
- 1.5 On 15 January 2009, the Applicant lodged an Application for Review of the decision to refuse the application for an ETP under Section 25 of the Act.
- 1.6 On 21 January 2009, the Director of Liquor Licensing lodged a Notice of Intervention in the matter for the purpose of making submissions.

2. Application for Review

- 2.1 The Application for review was treated as a re-hearing of the matter on the basis of all the evidence and other materials that were before the Director. Hence the Commission sets out in some detail essential and relevant issues relating to the determination of the matter on the basis that where there is a conflict in evidence which is significant to the outcome, it is necessary for the Commission to refer to the conflicts in evidence and to explain why one set of evidence is preferred over another and similarly when there is a conflict in submissions which is significant to the outcome, it is necessary for the Commission to set out the differing positions advanced by the parties and the reasons why it prefers one position over another. *Hancock v Executive Director of Public Health* [2008] WASC 224 at para 69 on page 24.

2.2 The Applicant is dissatisfied with the Decision of the Director of Liquor Licensing and seeks a review of the decision on the basis that the Director erred in law by:

- **Ground 1**
Ignoring or misapplying provisions of the *Liquor Control Act 1988* and inappropriately applying policy; and
- **Ground 2**
Applying the wrong test; and
- **Ground 3**
Failing to deal with the application on its merits by not having proper regard to the relevant evidence; and
- **Ground 4**
Failing to give cogent or adequate reasons for the refusal.

3. Director's Decision

The Director's Decision to refuse the application for the ETP (A190813) referred to the following matters:

3.1 Merits of the Application

The Director stated that the merits of the application for the ETP were substantially outlined in Decision A190334 (the application for the Liquor Store Licence).

3.2 Legislative Provisions

3.2.1 The Director referred to the provisions of:

- Section 60 of the Act which provides for the issue of ETPs;
- Section 97(1) of the Act which provides for permitted trading hours, relevantly as may be specified under an ETP;
- Section 98(D) of the Act which specifies the permitted hours for trading under a liquor store licence, and provides that Sunday trading is permitted only in liquor stores in the metropolitan area;

- Section 5 (1) of the Act which states that the primary objects of the Act are:
 - a) To regulate the sale, supply and consumption of liquor; and
 - b) To minimise harm or ill health caused to people, or any groups of people, due to the use of liquor; and
 - c) To cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
- Section 33 of the Act which provides for an absolute discretion for the licensing authority (relevantly the Director or the Commission as the case may be) to grant or refuse an application under the Act but requires an application be dealt with on its merits after such inquiry as the licensing authority sees fit.

3.2.2 The Director made reference to the May 2007 amendments to Section 38 of the Act which introduced the requirement for applicants to satisfy the licensing authority that the granting of an application is in the public interest.

3.2.3 The Director also referred to Section 38(1)(b) and Regulation 9F(b) which provide that an application for an ETP is a relevant application.

3.2.4 The Director stated that pursuant to Section 33(1) and 38 of the Act the test to be applied in the determination of this application is a public interest test.

3.2.5 The Director referred to the history of the public interest test for the grant of an ETP for liquor stores outside the metropolitan area to trade on Sundays and referred to and quoted an extract from the Second Reading Speech of the *Liquor and Gaming Legislation Amendment Bill 2006* where the Minister referred to the differentiation between the metropolitan area (Sunday trading permitted) and non metropolitan areas (liquor stores explicitly not allowed to trade on Sundays) but went on to refer to the ability of the licensing authority to grant ETP's to liquor stores in non metropolitan areas to trade on Sunday in certain circumstances .

3.2.6 The Director referred to the Policy document dated 7 May 2007 issued by the Department of Racing, Gaming and Liquor ("the Policy") which states, inter alia, that;

"Given that Section 98D does not authorise non metropolitan liquor stores to trade on a Sunday, and that many country communities already have access to packaged liquor from a number of different outlets, travelling distance to the nearest outlet will be one of the circumstances of particular relevance.

In this regard , it may not be unreasonable for the public to have to travel a total distance of approximately 20 kilometres to/from the nearest licensed premises that sells packaged liquor."

3.2.7 In relation to the issue of taking the Policy into account in determining an application for an ETP the Director referred to the judgement of McLure J in *Re Romato; ex parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286 at [38] and to the judgment of Templeman J in *Hermal Pty Ltd -v- Director of Liquor Licensing* [2001] WASCA 356 at [37].

3.2.8 The Director referred to the Public Interest Assessment lodged by the Applicant as part of the original application for the liquor store licence and the ETP and to the submissions made by the Applicant which referred to the following factors in support of the ETP:

3.2.8.1 the level of support for the licence proposal;

3.2.8.2 the tourism nature of the area;

3.2.8.3 the obvious existing demand for retail services at the IGA supermarket which trades seven days per week; and

3.2.8.4 the lack of packaged liquor services in town.

3.2.9 The Director stated that after considering the Applicant's submissions he was of the opinion that on the balance of probabilities, the liquor merchants in the Pemberton area authorised to sell liquor on Sundays, can cater for requirements of consumers of packaged liquor and went on to state the Applicant had not satisfied him that, on the balance of probabilities that the grant of the application is in the public interest and accordingly the application for the ETP was refused.

4. The Review Hearing

General

- 4.1 All the evidence and material before the Director was available to and considered by the Commission.
- 4.2 The submissions to the Commission by the Applicant and the Director (as Intervener) were detailed, thorough and useful and the Applicant and the Intervener each made oral submissions to the Commission at some length.
- 4.3 The Commission accepts that essentially there are no issues between the Applicant and the Intervener in relation to the following matters:
 - 4.3.1 The premises are not in the metropolitan area;
 - 4.3.2 The premises are in Pemberton which is a tourist destination;
 - 4.3.3 There were no explicit objections to the application for the ETP- and the Executive Director of Public Health did not intervene to oppose Sunday trading;
 - 4.3.4 Applications for Sunday ETP's in areas outside the metropolitan area have previously been both granted and refused;
 - 4.3.5 Packaged liquor is available for sale on Sundays in Pemberton (Pemberton Hotel) and in the surrounding district.
 - 4.3.6 The relevant provisions of the Act are as follows:
 - Section 5 (Objects);
 - Section 16(1)(a) and (b)(ii), 7(b) and (c) and 11- (Procedure);
 - Section 33-(absolute discretion of Licensing Authority- subject to Act);
 - Section 38(1)(b), (2) and (4)- (Requirement for applicant to satisfy Licensing Authority that certain applications are in the public interest);
 - Section 47 (Liquor Store Licence);
 - Section 60(1) and (4)(g)- (Extending Trading Permits);
 - Section 97-(Permitted Hours of Trading);

- Section 98D(1) and (2) and (3)- (Permitted Hours under a Liquor Store Licence).

Applicants Submissions

4.4 The Applicant made written submissions in relation to each of the grounds set out in the application for review and these grounds may be summarised as follows;

- **Ground 1**
The Director ignored or misapplied relevant provisions of the Act and inappropriately applied the Policy.
- **Ground 2**
Applying the wrong test- addressed in conjunction with Ground 1.
- **Ground 3**
The Director failed to deal with the application on its merits by not having proper regard to the relevant evidence.
- **Ground 4**
The Director failed to give cogent or adequate reasons for the refusal.

4.5 The submissions in relation to Grounds 1 & 2 were effectively:

- 4.5.1 that the Director referred to Section 98(D) without taking into account Section 60(4)(g) read with S97;
- 4.5.2 Since the 2006 Amendment to the Act the approach to dealing with non metropolitan area liquor store trading on Sunday should be more liberal than restrictive;
- 4.5.3 The ETP decision wrongly puts in the negative the Government approach to non metropolitan liquor store Sunday trading;
- 4.5.4 Under the Act there is no inability to trade on Sunday- what is required is a fuller exercise of the Director's discretion to allow Sunday trading which discretion must be exercised on the same public interest test as for the liquor store ;
- 4.5.5 The Policy was the only basis for the refusal to issue the ETP;
- 4.5.6 The comments and findings of the Director in respect of the Policy-

- ignored the object provisions in the Act (ie disregarded tourism and the need to cater for diversity of consumer demand);
- reflect the Director was wrong in treating the existence of the Policy in isolation and failing to refer to the statutory provisions and other relevant circumstances in the application;
- revealed the travelling distance issue, stated by the Director to be relevant, was not dealt with in the ETP decision;
- show the Director made no assessment and no findings as to the nature of the existing premises , their locations, their actual distances from the premises, the driving routes or the road conditions involved;
- are rigid and fail to have regard for the nature and status of the locality as a recognized tourist destination;
- a conclusion by the Director (if such was reached) in relation to the distances between other premises in the area and the Premises was not open to the Director based on the evidence before him;
- both before and since the introduction of the Act ETP's have been issued for liquor stores outside the metropolitan area (examples given);
- the Section 33 discretion is subject to Section 5 (Objects) of the Act and the Director was required to give paramount consideration to catering "for the requirements of consumers for liquor and related services, with regard to the tourism industry" Section (5)(1)(c) and; have regard for "facilitating the use and development of licensed facilities ...reflecting the diversity of the requirements of consumers in the State" (Section 5(2)(a));
- the Director's acknowledgments of Pemberton as a tourist destination were nothing more than a passing reference. No consideration was given to the relevance of the tourism industry in the context of tourist numbers (mentioned in the Applicants' Supplementary Legal

Submissions before the Director in the original Application) and

- the role of the tourist industry was elevated in its status in the Act following the 2006 amendments. The Director is obliged to give priority consideration to tourists and the tourism industry when determining applications.

4.6 The submissions in relation to Ground 3 were effectively:

4.6.1 The Director's ultimate conclusion in the ETP decision that;

"After considering the Applicants' submissions I am of the opinion that, on the balance of probabilities, the liquor merchants in the Pemberton area authorised to sell packaged liquor on Sundays, can cater for the requirements of consumers for packaged liquor. The Applicant has not satisfied me that, on the balance of probabilities, the grant of the application is in the public interest. Accordingly the application by (the Applicant) for an indefinite Extended Trading Permit is refused"

is not supported by the evidence and is contradicted by the Director's reasons in the licence decision.

4.6.2 The Director acknowledges that Pemberton is a tourist destination but does otherwise not appear to have taken this into account- there is no consideration given to the tourism status of the locality or the requirements of tourists.

4.6.3 Paras 28, 29, 30 & 31 of Applicant's submissions- these submissions relate to the lack of availability of liquor products, distance from town centre of outlets, sale by producers of only their own products, public entitled to a choice of liquor products- not just a hotel drive through (distinguished from a liquor store) and choice should exist on 7 days a week.

4.6.4 Licence decision recognized the need of the Premises to cater for tourists- this need not be limited to particular days of the week- arguably weekend days are of particular importance.

4.6.5 The non intervention of Executive Director of Public Health can reasonably be assumed to indicate that the Executive Director did not consider there to be any public interest reason for seeking the refusal of the ETP.

- 4.6.6 No objectors (to Liquor Licence) have opposed the ETP decision.
- 4.6.7 Director acknowledges in ETP decision, “the merits of the application for the liquor store licence and ETP”, as outlined in the licence decision, but makes no reference to those merits or why they were apparently not considered or applied in determining the ETP application.
- 4.6.8 The requirements of S5(2)(a) of the Act to cater for diversity in consumer requirements is not qualified in terms of location, licence categories or days of the week. The (Director’s) role in respect of S5 in ensuring that the public has a diverse range of licensed services and facilities available is just as applicable to packaged liquor services on a Sunday in Pemberton as on any other day.
- 4.7 The submissions in relation to Ground 4 were effectively:
- 4.7.1 The requirements for a decision maker to give reasons and the importance of giving reasons were addressed and confirmed in *Hancock v Executive Director of Public Health* [WASC] 224, at paras 63 and 64 on page 22.
- 4.7.2 The reasons given for refusing the ETP application fall well short of what is reasonable in the circumstances and what is required for natural justice, particularly given the right of review.
- 4.7.3 The Director has given no indication or explanation as to how or why he came to his conclusion or why he considers existing premises will adequately cater for the public on Sunday when the decision proves they cannot so cater during the rest of the week.
- 4.7.4 The Director reached a conclusion in respect of the application of the Policy without any evaluation of the relevant factors associated with the existing 28 premises- other than the mere existence of 28 Licences in the region.
- 4.7.5 The Director had before him ample evidence to satisfy him and which clearly proved that the existing packaged liquor services are totally deficient, particularly for a “tourist” destination” town like Pemberton.

Intervener's Submissions

4.8 The Intervener made submissions under the heading "Legal Principles" considering,

Legislative provisions – including Sections 60(4), 97(1), 98(D), 5(2), 33(1), 33(2), 38(2) (and regulation 9F of the *Liquor Control Regulations 1989*), 38(4) and 25(2c).

4.9 The Intervener made written submissions in relation to Grounds 1 & 2 of the ETP Application summarised as follows;

4.9.1 The discretion of the Director in S33(1) of the Act is an absolute discretion, being confined only by the scope and focus of the Act.

4.9.2 The reference to "public interest" indicated that both Sections 5 and 38 of the Act are relevant when making a decision.

4.9.3 The ETP provisions of the Act do not require the Director to treat Sunday in the same way as other days of the week.

4.9.4 Amendments to legislation introduced by the *Liquor and Gaming Legislation Amendment Bill 2006*, Section 38 introduced the public interest test and Section 5(1)(c) was included as a primary object of the Act.

4.9.5 Section 19 of the *Interpretation Act 1984* provides that regard may be had to extrinsic materials (including the Second Reading Speech to a Bill) to confirm that the ordinary meaning of a provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law.

4.9.6 Extract from Second Reading Speech- (referred to in the Director's Decision and see para 3.2.5 above and para 7.5 below).

4.9.7 The change in the legislative scheme is a matter which needs to be considered in the formation of any lawful policy in relation to the exercise of discretion under the Act.

4.9.8 Director's correct reference to Sections 33(1) and 38 of the Act and statement that the test to be applied is a public interest test.

4.9.9 Submissions 25 & 26- Director's reference to legislative history and scheme of the Act in relation to Sunday trading by liquor stores outside the metropolitan area.

4.9.10 Director's regard to Policy in respect of Sunday trading by liquor stores outside the metropolitan area.

4.9.11 Decision maker adopting a policy entitled to apply policy provided an applicant is given opportunity to show there are exceptional reasons why it should not apply (in a particular case).

4.9.12 In his decision the Director:

- Correctly identified that Pemberton is located outside the metropolitan area;
- Recognized that there was an onus on the Applicant to demonstrate the grant of the ETP was in the public interest;
- Considered that Pemberton was already serviced by other liquor merchants who could cater for the requirements of consumers for packaged liquor.

4.9.13 Taking into account the primary objects of the Act (in particular Section 5(1)(c)) the Director exercised his discretion not to grant the ETP in this case. In doing so the Director correctly applied the provisions of the Act and had proper regard to the Policy.

4.10 The Intervener made written submissions in relation to Ground 3, summarised as follows:

4.10.1 The Director in reaching his decision found that Pemberton was already serviced by other liquor merchants who could cater for the requirements of consumers for packaged liquors. In particular the evidence established (and the Director found) that the Pemberton Hotel and Pemberton Cellars are located within 200 metres of each other and the Pemberton Hotel provides a range of packaged liquors including locally produced wines.

4.10.2 The evidence before the Director indicates that;

- The Pemberton hotel dedicates at least 50% of its shelf space to locally produced wines;
- None of the letters (save one by the owner of the IGA store, the owner having an interest in the Premises) in

support of the liquor store state positively that Sunday trading is supported;

- A petition by Objectors to the application (for the Liquor Store licence and the ETP) suggests that a number of residents of the area consider there is sufficient packaged liquor available on a Sunday.

4.11 The Intervener made written submissions in relation to Ground 4, summarised as follows:

4.11.1 There is no obligation in the Act for the Director to provide reasons for his decision. Additionally there is no general rule of the common law or principle of natural justice that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations of other persons; (*Public Services Board of NSW v Osmond* (1986) 159 CLR 656)

4.11.2 Even if the Director is required to give reasons for his decision the assessment of even the manner in which the requirement must be met is affected by the fact that the Director is not legally qualified and therefore may express his reasons for decisions in a different manner than a legally trained person; (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR at 259 per Kirby J and *Hancock v Executive Director of Public Health* [2008] WASCA 224 at [69] to [70] per Martin CJ)

4.11.3 In this context the adequacy of the Director's reasons may be tested by asking whether the Applicant is able to understand why the decision may not be more favourable. (*Re Goser; Ex parte Rutherford* [2001] WASCA 422; (2001) 25 WAR 170)

In this case the basis of the Director's decision was clear. As such no error is revealed by this ground of appeal.

5. Oral Submissions

Both the Applicant and the Intervener made extensive oral submissions to the Commission. These oral submissions clarified and expanded upon the written submissions and in some cases served to establish that in relation to some matters there was no issue between the Applicant and the Intervener.

6. Reasons for Decision of the Commission

The Act

- 6.1 Pursuant to ss 98D(1)(b) and 98D(2) of the Act a liquor store outside the metropolitan area is not permitted to sell liquor on Sunday.
- 6.2 Pursuant to ss 60(1) and 60(4)(g) of the Act a licensee of a non-metropolitan liquor store can apply to the licensing authority for an ETP to sell liquor on Sunday.
- 6.3 Pursuant to s 33 of the Act the licensing authority, in this case the Commission has an absolute discretion to decide any application for an ETP. Specifically s 33(2) of the Act provides that:

An application-

- (a) may be refused, even if the applicant meets all the requirements of this Act; or*
- (b) may be granted, even if a valid ground of objection is made out, but is required to be dealt with on its merits, after such enquiry as the licensing authority thinks fit.*

The case laws provide useful guidance on how this discretion is to be exercised.

In *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 Dixon CJ said [505]:

"...there is no positive indication of the considerations upon which it is intended that the grant or refusal of consent should depend. The discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have in view."

In *Palace Securities v Liquor Licensing* (1992) 7 WAR 241, at [249] Malcolm CJ said in discussing the meaning of s33:

"The discretion referred to in s33 (1) is an "absolute discretion" to grant or refuse an application on any ground or for any reason that the licensing authority considers in the public interest."

And at 250:

"This is not of course, a case where the context provides no positive indication of the considerations by which the decision is to be made. The reference is to the "public interest". In this respect s 5 of the Act is

relevant as are the provisions of s 38 relating to “the reasonable requirements of the public”...

In *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 at [37] Templeman J said

“The only question is whether, having regard to all the circumstances and the legislative intention, an extended trading permit is justified. In answering the question the Director has a wide discretion: it is a matter for him to decide what weight he will give to the competing interests and other relevant considerations.”

Accordingly the Commission, in the exercise of its discretion, has considered the merits of the application and looked widely at the scope and purpose of the Act and in particular s 5 (Objects), s 38 (Public Interest). It has also looked at the legislative intention and the impact of policy.

- 6.4 The Applicant argued that the Director has failed to properly consider the objects of the Act and in particular the primary object at s 5 (1)(c):

To cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

The Commission examined all of the information before the Director and accepts that Pemberton is a tourist destination and vital to the local economy. The facts are that the Pemberton area has 28 licensed facilities able to sell liquor on Sunday. There is a wide range of product offering tourists ample choice of wine, beer and spirits and there is little weight in the argument that the development of the tourist industry is inhibited by the decision not to approve the permit. The applicant argued further that the current growth in demand and population necessitates this facility, however with the tourist numbers that have been provided and the facilities that are available one would be hard pressed to show that the tourism industry is thwarted in any way by the decision not to grant this application.

- 6.5 The Applicant also referred to the secondary object at s 5(2)(a):

To facilitate the use and development of licensed facilities,Reflecting the diversity of the requirements of consumers in this State

Similarly it is difficult to mount an argument based on this objective that the Pemberton area does not currently offer a wide range of choice to

the consumer on Sunday. A thorough examination of the material before the Commission and in particular the Public Interest Assessment of the Applicant reveals a wide range of consumer choice particularly in respect of locally produced wines but also beer and spirits. Whilst the existing facilities are dispersed throughout the Pemberton area, the distances are not great and consumers would have ready access.

- 6.6 A matter often overlooked in arguments for these sorts of permits is that the Commission must look at the whole of the Act to gain an understanding of the intention of the legislature. In terms of s 5(1)(c) of the Act the first primary object of the legislation is:

to regulate the sale, supply and consumption of liquor

There is an expectation in the Act that the Commission will regulate the supply of liquor subject to the various provisions of the Act weighed up against the particular merits of each application. The disposition of the Act, read as a whole, is to regulate.

- 6.7 Section 38 of the Act provides for the public interest test. It is common ground between the Applicant and the Director that the subject application would not potentially breach any of the three negative issues in the inclusive definition of public interest found at s 38(4)(a)(b) and (c) of the Act. The Commission has looked at the broader meaning of public interest and notes that the onus is on the applicant to satisfy the Commission that it is in the public interest to grant the ETP pursuant to section 38(2) of the Act.

- 6.8 Whilst the public interest test has not been extensively litigated in this jurisdiction since its introduction the cases do provide some guidance as to how it is to be assessed;

In the High Court decision of *O'Sullivan v Farrer* (1989) 168 CLR 210 Mason CJ, Brennan, Dawson and Gaudren JJ said at [217]:

"Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ...given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'"

Malcolm CJ said in *Jericho Nominees Pty Limited v Dileum Pty Ltd* (1992) 6 WAR 380 at [400]:

“The public interest... involves satisfying the reasonable requirements of the public to have liquor outlets consistent with good order and propriety in relation to the distribution and consumption of liquor...”

6.9 The evidence before the Commission in respect of the public interest test can be summarized by at least the following;

Matters which go against the public interest

- The Pemberton Hotel, 200 metres from the Pemberton Cellars, dedicates at least 50% of shelf space to the locally produced wines. In addition it has a range of other wines, beer and spirits available.
- None of the letters in support of the proposed liquor store provided by the Applicant state positively that the writers of the letters support Sunday trading. There is a letter of support for Sunday trading by Mr. Tartaglia, the owner of the IGA Store; however he is a partner in the Pemberton Cellars.
- The petition provided by the objectors suggests a number of persons resident in the area consider that there is sufficient packaged liquor available on Sunday.
- There are 28 licensed premises in the Pemberton area that can sell liquor on Sunday.
- There is insufficient population in Pemberton to support both outlets.

Matters which support the public interest

- The applicant will offer a wide range of premium and quality products.
- The contiguous IGA Store has experienced 8% growth over the last 5 years and 15% of its takings from 450 customers occur on Sunday. There is a synergy between the IGA and the liquor store and it is convenient to access.
- The store will be a “fresh, well managed and immaculately presented liquor store” servicing both the community and the tourists and will offer a more modern facility than the Pemberton Hotel.
- The store will provide competition to the Pemberton Hotel and impact on prices.
- The Pemberton Hotel has a drive through bottle shop, which is difficult to access and unattractive.

The Commission has weighed up these competing interests and decided that the applicant has not satisfied the Commission that the granting of the licence is in the public interest. Each one of the arguments above has its merits but does not attract the weight necessary to satisfy the Commission. The applicant must demonstrate that there are 'certain circumstances' which justify the granting of the permit and when the above matters are balanced out and weighed, the Commission is unable to approve the application.

- 6.10 The Applicant consistently argued (see APPLICANT'S OUTLINE OF SUBMISSIONS, dated 23rd February, 2009, paragraphs 30, 32 and 39) that the Director's decision to grant a liquor store licence to the Applicant (Decision No. A190334) can be construed to mean the Director has assessed the operation of the liquor store positively against the 'objects' and 'public interest' tests for six days of the week and as Sunday is just another day then it follows that the Sunday application also satisfies these tests. This can not be correct and is indeed inconsistent with the Act itself. In *Re Romato; Ex parte Mitchell James Holdings Pty Ltd* (2001) WASCA 286 McLure J at [38] said:

"...the ETP provisions of the Act do not require the Director to treat Sunday in the same way as other days of the week."

It is the Commission's view that the Director was correct in treating Sunday differently from the rest of the week and has exercised his discretion on this basis.

7. The Intention of the Legislature

- 7.1 Significant amendments were made to the Act in 2006 in respect of the introduction of a public interest test and the differentiation between metropolitan and non metropolitan liquor stores in respect of selling liquor on Sunday.
- 7.2 Section 19 of the *Interpretation Act 1984* provides that regard may be had to extrinsic material to confirm that the ordinary meaning of a provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose and object underlying the written law.
- 7.3 During the Second Reading Speech to the Bill, the Minister for Racing and Gaming stated as follows in respect of the public interest test;

“A key reform is the creation of a public interest test for new licences to replace the current needs test. Under the public interest test, all applicants will be required to demonstrate that the application is in the public interest, and the licensing authority will be required to consider the application based on the positive and negative social, economic and health impacts on the community.

While the public interest test will involve consideration of the amenity of a locality in the context of the facilities and services provided for consumers, the competitive impacts on other liquor businesses will not be considered.

It should be noted, however, that the Government does not consider proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test.

When considering the public interest, the licensing authority is bound by the objects of the Act as set out in section 5.

Members would appreciate that at times, tensions may arise between the objects. The resolution of any tension that arises will depend on the weight that is to be attributed to each of the relevant factors in relation to an application.

When determining an application, therefore, the licensing authority will have to weigh and balance the competing arguments about the public interest, first against the primary objects, and then the secondary objects, with a view to achieving the best possible outcome.”

The Commission notes these matters and discerns an intention and expectation that each application must carefully be assessed on its merits.

7.4 In respect of non-metropolitan country liquor stores selling liquor on Sunday the Minister said this in the Second Reading Speech:

“In terms of the packaged liquor market, the Bill permits metropolitan liquor stores to trade on Sundays between the hours of 10.00am and 10.00pm – the same trading hours as hotels.

In country areas the status quo will continue whereby liquor stores are not explicitly able to trade on Sundays. However, the Director of Liquor Licensing is able to grant extended trading permits to liquor stores to trade on a Sunday in certain circumstances.”

7.5 The Second Reading Speech is silent on which “certain circumstances” would satisfy the test. Accordingly the Commission has looked at the merits of the application and assessed it in accordance with the whole of the Act and in particular s5 (the objects) and s38 (the public interest test). However there is a clear intention of the legislature that a liquor store outside the metropolitan area must demonstrate good reasons why it can trade on Sunday.

8. The Policy

8.1 The Department of Racing, Gaming and Liquor issued a policy document dated 7th May, 2007 entitled Extended Trading Permits – Sunday Trading: Non-Metro Liquor Stores (defined above as “the Policy”).

On page 2 of the Policy it states:

Given that section 98D does not authorize non-metropolitan liquor stores to trade on a Sunday, and that many country communities already have access to packaged liquor from a number of different outlets, travelling distance to the nearest outlet will be one of the circumstances of particular relevance.

In this regard it may not be unreasonable for the public to have to travel a total distance of approximately 20 kilometres to/from the nearest licensed premises that sells packaged liquor.

The Applicant argued that the Director placed too much weight on this statement in the Policy and in any event many of the 28 liquor outlets in the Pemberton area able to trade on Sunday were outside the 20 kilometre maximum. The inference of the Director was that excessive distance is one of the “certain circumstances” referred to in paragraph 21 above. The Director relied on the comments of McLure J in *Re Romato; Ex Parte Mitchell James Holdings Pty Ltd* (2001) WASCA 286 who said at [28]:

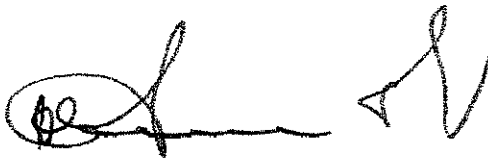
“A policy which fetters all or part of a discretion is unlawful. However, where a decision maker adopts a policy, it is entitled to apply that policy provided applicants are given an opportunity to show that there are exceptional reasons why it should not be applied in their case.”

8.2 Whilst the Commission accepts the Director can take policy into account in the exercise of his discretion a complete reading of the subject document indicates it is not prescriptive. The key words are

cast in the subjunctive mood and the Commission would see this document as only a guide for prospective applicants. Accordingly the Commission considers distance to be just one factor among many in the public interest assessment; however it can not be disputed that the Pemberton area is well served by liquor outlets able to sell liquor on Sunday, the closest being within 200 metres of the Applicant's premises.

9. Summation

9.1 In the exercise of its discretion the Commission has examined the merits of the Applicant's submissions and the provisions of the Act, read as a whole, but with particular regard to s5 (the objects) and s 38 (the public interest test). It has also considered the intention of the legislature with the 2006 amendments and the Policy. It has weighed up the competing interests of both the Director and the Applicant and decided that the Applicant has not satisfied the Commission that it is in the public interest to issue the permit.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

**MR JIM FREEMANTLE
CHAIRPERSON**