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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**CITATION** : SAND VOLLEY AUSTRALIA PTY LTD -v-  
DIRECTOR OF LIQUOR LICENSING [2019]  
WASC 209

**CORAM** : ACTING JUSTICE STRK

**HEARD** : 10 DECEMBER 2018

**DELIVERED** : 19 JUNE 2019

**FILE NO/S** : GDA 6 of 2018

**BETWEEN** : SAND VOLLEY AUSTRALIA PTY LTD  
Appellant

AND

DIRECTOR OF LIQUOR LICENSING  
Respondent

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**ON APPEAL FROM:**

**For File No** : GDA 6 of 2018

**Jurisdiction** : LIQUOR COMMISSION OF WESTERN  
AUSTRALIA

**Coram** : MR A ZILKENS (PRESIDING MEMBER)  
DR E ISAACHSEN (MEMBER)  
MS E POWER (MEMBER)

**File Number** : LC 15 of 2018

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*Catchwords:*

Appeal - Liquor licensing - Refusal of application for the grant of a special

facility licence

Prescribed purpose 'sports arena' - Construction of the *Liquor Control Regulations 1989* (WA) reg 9A(11)

Whether the Liquor Commission erred in law by concluding that the appellant had not demonstrated to a satisfactory degree that the grant of the licence was in the public interest - Whether the Liquor Commission failed to exercise its functions in accordance with the *Liquor Control Act 1988* (WA) - Whether the Liquor Commission's finding that the appellant had not demonstrated to a satisfactory degree that the grant of licence was in the public interest was so unreasonable as to be outside the scope of its powers under the *Liquor Control Act 1988* (WA) - Turns on own facts

*Legislation:*

*Interpretation Act 1984* (WA)  
*Liquor Control Act 1988* (WA)  
*Liquor Control Regulations 1989* (WA)

*Result:*

Appeal allowed  
Decision quashed  
Application to be reconsidered by the Liquor Commission

*Category:* B

**Representation:**

*Counsel:*

Appellant : P A Honey & A G Weston  
Respondent : J A Carroll & E J O'Keeffe

*Solicitors:*

Appellant : Lavan  
Respondent : State Solicitor's Office

**Case(s) referred to in decision(s):**

Ardizzone v Valentino Nominees Pty Ltd [2019] WASC 55  
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321  
Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police [2016] WASC 40  
Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police [2017] WASC 88  
Baker Investments Pty Ltd v City of Vincent [2017] WASC 263  
Carnegies v Director of Liquor Licensing [2015] WASC 208  
Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; (1996) 186 CLR 389  
Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 456; (1993) 43 FCR 280  
Commissioner of Taxation v Softex Industries (formerly COSCO Holdings Pty Ltd) (2001) 191 ALR 724  
Craig v South Australia (1995) 184 CLR 163  
Director General of Department of Transport v McKenzie [2016] WASCA 147, 16  
Executive Director of Health v Lily Creek International Pty Ltd [2000] 22 WAR 510  
Federal Commissioner of Taxation v McCabe (1990) 26 FCR 431  
Hancock v Executive Director of Public Health [2008] WASC 224  
Jacob v Save Beelie Wetlands (Inc) [2016] WASCA 126; (2016) 50 WAR 313  
Leighton v Day MLA [2014] WASC 164  
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24  
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; (2018) 92 ALJR 713  
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332  
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259  
Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323  
Paradis v The Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361  
Scaffidi v Chief Executive Officer, Department of Local Government and Communities [2017] WASCA 222; (2017) 52 WAR 368  
The Owners of Strata Plan No 3397 v Tate [2007] NSWCA 207; (2007) 70 NSWLR 344  
The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd [2016] WASCA 36  
Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227

**ACTING JUSTICE STRK:**

1 This is an appeal brought by Sand Volley Australia Pty Ltd concerning its unsuccessful application for the grant of a special facility licence pursuant to the *Liquor Control Act 1988* (WA).

2 The *Liquor Control Act* provides that the licensing authority shall not grant a special facility licence except for a prescribed purpose.<sup>1</sup> Sand Volley applied for a special facility licence to be granted for the purpose of allowing the sale of liquor at a sports arena, a prescribed purpose by operation of the *Liquor Control Regulations 1989* (WA) reg 9A(11).

3 For the reasons set out below, I have determined that the appeal should be upheld and, as a reconsideration of the application involves the assessment of whether the premises are primarily used for playing and viewing sport, and consideration of public interest, the application should be remitted to the Liquor Commission for reconsideration.<sup>2</sup>

4 I note that after the Commission made its decision, relevant provisions of the *Liquor Control Act* were amended.<sup>3</sup> Whether the Commission made the errors alleged by Sand Volley must be judged by reference to the legislation in force at the time of the decision. Accordingly, references to the legislation in my reasons are references to the *Liquor Control Act* in force at the time of the decision.

**Background**

5 Sand Volley operates a sand based sports facility known as Sand Sports Australia, at 34 Verdun Street, Nedlands (on the corner of Verdun Street and Smyth Road).

6 Two main sporting activities are conducted at Sand Sports Australia, being sand based volleyball (also known as beach volleyball), and netball. The activities are available to registered teams during the regular season for each sport, and there is capacity to cater to outside groups for private, social and corporate events.

7 Prior to 25 November 2011, Sand Sports Australia had operated under a liquor licence, being club licence no. 6040005207.

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<sup>1</sup> *Liquor Control Act* s 46(1).

<sup>2</sup> *Liquor Control Act* s 28(5)(c).

<sup>3</sup> *Liquor Control Amendment Act 2018* (WA): Western Australia, *Government Gazette*, No 122 (17 August 2018) 2893; Western Australia, *Government Gazette*, No 149 (2 October 2018) 3779.

8 In 1996, Sand Volley had entered into a sub-lease with the Hollywood-Subiaco Bowling Club and the City of Nedlands. From that time, players and spectators at Sand Sports Australia could purchase liquor under the club licence.

9 In November 2011, the licensing authority determined that Sand Sports Australia was not able to be sufficiently controlled by the Bowling Club. The licenced area of the club licence was reduced to exclude the Sand Sports Australia premises.

### **The application**

10 On 7 August 2017, Sand Volley made an application for the grant of a special facility licence. Sand Volley specifically sought a licence for the prescribed purpose of a 'sports arena'.

11 The whole of the Sand Sports Australia premises is approximately 2421 m<sup>2</sup>. The number of people that may be accommodated on the premises at any one time is limited to 80. Sand Volley proposes to licence approximately 185 m<sup>2</sup> of the 2421 m<sup>2</sup> area, within which the patron area will comprise 125 m<sup>2</sup>.

12 The proposed patron area is outside, adjacent to and in one corner of the playing area.

13 The proposed trading hours (as amended) were:

- (1) Monday to Thursday from 10 am to 10.30 pm;
- (2) Friday and Saturday from 10 am to 11 pm;
- (3) Sunday from 10 am to 10.30 pm; and
- (4) trading on Christmas Day, Good Friday and ANZAC Day.

14 There is no suggestion that the application was deficient in any respect. In the making of the application, Sand Volley complied with the prescribed statutory requirements and lodged documentation in support of the initial application, including a Public Interest Assessment submission.

15 In support of the application, Sand Volley submitted (among other things) that it provides players and spectators with a sand based sports and recreation premises, and aims to provide a limited range of food and beverage (including alcoholic beverages) as an ancillary service to

players and spectators playing or viewing sports or attending events at Sand Sports Australia. Sand Volley also submitted that the licence would provide an amenity that was previously available when it was part of the licensed premises of the Hollywood-Subiaco Bowling Club, and it aims to attract local residents, workers and visitors to the venue by providing an outdoor sport amenity.<sup>4</sup>

16 Six notices of objection to the application were lodged (from eight individual objectors) on various grounds. The objectors were local residents living in close proximity to the venue.

### The Director's decision

17 The application was refused by the Director of Liquor Licensing (by the Director's delegate) on 2 February 2018. Reasons for decision were published.<sup>5</sup>

18 In summary, the decision maker found that the premises were not suitable for the purpose of a special facility 'sports arena' licence. The following observation was made:<sup>6</sup>

61. ... I consider that a 'Sports arena' suitable to be licensed may provide facilities including:

- playing surface;
- stands;
- tiered seating / standing areas surrounding the playing surface;
- change rooms / locker rooms;
- bar facilities;
- dining facilities;
- function rooms;
- canteen facilities; and
- toilet facilities.

62. In my opinion, the area sought to be licensed under this application is no more than an area that may exist on part of

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<sup>4</sup> Decision of the Director of Liquor Licensing, Decision A000243122 (2 February 2018) [10], [12].

<sup>5</sup> Decision of the Director of Liquor Licensing, Decision A000243122 (2 February 2018).

<sup>6</sup> Decision of the Director of Liquor Licensing, Decision A000243122 (2 February 2018) [61] – [62].

premises licensed under a club licence, commonly referred to as a 'can bar' and used by members and their guests while playing or participating in a game, such as a game of bowls, without the need to resort to the main building of the licensed premises for refreshments, including liquor.

19 Given the finding that the premises were not suitable, the delegate determined that it was not necessary to decide whether the applicant had discharged its obligation under the *Liquor Control Act* s 38(2), (that is, whether the applicant had satisfied the licensing authority that granting the application was in the public interest), nor to assess the validity of the objections.

### Review of the Director's decision

20 Sand Volley applied to the Liquor Commission for a review of the decision.<sup>7</sup>

21 When conducting a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.<sup>8</sup> The Commission was not required to find error on the part of the Director, but rather was to undertake a full review and make a determination on the basis of the same materials as before the Director when the decision was made.<sup>9</sup>

### *Submissions made to the Commission by Sand Volley*

22 Sand Volley asserted that a special facility licence (sports arena) was the most appropriate licence for the premises due to the fact that the playing of netball and volleyball was the primary focus of the business located at the venue.<sup>10</sup> Further, it was submitted that the special facility licence was in the public interest and should be granted due to the following factors:<sup>11</sup>

- a. the [special facility licence] is consistent with consumer requirements as evidenced by a number of consumer surveys;
- b. the [special facility licence] will provide an amenity, including functions, that were previously available pursuant to the licence

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<sup>7</sup> *Liquor Control Act* s 25(1).

<sup>8</sup> *Liquor Control Act* s 25(2c).

<sup>9</sup> As noted in the Decision of the Commission, LC 15/2018, 6 June 2018 [21], citing *Hancock v Executive Director of Public Health* [2008] WASC 224.

<sup>10</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [8].

<sup>11</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [9(a) - (e)].

held by the adjacent Hollywood-Subiaco Bowling Club (Inc), (Club licence number 6040005207);

- c. the [special facility licence] will assist the attraction of local players, corporate clients, local residents, workers and visitors to the venue;
- d. the applicant provides a sought after amenity not readily available in other localities in Western Australia; and
- e. the [special facility licence] will facilitate the growth of the hospitality, liquor and tourism industries by providing high standard licensed premises that caters to the contemporary requirements of consumers of liquor and related services.

23 Sand Volley also made the following submissions:<sup>12</sup>

- a. the applicant is an experienced licensed sporting venue operator committed to upholding high compliance and regulatory standards;
- b. the harm minimisation strategies to be put in place, the nature of the proposed functions and the demographic of customers will deter the rapid consumption of alcohol, overconsumption and intoxication, and do not encourage parties to remain on site for extended periods of time;
- c. no 18th or 21st birthday parties will be permitted;
- d. no liquor will be able to be purchased for consumption off the Premises;
- e. the locality is comprised on a demographic with a high SEIFA Index of Relative Socioeconomic Disadvantage score demonstrating an advantaged low-risk locality;
- f. there will be minimal or no direct negative impact on the locality as a result of approving the application;
- g. certain of the Objectors are aware of, and have consented to, any additional noise levels and light spill from the Premises due to the Notification J733200 under section 70A of the *Transfer of Land Act 1893* lodged on the certificate of titles of such Objectors' residences;
- h. when liquor was previously served from the Premises (pursuant to Club Licence number 60400052070) there were no

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<sup>12</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [10].



infringements or complaints relating to liquor consumption, anti-social behaviour, noise, vandalism or any other offence;

- i. the applicant has met with the Objectors and has addressed issues and concerns regarding noise and parking;
- j. despite any assertions of the Objectors, no evidence has been provided that demonstrates the proposed Premises has contravened any local or State laws or regulations; and
- k. no interveners objected to the application.

### ***The Commission's decision***

24 The Commission, constituted by three members, observed that there were two main aspects to be considered in respect of the application. First, the suitability of the venue to meet the criteria of a special facility licence (sports arena); and secondly, demonstration that the granting of the licence would be in the public interest.<sup>13</sup>

25 For the reasons published by the Commission on 6 June 2018, the application was refused. In summary, the Commission determined that:<sup>14</sup>

- (1) the facility in which the premises was to be located did not constitute a 'sports arena', and to grant a special facility licence of that type would not be appropriate; and
- (2) the Public Interest Assessment submission did not demonstrate to a satisfactory degree that the granting of the application was in the public interest. That is, the applicant failed to discharge the onus required by the *Liquor Control Act* s 38(2).

26 The Commission's reasons for finding that the venue did not constitute a 'sports arena' are reproduced at sch A to these reasons.

27 As to the finding that Sand Volley failed to discharge the onus required by the *Liquor Control Act* s 38(2), the Commission's reasons are reproduced at sch B to these reasons.

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<sup>13</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [28].

<sup>14</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [63].

**The appeal****Nature of the appeal**

28 No appeal lies against a decision of the Commission constituted by three members except to the Supreme Court on a question of law.<sup>15</sup> On such an appeal, the court may:<sup>16</sup>

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

29 It was common ground in the appeal that an appeal on a question of law from the decision of an administrative body is in the nature of judicial review.<sup>17</sup> What constitutes a jurisdictional error by an administrative tribunal, such as the Commission, was discussed by the High Court in *Craig v South Australia*,<sup>18</sup> which was applied in the *Minister for Immigration and Multicultural Affairs v Yusuf*.<sup>19</sup>

If...a tribunal falls into error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

30 As noted on behalf of the appellant as being relevant to this appeal, a ground of appeal that a tribunal has:

- (1) misdirected itself as to the scope of a definition;<sup>20</sup>

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<sup>15</sup> *Liquor Control Act* s 28(2).

<sup>16</sup> *Liquor Control Act* s 28(5).

<sup>17</sup> *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [10]. See also appellant's submissions pars 10 - 11.

<sup>18</sup> *Craig v South Australia* (1995) 184 CLR 163.

<sup>19</sup> *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 [82].

<sup>20</sup> *Commissioner of Taxation v Softex Industries (formerly COSCO Holdings Pty Ltd)* (2001) 191 ALR 724 [33].

- (2) failed to take into account a consideration which, in the circumstances it was bound to take into account;<sup>21</sup> or
- (3) made a finding which is legally unreasonable,<sup>22</sup>
- allege an error law capable of review.

### Approach to the reasons of the Commission

31 As observed by Banks-Smith J in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police*, it is well recognised that when an administrative decision-maker gives reasons, they are meant to inform. They should not be over scrutinised for perception of error. They should be read as a whole and considered fairly.<sup>23</sup> At the same time, the reasons must enable the parties to comprehend the process of reasoning and evaluation. It is not enough to summarise evidence and state conclusions. The evaluation must be present.<sup>24</sup>

### Grounds of appeal and orders sought

32 At the hearing of the appeal, Sand Volley relied upon the amended appeal notice filed on 15 November 2018; a combined bundle of documents volumes 1 and 2, incorporating all records which were before the Liquor Commission which either the appellant or the respondent sought to rely upon in the appeal, filed 21 September 2018; and an outline of submissions filed 19 October 2018. The respondent relied upon an outline of submissions filed 1 November 2018; and the combined bundle of documents. No objector to the proceedings before the Commission sought to take part in the appeal.

33 The effect of the amendment to the appeal notice was to reduce the number of grounds of appeal, such that only two grounds of appeal, ground 1 and ground 3, were pressed:

<sup>21</sup> *Paradis v The Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 [53] - [57], citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 39 - 40.

<sup>22</sup> Appellant's submissions par 12(c), citing *Paradis v The Settlement Agents Supervisory Board* [53] - [57], citing *Federal Commissioner of Taxation v McCabe* (1990) 26 FCR 431, 437 - 438.

<sup>23</sup> *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [14] (Banks-Smith J), citing *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; (1993) 43 FCR 280; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, 271 - 272; *Carnegies v Director of Liquor Licensing* [2015] WASC 208 [53]; *Hancock v Executive Director of Public Health* [70].

<sup>24</sup> *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [15], citing *Hancock v Executive Director of Public Health* [72], [80].

1. The Liquor Commission erred in law by misconstruing the meaning of 'sports arena' in regulation 9A(11) of the *Liquor Control Regulations 1989* (WA).

[Deleted]

3. The Liquor Commission erred in law by concluding that the appellant had not demonstrated to a satisfactory degree that the grant of the licence was in the public interest as such a finding was:

- a) to constructively fail to exercise its functions in accordance with section 38(2) of the [*Liquor Control Act*];
- b) alternatively, so unreasonable as to be outside the scope of its powers under the [*Liquor Control Act*],

in circumstances where it:

- c) failed to consider all the primary and secondary objects of the [*Liquor Control Act*] set out in sections 5(1) and 5(2), as it was bound to do;
- d) gave disproportionate weight to the object in paragraph 5(1)(c) of the [*Liquor Control Act*], being the proper development of the tourism industry and other hospitality industries in the State;
- e) failed to undertake a weighing and balancing exercise of the various objects of the [*Liquor Control Act*] with a view to achieving the best possible outcome; and
- f) made factual findings in support of its public interest assessment and identified no negative aspects in opposition to its public interest assessment.

34 Sand Volley sought orders in the following terms.

- (1) The decision of the Commission dated 6 June 2018 dismissing the appellant's application for a special facility licence be set aside.
- (2) The matter be remitted to the Commission, differently constituted, to be determined in accordance with law.

35 It was common ground that in order for the court to make the orders sought by Sand Volley, the appellant must succeed on both ground 1 and ground 3.<sup>25</sup>

### **Ground 1**

36 I turn first to the question of whether the Commission erred in law by misconstruing the meaning of 'sports arena' in the *Liquor Control Regulations* reg 9A(11). For the reasons set out below, ground 1 is made out.

### **Statutory framework**

37 The prerequisites for the grant of a special facility licence are prescribed in the *Liquor Control Act* s 46, as follows:

#### **46. Special facility licence, pre-requisites for grant of**

- (1) The licensing authority shall not grant a special facility licence except for a prescribed purpose.
- (2b) The application for a special facility licence must demonstrate how the business for which the licence is sought meets any of the prescribed purposes for which a special facility licence may be granted.
- (3) If a special facility licence is granted, it must be granted on such terms and conditions as are necessary to ensure that the licence is used only for the prescribed purpose for which it is granted.

38 The *Liquor Control Regulations* reg 9A prescribes the fifteen purposes for which a special facility licence may be granted, which includes the following purpose:

#### **Sports arena**

- (11) A special facility licence may be granted for the purpose of allowing the sale of liquor at a sports arena (being premises primarily used for playing and viewing sport) to persons playing or viewing sports, or attending any other event, at the arena.

39 In this case, the onus was on Sand Volley, by its application, to demonstrate that Sand Sports Australia met the prescribed purpose of allowing the sale of liquor at a sports arena (being premises primarily

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<sup>25</sup> ts 2 and 16 (10 December 2018); Respondent's submissions par 7.

used for playing and viewing sport) to persons playing or viewing sports, or attending any other event, at the arena.

### The appellant's argument

40 Sand Volley's argument concerning ground 1 may be summarised as follows.

41 First, that the text within the parentheses in reg 9A(11) provides a statutory definition for the term 'sports arena'.

42 Secondly, the statutory definition must be applied by operation of the *Interpretation Act 1984* (WA) s 6, which provides:

#### 6. Definitions in a written law, application of

Definitions or rules of interpretation contained in a written law apply to the construction of the provisions of the written law that contain those definitions or rules of interpretation as well as to other provisions of that written law.

43 Thirdly, the Commission found that the facilities described (and shown in photographs) do permit individuals to play sport as well as watch players at the premises from a limited physical area which provides a restricted view.<sup>26</sup> Therefore, constructively, the Commission found that the premises met the definition of 'sports arena', being premises primarily used for the playing and viewing of sport.<sup>27</sup>

44 Fourthly, by considering matters beyond whether the premises were 'primarily used for the playing and viewing of sport', the Commission misconstrued the scope of the definition of 'sports arena' and thereby fell into legal error.<sup>28</sup> As a consequence the Commission identified the wrong issues; asked itself the wrong question; and applied the wrong test.<sup>29</sup>

45 Fifthly, the error was material and contributed to the outcome of the decision. If the Commission properly construed the scope of the definition and applied the correct test, the outcome of the Commission's determination on whether the premises were a 'sports arena' for the

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<sup>26</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [30].

<sup>27</sup> Appellant's submissions par 16.

<sup>28</sup> Appellant's submissions par 23(a), citing *Commissioner of Taxation v Softex Industries Pty Ltd (formerly COSCO Holding)* [33].

<sup>29</sup> Appellant's submissions par 23(b), citing *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 [65] - [67], citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Yusuf* [82].

purposes of the *Liquor Control Act* would have been, or may have been, different.<sup>30</sup>

### The respondent's argument

46 The respondent says that the position put on behalf of Sand Volley (that the text within the parentheses in reg 9A(11) provides a statutory definition for the term 'sports arena'), is incorrect.

47 In summary, the respondent complains that Sand Volley provides no explanation for having concluded that the words in parenthesis provides a statutory definition; and argues that the Commission's interpretation of reg 9A(11) was correct, and that no error of law is established.

48 At the hearing of the appeal, an alternative submission was also pressed on behalf of the respondent in these terms: if the Commission's interpretation of reg 9A(11) was incorrect, and the text within the parentheses in reg 9A(11) does provide a statutory definition for the term 'sports arena', then there was insufficient evidence before the Commission to have allowed the Commission to be satisfied that the premises were primarily used for playing *and* viewing sport.<sup>31</sup>

### Principles of construction

49 The *Liquor Control Regulations* are subordinate or delegated legislation.

50 The *Interpretation Act* s 44 provides that words and expressions used in subsidiary legislation shall have the same respective meanings as in the written law under which the subsidiary legislation is made. However, in this case, the *Liquor Control Act* does not contain an applicable definition of the term 'sports arena'.<sup>32</sup>

51 The general principles of statutory construction were summarised by the Court of Appeal in *Scaffidi v Chief Executive Officer, Department of Local Government and Communities*,<sup>33</sup> as follows:

<sup>30</sup> Appellant's submissions par 24, citing *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353, 384.

<sup>31</sup> ts 19 - 22 (10 December 2018).

<sup>32</sup> The term 'sports arena' in the *Liquor Control Act* s 110(4B) is defined for the purpose of subsection 4A, and does not have a broader application.

<sup>33</sup> *Scaffidi v Chief Executive Officer, Department of Local Government and Communities* [2017] WASC 222; (2017) 52 WAR 368 [130] (Buss P, Mitchell & Beech JJA). See also *Director General of Department of Transport v McKenzie* [2016] WASC 147 [45] - [48] (Buss P, Murphy JA & Beech J).

The construction of a statute is 'reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy'. Those rules require primary attention to be directed to the text of the relevant provisions. There must be regard to the language of the statutory instrument viewed as a whole, considered in its context. An important part of that context will be the purpose of the legislation, ascertained from what the legislation says (rather than any assumption about the desired or desirable reach or operation of the relevant provisions). Once the purpose of the legislation is established, a construction that would promote that purpose shall be preferred to a construction that would not promote the relevant purpose. (Citations omitted.)

52 The general principles of statutory interpretation apply to delegated legislation. The relevant context includes the statute under which the legislation has been made.<sup>34</sup>

### **Disposition**

53 Taking into account the plain reading of the regulation, considered in its context, and the usual meaning accorded to the words 'sports arena', I am persuaded that the words in parenthesis in reg 9A(11) provide a statutory definition of the term 'sports arena'.

### ***The language of reg 9A viewed as a whole***

54 The respondent contends that the interpretation pressed on behalf of Sand Volley is inconsistent with the language of reg 9A viewed as a whole. In support of this proposition, the respondent says that where reg 9A defines terms used in that regulation, another method for defining terms within a statutory instrument is consistently used. For example, for the prescribed purpose of a 'works canteen', the term 'works canteen' is defined in reg 9A(3) in the following manner:

#### **Works canteen**

- (1) A special facility licence may be granted for the purpose of allowing the sale of liquor at a works canteen, or at other specified premises, to workers and their guests.

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<sup>34</sup> *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389, 398 (Brennan CJ, Dawson, Toohey, Gaudron & McHugh JJ); *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207; (2007) 70 NSWLR 344 [36] (McColl JA & Mason P relevantly agreeing), as applied in *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd* [2016] WASC 36 [131] (Buss, Murphy JJA & Beech J); *Baker Investments Pty Ltd v City of Vincent* [2017] WASC 263 [37] (Le Miere J); *Ardizzone v Valentino Nominees Pty Ltd* [2019] WASC 55 [782] (Archer J).



(2) A licence granted for this purpose may permit the sale of packaged liquor.

(3) In this regulation –

*specified* means specified in the licence;

*worker* means a person –

(a) working on a specified project; or

(b) working for a specified business;

*works canteen* means a canteen, located at or near the place where a specified project is being undertaken or a specified business is being carried on, catering for the needs of workers.

55 This method of defining terms is also used in reg 9A(7) (tourism); reg 9A(10a) – (10d) (education and training course); reg 13 (catering); reg 9A(15) and (16) (room service restaurant); reg 9A(18) (amusement venue).

56 I accept that this method of defining terms is used in reg 9A, but it is not the only method used.

57 Regulation 9A(14) concerns the prescribed purpose of a bed and breakfast facility and provides as follows:

**Bed and breakfast facility**

(14) A special facility licence may be granted for the purpose of allowing the sale of liquor at a bed and breakfast facility (being an accommodation facility that offers bed and breakfast) to persons staying at the facility.

58 In reg 9A(14), the words in parenthesis provide a statutory definition of a bed and breakfast facility. They serve no other function.

59 I do not accept that there is only one definitional device used in reg 9A, and therefore I do not accept the respondent's contention that the interpretation pressed on behalf of Sand Volley is inconsistent with the language of reg 9A, viewed as a whole.

***Operation of the words in parenthesis in reg 9A(11)***

60 On balance, I find that the text of reg 9A(11) supports the conclusion that the words in parenthesis provide a statutory definition of the term 'sports arena'.

61 The language and structure of reg 9A(11) is similar to that of reg 9A(5) (reception or function centre), which provides as follows:

**Reception or function centre**

(5) A special facility licence may be granted for the purpose of allowing the sale of liquor at a reception or function centre (*being premises primarily used as a venue for functions and receptions*) to persons attending a reception or function at the centre. (Emphasis added.)

62 Common to both reg 9A(5) (reception or function centre), and reg 9A(11) (sports arena), is the incorporation of the words 'being premises primarily used'.

63 In reg 9A(11), 'primarily' is a word of limitation. I accept that it is not sufficient for premises to be once used (or on occasion used) as a sports arena, nor is it sufficient that a premises has capacity to be used as a sports arena, or may in the future, on occasion, be so used.<sup>35</sup>

64 The word 'primarily' in reg 9A(5) serves the same limiting function. However, that is not the only function of the words in parenthesis.

65 In reg 9A(11), Parliament could have used the words 'being premises primarily used as a sports arena'. Instead the words 'being premises primarily used for playing and viewing sport' were used, and purpose ought to be given to all of the words in parenthesis.

66 The words in parenthesis in reg 9A(11):

- (1) provide a statutory definition of the term 'sports arena' which, as discussed below, is consistent with the ordinary meaning of that term; and
- (2) add a further limitation to the ordinary meaning of that term by introduction of the word 'primarily'.

67 Reading reg 9A(11) this way gives purpose to all of the words in parenthesis and does no violence to the language of the regulation.

***Meaning of 'sports arena'***

68 The meaning of the term 'sports arena' does not appear to have been the subject of judicial consideration.

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<sup>35</sup> Respondent's submission par 33.

69 Being a compound, it is not possible to turn to a dictionary definition of 'sports arena'. However, the dictionary definition of the word 'arena' is of assistance.

70 'Arena' is defined in the Macquarie Dictionary to be an enclosure for sports contests, shows, etc.<sup>36</sup> It is also defined in the *Long Oxford English Dictionary* as a central part of an amphitheatre, in which the combats or spectacular displays take place, and which was originally strewn with sand to absorb the blood of the wounded and slain. Used also, by extension, of the whole amphitheatre.<sup>37</sup>

71 The words in parenthesis 'being premises ... used for playing and viewing sport' are consistent with the dictionary meaning of the term 'sports arena'.

72 It might be argued that the *Concise Oxford English Dictionary* better favours the respondent's interpretation, as it defines 'arena' as a level area, surrounded by seating, in which public events and entertainment are held.<sup>38</sup>

73 However, in this matter, the question of construction is not answered by the court simply preferring a certain dictionary meaning.

### *Statutory context*

74 It is appropriate to consider the meaning of the words used, within their context.

75 The *Liquor Control Act* is, among other things:<sup>39</sup>

An Act to regulate the sale, supply and consumption of liquor, the use of premises on which liquor is sold, and the services and facilities provided in conjunction with or ancillary to the sale of liquor, ...

76 In its reasons, the Commission noted that one of the primary objects of the *Liquor Control Act* is to 'regulate the sale, supply and consumption of liquor'.<sup>40</sup> The Commission went on to observe that '[in] many cases this regulatory purpose will necessitate a narrow or limited interpretation of the Act and Regulations'.<sup>41</sup>

<sup>36</sup> *Macquarie Dictionary*, (6<sup>th</sup> ed, 2013 and Online ed, 2019).

<sup>37</sup> *Long Oxford English Dictionary* (2<sup>nd</sup> ed, 1989).

<sup>38</sup> *Concise Oxford English Dictionary* (12<sup>th</sup> ed, 2011).

<sup>39</sup> *Liquor Control Act*, long title.

<sup>40</sup> *Liquor Control Act* s 5(1)(a).

<sup>41</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [39].

77 I am not satisfied that the regulatory purpose necessitates a narrow or limited interpretation of reg 9A(11). However, a regulatory (or controlling) purpose may favour an interpretation that is clear and unambiguous.

78 Interpreting the words in parenthesis as providing a statutory definition of the term 'sports arena' is consistent with the regulatory purpose, as it accords a simple, clear and unambiguous meaning.

79 The Commission determined that the facilities do permit individuals to play sport as well as watch players at the premises from a limited physical area which provides a restricted view.<sup>42</sup> However, the Commission fell into error by making an assumption about what it perceived to be the desired operation of the regulation. Further, in weighing in the balance the standard of the facilities available at the premises,<sup>43</sup> it confused the task of construing the regulation with making an assessment as to the suitability and standard of the premises under the *Liquor Control Act* s 37(1)(f)(i).

80 The Commission misconstrued the meaning of 'sports arena' in reg 9A(11) and therefore erred in law.

81 I turn to the alternative submission pressed by the respondent, described at [48] above.

82 The respondent refers to the finding of the Commission at [30] of its reasons, namely, that '[the] facilities described (and shown in photographs) do permit individuals to play sport as well as watch players at the Premises from a limited physical area which provides a restricted view.'

83 The respondent says that this is not a finding that the premises is primarily used for playing *and* viewing sport; and the evidence before the Commission did not establish the extent to which the premises was in fact used for viewing sport.<sup>44</sup> The respondent contends that a premises will not fall within the meaning of a 'sports arena' if the evidence only establishes that the premises is used for playing sport and players resort to another part of the premises to consume liquor after playing.

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<sup>42</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [30].

<sup>43</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [34] - [35].

<sup>44</sup> ts 19 (10 December 2018).

84 It appears that the respondent's alternative submission was made without notice to the appellant. In reply, counsel for Sand Volley made the following submission:<sup>45</sup>

My friend also made a submission in relation to the fact there's no evidence that the premises – or insufficient evidence – that the premises are used for playing and viewing sport. And we would simply submit that the premises are not used for any other purpose. They are used for playing sport and viewing sport and there was evidence in the public interest assessment before the licensing authority in terms of the viewing of sport and, for example, one that I was able to pull up quickly is at page 39 of tab 6 at paragraph 5.23 which talks about the players remaining onsite to watch other matches and generally socialise with players.

85 For the reasons set out above, I find that the Commission did not properly construe reg 9A(11). Had the Commission properly construed reg 9A(11), the outcome of the Commission's determination on whether the premises were a 'sports arena' may not have been different. On the other hand, it may have.

86 The appellant succeeds on appeal ground 1. However, as noted above, appellant must succeed on both ground 1 and 3 in order to succeed in the appeal.

### **Ground 3**

87 By ground 3, Sand Volley contends that the Liquor Commission erred in law by concluding that the appellant had not demonstrated to a satisfactory degree that the grant of licence was in the public interest.<sup>46</sup>

88 Two complaints are pressed. First, the appellant contends that the Commission constructively failed to exercise its functions in accordance with the *Liquor Control Act* s 38(2) (ground 3(a)). Secondly, the appellant contends that the Commission's finding that the appellant had not demonstrated to a satisfactory degree that the grant of licence was in the public interest was so unreasonable as to be outside the scope of its powers under the *Liquor Control Act* (ground 3(b)).

89 The appellant relies upon four particulars, common to each of grounds 3(a) and 3(b), which are reproduced at [33] above.

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<sup>45</sup> ts 29 (10 December 2018).

<sup>46</sup> By operation of the *Liquor Control Act* s 38(2), an applicant for the grant of a special facility licence was obliged to satisfy the licensing authority that granting the application was in the public interest.

### Ground 3(a) - constructive failure to exercise its functions

90 I turn to the argument pressed on behalf of Sand Volley that the Commission constructively failed to exercise its functions in accordance with the *Liquor Control Act* s 38(2), in circumstances where it failed to consider all the primary and secondary objects of the Act set out in s 5(1) and s 5(2), as it was bound to do.

91 By this ground, Sand Volley alleges a failure by the Commission to take account of a relevant consideration which it was obliged to take into account. As observed by Banks-Smith J in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police*,<sup>47</sup> the preponderance of authority is to the effect that what is required to satisfy the duty to take into account relevant considerations is proper, genuine and realistic consideration of the relevant matter.

### *The function of the Commission*

92 The function of the Commission, as examined by the Court of Appeal in *Woolworths Ltd v Director of Liquor Licensing*,<sup>48</sup> was summarised by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing*,<sup>49</sup> as follows:

In summary:

- (1) By s 16, s 30A, s 33 and s 38, the Commission is required to hear and determine the application in accordance with the Act.
- (2) By s 38(2), the applicant has to 'satisfy' the Commission that the granting of the application is 'in the public interest'.
- (3) The expression 'in the public interest' imports a discretionary value judgment, confined only by the scope and purposes of the statute.
- (4) In determining whether it is satisfied that the granting of the application is 'in the public interest', to the extent that those matters arise on the evidence (including notorious facts) before the Commission, the Commission is:

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<sup>47</sup> *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [37], citing *A v Corruption and Crime Commissioner* [2013] WASCA 288 [88] – [92]; *Jacob v Save Beelie Wetlands (Inc)* [2016] WASCA 126; (2016) 50 WAR 313 [49] - [52].

<sup>48</sup> *Woolworths Ltd v Director of Liquor Licensing* [46] - [55].

<sup>49</sup> *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [22], as cited in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [16] (Banks-Smith J).

- (a) bound to take into account those matters relevant to the objects of the Act; and
  - (b) entitled to take into account those matters set out in s 38(4).
- (5) The Commission's obligation to take into account the public interest in that manner is not diminished by s 33(1). The absolute discretion in that section is subject to the Act. Section 33 does not confer on the Commission an arbitrary or unlimited power, or permit the Commission to grant or refuse an application other than consistently with the objects and other provisions of the Act.

93 The Commission was bound to take into account factual matters relevant to the objects of the *Liquor Control Act*. The objects as set out in s 5, were as follows:

- (1) The primary objects of this 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 group 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.
- (2) In carrying out its functions under this Act, the licensing authority shall have regard to the primary objects of this Act and also to the following secondary objects -
  - (a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and
  - [(b), (c) deleted]
  - (d) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
  - (e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act;

- (3) If, in carrying out any of its functions under this Act, the licensing authority considers that there is any inconsistency between the primary objects referred to in subsection (1) and the secondary objects referred to in subsection (2), the primary objects take precedence.

94 The Commission was then to undertake a weighing and balancing exercise of the various objects of the *Liquor Control Act* with a view to achieving the best possible outcome.<sup>50</sup>

***The Commission's determination***

95 I now turn to consider the approach taken by the Commission in exercising its function.

***Consideration of the s 5(1)(a) object***

96 The appellant says that in determining the application, the Commission did not consider the s 5(1)(a) object, that is the regulation of the sale, supply and consumption of liquor. Further, the appellant says that there was evidence before the Commission relevant to the s 5(1)(a) object, and refers to the following by way of example:<sup>51</sup>

1. the appellant currently allows patrons to 'BYO' alcohol or supplies alcohol pursuant to a 'small functions exemption'; and
2. granting a licence to the appellant would provide greater regulation of the sale, supply and consumption of liquor from the premises.

97 The respondent says that Sand Volley did not make this submission to the Commission. Further, the respondent made the following submission in response:<sup>52</sup>

60. Given the paucity of evidence adduced by the appellant as to the prior allowance for BYO and the supply of liquor pursuant to the "small functions exception", it is not the case that the only available inference is that the grant of the Application will result in greater regulation of sale, supply and consumption of liquor. For example:

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<sup>50</sup> Appellant's submissions par 41, citing *Executive Director of Health v Lily Creek International Pty Ltd* [2000] 22 WAR 510, 515; Explanatory Memorandum, *Liquor and Gaming Legislation Amendment Bill 2006* (WA) 1, as referred to in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [57] (Banks-Smith J).

<sup>51</sup> Appellant's submissions par 42(a)(i) - (ii).

<sup>52</sup> Respondent's submissions pars 60 - 61.



- (a) In the absence of evidence regarding the quantity of alcohol being consumed as BYO, or during the "small functions", it is reasonable to infer that the grant of the Application will result in increased consumption of liquor at the premises due to the ready availability of liquor. Accordingly, any "greater regulation" will be counterbalanced by the negative public interest considerations that arise from increased consumption of alcohol.
  - (b) When liquor is lawfully supplied on the appellant's premises pursuant to the "small functions exemption", the premises is operating as "regulated premises" under the Act. The Act regulates the sale, supply, and consumption of liquor on "regulated premises" by creating a number of criminal offences. Thus, it is an offence to sell or supply liquor (or permit the sale or supply of liquor) to juveniles. It is also an offence to sell or supply liquor to a drunk person, allow a drunk person to consume liquor, or aid a drunk person to obtain or consume liquor on "regulated premises".
  - (c) In addition, as an occupier of the premises, the appellant owes a common law duty of care to patrons who are present on its premises.
  - (d) To prevent a breach of the Act and discharge its common law duty, the appellant may be expected to take steps to ensure that patrons on its premises consume liquor in a responsible manner, so as to not place themselves, or others, at undue risk of harm as a result of the intoxicating effects of liquor. In these circumstances, it was open to the Commission to infer that there would be no material difference in the regulation of the consumption of alcohol at the premises, whether the Application was granted or not.
61. In circumstances where:
- (a) the submission was not made before the licensing authority, and
  - (b) it is not the case that the only inference that can be drawn from the appellant's previous allowance for BYO and previous supply of liquor is that the grant of the licence will result in greater regulation of the supply and consumption of liquor at the premises,

the failure of the Commission to refer to or consider this matter to be a positive public interest factor does not amount to an error.

(Footnotes omitted.)

98 The appellant's complaint is not a failure to take into account particular pieces of evidence. It is the alleged failure to properly consider the object prescribed by s 5(1)(c).<sup>53</sup> The reasons of the Commission do not reveal that it turned its attention to the object of regulation, particularly regulating the sale, supply and consumption of liquor.

99 Taking into account the submissions made on behalf of the parties, I do not consider that the reasons reveal that the Commission gave proper, genuine and realistic consideration to the matters relevant to the s 5(1)(a). Had the Commission done so, the outcome of the Commission's determination as to whether the appellant had demonstrated to a satisfactory degree that the grant of the licence was in the public interest may have been different.

*Consideration of the s 5(1)(c) object*

100 Catering for consumer requirements is not to be considered in isolation. Section 5(1)(c) requires regard be given to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State in considering the issue of catering for consumer requirements.<sup>54</sup>

101 The Commission in its reasons at [51] expressly referred to the language of s 5(1)(c), finding that:

1. Sand Volley had '... demonstrated that the current members of Sand Sport Australia would be inconvenienced by the availability of a licenced area and that there [was] support for the same'; and
2. there was a lack of evidence that showed the licence would aid the 'proper development of the liquor industry, the tourism industry and other hospitality industries in the State'.

102 The appellant says that there was evidence before the Commission relevant to the object of catering for the requirements of consumers for

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<sup>53</sup> Appellant's submissions pars 42 – 43. The distinction is noted in *Paradis v Settlement Agents Supervisory Board* [57], cited in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [87] (Banks-Smith J).

<sup>54</sup> *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [67] - [68] (Banks-Smith J).

liquor and related services, with regard to the proper development of the liquor industry, and refers to the following by way of example:<sup>55</sup>

1. sand volleyball and netball (being the activities offered from the premises) are relatively new to Western Australia;
2. the premises provide a sought after activity not readily available in other localities in Western Australia;
3. the premises positively contribute to the social, sporting and recreational aspects of the locality and will further assist in increasing the diversity of the amenity available within the locality;
4. currently 90 teams compete in sand volleyball and netball at the premises, with the number of players and spectators growing; and
5. there is a demand for the supply of alcoholic beverages from the premises.

103 Again, the appellant's complaint is not a failure to take into account particular pieces of evidence. It is the alleged failure to properly consider the object prescribed by s 5(1)(c).<sup>56</sup>

104 Taking into account the submissions made on behalf of the parties, I do not consider that the reasons reveal that the Commission gave proper, genuine and realistic consideration to the matters relevant to s 5(1)(c).

105 The reasons reveal that the Commission turned its attention to catering for the requirements of consumers for liquor and related services, with regard to the proper development of the tourism industry and other hospitality industries in the State.<sup>57</sup> The Commission was also obliged to turn its attention to catering for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry. The reasons do not disclose that it did so.

106 As observed by Banks-Smith J in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* at [101], '[s]ome matters will be particularly important to that process. It is not appropriate that the court prescribe what they might be. It is a matter for the Commission and will depend upon the circumstances of any application.'

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<sup>55</sup> Appellant's submissions par 42(b)(i) - (v).

<sup>56</sup> Appellant's submissions pars 42 - 43.

<sup>57</sup> Decision of the Commission, LC 15/2018, 6 June 2018 [52] - [53].

107 In this case, it would seem that the introduction of a different offering in terms of consumer choice and diversity (reflected in particular by the matters set out at [102(1) and (2) above]) are important matters for evaluation and the Commission ought to have proper regard to them.

108 Again, a proper consideration of the s 5(1)(c) object may not have led to a different result for the appellant, but on the other hand, it may have.

*Weighing and balancing exercise*

109 Sand Volley contends that the Commission gave disproportionate weight to the proper development of the tourism industry and other hospitality industries in the State. Further, Sand Volley says that the Commission failed to undertake a weighing and balancing exercise of the various objects of the *Liquor Control Act* with a view to achieving the best possible outcome.

110 For the reasons set out above, I find that the Commission did not consider all mandatory objects which arose on the evidence. It follows that the Commission did not (as without considering all relevant objects, it could not) undertake a weighing exercise of the various objects of the Act with a view to achieving the best possible outcome.

111 Having found that the Commission did not consider all mandatory objects which arose on the evidence, it is appropriate to also allow ground 3(a) on this basis.

*Factual findings*

112 Sand Volley contends that the Commission also constructively failed to exercise its functions in accordance with the *Liquor Control Act* s 38(2) in circumstances where it made factual findings in support of its public interest assessment and identified no negative aspects in opposition to its public interest assessment.

113 Sand Volley refers to the following findings of the Commission.<sup>58</sup>

1. The finding of the Commission that the applicant had demonstrated that the current members of Sand Sports Australia would be inconvenienced by the availability of the licenced area and that there is support for the same.

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<sup>58</sup> Appellant's submissions par 45, citing Decision of the Commission, LC 15/2018, 6 June 2018 [51], [56].

2. In any event, the locality appears to be generally low risk in respect to harm and ill-health.

114 Sand Volley says that no negative aspects of the application, in terms of adverse finding or comment, are apparent, and says that the Commission failed to properly exercise its jurisdiction, amounting to jurisdictional error. In this regard, Sand Volley seeks to rely upon the reasons of Martin CJ in *Woolworths* [7]:

So, on the face of the Commission's reasons, no negative aspects of the application are apparent, whereas many positive aspects of the application are identified without adverse finding or comment. The question posed by this appeal is how, in those circumstances, consistently with the proper construction of the Act and its objects, the Commission could have concluded that it was not in the public interest to grant the application. The answer to that question is that the Commission could only have arrived at that conclusion by misconceiving its function or misconstruing the Act, either of which are jurisdictional errors of law which vitiate the Commission's decision.

115 In response, the respondent says that the Commission's finding that the locality was a low risk in respect of harm and ill-health was not a positive public interest factor, but rather, a minor negative public interest feature of the application.

116 It is not necessary to further opine on this particular contention made on behalf of Sand Volley. For the reasons given, I have concluded that the Commission did not consider all mandatory objects which arose on the evidence. Accordingly, the Commission was not in a position to undertake a weighing exercise of the various objects of the *Liquor Control Act* (grounded on a full suite of factual findings) with a view to achieving the best possible outcome.

### **Ground 3(b) - unreasonableness**

117 Further or in the alternative to the argument that the Commission constructively failed to exercise its functions in accordance with s 38(2), Sand Volley argues that the Commission's decision that the appellant did not satisfy it that granting the application was in the public interest was so unreasonable as to amount to a jurisdictional error.

118 As noted on behalf of the appellant, this argument is based on the principle that even where a decision maker has a genuinely free

discretion, it resides within the bounds of reasonableness.<sup>59</sup> The question to be determined is whether, in relation to the particular decision in issue, the statutory power has been abused by the decision maker, or put in different terms, the decision is beyond power.<sup>60</sup>

119 How that abuse of statutory power manifests itself is not closed or limited by particular categories of conduct, process or outcome. Nor is the abuse of a statutory power limited to a decision which might be described as 'manifestly unreasonable', or what might be described as an irrational, if not bizarre, decision that is so unreasonable that no reasonable person could have arrived at it.<sup>61</sup>

120 A conclusion of legal unreasonableness may be outcome focused – where, for instance, there is no 'evidence and intelligent justification' for the decision.<sup>62</sup> Alternatively, a conclusion of legal unreasonableness may be process focussed. In this regard, the appellant refers to the reasons of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*,<sup>63</sup> where his Honour stated that unreasonableness would be demonstrated where the decision maker has 'committed a particular error in reasoning, giv[ing] disproportionate weight to some factor, or reasoned illogically or irrationally'.

121 Taking into account my findings in relation to ground 3(a), the appellant has established that despite evidence being before the Commission relevant to certain mandatory objects of the *Liquor Control Act*, the Commission failed to consider those objects in its assessment of public interest. In so doing, I find that the Commission has not exercised its decision-making power within the bounds of legal reasonableness, amounting to a jurisdictional error.

## Conclusion

122 I have determined that the appeal should be upheld.

123 I have had regard to the options available under the *Liquor Control Act* s 28(5). As a reconsideration of the application involves the assessment of whether the premises are primarily used for playing and

<sup>59</sup> Appellant's submissions par 49, citing *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 92 ALJR 713 [97].

<sup>60</sup> Appellant's submissions par 50, citing *Minister for Immigration and Border Protection v SZVFW* [80]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [67] - [76].

<sup>61</sup> Appellant's submissions par 51, citing *Minister for Immigration and Border Protection v SZVFW* [81] - [82].

<sup>62</sup> Appellant's submissions par 52, citing *Minister for Immigration and Border Protection v SZVFW* [81] - [82]; *Leighton v Day MLA* [2014] WASC 164.

<sup>63</sup> *Minister for Aboriginal Affairs v Peko-Wallsend* [72].

viewing sport; and an assessment of public interest, the application should be remitted to the Commission as the specialist tribunal established for the purpose of dealing with such applications.<sup>64</sup>

124 I will hear the parties as to the precise form of orders.

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<sup>64</sup> *Australian Leisure & Hospitality Group Pty Ltd v Commissioner of Police* [2016] WASC 40 [24] (Martino J), cited with approval in *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 [168] (Banks-Smith J).

**SCHEDULE A: COMMISSION'S REASONS – SPORTS ARENA CLASSIFICATION****Sports Arena Classification**

- 29 The applicant submitted that the Premises meets the criteria of a sports arena in that is a venue providing for both players and spectators in relation to sand based volleyball and netball. ...
- 30 The facilities described (and shown in photographs) do permit individuals to play sport as well as watch players at the Premises from a limited physical area which provides a restricted view.
- 31 However, it is important to note that the Premises is not what the general member of the public would understand as constituting a 'sports arena'. If that were the case, then any playing ground, oval or park where people play sport and view from the side lines could constitute an 'arena'.
- 32 Generally, a classification of 'sports arena' indicates a site where there is an open invitation (usually paid) for members of the public (often in large numbers) to come and view specific sports or other events and that there will be suitable amenities to facilitate such activity. However, the Premises appears to be primarily for the use of team members that pay a season fee.
- 33 Further, the fact that there is casual court hire or availability for functions does not necessarily establish facility as an arena. These are simply facilities that are available for private hire.
- 34 The list of facilities proposed by the Director are not a definitive or obligatory list of what is required for a facility to constitute an arena. However, these are items and amenities that are highly indicative of the actual use of any particular facility. It is reasonable to anticipate that at least some of these facilities would be present in any 'sports arena'.
- 35 Generally, the licensed Premises will not provide an easy or organised view to the entire playing area from appropriate seating, the bathroom facilities are inadequate for what the public may generally expect and no special function facilities exist which together indicate the Premises would not ordinarily be classified as an 'arena' type venue.
- 36 The specific use of the words 'sports *arena*' (emphasis added) in conjunction with the definition set out in regulation 9A(11) of the Regulations indicates the legislative intent that the word 'arena' be taken into account (and be given an appropriate weight) when interpreting the regulation.



- 37 The Commission notes the applicant's comments as to the absence of a Club president, board, constitution, committee, by-laws and meetings however, this does not necessarily support the Premises as being categorised as an 'arena'.
- 38 The [*Liquor Control Act*] and [*Liquor Control Regulations*] make appropriate provision for sporting clubs to seek liquor licences subject to certain conditions and requirements. The fact that the applicant does not meet those conditions and requirements due to its internal organisation is not enough reason to grant a special facility licence of a category it does not properly fall under. Further, this appears to attempt to circumvent the purposes of the pre-requisite provisions relating to clubs in section 49 of the [*Liquor Control Act*].
- 39 One of the primary objects of the [*Liquor Control Act*] is to 'regulate the sale, supply and consumption of liquor'. In many cases this regulatory purpose will necessitate a narrow or limited interpretation of the [*Liquor Control Act*] and [*Liquor Control Regulations*].
- 40 In the Commission's view the Director was correct in taking the view that the facility containing the Premises does not constitute a 'sport arena'.
- 41 The applicant also submitted that their view that the Premises meets the requirements of being a 'sports arena' under the [*Liquor Control Act*] and [*Liquor Control Regulations*] is supported by the lack of specific concerns as to the suitability of the Premises by the Premises Inspector during the Site Visit in August 2017 as well as the subsequent Report and limited Schedule of Requirements.
- 42 Such an inspection or the Report is in no way determinative of the Premises suitability to meet the criteria of a special facility licence (sports arena), or indicative of whether any licence will be granted. This is not the function of the Premises Inspector.
- 43 The Premises Inspector's Report did also propose that the maximum number of people permitted on the licensed Premises at any one time be limited to 80. This would be consistent with the accommodation certificate issued by the City of Nedlands. This restriction alone would make it very difficult to classify these Premises as an 'arena'.
- 44 The Commission has considered the background to the location and operation of the applicant's Premises and is of the view that these Premises cannot properly be classified as a sports arena either within the generally accepted definition of the word 'arena' or within the intent of the legislation.

**SCHEDULE B: COMMISSION'S REASONS – PUBLIC INTEREST****Public Interest**

- 45 The expression 'the public interest' imports a discretionary value judgment, confined only by the scope and purposes of the statute (*Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208).
- 46 Subsections 38(1)(b) and (2) of the [*Liquor Control Act*], and regulation 9F(b) of the [*Liquor Control Regulations*], place the onus on the applicant to satisfy the Commission that the grant of the application is in the public interest. To discharge its onus under section 38(2) of the [*Liquor Control Act*], the applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
- 47 The [Public Interest Assessment submission] refers to the Consumer Survey and submitted 42 samples – four of whom reside in the suburbs of Nedlands and Shenton Park, the two suburbs referenced in the ABS statistics. The responses are solely drawn from the users of the facility and are supportive of the application. The Commission affords little weight to such a survey as it is limited probative value in considering the sentiment of the general public.
- 48 The claim that the [special facility licence] will facilitate the growth of the hospitality, liquor and tourism industries by providing high standard licensed premises that caters to the contemporary requirements of consumers of liquor and related services is not backed by any evidence.
- 49 Mere assertions or opinions are not enough and must be supported by appropriate evidence (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC 16/2015)).
- 50 It is within the Commission's discretion to decide what weight to give to certain evidence. The evidence provided by either party must be 'relevant, reliable, and logically probative to assist the decision maker in assessing the probability of the existence of the facts asserted in each case' (*Busswater Pty Ltd v Director of Liquor Licensing* (LC 17/2010)).
- 51 The applicant has demonstrated that the current members of Sand Sports Australia would be inconvenienced by the availability of a licensed area and that there is support for the same. However, there is a lack of evidence that shows the licence will aid the

*'proper development of the liquor industry, the tourism industry and other hospitality industries in the State'.*

52 The applicant maintains that corporate functions and events are a 'popular activity' but does not supply evidence as to how often such function events have occurred in the past or how many are [expected] to occur. It is difficult on the basis of these mere assertions to make any clear finding as to the value of the [special facility licence] to the hospitality industry.

53 Further, there is no evidence or assertion in the [Public Interest Assessment submission] that indicates that the tourism industry would be particularly benefited by the grant of the [special facility licence] or that tourists make up any of the applicant's current or proposed patrons.

54 Consideration of the issue of harm and ill-health due to the use of alcohol related products in the locality is clearly restricted by the 'destination' aspect of the venue stated at Attachment E at paragraph 5.17 and also seen in the diversity of residential addresses of those surveyed.

55 It is a matter of record that the locality comprises a demographic with a high SEIFA Index of Relative Socioeconomic Disadvantage score demonstrating an advantaged low-risk status.

56 In any event, the locality appears to be generally low risk in respect to harm and ill health.

57 The fact that the applicant previously operated successfully under the Hollywood-Subiaco Bowling Club (Inc) Club licence number 60400052070 is of limited assistance to the Commission. It is noted that such licence:

- a. covered the entirety of the area occupied by the applicant (not the limited area now proposed to be licensed); and
- b. is a Club licence, not a special facility licence,

and, therefore, the [special facility licence] would be of a different character.

58 Given the above, the PIA has not demonstrated to a satisfactory degree that the granting of this application is in the public interest.

*ACTING JUSTICE STRK*

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

YO

Associate to the Honourable Acting Justice Strk

19 JUNE 2019