

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** That Cocktail Guy Pty Ltd
(represented by Mr Andrew Cameron of Douglas Cheveralls Lawyers)
- Intervener:** Director of Liquor Licensing
(represented by Mr Daniel Harrop of State Solicitor's Office)
- Commission:** Mr Michael Egan (Presiding Chair)
Mr Paul Heaney (Member)
Mr Denis Temby (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of a decision by the delegate of the Director of Liquor Licensing to refuse a grant of a special facility licence (caterer) for premises to be known as *That Cocktail Guy*.
- Premises:** 15 Alexwood Drive, Forrestdale
- Date of Determination:** 14 February 2017
(on papers)
- Determination:** The application for review is refused.

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *VHT Perth Pty Ltd v Commissioner of Police & others* LC 26/2012
- *Re Gull Liquor, Gingers' Roadhouse, Upper Swan* (1999) 20 SR (WA) 321
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208

Background

- 1 On 3 March 2016, That Cocktail Guy Pty Ltd ("the applicant") applied for a special facility licence (caterer) pursuant to section 46 of the *Liquor Control Act 1988* ("the Act").
- 2 As special facility licences may only be granted for prescribed purposes, one of which is for a caterer to sell liquor in specified circumstances, the application also addressed regulations 9A (13) and 9A (14A) of the *Liquor Control Regulations 1989* ("the Regulations"). In the Regulations, caterer is defined by reference to a person who carries on a food business as defined in section 10 of the *Food Act 2008*, and who handles and sells food for consumption at functions.
- 3 On 28 October 2016, the delegate of the Director of Liquor of Licensing ("the Director") determined to refuse the application, principally on the basis that he was not satisfied the applicant could be considered to be a caterer as intended by, and for the purposes of, the Act.
- 4 On 28 November 2016, the applicant applied, pursuant to section 25 of the Act, for a review of the decision of the Director.
- 5 On 30 November 2016, the Director of Liquor Licensing lodged a Notice of Intervention in respect of the review pursuant to section 69(1) of the Act.
- 6 In its application for a review of the Director's decision, the applicant submitted that the Director erred in law and in fact in determining the application.
- 7 However, the Liquor Commission ("the Commission") is required to undertake a full review of the material before the Director and make its own determination in respect of the licence application.
- 8 At the request of the applicant, this application for a review of the Director's decision has been determined on the papers.

Submissions on behalf of the applicant

- 9 As the applicant is required under the Act to demonstrate that the grant of the application for a special facility licence (caterer) is in the public interest, the application for the licence was accompanied by a Public Interest Assessment ("PIA") which, among other things, describes the existing and proposed manner of trade of the applicant's business, and addresses the public interest criteria set out in the Act.
- 10 The applicant currently operates a mobile cocktail bar service, which includes the provision of a cocktail bar, wait staff and "the preparation and service of

platters and novelty cocktails” at private functions and events at various locations around the Perth metropolitan area.

- 11 The applicant is seeking to extend this service to the provision of alcoholic cocktails thereby “reducing the organisational burden on the event organiser” with whom the applicant has arranged to supply the cocktail service.
- 12 The stated aim of the applicant is to “target those in the 20+ to 40+ age bracket, plus small business and community events, specifically those with a higher than average disposable income and a mature and responsible approach to the consumption of alcohol”.
- 13 According to the PIA, the cocktails prepared by the applicant would contain one standard (alcoholic) drink and, in conjunction with the quality cocktails prepared by the applicant, the customer’s experience “can be enhanced with several gourmet platters recommended for purchase at the time of booking the applicant’s services”.
- 14 Further, according to the applicant, “good food, whether supplied by a third party or the event organiser, is a key component of the events organised by the applicant” and “if required, the applicant has access to the commercial kitchen of Country Kitchen Catering in order to ensure food is prepared in accordance with all health rules and regulations”.
- 15 In response to a request from the Director for details of the functions at which the applicant had supplied food itself or via another party to assist the Director in determining whether the applicant satisfied the prescribed purpose of the special facility licence applied for, namely a caterer, the applicant advised that:
 - a) the applicant had catered a number of events since commencing business in May 2015 and, at all events, has sold to the event organiser the ingredients for beverages prepared and served at functions;
 - b) at four events since 6 February 2016, which were specified, food was supplied by a third party or the event organiser; and
 - c) at three future events, the applicant would be supplying and/or preparing and serving food.
- 16 The applicant also contended to the Director that it meets the prescribed purpose of a caterer as it clearly handles food for consumption at functions and, in any event, the definition of “food” in the Food Act 2008 encompasses liquids, and the applicant’s sale and handling of beverages and beverage ingredients, such as olives, pineapple pieces, soda water and lime juice, means that it meets the definition of food business in the Food Act and the definition of a caterer in the Regulations.

- 17 In response to a further request from the Director, who on this occasion referred to the Director's Policy on special facility licences for a caterer which sets out the expectations of applicants applying for this type of licence, including the use of, or access to, a commercial kitchen, the applicant submitted that past examples of how it has previously utilised a commercial kitchen are irrelevant to compliance with the Director's Policy and the determination of the application.
- 18 However, upon a further request from the Director, the applicant advised it had not utilised the commercial kitchen of Country Kitchen Catering in the past, but had utilised the commercial kitchen of event organisers when catering events on 27 August 2016 (to heat, prepare and serve platters of finger food procured in an unfinished state), and on 22 September 2016 (to supply, prepare and serve fresh juice recipes).
- 19 In addressing the public interest criteria, the applicant has submitted:

Consumer requirement

- a) the significant growth in population and rising affluence in Perth, and the advent of specified and themed venues, such as small bars, has generated interest and demand for novel and highly personalised services relating to the service and consumption of alcohol;
- b) previous and prospective customers have expressed an interest in the applicant being able to provide alcohol – copies of emails from nine customers are provided with the PIA;
- c) the proposed licence will assist in the establishment of a more mature, diverse and dynamic mobile cocktail bar sector within the liquor industry;

Harm and ill-health

- d) the majority of events are small and "low risk", taking place at the premises of the event organiser involving people known to the organiser;
- e) for events at which the organiser expects a large number of guests, the applicant will liaise with the event organiser, owner or occupier to ensure the event is effectively resourced with safety and security measures and there is no risk to staff or attendees;
- f) a House Management Policy, Code of Conduct and Management Plan provides, among other things, that:
 - i. the applicant reserves the right not to serve alcohol to anyone under the influence of any drug;
 - ii. function organisers must agree to deny entry to persons who are intoxicated or abusive;

- iii. service of alcohol will be refused to juveniles and persons attempting to procure alcohol on behalf of juveniles;
- iv. customers are to be informed of the availability of low alcohol and alcohol free beverages;
- v. the applicant and its staff are empowered to enforce the responsible service of alcohol; and
- vi. staff will request intoxicated people to leave the venue.

Impact on Amenity

- g) there will be no impact on amenity as any impact will last only as long as the applicant remains at the location (no more than 12 hours) and the applicant does not provide music or other entertainment services;

Offence, Annoyance, Disturbance and Inconvenience

- h) there is no scope for offence, annoyance, disturbance or inconvenience as the applicant does not generate noise or excessive light; and
- i) it is the responsibility of the event organiser to ensure the function complies with all nuisance laws and local laws and the applicant maintains the right to cease providing its services if a person or persons at the function behaves in an inappropriate, offensive or aggressive way, or under any other unacceptable circumstances.

Submissions on behalf of the Director

20 It is submitted on behalf of the Director that:

- a) the Regulations and the Director's Policy on special facility licences for caterers makes it clear that a special facility licence (caterer) is only intended to be granted to an applicant involved in providing food at functions that has been prepared by the applicant in its commercial kitchen;
- b) the applicant's contention that it sells and handles "food", being "soft drinks, which are food, olives, pineapple pieces, soda water and lime juice, all of which are also food" does not make the applicant a caterer within the spirit of the Act;
- c) to define the applicant as a caterer would go well beyond the definition intended by the legislature, set a dangerous precedent for licensing what

could only be described as mobile bars and obfuscate the legislative intent of the Act; and

- d) as the applicant has not demonstrated it is a caterer for the purposes of the Act, the applicant has not discharged its onus to establish that the grant of the application is in the public interest.

Responsive submissions on behalf of the applicant

- 21 The applicant rejects the contention made on behalf of the Director that the applicant must use a commercial kitchen, highlighting the purpose prescribed in the Regulations, which states that a special facility licence (catering) “may be granted for the purpose of allowing at a function the sale, by a caterer, of liquor supplied at premises at which the caterer has agreed with the person organising the function to provide liquor (**whether with or without food**), for consumption by persons at that premises”. (emphasis added by the applicant)
- 22 Further, the applicant submits that it supplies substantial food, not simply olives and fruit juice as contended on behalf of the Director, that it has provided a wealth of evidence to support the fact it does supply food catering and that it does utilise commercial kitchens when doing so.
- 23 In contrast to the submission on behalf of the Director, the applicant also submits:
 - a) whether the applicant is a caterer is not a question relating to the public interest, but rather is a question of law to be determined by reference to the Act and Regulations and the facts established by the evidence; and
 - b) the applicant has demonstrated how its business meets the prescribed purpose and it is not open to find that the applicant is not a caterer.

Responsive submissions on behalf of the Director

- 24 In response, it is submitted on behalf of the Director that the applicant cannot be properly considered a “caterer” for the purposes of the Act and that the clear intent of the Director’s Policy is that an applicant for a special facility licence (caterer) must be involved in the preparation of food, not simply heating up and serving finger food provided by a third party.

Determination

- 25 Section 25(2c) of the Act provides that when considering 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.

- 26 On a review under section 25 of the Act, the Commission may –
- (a) affirm, vary or quash the decision subject to the review; and
 - (b) make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and
 - (c) give directions –
 - (i) as to any question of law, reviewed; or
 - (ii) to the Director, to which effect shall be given; and
 - (d) make any incidental or ancillary order.
- 27 In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials (refer *Hancock v Executive Director of Public Health* [2008] WASC 224).
- 28 The applicant must demonstrate the grant of the special facility licence (caterer) applied for is in the public interest.
- 29 In determining whether the applicant has discharged that onus, the Commission must have regard to, and must exercise its judgement in accordance with the objects and provisions of the Act.
- 30 Under section 46(1) of the Act, the Commission shall not grant a special facility licence except for a prescribed purpose.
- 31 Further, the Act requires the applicant to demonstrate how the business for which the licence is sought meets the prescribed purpose (section 46(2b) of the Act).
- 32 The Director's Policy on special facility licences for caterers supplements the provisions of the Act and Regulations and provides guidance to applicants on the requirements of the Act when applying for such a licence.
- 33 The Director's Policy refers to section 37 of the Act and indicates that the licensing authority shall not grant an application unless it is satisfied that the premises to which the application relates are of sufficient standard and suitable for the conduct of the business, and specifies that the applicant must have a commercial kitchen or exclusive access to a kitchen or kitchens approved by the relevant local authority.

- 34 The policy also requires the applicant to lodge details of the refrigeration and transport arrangements and envisages that the kitchen will be used for the preparation, cooking and heating of food for functions, occasions and events.
- 35 The policy also outlines other requirements concerning the presence of an approved manager, the responsible service of alcohol training, the provision of drinking water and the maintenance of an incident register.
- 36 The Director's Policy is a guide for applicants and does not constrain how the Commission will determine an application – each case must be determined on its merits having regard to the provisions of the Act and the Regulations.
- 37 The applicant contends that its existing and proposed business model meets the prescribed purpose set out in regulation 9A (13) of the Regulations.
- 38 Regulation 9A (13) states:
- A special facility licence may be granted for the purpose of allowing at a function the sale, by a caterer, of liquor supplied at premises at which the caterer has agreed with the person organising the function to provide liquor (whether with or without food), for consumption by persons at that premises.*
- 39 Further, regulation 9A (14A) states:
- caterer** means a person who —
- (a) carries on a food business as defined in the Food Act 2008 section 10;
and
- (b) handles or sells food for consumption at functions.
- 40 *The Food Act 2008* is legislation that provides for the safety and suitability of food for human consumption, and the terms “food business”, “food” and “handling” (of food) are broadly defined.
- 41 The Food Act also provides for food businesses (and their premises, which is also broadly defined and includes a vehicle) to be registered or to notify the appropriate enforcement authority, which in most cases is the local authority in which the premises are located. This regulatory framework ensures, among other things, that food businesses comply with the current Australian and New Zealand Food Standards Code and Food Safety Standards.
- 42 It appears clear to the Commission that the purpose or one of the purposes of defining a caterer in regulation 9A (13) and regulation 9A (14A) of the Act by reference to the Food Act 2008 is to ensure that an applicant for a special facility licence (caterer) is subject to the provisions of the Food Act and meets the requirements of the Food Standards Code governing, among other things,

the receipt, storage, processing, display, packaging and distribution of food, as well as the skills, knowledge, health and hygiene of food handlers.

- 43 It is evident from the material accompanying the PIA that:
- a) the premises of the applicant have been approved by the City of Armadale for the storage of its equipment (not for any other purpose);
 - b) the principal of the applicant has completed a “Basic Food Handling” course; and
 - c) Country Kitchen Catering is registered as a Food Business with the City of Stirling.
- 44 It is not apparent if the applicant has been, or is, registered as a food business, or the basis upon which the applicant has conducted its business since it commenced operating in May 2015 (for example under permit issued by a local authority or otherwise).
- 45 In its responsive submission, the applicant indicated it “has also obtain (sic) an occasional licence to sell and supply alcohol for specific events, which also demonstrates its history of operating without causing any alcohol related harm”, but no details are provided and, in any event, this information appears not to have been before the Director.
- 46 Having regard to the purpose, scope and provisions of the Act as a whole, the Commission is of the view that the legislature envisaged and intended that a special facility licence (caterer) may be granted to catering businesses of substance, capable and appropriately qualified and experienced in preparing and distributing food in compliance with the Food Act, not to businesses such as portable or mobile bar services whose primary or principal purpose is to only serve alcohol.
- 47 As appears to have been accepted by the applicant in its submissions to this review, it was entirely appropriate for the Director to seek details of the experience of the applicant in catering for events utilising a commercial kitchen to assist in determining the manner in which the applicant has conducted its business, the nature of the applicant’s business and how the applicant may be expected to operate its business in the future.
- 48 The applicant submitted that it had catered a number of events since commencing business in May 2015 and at all events “has sold to the event organiser the ingredients for beverages that it prepares and serves at the functions”. The applicant provided a list of “recent events (four were listed), plus three examples of upcoming events where it has also been involved in other food related activities”.

- 49 No details have been provided of the events at which the applicant provided services between May 2015 and February 2016.
- 50 At the more recent events at which a commercial kitchen was utilised (two events – see paragraph [18] above), no details of the staff employed, their qualifications and training or the practices governing the operation have been provided.
- 51 In the Commission’s view, there is very limited information upon which to make an informed judgment about the scope of the applicant’s business or the manner in which the applicant conducts and controls its business.
- 52 Furthermore, it is not clear to what extent the applicant would be preparing and providing food as part of its operation should the application be granted.
- 53 As indicated above, in addition to determining whether the applicant meets the prescribed purpose for a special facility licence (caterer), the applicant must demonstrate that, if it does meet the purpose prescribed in the Regulations, the grant of the application would be in the public interest (section 38(2) of the Act).
- 54 The objects and provisions of the Act particularly relevant to this application are sections 5(1)(b), section 5(1)(c), section 5(2)(a) and section 38 of the Act.
- 55 To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts the grant of the application will have on the local community, and, in this regard, it is not sufficient to merely express opinions and make assertions about the perceived benefits of its application; such opinions and assertions must be supported by an appropriate level of evidence (see *VHT Perth Pty Ltd v Commissioner of Police & others* LC 26/2012 at [40] and [41]).
- 56 In the Commission’s view, the evidence in support of a consumer requirement for the proposed services is very limited indeed.
- 57 Further, the Commission has not been persuaded, on the basis of the evidence presented, that granting the application will contribute to any significant extent, if at all, to the proper development of the liquor industry, tourism industry or hospitality industries in the State, or increase diversity, as contemplated by section 5(1)(c) and section 5(2)(a) of the Act.
- 58 More significantly, however, the Commission is not satisfied that the applicant has demonstrated its ability to manage and control functions and events at which alcohol would form a substantial part of the applicant’s operation if the application is granted.
- 59 The proposal by the applicant to provide alcoholic cocktails and beverages changes the nature of the business considerably.

- 60 Alcohol is not an ordinary product and it is well known that the risk of harm resulting from illegal, offensive and anti-social behaviour tends to increase around venues where liquor is consumed.
- 61 The contention in the PIA that the applicant “aims to target those in the 20+ to 40+ bracket plus small business and community events specifically those with a higher than average disposable income and a mature and responsible approach to the consumption of alcohol” and that “the services of the applicant are aimed towards event organisers and low risk private events where entertainment, gourmet food and quality is prioritised over the consumption of alcohol”, is commendable, but there is no cogent evidence on how this objective would be realized, even if it were possible.
- 62 Moreover, there is no evidence that people on “higher than average disposable income” are any more mature in their approach to the consumption of alcohol than anybody else or how the applicant could discern who will be attending a function and their likely drinking behavior.
- 63 The applicant has indicated that: “each cocktail prepared by That Cocktail Guy contains only one standard drink”. Leaving aside the fact that cocktails are generally a mix of a number of different high content alcohol products, the fact the cocktails will be equivalent to one standard drink does not prevent attendees at a function drinking irresponsibly and to excess given the event may be over an extended period.
- 64 The Commission also notes that drinks are not intended to be limited to cocktails, but will also include pre-mixed spirits.
- 65 The applicant further indicates in the PIA that it requires its clients to provide details of the number of attendees and, if a large number of attendees are expected, the details of any security or safety precautions to ensure there is no risk to staff or attendees. The applicant goes on to say that the applicant will liaise directly with the event organiser, owner or occupier to ensure the event is effectively resourced with safety and security measures before it accepts the engagement of services from the customer.
- 66 However, there is limited, or no, evidence of what “security and safety precautions” and “adequate resources” comprise, or how the applicant will ensure the event is adequately resourced and how the applicant will control an event.
- 67 Although the Commission notes that the principal of the applicant has completed an accredited unit of “Manage Legislative Responsibilities for the Sale, Supply and Service of Liquor” in the training course offered by the Australian Hotels Association (WA), it is by means clear that if an approved manager is to be appointed, who that would be, whether there would be more than one for large events, whether the approved manager would be supplemented with crowd controllers, what the relationship would be between

the applicant, the approved manager(s) and the owner or organiser of the event and how the applicant and/or approved manager(s) would enforce the provisions of the Act.

- 68 It is evident from the PIA that the applicant is contemplating providing services to events of up to 200 people without any changes to the licence conditions, and is seeking the ability to provide services to larger functions and events (up to 1000 people) subject to additional conditions.
- 69 Even if a proportion of events were to be relatively small, the licence, if granted, would provide for the sale and service of alcohol at events frequented by the general public or at least by persons other than those personally known to the event organiser. Such events could not be described as low risk and although an additional condition may be imposed regarding the security and safety arrangements, the Commission is not satisfied on the evidence presented that the applicant has demonstrated its ability to, or how it would, properly manage and control such events.
- 70 Whilst there is no specific evidence of harm and ill-health presented, it is well known and is evident from the provisions of the Act that there is a level of alcohol related harm and ill-health in the community and a recognition that the sale and consumption of alcohol, if not properly managed and controlled, may exacerbate that level of harm and ill-health.
- 71 Further, the harm contemplated by the Act is not confined to consumers of alcohol and extends to harm caused to people other than the consumers of liquor. This includes harm which may occur through an increase in anti-social and injurious behavior due to the use of liquor and is not limited to physical harm (*Re Gull Liquor, Gingers' Roadhouse, Upper Swan* (1999) 20 SR (WA) 321).
- 72 Having regard to the approach outlined by His Honour, Allanson J, in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208, the Commission considers there is a real risk that the grant of the application could lead to an increase in the incidence of alcohol related harm in the community and that that risk and the resulting harm outweighs any potential benefits that could be said to result from the grant of the application.
- 73 Furthermore, it has not been demonstrated to the satisfaction of the Commission that there is not a risk of offence, annoyance, disturbance or inconvenience to people in the vicinity, or of a diminution on the amenity, of the area in which an event is organised, and that that risk is not unacceptable, notwithstanding the fact that the applicant does not itself provide entertainment or music at such events or functions.
- 74 In the final analysis, the Commission finds that the applicant has not provided sufficient evidence to satisfy the Commission the grant of the licence is in accordance with the provisions of the Act.

- 75 In summary, the Commission is not satisfied that the applicant has demonstrated that its business model meets the prescribed purpose set out in regulations 9A (13) and 9A (14A) of the Regulations.
- 76 However, irrespective of this finding, the Commission is not satisfied that the applicant has discharged its onus and demonstrated that the grant of the application is in the public interest.
- 77 Accordingly, the application to review the Director's decision is dismissed.

A handwritten signature in black ink, appearing to read 'Michael Egan', with a long horizontal flourish extending to the right.

MICHAEL EGAN
PRESIDING MEMBER