

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Wiseview Pty Ltd and Argyle Holdings Pty
(represented by Mr J Prior under instructions from McCallum, Donovan and Sweeney)

Premises: "The Claremont"

Date of Hearing: 27 March 2008

Commission: E. J. Watling

Other Parties: The Commissioner of Police
(represented by Ms. Diane Scaddan, Solicitor)

Ms Tanya Le Milliere, Executive Officer
Liquor Commission of Western Australia (recording the hearing).

Observers

Senior Sergeant Simon Parke, Police Department
Central Metro Alcohol & Drug Unit

Senior Constable Nathan Trenberth, Police Department
Central Metro Alcohol & Drug Unit

Mr. Barry Jones, *Argyle Holdings Pty Ltd*

Mr. Patrick Prindiville, *Argyle Holdings Pty Ltd*

Authorities Referred to in the Determination

Liquorland v Austie Nominees Pty Ltd

Hermal Pty Ltd v The Director of Liquor Licensing

Executive Director of Health v Lily Creek International Pty Ltd and Others

Woolworths Supermarket Derby

Date of Determination: 14 April 2008

Matter:

Application for a review of a decision of the Director of Liquor Licensing, decision No. A186438, delivered on 17 December 2007. That decision being:

Under Section 64 of the Act the following conditions are to be imposed on the license:

1. A maximum of 1 crowd controller, licensed under the *Security and Related Activities (Control) Act*, must be on duty and stationed in the "drive-thru" bottleshop at the licensed premises, between the hours of 6.00pm and 9.30pm on Thursday evenings.
2. The "drive-thru" bottleshop is not permitted to operate beyond 9.30pm on Thursday evenings.
3. Liquor purchased from the "drive-thru" bottleshop is prohibited from being consumed on the licensed premises.

Background:

On September 25, 2007, November 9, 2007 and November 19, 2007 the Central Metropolitan Alcohol and Drug Unit of the Police Department wrote to the Director Liquor Licensing relating to Police observations of the operations of the "drive-thru" bottle shop. The Police requested that the Director impose specific restrictive trading conditions on the license pursuant to the provisions of Section 64 of the *Liquor Control Act 1988*.

It was reported that on numerous occasions police observed a number of persons:

- Consuming liquor in the immediate vicinity of the licensed premises, the liquor being purchased from the "drive-thru" bottle shop;
- Consuming liquor in the "drive-thru" bottle shop area; and
- Purchasing liquor at the bottle shop and consume it whilst waiting in a queue to enter the licensed premises.

On 21 November 2007 the Director Licensing wrote to the licensee offering an opportunity to show cause why the proposed conditions (as listed above) should not be imposed.

On 7 December 2007 the licensee submitted reasons why the conditions should not be imposed on the license.

These reasons were not accepted and on 17 December 2007 the Director of Liquor Licensing imposed the conditions.

Application for Review:

On 24 December 2007 the licensee lodged an application under Section 25(1) and (2) of the Act for a review of the decision.

On 8 January 2008 the licensee lodged an application under section 26 of the Act for the grant of an interim order so that the decision would not take effect until such time as the Review Application had been determined.

On 18 January 2008 the licensee was advised that the Liquor Commission had determined not to grant the interim order.

The applicant sought a review of the decision for ultimately the three conditions which were placed on the license to be removed. Four grounds were submitted to support this request:

- The applicant was denied natural justice in that the decision was based on material that was not disclosed to the applicant;

The Commission closely considered the argument that there was a denial of natural justice in that certain materials – annexures A to D referred to in the report from Sergeant Parke, were not provided to the licensee.

As these annexures had no bearing on the decision of the Commission and as the information contained in the annexures relevant to The Claremont was the same as that in the covering memo of 25 September 2007, it is not considered that the fact that this material was not disclosed to the applicant constitutes a denial of procedural fairness and natural justice.

All of the relevant material upon which the Commission's decision has been reached was provided to the licensee, referred to in the Directors letter to the licensee dated 21 November 2007, and acknowledged in the licensee's letter of response of 7 December 2007.

Further, the show cause notice of 21 November 2007 provided the opportunity for the licensee to respond to the material that was provided, with the licensee's response of 7 December 2007 not challenging the veracity of the material but seeking to introduce management difficulties based on the distance factor between the location of the reported offences and the "drive-thru" bottle shop.

Earlier confirmed action by the licensee in the placing of signage in the "drive-thru" bottle shop advising that:

"Patrons arriving by foot will not be served after 9.00pm due to an agreement with authorities" and

“Single serves of alcohol will not be available on Thursday nights”

also indicate a knowledge and understanding of the issues by the licensee.

The Commission considers that the applicant was aware of all of the relevant material upon which the three conditions were based and the decision of the Commission reached.

- The Director erred in fact and/or law;

The Commission does not accept the argument that the Director has erred in fact and/or law on the basis of reliance on police reports and other sources of information.

The relationship between the Police Department and the Licensing Authority is set out in 155(d) of the Act which provides for the Director to act on police reports.

Also, in accordance with section 16(1)(b) of the Act the licensing authority may –

- (i) obtain information as to any question that arises for decision in such manner as it thinks fit; and
- (ii) make its determination on the balance of probabilities.

In identifying the three primary objectives of the Act [section 5(1)(a), (b) & (c)] in the decision there is no evidence to conclude that the Director excluded proper consideration of primary objective 5(1)(c). These objectives are conjunctive and have to be applied in a balanced approach in accordance with the overall provisions of the Act.

The Commission considers that the Director has acted in accordance with Liquor Control Act 1988 in applying the conditions imposed on 17 December 2007.

- There was insufficient material before the Director to support the ultimate finding;

The Commission considered that the police reports, in accordance with section 155 (d) of the Act constituted sufficient material upon which to reach a decision under section 64 of the Act.

- Even if there was sufficient material before the Director, the conditions imposed on the license will have no practical effect in achieving or rectifying the issues found by the Director in relation to the licensee's method of trade, or in the alternative are totally unnecessary.

In reviewing the decision, the Commission is of the opinion that a case has been made to support a variance to the conditions imposed.

Condition 1

The requirement for 1 crowd controller to be stationed in the “drive-thru” bottle shop between the hours of 6.00pm and 9.30pm on Thursday evenings does not address the issues in the reported offences, all of which took place after 9.30 pm.

Condition 2

The condition for the “drive-thru” bottle shop to close at 9.30pm on a Thursday is relevant to the issues, however, the same outcome should be achieved by the positioning of 1 crowd controller in the “drive-thru” bottle shop between the hours of 9.00pm and 12.00 midnight – the original trading hours of the “drive-thru” bottle shop.

Further, should the licensee adopt and administer appropriate trading policies in relation to the serving of walk-up patrons on Thursday evenings, the requirement for 1 crowd controller to be stationed in the area may not be necessary.

Condition 3

Considered to be adequately covered under section 65(1)(c) of the Act and applies to all licensed premises, therefore does not have to be specifically re-stated in this determination.


Determination

Under section 24(4) of the Act to vary the conditions imposed as follows:

- The “drive-thru” bottle shop is permitted to operate to 12.00 pm Thursday evenings.
- A minimum of 1 crowd controller, licensed under the Security and Related Activities (Control) Act, must be on duty and stationed in the “drive-thru” bottle shop at the licensed premises, between the hours of 9.00pm and 12.00pm on Thursday evenings.
- Should the licensee, after the expiration of a period of 6 months from this determination, be of the opinion that appropriate management and operational policies have been instituted to ensure that there are no sales to walk-up patrons on Thursday evenings, then the licensee may apply to the Director for further review the requirement for 1 crowd controller to be stationed in the “drive-thru” bottle shop between the hours of 9.00pm and 12.00pm on Thursday evenings.
- The third original condition that “liquor purchased from the “drive-thru” bottle shop is prohibited from being consumed on the licensed premises” is considered to be adequately covered under section 65 (1) (c) of the Act and applies to all licensed premises, therefore does not have to be specifically re-stated in this determination.

Costs

There is no order for costs.


E.J. Watling
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