

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : THE COURT OF APPEAL (WA)

**CITATION** : EXECUTIVE DIRECTOR, PUBLIC HEALTH -v-  
MEERS [2007] WASCA 187

**CORAM** : McLURE JA  
PULLIN JA  
BUSS JA

**HEARD** : 13 JUNE 2007

**DELIVERED** : 17 SEPTEMBER 2007

**FILE NO/S** : CACV 14 of 2006

**BETWEEN** : EXECUTIVE DIRECTOR, PUBLIC HEALTH  
Appellant

AND

PAMELA FAY MEERS as Trustee for MEERS  
FAMILY TRUST  
Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : LIQUOR LICENSING COURT OF WESTERN  
AUSTRALIA

**Coram** : GREAVES J

**Citation** : RE WONGAN LIQUOR; WONGAN LIQUOR -v-  
KINGSWAY HOLDINGS PTY LTD & ORS [2006]  
WALLC 2

**File No** : LLC 4 of 2005

*Catchwords:*

*Liquor Licensing Act 1988 (WA)* - Extended trading permit - Discretion to grant or refuse application - Whether primary judge failed to take into account relevant considerations

*Legislation:*

*Liquor and Gaming Legislation Amendment Act 2006 (WA)*  
*Liquor Licensing Act 1988 (WA)*, s 5, s 28, s 28(2), s 33, s 33(1), s 38, s 60(1), s 60(4)(g), s 69(8a), s 76, s 97, s 97(3a), s 98S(1), s 98D(2), sch 1A

*Result:*

Appeal dismissed

*Category:* B

**Representation:**

*Counsel:*

Appellant : Mr N C Monahan  
Respondent : Mr D Mossenson

*Solicitors:*

Appellant : State Solicitor for Western Australia  
Respondent : Lavan Legal

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

*Elias v Commissioner of Taxation* (2002) 123 FCR 499  
*Esber v Commonwealth of Australia* (1992) 106 ALR 577  
*Friends of Hinchinbrook Society Inc v Minister for the Environment* (1997) 147 ALR 608  
*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  
*Nestle Australia Ltd v Commissioner of Taxation (Cth)* (1987) 16 FCR 167  
*Re Romato; Ex parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286

**Re Subi Cleanskins; Doinwell Investments Pty Ltd v Executive Director Public  
Health [2005] WALLC 15  
The Queen v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327**

McLURE JA

1     **McLURE JA:** This is an appeal under s 28 of the *Liquor Licensing Act 1988* (WA) (the Act) against the decision of Greaves J granting an extended trading permit to the respondent who was at the same time granted a conditional liquor store licence for premises in Wongan Hills. The extended trading permit authorised Sunday trading. There is an appeal to this Court only on a question of law (s 28(2) of the Act).

2             The Executive Director of Public Health (the Executive Director) intervened in the proceedings below pursuant to s 69(8a) of the Act to oppose the application for an extended trading permit. The Executive Director adduced expert evidence from two witnesses. Ms D Hendrie, a lecturer in the School of Population and Health at the University of Western Australia, gave evidence that the grant of a Sunday extended trading permit to the Wongan Hills liquor store would create commercial pressures on other licensees in surrounding areas to seek similar permits. Dr T Chikritzhs gave evidence that the higher the density of liquor outlets in an area the higher the alcohol consumption and alcohol-related harm, including injuries due to violence and road accidents. According to this witness, non-metropolitan regions of Western Australia have some of the highest levels of alcohol consumption and related harm in Australia and that per capita pure alcohol consumption in non-metropolitan Western Australia is over 40 per cent greater than in metropolitan areas.

3             The Executive Director had also intervened in an application for a Sunday extended trading permit for a liquor store in Subiaco: *Re Subi Cleanskins; Doinwell Investments Pty Ltd v Executive Director Public Health* [2005] WALLC 15 (the *Subi Cleanskins* case). The issues and evidence in both cases were similar.

4             Greaves J accepted Ms Hendrie's evidence in the *Subi Cleanskins* case. He said:

I find it very likely that the grant of this application may result in liquor store licensees in the affected area, the metropolitan area, and throughout the State, making application for Sunday extended trading permits and making such applications repeatedly. I find that if each application is determined on its merits and the discretion is exercised consistently, it is obvious some applications will succeed [22].

5             Greaves J also accepted Dr Chikritzhs' evidence in the *Subi Cleanskins* case. He said:

Dr Chikritzhs concludes it can be predicted that there is likely to be a significant increase in liquor consumption and related harm in Western Australia, if this and subsequent applications for Sunday extended trading

permits are granted. In my opinion, on the evidence, the court should find that the increase in liquor consumption and related harm that Dr Chikritzhs predicts is likely if this and subsequent applications for Sunday extended trading permits are granted [29].

6 Greaves J incorporated [30] - [35] of his reasons in the *Subi Cleanskins* case into his reasons below (at [23]). He said:

30. It remains to determine whether the conclusions I have reached on the evidence of Ms Hendrie and Dr Chikritzhs should lead to the refusal of this application in the public interest. The policy of the Act is clear: the court should exercise its discretion in order to minimise harm or ill-health to people or any group of people, due to the use of liquor, where it is found that is likely to occur as a result of the grant of an application such as the present.
31. The court has found that an increase in liquor consumption and related harm is likely if this *and subsequent applications are granted*. The court has not found, and it is not open to find, that the grant of this application alone is likely to increase liquor consumption and related harm in the affected area and elsewhere.
32. The question for determination is whether the court should refuse this application on its merits in the exercise of the discretion under s 33(1) of the Act. In my opinion it should not refuse the application. Under the Act, the merits of any one application are paramount in its determination.
33. It follows that while I have found that an increase in liquor consumption and related harm is likely if this and subsequent applications are granted, that finding should not fetter the exercise of the discretion in this or any one case. Implicit in such a fetter is a policy that extended trading permits for Sunday trading should not be granted to liquor store licensees in this affected area or elsewhere. The determination of any one case in accordance with such a policy would not in my opinion be in accordance with the scheme of the Act, including the primary objects, as previously explained in the Full Court and in this court.
34. It is important to observe that this decision itself should not be regarded as limiting the exercise of discretion in future cases in different circumstances. While the discretion under the Act must be exercised consistently, it is obviously not fettered by any one decision.
35. I have observed that the grant of this application is otherwise in the public interest. I conclude, therefore, that the application should be granted. (emphasis in original)

**The grounds of appeal**

- 7           The appellant contends that Greaves J erred in law:
1.       by declining to have regard to evidence which established the probability of a relevant future event, as a result of the grant to the respondent of an extended trading permit for Sunday trading, that being an increase in alcohol-related harm;
  2.       in the exercise of his discretion under s 33(1) of the Act by failing to:
    - (a)     assess the significance of that future event, having regard to its likelihood and its potential impact in terms of alcohol-related harm; and
    - (b)     attribute the appropriate weight to the 'public interest' engaged by that future event, and take that into account in the balancing process;
  3.       in that the purported exercise of the discretion under s 33(1) of the Act consequently miscarried.

8           The grounds of appeal do not clearly identify the question of law said to give rise to a right of appeal under the Act. As I understand the effect of the oral submissions put on behalf of the appellant, the proposition is that Greaves J failed to take into account a relevant consideration, being an increase in alcohol-related harm.

**The Scheme of the Act**

9           Significant amendments were made to the Act by the *Liquor and Gaming Legislation Amendment Act 2006* (WA) (Amendment Act) which commenced after the decision under appeal was made. It is accepted that those amendments do not apply to the determination of whether the primary Judge made an error of law. Section 28 as it was prior to the Amendment Act applies to this appeal: cl 4(2) of sch 1A of the Act. The following references are to the Act as it was prior to the commencement of the Amendment Act.

- 10          Section 5 of the Act identifies its primary objects which 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.

11 Section 33 of the Act vests a discretion in the licensing authority, relevantly defined to include the Liquor Licensing Court, to grant or refuse applications under the Act. Section 33 materially provides:

(1) Subject to this Act, the licensing authority has an absolute discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers in the public interest.

(2) An application -

(a) may be refused, even if the applicant meets all the requirements of this Act; or

(b) may be granted, even if a valid ground of objection is made out,

but is required to be dealt with on its merits, after such inquiry as the licensing authority thinks fit.

12 Section 97 of the Act deals with the hours of trading. Under s 97(2), on a day other than Sunday, Good Friday, Christmas Day or Anzac Day the permitted hours of trading under a liquor store licence are between 8 am and 10 pm. Section 97 makes no provision for Sunday trading under a liquor store licence. That is not the case for a hotel licence whose permitted hours on a Sunday are between 10 am and 10 pm (s 97(3)(a)).

13 Section 76 of the Act provides for applications for extended trading permits. An extended trading permit authorises the licensee to sell and supply liquor in accordance with the terms of the permit (s 60(1)). An extended trading permit may be issued for extended trading hours on Sunday (s 60(4)(g)).

14 Section 69(8a) relates to the powers of the Executive Director. It provides:

The Executive Director, Public Health ... may intervene in proceedings before the licensing authority for the purpose of introducing evidence or making representations in relation to the harm or ill-health caused to people, or any group of people, due to the use of liquor, and the minimization of that harm or ill-health.

15 The Amendment Act introduced s 98D(1) which changed the permitted hours under a liquor store licence to include Sunday trading from 10 am to 10 pm other than on Anzac Day. However, the permitted Sunday hours apply only to liquor stores in the metropolitan area

(s 98D(2)). As a result of the Amendment Act, the appellant discontinued its appeal in the *Subi Cleanskins* case.

- 16 The primary Judge referred to the 'affected area'. This term appears in s 38 of the Act which sets out the requirements for, inter alia, the grant of a liquor store licence. The applicant for such a licence must satisfy the licensing authority, having regard to specified matters, that the licence is necessary in order to provide for the reasonable requirements of the public for liquor and related services in the affected area. The primary Judge accepted that the discretion in s 33 was not confined to matters within or concerning the affected area.

### Analysis

- 17 A relevant consideration is one which a decision-maker is expressly or impliedly obliged to take into account in the course of reaching the decision under review. The relevant legislation may specify the particular matters that are to be considered or the obligation may arise by implication from the subject matter, scope and purpose of the legislation: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39 - 40.

- 18 Having regard to the primary objectives of the Act and the Executive Director's right to intervene in relation to liquor-related ill-health and harm, there can be no doubt that a proven increase in alcohol-related harm directly or indirectly related to the grant of an application under the Act is a mandatory consideration that the primary Judge was obliged to consider. That includes the direct and indirect effect of the grant in areas inside and outside the affected area.

- 19 <sup>11</sup> The primary objectives of the Act implicitly acknowledge the relationship between the grant of applications under the Act and the associated harm and ill-health that directly and indirectly flow from the availability and use of alcohol. The competing tensions have to be balanced and that is reflected in a harm minimisation objective rather than a zero tolerance policy.<sup>11</sup> However, the weight to be given to the relevant considerations can vary from time to time having regard to evidence as to the overall effect in the community, or sections of it, of the discretionary approval of applications under the Act. The findings and the Executive Director's resulting concern about the extent of alcohol use and harm are relevant considerations in the exercise of the discretion to authorise trading outside statutorily permitted hours.

Bdd



20 There are divergent views on the question of what is required to satisfy the duty to take into account relevant considerations. See Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3<sup>rd</sup> ed, 2004) 258 - 260. In my respectful opinion, the approach of Hill J in *Friends of Hinchinbrook Society Inc v Minister for the Environment* (1997) 147 ALR 608 stops short of an inappropriate merits review and I would apply it. He said:

There is always a difficulty when a statute provides that a decision-maker shall 'have regard to' a particular matter or series of matters. While it is clear that what is meant is that the decision-maker must apply his mind to the matter or matters stipulated, and 'take them into account and give weight to them' ... it leaves it open what weight or influence each of the particular matters is to have in the decision to be made (638). //

21 See also *The Queen v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 333 (Gibbs CJ). What is uncontroversial is that a matter is not taken into account by being noticed and erroneously discarded as irrelevant: *Nestle Australia Ltd v Commissioner of Taxation (Cth)* (1987) 16 FCR 167, 184 (Wilcox J); *Elias v Commissioner of Taxation* (2002) 123 FCR 499, 512 (Hely J).

22 On my reading of the primary Judge's reasons, in particular [23] (quoting [33] from the *Subi Cleanskins* case), he referred to the relevant matters but dismissed them as irrelevant. I come to this conclusion because of the primary Judge's erroneous conclusion that to take into account the findings necessarily resulted in a policy that Sunday extended trading permits should never be granted in the affected area or elsewhere. In other words, the primary Judge concluded that if he took the findings into account they would prevent the grant of all Sunday extended trading permits and that such an outcome was inconsistent with the primary objects and scheme of the Act.

23 The non-sequitur in the primary Judge's reasoning is that the findings necessarily resulted in a policy that foredoomed all such applications. The findings do not, and could not lawfully, have that effect. A policy cannot be treated as a fixed determinative rule regardless of the merits of an individual case. This Court has previously upheld a policy relating to the exercise of the discretion in relation to extended permits that did not constitute an improper fetter on the exercise of the discretion: *Re Romato; Ex parte Mitchell James Holdings Pty Ltd* [2001] WASCA 286. The Act has since been amended to permit Sunday trading under liquor store licences as of right in the metropolitan area but not elsewhere. That change in the legislative scheme is a matter that would need to be

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considered in the formulation of any lawful policy in relation to the exercise of the discretion under the Act as amended. However, whether or not the decision-maker chooses to adopt a policy, the weight to be given to all relevant considerations, and in particular to those that are in tension, will no doubt affect the approach taken to the future exercise of the discretion.

24 The primary Judge, having failed to take into account a relevant consideration, erred in the exercise of his discretion in granting the extended trading permit to the respondent. Accordingly, the decision must be set aside. The usual and appropriate course in such a case is to remit the matter to the specialist Liquor Licensing Court for its determination of the application in accordance with this Court's reasons. However, the Liquor Licensing Court was abolished by the Amendment Act and replaced by the Liquor Commission. Accordingly the matter should be remitted to the Liquor Commission.

25 This Court did not hear submissions as to whether, on the rehearing, the Liquor Commission must apply the law as it stood before the commencement of the Amendment Act, as to which see *Esber v Commonwealth of Australia* (1992) 106 ALR 577. The parties will need to address the Commission on that issue.

26 For these reasons, I would allow the appeal, set aside the decision of Greaves J granting an extended trading permit to the respondent and remit the respondent's application for such a permit to the Liquor Commission for determination in accordance with these reasons.

27 **PULLIN JA:** I have had the benefit of reading McLure JA's reasons for decision in draft. Her Honour has set out the facts, the grounds of appeal and the relevant passages from the reasons for decision of Greaves J.

28 I have reached the conclusion that the appeal should be dismissed for the following reasons.

29 The evidence given by Ms Hendrie and Dr Chikritzhs in this case was the same evidence they gave in *Re Subi Cleanskins; Doinwell Investments Pty Ltd v Executive Director Public Health* [2005] WALLC 15. The findings his Honour made in the *Subi Cleanskins* case, based on that evidence, were findings he made again in this case. His Honour, in effect, found in the *Subi Cleanskins* case, based on the evidence of Ms Hendrie and Dr Chikritzhs, that an increase in liquor consumption and related harm was likely if the *Subi Cleanskins* case and subsequent applications were granted. His Honour concluded, in effect, that the grant

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the Wongan Hills application, alone, would not result in an increase in liquor consumption and related harm in the affected area or elsewhere.

35 Ground 2(b) asserts that the judge failed to attribute the appropriate weight to the 'public interest', and to take that into account in the balancing process. A ground complaining about the appropriateness of the weight to be given to a future event does not raise a question of law and the ground must be dismissed for that reason.

36 Ground 3 depends entirely upon success in relation to the first two grounds. I would dismiss the first two grounds and therefore ground 3 must also be dismissed.

37 The appeal must be dismissed.

38 **BUSS JA:** The material facts, the reasoning of the learned primary Judge and the grounds of appeal are summarised in the reasons of McLure JA.

39 I agree with McLure JA that the learned primary Judge accepted that under s 33 of the *Liquor Licensing Act 1988 (WA)* (the Act) the discretion to grant or refuse the application was not confined to matters within or concerning the affected area.

40 On my reading of the learned primary Judge's reasons, however, his Honour:

- (a) found, on the basis of the evidence of Ms Hendrie and Dr Chikritzhs, that if the application in this particular case and subsequent applications elsewhere in Western Australia for extended trading permits, to authorise licensees of liquor stores to trade on Sundays, were to be granted, there would be an increase in liquor consumption and related harm in Western Australia generally;
- (b) found that the grant of the application in the particular case before him was not likely to increase liquor consumption and related harm in the affected area or elsewhere in Western Australia;
- (c) decided that, on the whole of the facts and circumstances of the particular case before him, for the purpose of determining that case and to the extent that the findings at (a) and (b) above were incompatible with each other:
  - (i) no weight should be accorded to the finding at par (a) above; and

- (ii) decisive weight should be given to the finding at par (b) above; and
- (d) acknowledged that whether or not an extended trading permit should be granted, in a particular case, to authorise the licensee of a liquor store to trade on Sundays should be evaluated on a case by case basis, and the weight to be accorded to each of the competing considerations, the subject of the findings at pars (a) and (b) above, may differ from case to case.

41 In my opinion, each ground of appeal is without merit. As to ground 1, the learned primary Judge did not decline to have regard to the evidence of Ms Hendrie and Dr Chikritzhs. Rather, having considered that evidence, his Honour decided that, in the particular case before him, he should accord their evidence no weight. That was a decision which was reasonably open to him. As to ground 2(a), the learned primary Judge did not fail to assess the significance of the relevant future event, namely, an increase in liquor consumption and related harm in Western Australia generally was likely if the particular application by the present respondent and similar applications by other liquor store licensees elsewhere in Western Australia were granted. As I have mentioned, his Honour decided, on the whole of the facts and circumstances of the particular case before him, that decisive weight should be given to the finding that the grant of the particular application by the respondent was not likely to increase liquor consumption and related harm in the affected area or elsewhere in Western Australia, and that no weight should be accorded to the finding based on the evidence of Ms Hendrie and Dr Chikritzhs. As to ground 2(b), the complaint to the effect that the learned primary Judge failed to attribute appropriate weight to the 'public interest' associated with the relevant future event, and take that into account in the 'balancing process', does not constitute a ground of appeal on a question of law, as required by s 28(2) of the Act. As to ground 3, this ground alleges that the learned primary Judge's exercise of discretion under s 33 of the Act miscarried in consequence of the errors alleged in grounds 1 and 2. Ground 3 must fail in that neither ground 1 nor ground 2 has been established.

42 I would dismiss the appeal.