

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE FULL COURT (WA)

CITATION : HERMAL PTY LTD -v- DIRECTOR OF LIQUOR LICENSING [2001] WASCA 356

CORAM : WALLWORK J
TEMPLEMAN J
EINFELD AJ

HEARD : 6 SEPTEMBER 2001

DELIVERED : 14 NOVEMBER 2001

FILE NO/S : CIV 2758 of 2000

MATTER : An Application for a Writ of *Certiorari* against the Director of Liquor Licensing

BETWEEN : HERMAL PTY LTD
Applicant

AND

DIRECTOR OF LIQUOR LICENSING
Respondent

Catchwords:

Liquor licensing - Hotel licence - Whether trading hours should be extended - Whether Government policy is revealed - Whether necessary for "exceptional public interest considerations" - Whether procedural fairness

Legislation:

Liquor Licensing Act 1988

Result:

Director's decision quashed
Application remitted to be dealt with according to law

Category: A

Representation:

Counsel:

Applicant : Mr A R Beech
Respondent : Ms C J Thatcher

Solicitors:

Applicant : Monaghan & Associates
Respondent : State Crown Solicitor

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

Chiropractors Association v Work Cover [1999] SASC 470
Craig v South Australia (1995) 184 CLR 163
Haoucher v The Minister for Immigration and Ethnic Affairs (1991) 69 CLR 648
Palace Securities v Liquor Licensing (1992) 7 WAR 241
Water Conservation and Irrigation Commission (New South Wales) v Browning (1947) 74 CLR 492

Case(s) also cited:

A-G of Hong Kong v Ng Yuen Shniu [1983] 2 AC 629
Annetts v McCann (1990) 170 CLR 596
Century Metals & Mining NL v Yeomans (1989) 40 FCR 564
Cox v O'Donnell (1992) 34 FCR 42
Darling Casino Ltd v NSW Casino Control Authority (1997) 191 CLR 502
Executive Director of Health v Lily Creek International Pty Ltd [2000] WASCA 258; (2000) 22 WAR 510
Jericho Nominees Pty Ltd v Dileum Pty Ltd (1992) 6 WAR 380

Kioa v Est (1985) 159 CLR 550
Liquor Stores Association of WA v Manya Holdings [2000] WASCA 21
Minister for Aboriginal Affairs v WA (1996) 67 FCR 40
Peninsula Anglican Boys School v Ryan (1985) 7 FCR 415
Perron & The Northern Territory Planning Authority v Central Land Council
(1985) 6 FCR 226
Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD
634
Re Minister for Immigration; Ex parte Miah (2001) 75 ALJR 889
Re Minister for Mines; Ex parte Roberts (1997) 18 WAR 408
Re Universal Bar & Grill (1994) 10 SR (WA) 71
Rintag Pty Ltd v West Coast Hospitality Pty Ltd, unreported; FCt SCt of WA;
Library No 990194; 20 April 1999
WA Hotels Association (Inc) v Mad Dog Mexican Pty Ltd [1999] WASCA 149

1 **WALLWORK J:** This proceeding involves the return of an order *nisi* for a writ of *certiorari* concerning the refusal of an application on behalf of the applicant to be allowed to trade for an extra hour on Saturday nights and an extra two hours on Sundays. The proposed trading hours were from 12.00 midnight to 2.00 am the following morning on Saturday nights and from 10.00 pm to 12.00 midnight on Sunday nights. The application was determined pursuant to s 76(2)(c) of the *Liquor Licensing Act 1988* ("the Act"), which allows applications to be determined by the Director "at discretion" without a hearing in open court.

2 Extended trading permits are provided for in s 60 of the Act and allow licensees to sell and supply liquor according to the tenor of the permit "upon such terms as are specified in the permit at times, in circumstances, or in a place, to which that licence would not otherwise apply". Section 60(4) of the Act sets out some of the purposes for which an extended trading permit may be issued and includes such situations as permits for dining rooms and restaurants and also clubs on specified special occasions. The purposes also include extended trading permits for special functions. Section 60(5) provides that nothing in s 60(4) precludes the licensing authority from issuing an extended trading permit for a purpose to which that subsection does not refer.

3 Section 97 of the Act provides for the general hours of trading by providing, amongst other things, that:

"... a licensee is authorised to sell liquor during -

- (a) such of the permitted hours specified in this section; and
- (b) such of the hours that may be specified under an extended trading permit,

as the licensee wishes to do so."

It is provided in s 97(2) that on a day other than a Sunday, Good Friday, Christmas Day or Anzac Day, the permitted hours under a hotel licence are between 6.00 am and midnight, on a New Year's Day up to 2.00 am and at any time if the sale is to a lodger. The hotel licence hours on a Sunday are between 10.00 am and 10.00 pm.

4 The objects of the Act are set out in s 5 and the primary objects are to regulate the sale, supply and consumption of liquor and to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor. Section 5(2) provides relevantly:

"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 objects -

- (a) to regulate, and to contribute to the proper development of, the liquor, hospitality and related industries in the State;
- (b) to cater for the requirements of the tourism industry;
- (c) to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand;
- (d) ...
- (e)"

5 Importantly, s 33 of the Act 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.

(3) ...

(4) ...

(5) ...

(6) ...

(6a) ...

(7)"

6 In *Palace Securities v Liquor Licensing* (1992) 7 WAR 241, at 249 and following, Malcolm CJ discussed the meaning of s 33(1) of the Act and said that the discretion in that subsection was an "absolute discretion" to grant or refuse an application on any ground or for any reason that the licensing authority considers in the public interest. His Honour referred to the words of Dixon J, as he then was, in *Water Conservation and Irrigation Commission (New South Wales) v Browning* (1947) 74 CLR 492, at 505, where Dixon J noted that where the discretion was described as "absolute", or the matter was "entirely" within the discretion of the relevant body, the discretion was confined to the scope and subject of the Act and was not arbitrary and unlimited.

7 In the *Palace Securities* decision Malcolm CJ said at 250:

"This is not, of course, a case where the context provides no positive indication of a consideration by which the decision is to be made. The reference is to the 'public interest'. In this respect s 5 of the Act is relevant, as are the provisions of s 38 relating to 'the reasonable requirements of the public'"

8 In the course of his reasons for decision in this case, the Director said, amongst other things:

"... In my opinion it would be an abuse of statutory power to allow licensed premises to generally extend their hours of trading well beyond the permitted hours by way of issuing ongoing extended trading permits. In effect this would create the situation where the Director of Liquor Licensing is able to circumvent the intent of Parliament and the scheme of trading hours under the *Liquor Licensing Act 1988*. I am also mindful of the May 1998 Liquor Licensing Amendment Bill, where there was no recommendation given by the Government to allow the Director of Liquor Licensing to issue extended trading permits to hotels and taverns for periods of two or three hours beyond the permitted closing time. Yet the Government had the opportunity to state their support in principle for this to occur.

Each application must be considered on its merits and in the public interest. I am aware that the police are concerned with a general extension of trading hours for the Roebuck Bay Hotel and the extra problems that this can cause when large groups of patrons enter the streets during the early hours of the morning. In this case, I have no guidance as to what the Government's

policy is in relation to late night trading in places like Broome. Until the State Government amends the Act to allow hotels and taverns to trade until 2.00 am or 3.00 am through the use of extended trading permits, I will continue to refuse applications, unless there are exceptional public interest considerations."

9 A little further on in his reasons, the Director said:

"After considering all the evidence before me I am not convinced that the public is being substantially inconvenienced or that there are other exceptional circumstances for approving the extended trading hours as sought. For these reasons I would use the discretion under s 33(1) of the Act and refuse the application in the public interest."

10 It can be seen from the Director's reasons that the Director thought he had no guidance as to what the Government's policy is in relation to late night trading places in places like Broome. The Director also said that he would continue to refuse applications unless there were exceptional public interest considerations. He concluded that he was not convinced that the public was being substantially inconvenienced "or that there are other exceptional circumstances for approving the extended trading hours as sought".

11 The Director does have guidance as to what the Government's policy is in relation to late night trading places like Broome in the form of the provisions of the Act referred to above. For example, s 5(2) refers to some of the objects of the Act as being "to contribute to the proper development of the liquor, hospitality and related industries in the State". It also refers to catering "for the requirements of the tourism industry". The section also refers to facilitating the use and development of licensed facilities "reflecting the diversity of consumer demand".

12 In my view, when the Director said: "Until the State Government amends the Act to allow hotels and taverns to trade until 2.00 am or 3.00 am for the use of extended trading permits, I will continue to refuse applications unless there are exceptional public interest considerations", the Director was not applying the correct criteria to the consideration of the application. Some of the correct criteria are referred to earlier in these reasons.

13 In my view, it was correctly put for the applicant in this case that the test to be applied was a public interest test. Incorporated in that concept may be a variety of matters, such as the existing demand or the demands

of tourism. By saying that he would continue to refuse applications unless there were exceptional public interest considerations, the Director was narrowing the test in s 33(1) and not truly exercising his discretion in the particular case as he is required to do under the Act. Rather he was stating a policy different to the policy expressed in the Act which allows a decision to be made after the consideration of very broad criteria - see for example s 60(5) which is referred to earlier in these reasons.

14 In *Craig v South Australia* (1995) 184 CLR 163, at 179, five Justices of the High Court said:

"If such an administrative tribunal falls into an 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 mistake in 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."

15 In this case, in my opinion, the Director made a jurisdictional error by asking himself the wrong questions when considering the application. The order *nisi* should therefore be made absolute and the matter returned to the Director to enable him to reconsider the application.

16 The above reasons dispose of this matter. However, although it is not necessary for the decision in this case, it might be helpful if some comments are made on ground (A), which is:

"In making his decision in respect of the application to vary extended trading permit 3243, the Director breached the rules of natural justice by -

- (i) denying the applicant a fair opportunity to present its case; and
- (ii) failing to provide the applicant with the opportunity to comment, respond to, or lead evidence in response to evidence adverse to the applicant's case submitted to him by a representative by the West Australian Police Department."

17 The focus of that ground is that apparently the Director, before refusing the application, had received a written submission from a Senior Sergeant of Police and had also had discussions with that officer prior to making his decision. The applicant complains that it was given no notice of the written submission or the discussions.

18 It was submitted that the absence of an opportunity to comment upon, respond to or lead evidence in relation to the matters raised in the written and oral communications with the Senior Sergeant, constituted a failure by the Director to comply with the requirements of procedural fairness and that the applicant should have been given the opportunity to respond to the material which had been taken into account by the Director and was adverse to the application of the applicant. It was submitted that it is apparent from the reasons of the Director that there was a failure in this respect . It is said in the second paragraph of the reasons that:

"... Senior Sergeant G Fuller and Sergeant C Lockhart provided separate submissions, explaining the difficulties experienced by the Police concerning the operation of the Roebuck Bay Hotel and the general impact of extended trading hours in Broome."

There is also a further comment in the Director's reasons:

"From a Police perspective, it is therefore inappropriate to approve any further extension of trading hours at this stage."

19 It was submitted that matters in the Senior Sergeant's letter adverse to the applicant were that absence of need had been suggested, as had community disapproval. There had also been a suggestion of major alcohol problems and social issues. It was further submitted that there was no evidence of the content of the undisclosed conversation between the Director and the Senior Sergeant and that the content of the Senior Sergeant's letter of 12 September supports the inference that in the course of the discussions, the Sergeant had said things adverse to the application; that in the circumstances the proper conclusion is that the undisclosed material was adverse to the applicant and the failure to give the applicant an opportunity to respond to the adverse comment constituted a breach of the requirements of procedural fairness.

20 In response to those submissions, it was said for the Director that the report from Senior Sergeant Fuller agreed with the applicant's earlier response to the Acting Inspector's objections and made comment on matters of policy (not matters personal to the applicant) in maintaining an objection generally to the extension of trading hours in Broome. It was

submitted that to the extent that the Senior Sergeant's report was adverse to the application, it was adverse on broad policy considerations and therefore the obligation to afford procedural fairness does not arise. It was argued that the Director clearly did not refuse the applicant's application on the basis of adverse matters personal to the applicant but that it was refused because the Director was not convinced that the public was being "substantially inconvenienced" or that there were "other exceptional circumstances for approving the extended trading hours as sought". It was contended that if the obligation to accord natural justice does arise, it arises only in relation in matters of reputation or personal qualities or fitness of the applicant - *Chiropractors Association v Work Cover* [1999] SASC 470, per Bleby J at 44 - 65.

21 In the letter of 12 September from the Senior Sergeant, it is stated amongst other things

"I maintain our overall objection to allowing hotels in Broome to trade until 12.00 midnight on Sundays. There is no need for it to occur and this application is only based on commercial reasons to keep pace with the Mangrove Hotel. The local police objected to that hotel ETP at the time without success and I will continue to voice the disapproval of the Broome community and allow in the unwarranted ETPs. I recently successfully argued for the local nightclubs ... to be closed at 0200 hours to address the major alcohol problems in town. All that good work will come undone if the local hotels are allowed to extend their licences unchecked to take advantage of the circumstances of the nightclubs.

I accept that the deregulation of hotel trading is inevitable in the years ahead but the communities must be protected from the social issues that come with these decisions until they have time to put in place the infrastructure to deal with them.

My argument against the Roebuck's application has been weakened by the Mangrove Hotel decision and I would like to suggest that if this application is approved for the Saturday night, that all further ETPs be refused until an assessment can be made of the impact on Broome."

22 In *Chiropractors Association v Work Cover* (*supra*), Bleby J, with whose reasons Duggan and Debelle JJ agreed, said at [48]:

"... See *Annetts v McCann* (1990) 170 CLR 596 per Mason CJ, Deane and McHugh JJ at 598. That passage was cited with approval in the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576 where it was said:

'It is now clear that a duty of procedural fairness arises, if at all, because the power involved is one which may "destroy, defeat or prejudice a person's rights, interests or legitimate expectations".' "

23 Bleby J, in par 49, said:

"Brennan J, on the other hand in *Ainsworth v Criminal Justice Commission* went further at 583:

'In a majority of cases in which an act or decision is judicially reviewed, an exercise of statutory power affects the applicant's rights adversely or there is a failure to exercise a statutory power which, if exercised, would or might affect the applicant's rights beneficially. In such cases, where a person's rights or liabilities will or might be affected by the exercise or non-exercise of a statutory power following upon an inquiry, that person is *prima facie* entitled to be accorded natural justice in the conduct of the inquiry.' "

24 Bleby J was of the opinion that Brennan J had taken the test further than any other member of the High Court and without judicial support elsewhere. His Honour said he would not be prepared to act on that dictum "in the light of the clear statement of principle of other members of the court in *Annetts v McCann* and *Ainsworth v Criminal Justice Commission*".

25 In his judgment, Bleby J also referred to the words of McHugh J in *Haoucher v The Minister for Immigration and Ethnic Affairs* (1991) 69 CLR 648, at 680, where his Honour said:

"Prospective, as well as existing, rights, interests, privilege and benefits are now within the domain of natural justice. Just as the common law has traditionally given a person a right to be heard before the exercise of a statutory power prejudices any of his or her existing rights or interests, so the common law now gives a person a right to be heard before the exercise of a

statutory power prejudices some right, interest, privilege or benefit which that person can legitimately expect to obtain or enjoy in the future. The common law right to be heard may, of course, be excluded by statute. But an intention to exclude it 'is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations': *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396."

26 If, after the application of the correct criteria in the *Liquor Act*, the applicant in this case could legitimately expect to obtain an extension of the trading hours, and if a communication such as the one in question prejudiced that legitimate expectation, then in my view an adverse decision by the Director would prejudice the applicant's interests within the meaning of the reasons of the Justices of the High Court in *Ainsworth* and the reasons of McHugh J in *Haoucher* (*supra*).

27 It may be in this case that the applicant could have called evidence before the Director to dispute the Senior Sergeant's proposition in the letter referred to above that there was no need for hotels to be given an opportunity in Broome to trade until 12.00 midnight on Sundays and the further proposition that the relevant application was only based on commercial reasons to keep pace with the Mangrove Hotel.

28 The Sergeant had also said: "All that good work will come undone if the local hotels are allowed to extend their licences unchecked to take advantage of the circumstances of the nightclubs". It might be that the applicant would have wished to call evidence or comment on that statement and that the representations of the Senior Sergeant to some degree influenced the decision of the Director to refuse the application.

29 In my view, procedural fairness in the sense discussed above is required to be exercised by the Director when considering applications such as the one in question.

30 **TEMPLEMAN J:** I have read in draft the reasons to be published by Wallwork J. I agree with his Honour that the Director of Liquor Licensing did not exercise his discretion in a proper manner when he declined to grant an extended trading permit to the applicant, pursuant to s 33 of the *Liquor Licensing Act 1988*.

31 In his reasons, the Director observed, correctly in my view, that "each application must be considered on its merits and in the public interest". However, he went on to say that he had no guidance about the

Government's policy "in relation to late night trading in places like Broome": and that until the Act was amended to allow hotels and taverns to trade until 2.00 or 3.00 am through the use of extended trading permits, he would continue to refuse applications for such permits unless there were "exceptional circumstances".

32 A little later in his reasons the Director repeated that he was applying an exceptional circumstances" criterion. He said:

"After considering all the evidence before me, I am not convinced that the public is being substantially inconvenienced or that there are other exceptional circumstances for approving the extended trading hours as sought."

33 Although the Government has not formulated any policy specifically for places like Broome, it has formulated a general policy for the implementation of the Act. That policy is contained in s 5, in which the objects of the legislation are set out. These are the considerations which the Director must take into account when exercising the very broad discretions arising under s 60, on an application for an extended trading permit.

34 In my view, the crucial point here is that the Act does not require an applicant for an extended trading permit to demonstrate that there are exceptional circumstances which warrant a departure from the normal trading hours. The Director therefore took an irrelevant consideration into account in finding that there were no such circumstances.

35 Counsel for the Director submitted that in referring to a requirement for exceptional circumstances, the Director was saying only that there must be something "different" about the circumstances in which the application is made, so as to make out a case for departing from the trading hours set by s 97 of the Act.

36 I do not accept that submission because I do not think the Director was using the word 'exceptional' in that sense. Even if that was his intended meaning, I think the result would be the same: the criterion for granting an extended trading permit is not that circumstances be "different", any more than they be "exceptional".

37 The only question is whether, having regard to all the circumstances and the legislative intention, an extended trading permit is justified. In answering that question the Director has a wide discretion: it is a matter

TEMPLEMAN J
EINFELD AJ

for him to decide what weight he will give to the competing interests and other relevant considerations.

38 I agree also with Wallwork J, for the reasons he has given, that the applicant was denied procedural fairness because it was not given an opportunity to respond to the submission made to the Director by Senior Sergeant G J Fuller of the Western Australian Police Service.

39 The Director's decision should therefore be quashed and the application for an extended trading permit should be remitted to the Director to be dealt with according to law.

40 **EINFELD AJ:** For the reasons given by his Honour, I agree with Wallwork J that the order *nisi* should be made absolute and the matter returned to the Director.