

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

Applicant: Redport Enterprises Pty Ltd
(represented by Ms Jessica Patterson of Lavan Legal)

Intervener: Executive Director of Public Health
(represented by Ms Caroline Chapman of State Solicitor's Office)

Objector: Ms Lindal Hayes

Commission: Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan (Member)
Mr Michael Egan (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 an application for an extended trading permit for premises to be known as Cape Cellars.

Premises: Cape Cellars, Shop 8, 170-172 Bussell Highway, Busselton

Date of Hearing: 8 December 2015

Date of Determination:

5 January 2016

Determination:

The decision of the delegate Director of Liquor Licensing is quashed and the application for an extended trading permit is approved. An extended trading permit is granted authorising the sale and supply of liquor for consumption off the licensed premises only during the hours of:

11:00 am to 7:00 pm on Sundays.

The permit is subject to the following conditions:

1. no trading is permitted on Christmas Day or before noon on ANZAC Day;
2. there shall be no specific discounts or special prices of products specifically aimed to attract customers on Sundays - the price of liquor on Sunday shall not be distinctly different from weekdays;
3. the area to which the permit relates is the whole of the licensed premises;
4. the permit will remain in force for a period of five years commencing from the date of this decision.

Authorities referred to in determination:

- *Re Minister for Resources: Ex Parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258
- *Drake v Minister for Immigration and Ethnic Affairs* (No 2)(1979) 2 ALD 634
- *Romato: Ex Parte Mitchell Jones Holdings Pty Ltd* [2001] WASCA 286
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Liquorland (Australia) Pty Ltd v Commissioner of Police and Others* LC 18/2015
- *Ventorin Pty Ltd v Director of Liquor Licensing and Another* LC 04/2009

Background

- 1 This is an application pursuant to section 25 of the *Liquor Control Act 1988* ("the Act") for a review of a decision of the delegate of the Director of Liquor Licensing ("the Director") to refuse an application from Redport Enterprises Pty Ltd, the licensee of a liquor store trading as Cape Cellars ("the applicant") in the West Busselton Shopping Centre, Bussell Highway, Busselton, for an extended trading permit ("ETP") to sell liquor on Sundays.
- 2 The application for the ETP, made pursuant to section 60(4)(g) of the Act, was lodged on 9 September 2011, together with an application to remove the Cape Cellars liquor store licence from 231 Bussell Highway to its current location at 170-172 Bussell Highway ("the current premises").
- 3 The ETP application was deferred pending the determination of the application to relocate the liquor store and remove the accompanying licence to the current premises.
- 4 The conditional removal of the liquor licence to the current premises was granted on 8 May 2012 and issued on 9 April 2015.
- 5 As the application for the ETP is for a period exceeding three (3) weeks, a period prescribed in regulation 9F(b) of the *Liquor Control Regulations 1989* ("the Regulations"), subsections 38(1) and (2) of the Act require the applicant to satisfy the licensing authority that granting the application is in the public interest.
- 6 The application for the licence removal and ETP was advertised in accordance with the requirements of the Director.
- 7 An objection to the removal of the liquor store licence to the current premises and the grant of the ETP was lodged by Ms Lindal Hayes on 9 December 2011, pursuant to sections 72 and 74 of the Act.
- 8 A notice of intervention was lodged by the Executive Director of Public Health ("EDPH") on 6 January 2012 pursuant to section 69(8a)(b) of the Act. The grounds of intervention relate to the application for the ETP.
- 9 In view of the passage of time from the date of the initial application and the determination of the ETP application, the applicant, in response to an invitation from the Director to correct some outdated information, lodged further submissions and evidence to supplement the Public Interest Assessment ("PIA") lodged with the initial application.
- 10 Initially, the application for the ETP sought approval to trade on Sundays between 10am and 10pm; however, the hours now sought have been amended to 11am to 7pm.

- 11 The Director determined the application for the ETP on the papers and published his reasons for refusing the ETP application on 9 September 2015.
- 12 On 8 October 2015, the applicant lodged an application for a review of the Director's decision.
- 13 The application for a review of the Director's decision was heard by the Liquor Commission ("the Commission") on 8 December 2015.

Submissions on behalf of the applicant

- 14 Much of the information relied upon to support the removal of the Cape Cellars store and licence to the current premises, such as the nature of the store and its operating environment and clientele, as well as the special characteristics of Busselton as an expanding tourist centre, is relied upon to support the application for extended trading hours.
- 15 In the PIA and subsequent submissions, the applicant has highlighted the following factors:
 - a) the success and growth of the business in servicing the requirements of consumers of liquor, and the "need for the popular Cape Cellars operation to be able to meet modern consumer needs" by trading on Sunday;
 - b) the common and increasing number of requests from the general public for the store to open and be able to trade on Sundays (as evidenced by the 65 completed customer questionnaires largely in support of Sunday trading);
 - c) the demonstrated support for, and promotion of, local wine and liquor products by the applicant (as evidenced by letters of support from local producers and others);
 - d) the expansive range of liquor products, particularly local liquor products, and the ability of the applicant, due to its independent control over the business and its knowledge of the region and local producer's products, to respond to changing customer requirements;
 - e) the special requirements of tourists, who make up a sizeable portion of the Cape Cellars customer base, to be able to source their liquor from a comprehensive range of products, particularly local products;
 - f) the fact that, based on the applicant's records, "the majority of the applicant's customer base is made up of people living or currently staying at accommodation within three to five kilometres of the store...." and that from speaking with customers, observing their behaviour and general

knowledge, the applicant knows its regular customer base includes tourists staying at the following:

- i. Abbey Beach Resort;
- ii. Amalfi Resort;
- iii. Amblin Caravan and Camping Park;
- iv. Aqua Resort Busselton;
- v. Bayview Geographe Resort;
- vi. Beachlands Holiday Park;
- vii. Broadwater Bed and Breakfast;
- viii. Busselton Traveller's Rest;
- ix. Busselton Villas and Caravan Park;
- x. Forte Cape View Apartments;
- xi. Geographe Bay Holiday Park;
- xii. Grand Mecure Busselton Apartments;
- xiii. Lazy Days Caravan Park;
- xiv. Mandalay Holiday Resort & Tourist Park;
- xv. Peppermint Park Eco Village;
- xvi. Restawile Hotel;
- xvii. Sandy Bay Holiday Park; and
- xviii. Newtown House,

most of which are self-catered/self-contained arrangements which do not provide room service or much food and beverage services at the accommodation;

- g) the convenience of "one-stop shopping", particularly for tourists, due to the location of the IGA supermarket and other retail outlets in the West Busselton Shopping Centre;
- h) the significant growth in residential development and tourism construction, and the existing and expected population growth, as evidenced by the local authority's Demographic and Planning 2011 report and the following extract from the City of Busselton's website:

"With a resident population of around 32,000 people, Busselton has one of the fastest growing populations outside the Perth metropolitan area, experiencing an average annual growth rate of around 4% per annum. In February 2012, the Western Australian Planning Commission published an update on population forecasts for Busselton indicating a population increase of more than 58% by 2026 to 55,300 persons";

- i) the importance of tourism both during peak tourist periods (estimated to contribute up to 60,000 people on any given day during peak season) and on weekends, and more recently for special events which are increasing due to the particular focus of the City on enhancing its role as an event destination – in this regard, the Tourism WA statistics on

overnight visitor stays and the following statement in the abovementioned report are relevant:

“Tourism development and activity within the Shire of Busselton is one of the keys to its economic development.....Busselton remains the key accommodation hub in this area as shown in the greater number of visitor nights in comparison to Augusta Margaret River.....the Shire of Busselton itself makes up for 36% of total visitors to the South West”;

- j) the fact the Shire of Busselton was elevated to “City” status in January 2012; and
 - k) the ease of access and parking at the West Busselton Shopping Centre.
- 16 Additionally, in relation to Sunday trading the applicant has highlighted the following:
- a) thousands of shoppers patronise the West Busselton Shopping Centre on Sundays;
 - b) the majority of visitors to the Busselton region are intrastate visitors, many of whom would reside in metropolitan Perth and be accustomed to Sunday trading and expect not only the convenience of shopping for, but also the availability of, a full range of liquor products, particularly local wine and beer products, on a Sunday – likewise, tourists from interstate and overseas would be accustomed to, and expect, Sunday trading;
 - c) visitors to the region are unlike general members of the community in that Sunday has no particular significance, but is a normal day like any other;
 - d) many visitors are visiting over long weekends or for special events on normal weekends;
 - e) general retail trading hours have been extended to include Sunday and are operating in Busselton;
 - f) overwhelming support for Sunday trading is evident from respondents to an on-line survey (554 respondents) and in-store survey (122 respondents) of customers of the Cape Cellars store since its opening in April 2015;
 - g) the overwhelming majority of respondents to these surveys indicated they would choose to shop at Cape Cellars rather than Dan Murphy’s on Sunday (the surveys included a question on the preference for shopping at Cape Cellars or the proposed Dan Murphy’s store in the Busselton city centre, at least partly because the approval of a Dan Murphy’s store post-dated the initial application in 2011, and the Director had invited the

applicant to update its information in support of the application in light of that development); and

h) both surveys clearly demonstrate a requirement for choice and diversity.

17 The applicant acknowledges the potential for an increase in harm and ill-health should the application be granted, but submits:

a) a very high percentage of respondents to the initial survey and subsequent survey on Sunday trading indicated they did not consider harm or ill-health would result from the relocation of Cape Cellars or Cape Cellars selling alcohol on Sundays;

b) having considered the types/groups of people who may be classified as “at risk” by reference to the Director’s Guidelines on PIA’s, the 2006 Census for Busselton and West Busselton reveals the locality in which Cape Cellars is located contains “on the whole, considerably less indigenous persons, young people and migrants”;

c) further, the same data shows “an older population in the locality, particularly when considered in light of there being, on average, less children and young people, less couple families with children and more couple families without (children) when compared to the WA average”.....and “the locality is considered to comprise a large population of retirees”;

d) “at risk” groups will not suffer adversely based on, among other factors:

i. the applicant has a good trading record and knows the area;

ii. the applicant and staff have a good relationship with customers;

iii. the high standard of service and facilities derive patronage from mature and responsible people;

iv. the applicant’s management practices ensure the business is not operated in any manner that could have an adverse effect on these groups;

v. the principal of the applicant “has played an active role with Busselton Police in the establishment of the local liquor accord”; and

vi. the applicant has not been the subject of any infringement notices for a contravention of the Act

Submissions on behalf of the Executive Director of Public Health

- 18 The EDPH has made representations regarding a concern for the potential harm and ill-health that may be caused to people, or any group of people, due to the use of liquor if the application is granted.
- 19 In summary, the EDPH has submitted:
- a) whilst currently no liquor stores trade on Sunday in Busselton, packaged liquor is available from four licensed premises (the Esplanade Hotel, Albies Bar and Bistro, the Ship Inn and recently approved Dan Murphy's store, and Vasse Café and Bar) all of which are within 3 km of the Cape Cellar premises – in this regard, the Director's Policy on Sunday Trading in Non-metropolitan Liquor Stores is a relevant consideration;
 - b) the above four licensed venues are already servicing the packaged liquor requirements of the community and visitors/tourists to Busselton on a Sunday;
 - c) having regard to the Director's Guideline on PIAs, which states that liquor stores "typically have a greater impact on the surrounding community", serious consideration should be given to the potential for an increased risk of harm or ill-health in the community due to the proposed Sunday trading;
 - d) the size of the store, large range of stock, ability to browse and competitive pricing all reinforce the concern that a large amount of alcohol that would not otherwise have been introduced into the community on Sundays will occur if the application is granted leading to an increased risk of harm in the community;
 - e) as Sundays are traditionally days when less alcohol-related harm is experienced due to limits on alcohol availability on this day, increasing the availability of liquor in the West Busselton Shopping Centre, which is frequented on a Sunday by "thousands of shoppers" has the potential to impact harm in the locality;
 - f) a growing body of Australian research (referenced in the EDPH intervention) demonstrates a strong link between alcohol-related problems and packaged liquor sales;
 - g) an unpublished study by Professor Rob Donovan highlights the propensity of unplanned and impulse buying;
 - h) point of purchasing marketing has been shown to increase alcohol sales and consumption substantially, and:

- while a number of factors influence how a person drinks, increased access to, and convenience of obtaining, alcohol make it difficult for those who drink at risky levels to avoid or reduce their drinking; and
 - while some customers may adapt their purchasing patterns regarding alcohol by simply changing the day they purchase, it is likely that many people as a result of convenience and “visual reminders” will purchase alcohol on Sunday from the liquor store when they would otherwise not be considering purchasing alcohol;
- i) the lower socio-economic demographics with locality characteristics including high density social housing and lower weekly individual and family income compared to the national average is a relevant consideration “as people in lower socio-economic groups tend to have a more hazardous and harmful pattern of (alcohol) use than people in higher socio-economic groups”;
- j) there is a high proportion of alcohol-related violence in the locality of the premises, including on Sundays, as evidenced by the WA Police statistics and data for the period 1 January 2009 to 31 October 2011 which shows:
- 290 assaults were reported in Busselton and West Busselton, 45% of which were alcohol-related;
 - the majority of alcohol-related offences in Busselton occurred on the weekend peaking on Saturday, followed by Sunday;
 - a large proportion of persons charged with drink driving offences were recorded as having their last drink off licensed premises;
- k) increasing the availability of alcohol from a liquor store on a main road on a Sunday increases the risk of alcohol-related harm and ill-health to “at risk” groups (which according to the Director’s Guidelines on PIAs includes communities that experience high tourist numbers).

Submissions of the objector

- 20 The principal objection of the objector appears to relate to the removal of the Caper Cellars liquor store to its current location on the basis that it would not be in the public interest and would cause undue offence, annoyance, disturbance and inconvenience to those who live in the vicinity, and that the amenity of the locality would be lessened.

- 21 More specifically, the objector expressed concern about the increased possibility of anti-social behaviour brought on by drinking and rejected the applicant's claim that it would be confusing and inconvenient for the public (because of the trading on Sunday of other outlets in the West Busselton Shopping Centre) pointing out that some other retail outlets are also closed on Sunday.

Further and responsive submissions on behalf of the applicant

- 22 In the applicant's submission, it is significant that neither the Commissioner of Police nor any other liquor merchant, including the existing outlets trading on Sundays, has lodged an objection challenging the applicant's evidence in support of the public's requirement for Sunday trading.
- 23 Further, the trading experience of the applicant on 57 occasions when it has traded under an ETP on a Sunday between 1999 and 2011 (mostly around the Christmas and Easter periods) demonstrates a substantial demand for packaged liquor from the applicant's premises and provides "irrefutable evidence in support of the application" in terms of the relevant objects of the Act, namely catering for the requirements of consumers with regard to the proper development of the liquor and tourism industries as well as the development of licensed premises reflecting the diversity of the requirements of consumers.
- 24 The ETP application is in response to customer pressure in the form of customer complaints which reflect "the inconvenience of having to go into town on Sunday, and the distance, travelling time and petrol costs versus the convenience of being able to buy from the applicant seven days of the week".
- 25 The applicant accepts a proportion of customers would not have purchased liquor on a Sunday had the premises not been open; however, the applicant submits that some customers will purchase stock on a Sunday that otherwise would have waited until Monday and that the "greatest majority of customers the applicant will attract on a Sunday are currently being put to the trouble of the extra travel....to purchase liquor from outlets located in town".
- 26 In the applicant's view, the EDPH has over- emphasised the additional volume of liquor that may be introduced into the community (and be consumed) on Sundays without sufficient regard to the finite spending capacity of people in the area, customers spreading their purchases over seven days (rather than six days), customers redirecting their purchases from the other liquor outlets operating on Sundays and, in the case of tourists, visitors to the region ceasing to bring liquor with them.
- 27 The decision of the applicant to amend the proposed trading hours on Sunday to 11am to 7pm is a "harm minimisation measure reflecting the applicant's

desire not to put the public at risk". Furthermore, the applicant may trade for an even shorter period depending on the circumstances.

- 28 In response to the EDPH concern about competitive pricing, the applicant never has been, and will not be, a market leader when it comes to price discounting, and the applicant does not use pricing as a means of driving turnover as is the practice of some other operators (the applicant has proposed a trading condition to this effect).
- 29 Some of the characteristics defining the low socio-economic category of the population referred to by the EDPH, such as level of income and housing assistance, are evident in the locality because of the large number of retirees who do not experience, and are not at risk of experiencing, alcohol related problems.
- 30 Any potential harm that may occur as a result of Cape Cellars operating under an ETP is "no greater than that which appears to be commonly accepted in the community" and the "crime, harm and ill-health referred to in the EDPH's primary submission and previous submissions does not establish that the locality in this case is experiencing such issues at a level which is unique or sets the locality apart from others".
- 31 The applicant submits that "the small prospect of harm or ill-health possibly occurring from the operation is far outweighed by the several important benefits to the public and locality".
- 32 While the Act differentiates Sunday trading for liquor stores located outside the metropolitan area, it clearly prioritises issues of catering for requirements of consumers, the proper development of the liquor industry and the proper development of the tourism industry, which are essential and persuasive factors in this case.

Further and responsive submissions by the Executive Director Public Health

- 33 The EDPH challenges the claim by the applicant that the additional trade on Sunday and the consequential additional volume of liquor entering the community will not increase markedly, or at all, due to the distribution of sales throughout the week and the redirection of sales from other venues as it is not supported by the evidence – although patronage and sales figures have been provided for the days on, and around, which ETPs have been granted to the applicant in the past, no overall weekly sales figures have been provided to demonstrate that, overall, sales have not increased significantly.
- 34 If, based on the patronage figures provided by the applicant, trade on a Sunday is likely or expected to be the equivalent of, or slightly less than, a Monday, the EDPH has made an assessment of the additional sales (converted to standard drinks) that would be introduced into the community. While the EDPH

acknowledges a percentage of Sunday trade would come from patrons who would ordinarily purchase liquor from another liquor store as well as patrons who would have purchased liquor at Cape Cellars on another day of the week, the EDPH submits that if the application is approved a substantial amount of liquor will be sold into the community and consumed that would not otherwise have been, resulting in an increased risk of harm to the locality.

- 35 In the EDPH's view, the applicant's submissions ignore the role of convenience in influencing purchasing and are inconsistent with availability theory, marketing theory and other literature, as well as Western Australian research which found that a representative sample of people in metropolitan WA would buy more, buy more often and drink more alcohol if packaged liquor was available nearby.

Determination

- 36 When conducting a review of a decision of the Director, the Commission may have regard only to the material that was before the Director when making the decision (section 25(2c) of the Act).
- 37 Section 25 of the Act applies to ETPs of the type applied for in this instance (section 25(5a) of the Act and regulation 9F(b) of the Regulations).
- 38 On a review of the Director's decision, the Commission may:
- (a) affirm, vary or quash the decision subject to the review;
 - (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;
 - (c) give directions as to any questions of law reviewed, or to the Director to which effect shall be given; and
 - (d) make any incidental or ancillary order.
- 39 Whilst the Commission is not constrained by the need to find error in the Director's decision, but is to undertake a full review of the material before the Director and make a determination on the merits of the application, for completeness, the grounds upon which the applicant has sought this review are:
- a) the grant of the ETP is in the public interest;
 - b) the application was not determined (by the Director) in accordance with the substantial merits of the case; and

- c) the evidence and submissions in support of the application far outweigh the material before the Director in support of the objection and intervention and justify the grant.
- 40 Liquor stores outside the metropolitan area are not permitted to sell liquor on a Sunday by virtue of subsections 98D(1)(b) and 98D(2) of the Act.
- 41 However, a licensee of a non-metropolitan liquor store may apply for an ETP to sell liquor on a Sunday in accordance with subsections 60(1) and 60(4)(g) of the Act.
- 42 By virtue of subsections 38(1)(b) and (2) of the Act, and regulation 9F(b) of the Regulations, the applicant must satisfy the Commission that the grant of the application is in the public interest. To discharge its onus under section 38(2) of the Act, the applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
- 43 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175 and *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241).
- 44 The Commission also notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 where he said:
- “The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.*
- The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”*
- 45 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (*Palace Securities Ltd supra*).
- 46 The primary objects of the 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 of liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*

47 The secondary objects of the Act are:

- (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 requirements of consumers in the State; and*

[(b), (c) deleted]

- (d) *to provide adequate controls over, and over the person 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.*

48 Section 33(1) of the Act gives the Commission an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [32]:

"[Section] 33(1) is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole. Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application, but does not otherwise confine the scope or meaning of the public interest to make those objects the exclusive consideration nor the sole determinants of the public interest".

49 Each application must be considered on its merits and determined on the balance of probabilities pursuant to section 16 of the Act. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258).

50 The circumstances in which an ETP may be granted under section 60(4)(g) of the Act are not specified otherwise than the grant of the ETP must be in the public interest.

51 The Director's Policy on, and titled: "Extended Trading Permits – Sunday Trading: Non-metro Liquor Stores", provides guidance on the legislative requirements relating to ETPs for Sunday trading and the circumstances to which the licensing authority may have regard when considering applications for these permits.

52 Relevantly, the policy states:

"Given that section 98D (of the Act) does not authorise non-metropolitan liquor stores to trade on a Sunday and that many country communities already have access to packaged liquor from a number of different outlets, travelling distance will be one of the circumstances of particular relevance".

53 The benefit of such a policy is evident from the comments of Brennan J in *Re Drake v Minister for Immigration and Ethnic Affairs* (No 2)(1979) 2 ALD 634 referred to by McLure J in *Re Romato: Ex Parte Mitchell Jones Holdings Pty Ltd* [2001] WASCA 286 at [23]:

".....an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process".

54 However, as McLure J also commented:

"There is a general principle that a tribunal which is called upon to exercise a discretion does not perform its duty if it acts in blind obedience to a rule or policy that it had previously adopted".

(*Re Romato* supra at [31])

55 The Director's policy is a guide and only one aspect to be considered by the Commission.

56 The provisions of the Act and the relevant case law make it clear that the public interest is to be determined having regard to the scope and purpose of the Act, in particular section 38(4) and the primary and secondary objects of the Act.

57 The comments of Templeman J in *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 at [34] and following are also a relevant consideration:

[34] In my view, the crucial point here is that the Act does not require an applicant for an ETP 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 section 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 ETP 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 ETP is justified. In answering that question, the Director has a wide discretion: it is a matter for him to decide what weight he will give to the competing interests and other considerations”.

58 Cape Cellars is a substantial and contemporary liquor store offering a wide range of liquor products with a strong focus on local Western Australian liquor products, particularly those from the South West region.

59 In its letter of support for the application for the ETP, the Busselton Chamber of Commerce and Industry commented:

“The business success of Cape Cellars has been built on an exceptional level of customer service, for which it has been officially recognised, and for the sale of wines and beers from small local producers which often have difficulty finding their way into large national supply chains”.

60 Further, after commenting that the applicant has, as an independent liquor operator, successfully served the local community for over 15 years, the Chamber went on to say:

“The business is heavily involved in the promotion and marketing of local wines and this development, and needs to be able to continue to operate on an equitable basis as a major national chain”.

61 It is also evident that the applicant has contributed to the local wine industry and that, notwithstanding many wine producers in the region sell their own wine directly to customers, support from outlets “positioned close to those centres where accommodation facilities are located” (Marketing Manager, Happs, Margaret River) such as Cape Cellars are considered important, at least to some wine producers.

62 In a similar vein, the Managing Director of Wills Domain Winery commented in relation to the initial application:

“Independent liquor outlets like Cape Cellars coupled with excellent operators like Rob (the principal of the applicant) are sadly a very rare exception and should be encouraged where possible to ensure the diversity within our industry remains and, more importantly, continues to provide trade roads to allow our local wineries to achieve successful sales”.

63 The applicant has emphasised the focus of Cape Cellars on local producers as a significant feature distinguishing the store from those liquor outlets in the centre of Busselton selling packaged liquor on Sunday.

64 However, to an extent, this distinguishing feature has been diminished by the recent approval of a Dan Murphy's store, which is known to offer a very wide range of products, at the Ship Inn in the City centre.

65 However, notwithstanding the introduction of this store, the applicant maintains that the direct relationships the applicant has with local producers, the ability of the applicant to quickly respond to changing customer preferences, the continuing strong focus on local products and the close proximity of the store to the many tourist accommodation facilities to the west of the store clearly distinguishes Cape Cellars from not only Dan Murphy's, but also the other liquor outlets trading on a Sunday.

66 The applicant has pointed to the surveys conducted both at the time of the initial application to relocate the premises and more recently during the trading of the store at the current premises as support for the proposition there is a consumer requirement for Sunday trading within the meaning of the provisions of the Act (section 5).

67 Even though Sunday trading is referred to, and forms part of the questionnaire in the initial survey, that survey appears to the Commission to be mainly directed towards eliciting views on the relocation of the premises.

68 As a consequence, despite some specific comments, for example from the Pharmacist at the West Busselton Shopping Centre that tourists usually ask for directions to the “bottle shop” and that in his view coinciding the hours of the liquor store with the other businesses in the centre will give a good impression to tourists shopping at the centre, only limited weight can be afforded to this evidence in support of Sunday trading.

69 In contrast, the subsequent on-line and in-store surveys explicitly address Sunday trading and, as the applicant has submitted, the responses are overwhelmingly in favour of the proposed ETP.

70 The optional comments provided by respondents suggest the main reasons for supporting Sunday trading at the Cape Cellars liquor store include:

- convenience,
- an equal opportunity, currently available to other outlets, for Cape Cellars to trade on Sundays,
- competition, and
- tourism,

and the reasons for supporting Cape Cellars over Dan Murphy's appears to be predominantly because of the convenience and the preference to shop at a locally owned and operated business.

71 Further, some respondents make general comments about Busselton being a seven day a week tourist destination and the gateway to the Margaret River region, as well as the range of local products stocked by Cape Cellars.

72 Notwithstanding these comments and the level of apparent support, the weight that the Commission may attach to this evidence also has to be considered in light of the fact the surveys were completed by Cape Cellars customers and do not necessarily represent the views of the broader community in the locality. Nor do the surveys provide an in-depth insight into the views and expectations of tourists.

73 With respect to members of the local community, the Commission is of the view that the added convenience to local shoppers at the IGA supermarket and other retail outlets in the West Busselton Shopping Centre is not sufficient reason to grant the application. As the Commission has commented in other decisions (for example, *Liquorland (Australia) Pty Ltd v Commissioner of Police and Others LC18/2015*), convenience, of itself, is not a basis upon which to grant an application which is required to satisfy the public interest. The public interest involves much broader considerations.

74 Equally, the ability to purchase liquor at the same time as groceries does not necessarily amount to "one-stop shopping" in the sense that the local members of the community may expect to be able to undertake much, or most, of their daily and weekly shopping in the one location.

75 However, with respect to tourists and visitors to the City and the region, some of the comments in the letters of support accompanying the initial application underscore the significance of diversity and a full range of liquor products and related services to the tourism industry, such as:

- a) "It is often hard to explain to overseas visitors and other tourists that we don't have a world class wine shop in the town of Busselton that is welcoming on a Sunday." (professional architect)

- b) "It is also important to allow independent liquor stores in tourism regions to trade seven days a week, tourism in this region is not just about summer, we are relying more and more these days on the winter months to attract tourists to the region." (small business operator)
 - c) "The region attracts up to 600,000 visitors annually and is the most visited destination in Western Australia outside of the City of Perth. In order to remain a competitive tourist destination, it is essential that the region offers the facilities and services to cater to visitor demand.....In addition, the GBTA strongly supports the intention to operate the new liquor store on Sundays because there is no other liquor store service in the area on Sundays and visitors to the region expect these services to be available." (Geographe Bay Tourism Association)
 - d) "We would like to see Cape Cellars open seven days for the convenience of holiday makers." (Mandalay Holiday Resort and Tourist Park)
 - e) "Quite often our guests do not make all their intended Winery Cellar door visits. It would be a great service for tourists to have more wine labels available locally." (Sandy Bay Holiday Park)
- 76 Whilst there is no direct evidence before the Commission that those shopping on a Sunday, either at the existing outlets in the City centre or at Cape Cellars when it has operated under an ETP, are tourists or that the experience of tourists is diminished markedly because of the inconvenience of travelling the extra distance to liquor outlets currently trading on Sunday, the Commission considers that the grant of the ETP would enhance the diversity of liquor products and services available on a Sunday and enhance the experience of, and provide a better range of liquor products and related services to, tourists, especially those staying in self-contained and/or self-catering accommodation along Bussell Highway west of the Cape Cellars store.
- 77 Additionally, whilst in normal circumstances a requirement to travel an extra distance of two to three kilometres to purchase liquor on a Sunday would not be considered by the Commission to be sufficient justification or reason to grant an ETP, in this case, the Commission is persuaded there are a number of other factors that support the grant of this particular application:
- a) the extensive range, and focus on the promotion, of local wine and beer products from the region;
 - b) the close proximity of the Cape Cellars store to, and the heavy concentration of, self-catering tourist accommodation facilities along the Bussell Highway to the west of the store;
 - c) the support for Sunday trading from local producers and the Busselton Chamber of Commerce and Industry;

- d) the importance of Busselton as a tourist hub in the region and the complementary role played by Cape Cellars in promoting local liquor products and related services; and
 - e) the distinguishing features of the Cape Cellars store from other liquor outlets trading on Sunday.
- 78 The EDPH has provided important information to inform the Commission of the existing level of alcohol-related harm and ill-health in the locality, and the likelihood of any increase in that harm or ill-health, based on available research, should the application be granted.
- 79 The Commission accepts the view of the EDPH that there will be an increase in the amount of alcohol introduced into the community if the application is granted, but has some reservations about the EDPH's estimation of the amount of liquor in volume and standard drinks.
- 80 Given the visitors staying at the tourist accommodation to the west of Cape Cellars store in all likelihood drive past the store to access other liquor outlets in the City centre on a Sunday, it is reasonable to conclude that there will be a degree of redistribution of alcohol purchases from those other outlets.
- 81 The extent to which Cape Cellars customers (locals and tourists) will spread their liquor purchases across seven days rather than the six days without purchasing more liquor cannot be determined and is difficult, if not impossible, to estimate.
- 82 The applicant has indicated that the level of additional alcohol sold will not be significant based on its previous experience when trading under an ETP. It is unfortunate the applicant did not lodge weekly sales data with its application to support this contention. The Commission is not able to seek additional evidence as part of the section 25 review process, but must rely on the material and evidence before the Director.
- 83 Based on the Western Australian research referred to by the EDPH, there is a risk that members of the community will acquire more liquor than they otherwise would because of the additional day's trading and increased availability of liquor.
- 84 However, the nature of the Cape Cellars store and its long standing and continuing strong focus on local wines and small and boutique local wine and beer producers, and the fact a not insignificant proportion of customers are likely to be visitors to the area, would be expected to mitigate this risk.
- 85 In addition, the Commission has noted that the number of clearly identifiable "at risk" groups in the locality is small, and that while the socio-economic profile of the locality has been raised by the EDPH, it seems to the Commission that the

particular demographic mix, especially the high number of retirees, also mitigates the risk of harm or ill-health, to some extent, in this regard.

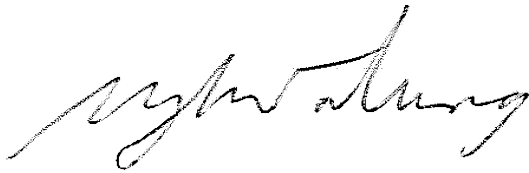
- 86 While the potential for any level of increase in harm or ill-health due to the consumption of liquor is concerning to the Commission, in the particular circumstances of this application the Commission is satisfied that the likelihood of an increase in harm or ill-health if the application is granted and the seriousness of any such harm or ill-health should it eventuate is not so significant or serious, or would be considered by the community to be so unacceptable, as to outweigh the benefits of approving the ETP, especially the benefits to the development of the tourism industry.
- 87 As the objector has not presented any probative or objective evidence to support the objection, the Commission accordingly finds that the objection has not been made out to the requisite standard under section 73(1) of the Act.
- 88 The Commission acknowledges the importance of consistent decision making to public and industry confidence in, and the proper administration of, the liquor licensing regulatory regime in this State, particularly in the granting of extended trading permits. In this regard, the Commission has noted that the Director made reference to the decision of the Commission in the Pemberton Cellars decision (LC04/2009) in the reasons for his decision and regarded the circumstances of that application as “largely synonymous with the current application”.
- 89 However, the Commission considers that the factors referred to at paragraph [77] above clearly distinguish this application from the Pemberton Cellars decision. Moreover, a number of other factual matters, such as, the close proximity of another liquor outlet, the absence of letters of support for Sunday trading, the concern on the part of some residents and the insufficient population of Pemberton, are also distinguishing features.
- 90 After a consideration of all the circumstances and the evidence, the Commission is satisfied that the grant of the application is in the public interest.
- 91 Accordingly the decision of the Director is quashed and the application is approved. An extended trading permit is granted authorising the sale and supply of liquor for consumption off the licensed premises only during the following hours:

Sunday 11:00 am to 7:00 pm

The permit is subject to the following conditions:

1. no trading is permitted on Christmas Day or before noon on ANZAC Day;

2. there shall be no specific discounts or special prices of products specifically aimed to attract customers on Sundays - the price of liquor on Sunday shall not be distinctly different from weekdays;
3. the area to which the permit relates is the whole of the licensed premises;
4. the permit will remain in force for a period of five years commencing from the date of this decision.

A handwritten signature in black ink, appearing to read 'Eddie Watling', written in a cursive style.

EDDIE WATLING
DEPUTY CHAIRPERSON