

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

Applicant: Mirvac Hotels Pty Ltd
(represented by Mr Paul Ryan of Ryan
Commercial Lawyers)

Intervener: Director of Liquor Licensing

Commission: Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan (Member)
Dr Eric Isaachsen (Member)

Date of Determination: 21 March 2012
(Determined on papers)

Premises: The Sebel Residence
60 Royal Street, East Perth

Matter: Application for review of the decision of the
Delegate of the Director of Liquor Licensing
pursuant to section 25 of the *Liquor Control Act*
1988

Determination: The application is refused

Authorities referred to in the determination:

- *Hancock v Executive Director of Public Health [2008] WASCA 254*
- *Busswater Pty Ltd v Director of Liquor Licensing [LC 17/2010]*
- *Harold Thomas James Blakely v Director of Liquor Licensing [LC 44/2010]*

Introduction and Background

- 1 On 13 May 2011, Ryan Commercial Lawyers lodged an application for the granting of a special facility licence to Mirvac Hotels Pty Ltd for the purposes of supplying liquor products through a mini-bar service in the accommodation rooms (57 self-contained apartments) at the Sebel Residence, East Perth.
- 2 The application was made pursuant to section 46 of the *Liquor Control Act 1988* ("the Act") and regulation 9A(7) of the *Liquor Control Regulations 1989* ("the Regulations").
- 3 Notice of the application was served on the Executive Director Public Health and the Commissioner of Police. No objections or interventions were lodged.
- 4 On 9 June 2011, the Department of Racing, Gaming and Liquor ("the Department") acknowledged receipt of the application and advised that the applicant might wish to give consideration to section 5 of the Act and recent precedent decisions of the Liquor Commission ("the Commission"), where it was determined that the Public Interest Assessment ("PIA") must be supported by objective evidence. The letter from the Department also stated that the Commission had found that assumptions, opinions, speculation and generalised statements alone will not demonstrate that the application is in the public interest and that the applicant may wish to consider providing sufficient supporting evidence that is objective, accurate and relevant to the application in support of the claims made in the PIA. The letter further stated that objective evidence could include market research findings; a feasibility study; target market surveys or letters of support and that ultimately what objective evidence is provided in support of the application is a matter for the applicant to consider. Additional documentation required for administration purposes was also requested.
- 5 On 21 June 2011, the applicant responded, providing details of the current customer mix and length of stay at the premises, a range of tourism statistical data and the requested documentation. The applicant also set out reasons why it was considered that no other licence category would be appropriate to meet the needs of the premises, in order to be granted a licence under section 46 of the Act.
- 6 On 1 August 2011, the applicant lodged final documentation and requested that the application be determined as soon as possible.
- 7 On 16 September 2011, the Delegate of the Director of Liquor Licensing ("the Director") wrote to the applicant and advised that the matter would be determined on the papers without a hearing. The applicant was also advised that there were concerns with:
 - i. the Management Agreement lodged on 13 May 2011; and
 - ii. section 46 submissions, as lodged on 13 May 2011 and expanded upon on 21 June 2011.The applicant was afforded 14 days (until 30 September 2011) to provide any further written submissions.
- 8 On 26 September 2011, the applicant lodged a written response to 7 above.

- 9 On 6 October 2011, the Director issued a determination refusing the application.
- 10 On 4 November 2011, the applicant lodged an application for review of the decision of the Director pursuant to section 25 of the Act.
- 11 On 23 November 2011, the Director lodged a notice of intervention and on 30 November 2011 lodged a submission in support of the intervention notice.
- 12 On 30 November 2011, the applicant lodged a submission in relation to the application for review and on 6 December 2011 lodged a further submission in response to the Director's intervention notice and submission.
- 13 At the request of the applicant, the Commission considered the matter on the papers.

Submissions on behalf of the applicant

- 14 The applicant has submitted the application for a review of the Director's decision on the basis that:
 - the application and documentation lodged was sufficient to support the granting of the licence;
 - the application complies with the objects of the Act and with regulation 9A(7);
 - the requirements of the public interest test have been satisfied;
 - the application was lodged for the appropriate type of liquor licence;
 - under section 46B of the Act the Director may grant a licence of another class where there is a finding that an application does not comply with section 46 of the Act and regulation 9A(7);
 - additional statistical information had been lodged to provide independent and objective evidence to support the application;
 - the decision of the Director to approve a similar application by Geraldton Ocean West Resort is of significant precedent value;
 - if there was a deficiency in the application, materials and submissions lodged then, as a matter of procedural fairness, the Director should have detailed those deficiencies and allowed the applicant to respond;
 - the application did not receive any objections or interventions;
 - the proposed operation of the licence is not controversial and is discrete to the premises.
- 15 The initial application lodged on 13 May 2011 was supported by a range of documentation including a PIA as required by section 38 of the Act.

- 16 In response to advice from the Director dated 9 June 2011, the applicant lodged additional documentation both for administrative purposes and to provide objective evidence from the Australian Bureau of Statistics and Tourism Research Australia in relation to the type of clientele attracted to the premises.
- 17 In addition, information from the Australian Bureau of Statistics and Tourism Research Australia was provided to support the applicant's submission that the clientele of the premises expects to have access to alcohol when staying in self-contained accommodation.
- 18 A detailed written response was provided to the Director on 22 September 2011 in relation to queries regarding:
- the compliance of the Management Agreement with the Act; and
 - the appropriateness of the application with regard to section 46(1) of the Act and regulation 9A(7) of the Regulations.
- 19 Subsequent to the lodging of the submission by the Director, the applicant responded on 6 December 2011 and reiterated its position in relation to the evidence already provided and referred to a number of previous decisions made by the Commission.
- 20 The applicant concluded its responsive submission by referring to the requirements of the principles of procedural fairness with regard to the provision of notice to an applicant in the instance of a possible adverse finding by the Director (refer Martin CJ in *Hancock v Executive Director of Public Health* [2008] WASCA 254 – paragraphs 42 and 43).
- 21 The applicant requested that the Commission make an order that would result in the recommencement of the process before the licensing authority, differently constituted for the reconsideration of the application.

Submissions on behalf of the Delegate of the Director of Liquor Licensing

- 22 The Director intervened on the question of the nature of evidence to be provided by an applicant in order to discharge the onus cast on the applicant by section 38(2) of the Act.
- 23 It was submitted that a number of previous decisions of the Commission had consistently and carefully enunciated its position confirming that it is not sufficient for an applicant merely to express opinions and make assertions about the perceived benefits of an application. Such opinions and assertions must be supported by an appropriate level of evidence to satisfy the Commission that there is a real and demonstrable consumer requirement to justify the granting of a licence.
- 24 With respect to the statement made in the application for review that “the applicant did not receive a response from the Director in relation to several requests for details of the alleged deficiencies”, section 38(2) of the Act imposes a positive obligation upon the applicant to satisfy the licensing authority that the grant of the application is in the public interest. The onus is on the applicant to satisfy the licensing authority.

- 25 It is therefore incumbent upon the applicant to adduce sufficient information to make it possible for the licensing authority to be satisfied that the application is in the public interest (refer *Busswater Pty Ltd v Director of Liquor Licensing* [LC 17/2010 at para 33]). The licensing authority, however constituted, cannot run an application, objection or intervention on behalf of a particular party (refer *Harold Thomas James Blakely v Director of Liquor Licensing* [LC 44/2010 at para 49]).
- 26 It was submitted that the Department's policy guideline "Public Interest Assessment", which is publicly available, provides detailed guidance in respect of the possible content of public interest assessment submissions.
- 27 Further, the applicant was notified on 9 June 2011 and 16 September 2011 that its submissions did not adequately address the requirements outlined in the policy guidelines, in particular the letter of 16 September 2011, which gave notice of a possible adverse finding. Accordingly procedural fairness was afforded to the applicant.
- 28 With regard to the additional statistical information provided by the applicant as being objective evidence from the Australian Bureau of Statistics and Tourism Research Australia, there is no elucidation of how these statistics apply to the particular circumstances of this application.
- 29 The applicant's reference to the special facility licence granted to Geraldton's Ocean West Resort as being of significant precedent value has no bearing as section 33(2) of the Act requires that each application is to be dealt with on its merits.

Determination

- 30 Under section 25(2c) of the Act, when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 31 On a review the Commission may, pursuant to section 25(4) –
- ...
- (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 –*
 - i. *as to any question of law, reviewed; or*
 - ii. *to the Director, to which effect shall be given; and*
 - (d) *make any incidental or ancillary order.*
- 32 Section 46(1) of the Act prescribes that the licensing authority shall not grant a special facility licence except for a prescribed purpose. Section 46(2b) of the

Act prescribes that the application for a special facility licence must demonstrate how the business for which the licence is sought meets any of the prescribed purposes for which a special facility licence may be granted.

- 33 The purposes for which a special facility licence may be granted are set out in regulation 9A of the Regulations, with the specific regulation 9A(7) headed 'Tourism' being relevant in this application and which states:

A special facility licence may be granted for the purpose of allowing the sale of liquor to persons likely to be attracted to, or present at, a place that, in the opinion of the licensing authority, is or will become –

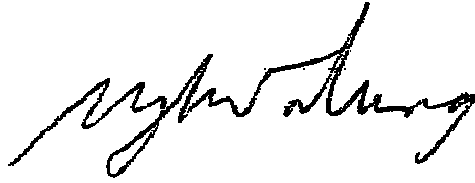
(a) an attraction for tourists; or

(b) a facility that enhances the State's tourism industry.

- 34 In considering the application, which has been lodged in accordance with section 46(2b) of the Act and regulation 9A(7) of the Regulations, the Commission accepts that the business model of the premises may operate in a manner that enhances the State's tourism industry, however, this has not been clearly established from the supportive material submitted with the application.
- 35 The Commission has a long established view that it is not sufficient for an applicant merely to express opinions and make assertions about the perceived benefits of an application. It is incumbent upon the applicant pursuant to section 38(2) of the Act to demonstrate that there is a consumer requirement to justify the granting of the licence.
- 36 The Commission has reviewed the PIA submitted with the application pursuant to section 46 of the Act, together with the additional information provided at the invitation of the Director and is satisfied that the applicant has been provided with every opportunity to present objective evidence to support the application.
- 37 The Commission is however of the view that that there is insufficient supportive evidence in substance and relevance to the premises to demonstrate that the granting of the licence is in the public interest as the information provided is based on generalised statements and data and therefore fails to demonstrate that the public interest will be served in the granting of a licence under section 46 of the Act and regulation 9A(7) of the Regulations.
- 38 Information on the current mix of customers, average length of stay and general Australian Bureau of Statistics and Tourism Research Australia data, as provided, does not allow the licensing authority to form an opinion that the granting of licence to this premises in this locality is in the public interest in that it will cater for the requirements of consumers who patronise the premises.
- 39 The Commission does not consider that there has been a denial of procedural fairness in the application process and accepts that the Director, in correspondence of 16 September 2011 gave notice of a possible adverse finding and provided appropriate advice and opportunity to the applicant to submit the necessary level of objective evidence to demonstrate that the application is in the public interest.
- 40 The applicant's reliance on similar applications is given little weight by the Commission as each application is considered on its merits and must provide

sufficient information to demonstrate that in the particular circumstances the granting of the licence is in accordance with section 38 of the Act.

- 41 Whilst section 46B of the Act enables the licensing authority to vary the special facility licence application to a licence of another class, the Commission concurs with the finding of the Director that as the applicant has not discharged its onus under section 38 of the Act, such discretion cannot be exercised.
- 42 The application is therefore refused.

A handwritten signature in black ink, appearing to read 'Eddie Watling', written over a horizontal line.

EDDIE WATLING
DEPUTY CHAIRMAN