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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : COMMISSIONER OF POLICE -v- AUSTRALIAN  
LEISURE AND HOSPITALITY GROUP PTY LTD  
[2019] WASC 114

**CORAM** : MCGRATH J

**HEARD** : 28 JUNE 2018

**DELIVERED** : 5 APRIL 2019

**FILE NO/S** : GDA 18 of 2017

**BETWEEN** : COMMISSIONER OF POLICE  
Appellant

AND

AUSTRALIAN LEISURE AND HOSPITALITY  
GROUP PTY LTD  
First Respondent

CHIEF HEALTH OFFICER formerly known as  
THE EXECUTIVE DIRECTOR OF PUBLIC  
HEALTH  
Second Respondent

JEFFREY MICHAEL CADDY  
Third Respondent

TIMOTHY MATTHEWS  
Fourth Respondent

LAURIE E SMITH  
Fifth Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : LIQUOR COMMISSION OF WESTERN AUSTRALIA

**Coram** : MR S RAFFERTY (CHAIRPERSON)  
MR E WATLING (DEPUTY CHAIRPERSON)  
MR LAURIE SMITH

**File Number** : LC 26/2017

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*Catchwords:*

Appeal - Liquor licensing - Application for approval to redevelop liquor store  
- Application granted by Liquor Commission - Failure of Liquor Commission  
by having regard to irrelevant considerations - Meaning of public interest -  
Whether objector denied procedural fairness

*Legislation:*

*Liquor Control Act 1988 (WA)*

*Result:*

Appeal allowed  
Decision quashed  
Application to be reconsidered by the Liquor Commission

*Category:* B

**Representation:***Counsel:*

Appellant : Mr D E Leigh  
First Respondent : Mr M N Solomon SC & Ms K A T Pedersen  
Second Respondent : No appearance  
Third Respondent : No appearance  
Fourth Respondent : No appearance  
Fifth Respondent : No appearance

*Solicitors:*

Appellant : State Solicitor's Office  
First Respondent : Squire Patton Boggs  
Second Respondent : No appearance  
Third Respondent : No appearance  
Fourth Respondent : No appearance  
Fifth Respondent : No appearance

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

Amatek Ltd v Googoorewon Pty Ltd [1993] HCA 16; (1993) 176 CLR 471  
Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208  
Civil Aviation Safety Authority v Ovens [2011] FCAFC 75; (2011) 278 ALR 418  
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd [1994] FCA 293; (1994) 49 FCR 576  
Hancock v Executive Director of Public Health [2008] WASC 224  
Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356  
IW v The City of Perth [1997] HCA 30; (1997) 191 CLR 1  
Kioa v West [1985] HCA 81; (1985) 159 CLR 550  
Mackiewicz v Kal Holdings Pty Ltd & Anor [1999] WASCA 84  
McKay v Commissioner of Main Roads [2013] WASCA 135  
Mighty River International Ltd v Hughes [2017] WASCA 152; (2017) 52 WAR 1  
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; [1986] HCA 40; (1986) 162 CLR 24  
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259  
Mohammadi v Bethune [2018] WASCA 98  
Osland v Secretary to the Department of Justice [No 2] [2010] HCA 24; (2010) 241 CLR 320  
O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210  
Plaintiff S4/2014 v Minister for Immigration and Border Protection [2014] HCA 34; (2014) 253 CLR 219  
Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355  
R v Trebilco; Ex parte FS Falkiner & Sons Ltd [1936] HCA 63; (1936) 56 CLR 20  
R v Wallis; Ex parte Employers Association of Wool Selling Brokers (Wool Stores Case) (1949) 78 CLR 529

Star & Garter Hotel Pty Ltd v Liquor Commission of Western Australia  
[2014] WASC 193

Stead v State Government Insurance Commission [1986] HCA 54; (1986) 161  
CLR 141

Sweedman v Transport Accident Commission [2006] HCA 8; (2006) 226  
CLR 362

That's Entertainment (WA) Pty Ltd v Commissioner of Police [2013] WASC  
75

Van Heerden v Hawkins [2016] WASCA 42

Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227; (2013)  
45 WAR 446

Woolworths Ltd v The Commissioner of Police [2013] WASC 413

**MCGRATH J:**

1           The Liquor Commission of Western Australia (the Commission) granted approval to an application by the first respondent to redevelop the Leisure Inn Hotel in Rockingham by remodelling the premises as a Dan Murphy's Liquor Store (the Application) pursuant to s 77(1) of the *Liquor Control Act 1988* (WA) (the Act). The Commission granted that approval upon finding that the development of the Dan Murphy's Liquor Store at the Leisure Inn Hotel premises was in the public interest (the Decision).

2           The appellant appeals the Decision, contending that the Commission erred in law by taking into account irrelevant considerations and, in the alternative, denying the appellant procedural fairness by failing reasonably to give the appellant notice of those considerations. The appellant further contends that the Commission erred in law by misconstruing its statutory function in applying the primary object in s 5(1)(c) of the Act.

3           The primary issue in the appeal is the proper construction and application of the Act and, in particular, the meaning of 'public interest' in s 38(2) of the Act.

4           I have determined that the appeal should be allowed for the reason that the Commission did err in law by taking into account irrelevant considerations and, further, by denying the appellant procedural fairness. Accordingly, the decision of the Commission must be quashed and the matter must be remitted to the Commission to consider the application according to law.

5           In this appeal, I will consider the following:

- (a)    The procedural background;
- (b)    The Decision;
- (c)    The grounds of appeal;
- (d)    The statutory framework; and
- (e)    An assessment of the grounds of appeal.

**Procedural background**

6           On 8 April 2014, the first respondent lodged the Application with the Director of Liquor Licensing (Director). The Application was supported by, relevantly, a Public Interest Assessment (PIA) prepared on behalf of the first respondent.

7           On 4 June 2014, pursuant to s 38(1)(c) of the Act, the Director notified the first respondent that it had been determined that it was appropriate that s 38(2) of the Act would apply. That is, it was necessary for the first respondent to satisfy the licensing authority that the granting of the Application was in the public interest.

8           On 21 August 2015, the Director referred the Application to the Commission pursuant to s 24(1) of the Act. On 20 July 2016, the Commission conducted a hearing. On 11 October 2017, the Commission delivered its reasons for the Decision.

9           The appellant now appeals the Decision. At the hearing of the appeal only the first respondent appeared as a contradictor.

**The Decision**

10          The Commission's reasons for decision are comprehensive. The Commission determined that, based upon an assessment of all the evidence, the Commission was satisfied that the applicant (first respondent) had discharged its onus that it was in the public interest to allow the Application and that the objectors had failed to establish that the granting of the licence would not be in the public interest.<sup>1</sup>

11          The Commission outlined the statutory framework relevant to the determination of the Application without error.<sup>2</sup>

12          The Commission received voluminous material including a substantial PIA on behalf of the first respondent. The Commission comprehensively outlined that PIA.<sup>3</sup>

13          The Executive Director of Public Health (EDPH) intervened pursuant to s 69(8a)(b) of the Act. The Commission considered the EDPH's representations to the effect that the nature of a Dan Murphy's

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<sup>1</sup> Reasons of the Commission [140] - [142].

<sup>2</sup> Reasons of the Commission [76] - [80], [116].

<sup>3</sup> Reasons of the Commission [6] - [42].

Liquor Store in the particular community would likely cause harm or ill-health to people or a group of people.<sup>4</sup>

14       The Commission considered the evidence and submissions from the Commissioner of Police (intervening) which were to the effect that the granting of the Application would lead to a significantly higher rate of liquor consumption and higher rates of crime and domestic violence.<sup>5</sup>

15       The Commission considered objections from the Rockingham Seventh Day Adventist Church and two other persons who are residents in the Rockingham area.<sup>6</sup>

16       The Commission provided a concise summary of the likely harm that may result if the Application were granted against the benefits of granting the Application.<sup>7</sup>

17       After outlining the factors to be considered, the Commission made a number of findings. It is convenient to set out the relevant paragraphs of the Decision in some detail given that it is relevant to the first ground of appeal.

139. It is important to note that this application cannot be viewed in a piecemeal manner. The Commission is required to consider all of the benefits that may arise from the totality of what is planned by the applicant. The development of the premises relating to food and beverage facilities will no doubt provide the benefits that are referred to by the applicant. The development of the Dan Murphy's store will also provide the types of benefits that will have previously been referred to by the Commission in similar applications. The totality of these benefits must then be weighed against the harm and ill-health issues that have already been referred to. Other factors that lend support to the application include:

- a) the investment of \$6.5 million in the City of Rockingham which may, notwithstanding the absence of any direct evidence of economic flow on benefits, contribute to the further development of the commercial precinct within which the premises are located;

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<sup>4</sup> Reasons of the Commission [43] - [53].

<sup>5</sup> Reasons of the Commission [40] - [42], [65] - [73].

<sup>6</sup> Reasons of the Commission [55] - [57].

<sup>7</sup> Reasons of the Commission [136] - [139].

- b) Whilst the Dan Murphy's store is a destination liquor outlet, a proportion of customers from outside the immediate area may shop elsewhere to the benefit of other businesses in the commercial precinct; and
  - c) although the frequency of use is not clear, the staff training facility may add some vitality to the precinct.
140. Based on the totality of the evidence submitted by all parties to the application, the Commission makes the following findings:
- a) the risk of an increase in alcohol related harm and ill-health, and the likely resultant magnitude of that harm and ill-health due to the proposed introduction of the Dan Murphy's store, over and above the alcohol related harm which is occurring in the community currently (due to existing licensed premises, including the applicant's BWS store) is not insignificant;
  - b) however, there are some potential mitigating factors:  
  
...
  - c) whilst the applicant has not clearly demonstrated that the proposed Dan Murphy's store is responding to the preference or requirements of consumers of liquor in the local community (given the ambiguity surrounding the results of the Community Survey), the high level of support for the upgrade of other facilities and the facilities overall is a relevant consideration;
  - d) although the extent of an upgrade to the accommodation component of the proposed upgrade has not been made clear, the tenor of the application is such that an upgrade in keeping with the redevelopment of the other facilities is expected; and
  - e) the benefits to be derived by the City of Rockingham and the local community in the form of employment, a staff training facility and the proposed \$6.5 million investment are also relevant considerations.
141. Although finely balanced, having considered the potential benefits of the proposed development as a whole, the Commission has determined that the likely increase in harm and ill-health that may result from the grant of the application is not so unacceptable as to outweigh the potential benefits to the City of Rockingham and the local community.
142. Based on an assessment of all the evidence relied upon by the parties (including materials not referred to specifically in these



reasons), the Commission is satisfied that the applicant has discharged its onus and established on balance that it is in the public interest to allow the application and that the objectors have failed to establish that the granting of the licence would not be in the public interest.

### **Grounds of appeal**

18 Section 28 of the Act provides the appellant with a right of appeal to this Court against the Commission's decision to grant the application. Section 28(2) provides that no appeal lies against a decision of the Liquor Commission constituted by three members, except to the Supreme Court on a question of law. Properly understood, an appeal from an administrative body confined to a question of law is in the nature of judicial review.<sup>8</sup> There was no dispute by the first respondent that the proposed grounds involved questions of law. I agree that each ground is competent.

19 The appellant relies upon the following three grounds of appeal:

1. In assessing whether granting the application was in the public interest, the Commission erred in law by taking into account irrelevant considerations, namely:
  - a. the extent to which granting the application would deliver benefits to the City of Rockingham and the local community, including in the form of employment, a staff training facility and the proposed \$6.5 million investment;
  - b. the extent to which the staff training facility may add some additional vitality to the precinct;
  - c. the extent to which granting the application may contribute to the further development of the commercial precinct within which the premises are located; and
  - d. the extent to which granting the application may benefit other businesses in the commercial precinct.
2. Alternatively to ground 1, the Commission erred in law by denying the appellant procedural fairness by failing reasonably to give the appellant notice of the Commission's view as to the significance to the Commission's decision of:

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<sup>8</sup> *Osland v Secretary to the Department of Justice [No 2]* [2010] HCA 24; (2010) 241 CLR 320, 331 – 332; *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 [37].

- a. the extent to which granting the application would deliver benefits to the City of Rockingham and the local community, including in the form of employment, a staff training facility and the proposed \$6.5 million investment;
  - b. the extent to which the staff training facility may add some additional vitality to the precinct;
  - c. the extent to which granting the application may contribute to the further development of the commercial precinct within which the premises are located; and
  - d. the extent to which granting the application may benefit other businesses in the commercial precinct.
3. In assessing whether granting the application was in the public interest, the Commission erred in law by misconstruing its statutory function in applying the primary object in section 5(1)(c) of the *Liquor Control Act 1988* (WA) by considering whether granting the application would cater for the requirements of consumers for liquor and related services in isolation.

20 The appellant submitted that should ground one be allowed then it was not necessary for the court to consider and determine grounds two and three.<sup>9</sup> I consider that it is appropriate that I determine all three grounds of appeal.

21 I will first determine ground one.

### **Ground One**

22 By ground one the appellant contends that the Commission took into account irrelevant considerations and thereby erred in law.<sup>10</sup> The ground concerns the proper construction and application of the Act. The paramount question of construction that arises on ground one is the meaning of the term 'public interest' in s 38 of the Act.

23 An appellant impugning a decision on relevancy grounds must establish that the decision maker was forbidden to take into account the considerations that are impugned or that the decision maker failed to take into account a relevant consideration.

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<sup>9</sup> ts 79 (appeal hearing).

<sup>10</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; [1986] HCA 40; (1986) 162 CLR 24, 40 (Mason J).

24 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*<sup>11</sup>  
Mason J stated:

The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account in making that decision.

25 That reasoning is applicable to a decision maker who takes into account an irrelevant consideration. That is, the consideration must not only be irrelevant but the Act must have forbidden its consideration by the decision maker. Determining what is forbidden is a question of statutory construction. As Professor Aronson in *Judicial Review of Administrative Action and Government Liability* observes:<sup>12</sup>

Relevancy and its opposite are defined ultimately by the Act which prescribes what must or must not be considered. More than that, for these grounds to apply, the Act must be seen to stipulate that breach of such of its relevancy criteria as are in question is meant to result in invalidity.

26 The appellant must therefore establish that the Commission took into account forbidden considerations and thereby made an error of law.

27 The appellant encapsulated the irrelevant considerations as 'the promotion and securing of general and diffuse benefits in the form of employment, facilities and investment in the locality in which licensed premises are situated or to be situated.'<sup>13</sup>

28 The appellant submits that the irrelevant considerations that were erroneously taken into account by the Commission were:<sup>14</sup>

- (a) the extent to which granting the Application would deliver benefits to the City of Rockingham and the local community, including in the form of employment, a staff training facility and the proposed \$6.5 million investment;
- (b) the extent to which the staff training facility may add some additional vitality to the precinct;

<sup>11</sup> *Minister for Aboriginal Affairs v Peko Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 39 (Mason J).

<sup>12</sup> Aronson et al, *Judicial Review of Administrative Action and Government Liability* (2017) [5.30].

<sup>13</sup> Appellant's submissions [19].

<sup>14</sup> Appellant's submissions [49]; Notice of Appeal.

- (c) the extent to which granting the Application may contribute to the further development of the commercial precinct within which the premises are located; and
- (d) the extent to which granting the Application may benefit other businesses in the commercial precinct.

29 For convenience, I will refer to these matters as the 'Economic Benefit considerations'.

30 The appellant in his written outline of submissions contended that the reference to 'potential benefits' in paragraph [141] of the Decision is a reference solely to the Commission's finding that at paragraph [140](e):<sup>15</sup>

- (e) the benefits to be derived by the City of Rockingham and the local community in the form of employment, a staff training facility and the proposed \$6.5 million investment are also relevant considerations.

31 Therefore, the appellant submitted that paragraph [141] - [142] of the Decision conclusively show that the Commission determined that the increase in harm and ill-health and the potential benefits to the City of Rockingham and the local community likely to result from the grant of the Application were the only considerations informing its assessment of the public interest.<sup>16</sup>

32 During the hearing of the appeal that submission appeared to be disavowed by counsel for the appellant. That is understandable. I agree with the first respondent's submissions regarding the construction of the Decision. The first respondent submitted that properly understood, the reference to 'benefits' in paragraph [141] is a reference to all the benefits of the proposed development as a whole.<sup>17</sup> In paragraph [139] the Commission stated that it was 'required to consider all of the benefits that may arise from the totality of what is planned.'

33 The Commission then referred to those benefits in broad terms and concluded that 'the totality of these benefits must then be weighed against the harm and ill-health issues'. Therefore, the appellant's contention in written submissions that the potential benefits to the City of Rockingham and the local community were the only relevant

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<sup>15</sup> Appellant's submissions [11].

<sup>16</sup> Appellant's submissions [12].

<sup>17</sup> First Respondent's submissions [31] - [33].

considerations taken into account cannot be accepted. As I have observed, during hearing of the appeal, the appellant's counsel appeared to accept that proposition and therefore, disavowed the proposition to the contrary in the written outline of submissions. However, the appellant did maintain the contention that the Commission did take the Economic Benefit considerations into account, though, they were not the only considerations.

34 It is clear that the Commission did take into account the Economic Benefit considerations. That is, the wider and diffuse benefits to the City of Rockingham and the local community were factors in the Commission's reasoning to grant the application. The Commission specifically referred to those considerations and clearly those considerations were not insignificant to the Commission's reasoning. The first respondent did not dispute that the Commission did take into account the Economic Benefit considerations.<sup>18</sup> The first respondent contended that the Commission did take into account the Economic Benefit considerations and that those considerations were relevant. The parties focused their respective submissions on whether the Economic Benefit considerations were relevant considerations to determining the public interest in s 38 of the Act.

35 The first respondent contended that 'the relevant public interest encompasses the economic development of the State. The potential impact of the Act upon aspects of economic development is obvious and direct and cannot be irrelevant to the exercise of the public interest discretions under the Act.'<sup>19</sup> The appellant's case in summary was that the Act justified a legislative intention that the Economic Benefit considerations were not relevant to the Commission's decision and thus should not be taken into account by the Commission.

### **The statutory framework**

36 It is necessary that I provide an outline of the sections of the Act relevant to the determination of ground one.

37 Before doing so it is appropriate to mention that after the Commission made the Decision (and indeed after the hearing of the appeal) the provisions of the Act most relevant to the appeal, namely s 5 and s 38(4), were amended.<sup>20</sup> However, whether the Commission

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<sup>18</sup> First respondent's submissions [21] - [24], [65]; ts 57 (appeal hearing).

<sup>19</sup> First respondent's submissions [58].

<sup>20</sup> See: *Liquor Control Amendment Act 2018* (WA); Gazette 17 August 2018, p 2893; Gazette 2 October 2018, p 3779.

made the errors alleged by the appellant must be judged by reference to the legislation in force at the time of the Decision. Accordingly, references to the legislation in the discussion below are references to the Act in force at the time of the Decision.

38 Section 38(1) and s 38(2) of the Act provide that an applicant for the grant of a licence 'must satisfy the licensing authority that granting the application is in the public interest.' The licensing authority in relation to an application under s 38 of the Act is the Commission.

39 Section 5 of the Act sets out the primary and secondary objects of the Act. Section 5(1) of the Act provides as follows:

- (1) The primary objects of this 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 for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
- (2) 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 secondary objects -
  - (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 of the requirements of consumers in the State; and
  - [(b), (c) deleted]
  - (d) to provide adequate controls over, and over the persons 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, for the administration of this Act;
- (3) If, in carrying out any of its functions under this Act, the licensing authority considers that there is any inconsistency between the primary objects referred to in subsection (1) and the

secondary objects referred to in subsection (2), the primary objects take precedence.

40       Section 33(1) of the Act provides that, subject to the Act, the licensing authority has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest.

41       Section 38 of the Act provides:

Some applications not to be granted unless in the public interest

- (1)    Subsection (2) applies to -
  - (a)     an application for the grant or removal of a licence of a kind prescribed; or
  - (b)     an application for a permit of a kind prescribed; or
  - (c)     any other application to which the Director decides it is appropriate for subsection (2) to apply.
- (2)    An applicant who makes an application to which this subsection applies must satisfy the licensing authority that granting the application is in the public interest.
- (3)    For the purposes of subsection (2), the applicant must provide to the licensing authority -
  - (a)     any prescribed document or information; and
  - (b)     any other document or information reasonably required by the licensing authority for those purposes.
- (4)    Without limiting subsection (2), the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include -
  - (a)     the harm or ill health that might be caused to people, or any group of people, due to the use of liquor; and
  - (b)     the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and
  - (c)     whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and

- (d) any other prescribed matter.
- (5) If an application referred to in subsection (1)(a) is not granted because the licensing authority is not satisfied that granting the application is in the public interest, an application for the grant or removal of a licence in respect of the same premises or land cannot be made within 3 years after the licensing authority's decision unless the Director certifies that the proposed application is of a kind sufficiently different from the application that was not granted.
- (6) A decision by the Director under subsection (1)(c) or (5) in relation to an application is not subject to review under section 25.

### **Appellant's two alternative construction arguments**

42 The appellant relies upon two alternative approaches to the proper construction of the Act in support of ground one. First, that public interest factors under the Act are confined by the objects of Act<sup>21</sup> and by s 38(4) of the Act. That is, s 5 and s 38(4) of the Act confine the meaning of the public interest and make the objects of the Act and the mandated permissive factors specified in s 38(4) exclusive considerations. Accordingly, the appellant contends that the objects and the mandated permissive factors are the determinants of the public interest.

43 The appellant proffers a second alternative construction of the Act should the appellant's primary submission not be accepted. The appellant contends that if s 5 and s 38(4) of the Act do not specify the exclusive determinants of the public interest then the considerations taken into account by the Commission are not within the scope and purpose of the Act and for that reason are irrelevant considerations.

### **Principles of statutory construction**

44 The principles of statutory construction are well known and were summarised by the Court of Appeal in *Mohammadi v Bethune*:<sup>22</sup>

The principles of statutory construction are well known and do not require detailed exposition. Statutory construction requires attention to the text, context and purpose of the Act. While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context. Statutory construction, like any process of

<sup>21</sup> *Liquor Control Act* s 5.

<sup>22</sup> *Mohammadi v Bethune* [2018] WASCA 98 [31] - [33].



construction of an instrument, has regard to context. As Kiefel CJ, Nettle and Gordon JJ recently explained in *SZTAL*:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.

The objective discernment of the statutory purpose is integral to contextual construction. The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.

### Ground one – First construction argument of appellant

45 Section 38(2) of the Act provides that the applicant must satisfy the licensing authority that the application is in the public interest.

46 The appellant relies upon *Woolworths Ltd v Director of Liquor Licensing*<sup>23</sup> in support of the appellant's primary submission concerning the meaning of 'public interest' in s 38(2) of the Act. The appellant contends that *Woolworths Ltd v Director of Liquor Licensing* is authority for the appellant's primary submission on the proper construction of the Act. It is necessary that the relevant paragraphs from *Woolworths Ltd v Director of Liquor Licensing*<sup>24</sup> relied upon by the appellant be outlined:

47 By s 38(2), the appellant had to 'satisfy' the Commission that the granting of the application was 'in the public interest'.

<sup>23</sup> *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; (2013) 45 WAR 446.

<sup>24</sup> *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; (2013) 45 WAR 446 [47] - [55].

- 48 It is not uncommon for statutes to provide that a decision maker shall or may take certain action if 'satisfied' of the existence of specified matters: see *Buck v Bavone* [1976] HCA 24; (1976) 135 CLR 110, 118 (Gibbs J). The expression 'in the public interest', when used in a statute, imports a discretionary value judgments: see *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute: see *O'Sullivan* (at 216).
- 49 In the present case, the factual matters which the Commission was bound to take into account, in determining whether it was satisfied that the granting of the appellant's application was 'in the public interest', were those relevant to the objects of the Act, as set out in s 5(2).
- 50 The factual matters which the Commission was entitled to take into account, in determining whether it was satisfied that the granting of the appellant's application was 'in the public interest', were those set out in s 38(4).
- 51 Section 5(2) is mandatory whereas s 38(4) is permissive.
- 52 On the proper construction of the Act (in particular, s 5(1), s 5(2), s 16(1), s 16(7), s 30A(1), s 33 and s 38(2)), the Commission was obliged to take into account the public interest in:
- (a) catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State (s 5(1)(c)); and
  - (b) facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State (s 5(2) (a)),
- to the extent that those matters arose on the evidence (including notorious facts) before the Commission: see *O'Sullivan* (216); *R v Hunt; Ex parte Sean Investments Pty Ltd* [1979] HCA 32; (1979) 180 CLR 322, 329 (Mason J); *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR 380, 400 (Malcolm CJ, Pidgeon & Nicholson JJ agreeing).
- 53 The Commission's obligation to take into account the public interest in the manner I have indicated was not diminished by s 33(1), which provides relevantly that, subject to the Act, the

Commission has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the Commission considers in the public interest. The word 'absolute' does not confer on the Commission an arbitrary or unlimited power: see *Water Conservation & Irrigation Commission (NSW) v Browning* [1947] HCA 21; (1947) 74 CLR 492, 503 (Dixon J); *R v Anderson; Ex parte Ipec Air Pty Ltd* [1965] HCA 27; (1965) 113 CLR 177, 189 (Kitto J); *FAI Insurances Ltd v Winneke* [1982] HCA 26; (1982) 151 CLR 342, 368 (Mason J). Section 33(1) is expressly 'subject to' the other provisions of the Act. It does not permit the Commission to grant or refuse an application other than consistently with the objects and other provisions of the Act: see *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241, 249 - 250 (Malcolm CJ).

- 54 Also, the Commission's obligation to take into account the public interest in the manner I have indicated was not diminished by s 33(2), which provides relevantly that an application may be refused even if the applicant meets all the requirements of the Act or may be granted even if a valid ground of objection is made out, but the application is required to be dealt with on its merits, after such inquiry as the Commission thinks fit. Section 33(2) does not empower the Commission to determine for itself the scope and content of the public interest, for the purposes of s 38(2), as if s 5(2) and s 38(4) did not exist. The references in s 33(2) to 'the requirements of this Act' and 'a valid ground of objection' do not include the criterion of 'in the public interest' embodied in s 38(2). Rather, those references are to other requirements of the Act which must be satisfied and other grounds of objection which may be made out. Examples of these other requirements and other grounds of objection include the requirement in s 37(1) that an applicant for a licence be a fit and proper person to be a licensee of the premises in question; the requirements in s 39 and s 40 to obtain certificates from the local government and the local planning authority; the requirement in s 72 to obtain the consent of an owner or lessor; and the general right of objection and the general grounds of objection specified in s 73 and s 74.
- 55 On the proper construction of the Act (in particular s 5(1), s 5(2), s 16(1), s 16(7), s 30A(1), s 33 and s 38(2)), the Commission was obliged to determine the appellant's application in accordance with the evidence (including notorious facts) before it and the criteria imposed by the Act. This statutory duty involves two aspects. First, the Commission must evaluate the evidence before it and make findings and draw conclusions from the evidence, including by inference. An

inference is an affirmative conclusion which arises from facts that have been established. Of course, the Commission's fact finding task extends to the making of findings and the drawing of conclusions, wholly or partly, from notorious facts. Secondly, the Commission must apply the public interest criterion, as I have explained it, to the relevant circumstances, in particular, the findings it has made and the conclusions it has drawn. The Commission was required to undertake the statutory duty by reference to the issues which arose from the application in the context of the relevant provisions of the Act, the evidence (including notorious facts) before the Commission and any submissions made by the appellant, the Director and the objectors.

47 At the hearing of the appeal, the appellant submitted that the above paragraphs 'make very plain' that the Court of Appeal has determined that the only matters which are relevant to the public interest consideration when granting a licence are stated in s 5 and s 38(4) of the Act.<sup>25</sup>

48 I do not accept the appellant's interpretation of *Woolworths Ltd v Director of Liquor Licensing*. There is no express statement by Buss JA or Martin CJ that the public interest is strictly confined by the objects of the Act as provided by s 5 and by s 38(4) of the Act. Rather, the objects of the Act were mandatory considerations and s 38(4) provided the permissive factors that the Commission may consider in determining the public interest. The reasoning of Buss JA must be understood in the context of the question of law being considered by the Court of Appeal, namely the scope of the Commission's discretion to take particular considerations into account in granting or refusing an application. The Court was not dealing with the question raised by the present case, namely whether the Act prohibits certain considerations from being taken into account. The Court concluded that the 'absolute discretion' in s 33 of the Act is subject to the other provisions of the Act,<sup>26</sup> and that the Commission cannot determine the scope and content of the public interest for the purposes of s 38(2) 'as if s 5(2) and s 38(4) did not exist.'<sup>27</sup> That is, the Commission does not have an unfettered discretion but must exercise the discretion having regard to the objects of the Act, and is entitled (but not obliged) to take into account the matters in s 38(4) of the Act.

<sup>25</sup> ts 25, (appeal hearing).

<sup>26</sup> *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; (2013) 45 WAR 446 [53].

<sup>27</sup> *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; (2013) 45 WAR 446 [54].

49 I do not accept that *Woolworths Ltd v Director of Liquor Licensing* is authority for the appellant's contention that the scope of the considerations relevant to the public interest in s 38 is defined solely by s 5 and s 38(4) of the Act.

50 I will now consider the further submissions made by the appellant in support of the appellant's primary construction argument.

51 In support of that construction the appellant submitted that by providing that the licensing authority may have regard to 'any other prescribed matter' in s 38(4)(d), the Parliament has impliedly prohibited the licensing authority to have regard to any other matters that have not been prescribed.<sup>28</sup> In short, s 38(4)(d) provides that the only means by which further matters relevant to determining the public interest may be identified is by way of the *Liquor Control Regulations 1989* (WA). The appellant submits that this is an application of the Hordern principle.<sup>29</sup> The proposition on which that principle rests is 'that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.'<sup>30</sup>

52 The appellant contends that if Parliament had intended for the licensing authority to have regard to any other matters it would have said so. The appellant referred to a number of statutes where the Parliament has done so.<sup>31</sup> The appellant submits that if the purpose of s 38(4)(d) is not to impliedly prohibit the licensing authority to have regard to other factors then the provision is superfluous. To construe s 38 in that way would be contrary to the established principle of construction that every provision has work to do.<sup>32</sup>

53 I do not accept those submissions. As the first respondent observed, the words 'any other prescribed matter' is a clear statement by the Parliament that further matters may be prescribed and thereby may be taken into account by the Commission in determining the public interest. That the Parliament would do so is most understandable. I

<sup>28</sup> Appellant's submissions [29].

<sup>29</sup> Appellant's submissions [29]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; (2014) 253 CLR 219 [43] (French CJ, Hayne, Crennan, Kiefel & Keane JJ).

<sup>30</sup> *R v Wallis; Ex parte Employers Association of Wool Selling Brokers (Wool Stores Case)* (1949) 78 CLR 529, 550 (Dixon J).

<sup>31</sup> Appellant's submissions [30]; See, for example: *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015* (WA) s 37(2)(f); *Charitable Collections Act 1946* (WA) s 11(2); *Contaminated Sites Act 2003* (WA) s 38(2).

<sup>32</sup> *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [71] (McHugh, Gummow, Kirby & Hayne JJ).

accept the first respondent's submission that the breadth of the notion of public interest necessitates that the Parliament would reserve to the Executive the power to promulgate any other factor that the Executive considers requires specific attention.<sup>33</sup>

54 The appellant's preferred construction confronts a number of difficulties. Section 38(4) provides that the matters that a licensing authority may have regard to 'include' the matters delineated. The word 'include' in a definition or enabling section usually denotes, though not always, that the matters delineated are not intended to be exhaustive.<sup>34</sup> Understood that way, the subsection is providing a permissive list of matters that the Commissioner may have regard to in determining the public interest. However, the factors that may bear on the public interest in any particular application is not otherwise limited by subsection 38(4) of the Act.

55 A further difficulty with the appellant's preferred construction is the wording of subsection 38(4) of the Act which provides 'without limiting subsection (2), the matters the licensing authority may have regard to [...]'. The appellant contends that the words 'without limiting subsection (2)' are necessary to recognise or give effect to s 5 of the Act.<sup>35</sup> I do not accept that submission. Section 5 is clear in its terms and does not require the words 'without limiting subsection (2)' in order to be operative.

56 The first respondent submitted that the words 'without limiting subsection (2)' is a clear statement of intent by the Parliament that the factors stated in s 38(4) do not limit the factors that the Commission may take into account when assessing the public interest.<sup>36</sup> That reasoning is compelling.

57 A further difficulty with the appellant's preferred construction is its reliance on the objects of the Act as criteria to determine the public interest. The statutory objects assist in determining the proper construction of the provision. The role of the statutory objects is to assist in resolving competition between competing constructions.<sup>37</sup> The purpose or objects must be read and understood in the context of the

<sup>33</sup> First respondent's submissions [69].

<sup>34</sup> See: Pearce DC & Geddes RS, *Statutory Interpretation in Australia* (LexisNexis, 8<sup>th</sup> ed, 2014), [6.60] - [6.63].

<sup>35</sup> ts 20 (appeal hearing).

<sup>36</sup> ts 56 (appeal hearing).

<sup>37</sup> *Sweedman v Transport Accident Commission* [2006] HCA 8; (2006) 226 CLR 362 [150] (Heydon J).

statute as a whole.<sup>38</sup> The wording of s 5 of the Act does not confine the meaning of the term public interest in the manner asserted by the appellant.

58 In requiring the licensing authority to have regard to the primary and secondary objects of the Act, s 5(2) obliges the licensing authority to have regard to those objects in determining the application. The section does not proscribe considerations of other matters and does not expressly confine the scope or meaning of the public interest. Nor does the section make those objects the exclusive considerations or the sole determinants of the public interest.

59 Therefore, I do not accept the appellant's primary submission as to the term 'public interest' in s 38 of the Act. That is, I do not accept that s 5 and s 38(4) of the Act confine the meaning of the public interest and make the objects of the Act and the permissive factors specified in s 38 the exclusive determinants of the public interest.

### Ground One - alternative construction

60 The appellant's alternative construction is that the Economic Benefit considerations are beyond the subject matter, scope and purpose of the Act and hence are irrelevant considerations. That is, the Act has manifested an intention that the Economic Benefit considerations should not be taken into account.

61 The term public interest is not defined in the Act. Therefore, the term public interest must be determined by the principles of statutory construction.

62 Ordinarily, the expression 'in the public interest' imports a discretionary judgment. In *O'Sullivan v Farrer*<sup>39</sup> the High Court considered the term 'public interest' in the context of the *Liquor Act 1982* (NSW):<sup>40</sup>

The expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable...given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view (citation omitted).

<sup>38</sup> *Mighty River International Ltd v Hughes* [2017] WASCA 152; (2017) 52 WAR 1 [88] (Buss P) citing *IW v The City of Perth* [1997] HCA 30; (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J).

<sup>39</sup> *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210.

<sup>40</sup> *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

63 In *R v Trebilco; Ex parte FS Falkiner & Sons Ltd*,<sup>41</sup> Dixon J (as he then was) observed that where an Act grants a decision maker a broad discretion 'the questions what are, and what are not, legitimate considerations for its exercise must always be disputable and open to wide differences of opinion.'<sup>42</sup>

64 The first respondent's submission is that 'the relevant public interest encompasses the economic development of the State.'<sup>43</sup> That is because the potential impact of the Act upon aspects of economic development is obvious and direct and cannot be irrelevant to the exercise of the public interest discretions under the Act.<sup>44</sup> The wide economic aspect of the public interest was put in the following terms by the first respondent:<sup>45</sup>

Not only are the businesses for which liquor licences are essential themselves directly relevant to the economic development of the State, but they also potentially have a wider impact on economic development, both with respect to the provision of related goods and services and the development of facilities for those related purposes and by encouraging surrounding business developments of an unrelated nature (for example, expansion and development of business districts). The grant of a licence for a major proposed new facility may have the potential to affect the prospect of nearby development.

65 I consider that on a proper construction of the subject matter, scope and purpose of the Act the Parliament has manifested an intention to forbid the Economic Benefit considerations from being taken into account in assessing where the public interest lies. I have reached that view for the following reasons.

66 First, the broader context in which the term public interest appears supports that conclusion. The Act is regulatory in nature and is directed, in large part, to the protection of the public.<sup>46</sup> In protecting the public, consideration must be given to the orderly and proper management and growth of the liquor industry. The Act is not concerned with regulating or developing wider economic objectives.

67 Secondly, the primary objects of the Act are narrow. The primary objects make no reference to wider economic benefits to a locality or

<sup>41</sup> *R v Trebilco; Ex parte FS Falkiner & Sons Ltd* [1936] HCA 63; (1936) 56 CLR 20.

<sup>42</sup> *R v Trebilco; Ex parte FS Falkiner & Sons Ltd* [1936] HCA 63; (1936) 56 CLR 20, 32.

<sup>43</sup> First respondent's submissions [58].

<sup>44</sup> First respondent's submissions [58].

<sup>45</sup> First respondent's submissions [59].

<sup>46</sup> *That's Entertainment (WA) Pty Ltd v Commissioner of Police* [2013] WASC 75 [28]; *Mackiewicz v Kal Holdings Pty Ltd & Anor* [1999] WASCA 84 [17].



the community more generally. Subsection 5(1) provides that a primary object is to regulate the sale, supply and consumption of liquor and to minimise the harm or ill-health caused to people from the use of liquor.

68 By subsection 5(1)(c) the only primary object which involves promoting industry is limited to the promotion of specified industries, namely the 'liquor industry, the tourism industry and other hospitality industries in the State'. The first respondent contends that the delineation of the specified industries in s 5(1)(c) cannot be read as exclusionary. That is, s 5 does not manifest an intention to disregard the interaction between such development of the particular industries and the wider economic development of the State.<sup>47</sup> I disagree. If the Parliament had intended that the wider economic development of the State was a relevant consideration in determining the public interest test then Parliament could very easily have said so.

69 Thirdly, there is no provision of the Act, by its terms or effect, which suggests that it is a purpose of the Act to promote general and diffuse benefits to a locality or the State in the form of employment, facilities or investment.

70 Fourthly, there are no provisions in the Act that, by their terms or effect, provide a regulatory framework for evidence to be received from interested parties in assisting the determination of whether general economic benefits in the form of employment and investment would or would not result from a particular application. In that respect the position may be contrasted with the *Industrial Relations Act 1979* (WA) which expressly requires that the Industrial Relations Commission permit certain parties to be heard in relation to matters such as the State Wage Order, which expressly involves the consideration of economic factors.<sup>48</sup>

71 Fifthly, the long title of the Act, to the extent that it is relevant,<sup>49</sup> does not support a contention that the scope or purpose for the Act should be read widely to include diverse economic purposes, which are not expressly articulated in s 5 of the Act.

72 The first respondent relied upon s 38(4)(b) which permits considerations of the impact on the amenity of the locality in which the

<sup>47</sup> First respondent's submissions [62].

<sup>48</sup> See: *Industrial Relations Act 1979* (WA) s 50 (3), s 51K.

<sup>49</sup> *Van Heerden v Hawkins* [2016] WASC 42 [97], citing *Amatek Ltd v Googoorewon Pty Ltd* [1993] HCA 16; (1993) 176 CLR 471, 477 (Mason CJ, Brennan, Dawson, Gaudron & McHugh JJ).

licenced premises, or proposed licences premises are, or are to be, situated to support the construction that the Act permits broader economic considerations to be taken into account.<sup>50</sup> The appellant's construction of s 38(4)(b) is that the words 'impact on the amenity of the locality' must be understood as being concerned with potential adverse impacts on the amenity. That is, the impact on the amenity is concerned with adverse social consequences resulting from the presence of licenced premises.<sup>51</sup>

73 Section 38(4)(b) refers to the impact on the amenity of the locality. Having regard to the ordinary meaning of the word 'amenity', the phrase 'the amenity of the locality' encompasses considerations of public order, and the maintenance of the peace and the pleasant quality or disposition of a locality.<sup>52</sup> Nothing in that phrase imports any notion that wider or diffuse economic benefits to a locality are encompassed.

74 Therefore, I have determined that it was impermissible for the Commission to take into account as relevant considerations the Economic Benefit considerations. However, the Commission did so. The Economic Benefit considerations were not so insignificant that the taking into account of them could not have materially affected the Commission's decision.

75 Accordingly, I uphold ground one and therefore, the appeal must be allowed. Whilst the appellant contended that if ground one is upheld there is no need to consider grounds two and three, I have determined that it is appropriate that I do so.

## **Ground Two**

76 By ground two the appellant contends that the Commission erred in law by denying the appellant procedural fairness by failing reasonably to give notice of the Commission's view as to the significance to the Commission of the Economic Benefit considerations.<sup>53</sup> The appellant submitted that a reasonable person in the appellant's position would not have anticipated an adverse decision in relation to the Economic Benefit considerations.<sup>54</sup>

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<sup>50</sup> First respondent's submissions [79] - [81].

<sup>51</sup> Appellant's submissions [42].

<sup>52</sup> Oxford English Dictionary.

<sup>53</sup> Appeal Notice, ground two.

<sup>54</sup> Appellant's submissions [50].

77 The Commission is bound by the requirements of procedural fairness.<sup>55</sup> The appellant was permitted to intervene,<sup>56</sup> did so and thereby became a party to the proceedings.<sup>57</sup>

78 In *Kioa v West* Mason J stated that where a statute makes provision for a decision to be made, in the making of the decision 'the application and content of [...] the duty to act fairly depends to a large extent on the construction of the statute.'<sup>58</sup>

79 Section 16 of the Act provides for procedural processes for decision making by the Commission that emphasise informality, efficiency and the power of the Commission to control its own procedure. They include provisions to the effect that the Commission may obtain information as to any question that arises for decision in such manner as it thinks fit. It may consider and dismiss or determine applications, and receive submissions and representations in relation to any application before it, as it thinks fit.

80 Section 16(7) of the Act provides that the Commission is to determine its own procedure and is not bound by the rules of evidence or any practices or procedures applicable to courts, except to the extent that the licensing authority adopts those rules, practices or procedures. It is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms, and as speedily and with as little formality and technicality as is practicable.

81 Section 16(11) of the Act requires that each party to a proceeding before the Commission be given a reasonable opportunity to present its case and, in particular, to inspect any documents to which the licensing authority proposes to have regard to in making a determination in the proceedings and to make submissions in relation to those documents.

82 In *McKay v Commissioner of Main Roads*<sup>59</sup> Murphy JA (Martin CJ and Buss JA agreeing) stated that the principles of procedural fairness 'ultimately involve matters of degree and judgment' and, further, that these principles 'are not susceptible to hard and fast rules and the forensic context in which such questions fall to be determined is relevant'.

<sup>55</sup> *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 [29]; *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; (2013) 45 WAR 446 [61] (Buss JA).

<sup>56</sup> *Liquor Control Act* s 69.

<sup>57</sup> *Liquor Control Act* s 69(13)(a).

<sup>58</sup> *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550, 584.

<sup>59</sup> *McKay v Commissioner of Main Roads* [2013] WASCA 135 [158].

83 In *McKay v Commissioner of Main Roads* Murphy JA (Martin CJ and Buss JA agreeing) endorsed the decision of the Full Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*<sup>60</sup> that there are two qualifications to the proposition that a decision maker is generally not obliged to invite comment on the decision maker's evaluation of the subject's case:

- (i) the subject of a decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it [...]; and
- (ii) the subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material.

84 In *Woolworths Ltd v The Commissioner of Police*<sup>61</sup> Edelman J specifically considered the Act and in so doing referred to two requirements which are incidents of procedural fairness encompassed by the structure of the Act, and implications from its terms, including the express terms of s 16(11), being:

- (i) that a party affected by a decision be given the opportunity of ascertaining the relevant issue; and
- (ii) that a decision maker identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute which it is made, and that a decision maker advise of any adverse conclusion which has been arrived at and which would not obviously be open on the known material.

### **First respondent's contentions – procedural fairness**

85 The first respondent contended that the requirements of natural justice to be afforded to the appellant depend, in part, on the role of the appellant in the application.<sup>62</sup> The contention is that the appellant in the proceedings is not participating as a party in adversarial proceedings. Rather, the appellant's participation is the consequence of a specific and

<sup>60</sup> *McKay v Commissioner of Main Roads* [2013] WASCA 135 [157]; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 293; (1994) 49 FCR 576, 591 - 592.

<sup>61</sup> *Woolworths Ltd v The Commissioner of Police* [2013] WASC 413 [22] - [24].

<sup>62</sup> First respondent's submissions [100] - [103].

prescribed statutory function for particular purposes. The first respondent submitted that the appellant objected on the basis that granting the application would not be in the public interest and would cause undue harm or ill-health to people due to the use of liquor. In oral submissions counsel for the first respondent contended that the appellant had objected on two bases only. The first respondent contends that the appellant elected not to comment or engage in respect of the Economic Benefit considerations and that the appellant had clear notice of those considerations.<sup>63</sup> I will now consider those contentions.

86 What constitutes a reasonable opportunity to present a case and the manner in which the party is permitted to do so may vary in accordance with the circumstances of the case. I agree with Pritchard J's observation in *Star & Garter Hotel Pty Ltd v Liquor Commission of Western*<sup>64</sup> that nothing in s 16(11), or in the Act more generally, obliges the Commission to permit each party to a proceeding to be heard in respect of each issue arising for consideration by the Commission, irrespective of whether that issue pertains to the case the party seeks to advance before the Commission.

87 The appellant objected to the application pursuant to s 73(1) of the Act. The objection relied on two grounds being first, that the grant of the application would not be in the public interest and second, that the grant would cause undue harm or ill-health to people, or any group of people, due to the use of liquor.<sup>65</sup> The Commission did take into account the Economic Benefit considerations in determining whether the grant of the application was in the public interest. The appellant objected on the basis that the application was not in the public interest. The issue of the Economic Benefits considerations clearly pertained to the case that the appellant, as a party to the proceedings, advanced before the Commission.

88 As I have observed, the first respondent contends that the appellant elected not to comment or engage in respect of the Economic Benefit considerations.<sup>66</sup> That submission is without merit. That the appellant did not comment in respect of the Economic Benefit considerations is most understandable. At the hearing before the Commission the Economic Benefit considerations were not the subject of written or oral submissions. There was limited discourse between

<sup>63</sup> First respondent's submissions [107].

<sup>64</sup> *Star & Garter Hotel Pty Ltd v Liquor Commission of Western Australia* [2014] WASC 193 [47].

<sup>65</sup> Notice of Objection, Western Australian Police dated 14 July 2014.

<sup>66</sup> First respondent's submissions [107].

the Commission and counsel for the appellant concerning irrelevant considerations generally.<sup>67</sup> However, neither counsel relied upon or referred to the Economic Benefit considerations.

89 On a fair reading of the first respondent's articulated case at the hearing no reliance was placed on the Economic Benefit considerations.

90 The PIA, as I have observed, was a voluminous document and was relied upon by the first respondent at the hearing before the Commission. At the hearing of this appeal, counsel for the first respondent outlined the parts of the PIA that disclosed the Economic Benefit considerations. The first respondent also referred to references to the Economic Benefit considerations in the witness statements of industry professionals and community members, and the Social Impact Assessment Liquor Licence prepared by Social Impact Strategies Pty Ltd.

91 However, counsel for the first respondent did not rely upon those references at the hearing of the application before the Commission to advance a contention of the wider economic benefits to the City of Rockingham from the grant of the Application. Whilst the PIA was referred to, both in the written and oral submissions at the hearing before the Commission, it appears that there were no submissions concerning the Economic Benefit considerations.

92 I accept that the position in this case is different from *Woolworths Ltd v Commissioner of Police*<sup>68</sup> where the Commission had regard to matters that were not part of the materials before the respective parties. However, the Commission considered the Economic Benefit considerations and did so in the absence of the appellant being put on notice. I do not accept that the first respondent's ex post search of the material before the Commission in order to identify references to the Economic Benefit considerations is sufficient to answer the Commission's failure to afford procedural fairness to the appellant.

### Whether the breach affected the outcome

93 A breach of procedural fairness will not always require an order for re-hearing. In *Stead v State Government Insurance Commission*<sup>69</sup> the High Court stated that:

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<sup>67</sup> ts 52 - 53 (20 July 2016).

<sup>68</sup> *Woolworths Ltd v Commissioner of Police* [2013] WASC 413.

<sup>69</sup> *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141, 145.

An appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.

94 However, the High Court further stated:<sup>70</sup>

Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference [...]. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of witness at the trial.

95 The appellant must show that the denial of natural justice deprived the appellant of the possibility of a successful outcome. That is, it must be asked whether 'the lack of procedural fairness could not have affected the outcome.'<sup>71</sup>

96 The appellant contended that if given the opportunity, his submissions would have addressed both the relevance and cogency of the evidence bearing upon the Economic Benefit considerations.<sup>72</sup> That being the case, I am unable to conclude that the lack of procedural fairness could not have affected the outcome of the proceedings.

97 When the Decision is read as a whole it is clear that the Economic Benefit considerations were matters that the Commission considered relevant and took into account. The Commission denied the appellant procedural fairness by failing reasonably to give the appellant notice of the Commission's view as to the significance of the Economic Benefit considerations to the Decision. I am not able to conclude that the lack of procedural fairness could not have affected the outcome.

98 Therefore, I have determined that ground two should be upheld and I would allow the appeal on this ground.

### **Ground Three**

99 By ground three the appellant contends that the Commission erred in law by misconstruing its statutory function in applying the primary

<sup>70</sup> *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141, 145 - 146.

<sup>71</sup> *Civil Aviation Safety Authority v Owens* [2011] FCAFC 75; (2011) 278 ALR 418 [35].

<sup>72</sup> ts 78 (appeal hearing).

object in s 5(1)(c) of the Act by considering whether granting the application would cater for the requirements of consumers for liquor and related services in isolation.

100 The appellant in support of that contention relies upon specific paragraphs of the Decision. The appellant refers to paragraph [99] of the Decision that states 'the upgrade and redevelopment of the premises is supported by the local community, and that there is a demonstrated requirement of consumers for the proposed upgrade.' The appellant then refers to the Commission's statement at paragraph [109] that '[b]ased on the totality of the evidence, the Commission is satisfied that the granting of the application would be consistent with the primary and secondary objects of the Act relating to consumer requirement.' The appellant contends that given that the Commission did not refer to the 'proper development of the liquor industry' in that paragraph the Commission has failed to properly consider s 5(1)(c) of the Act.

101 An administrative decision maker gives reasons to inform. The reasons must enable the parties to comprehend the process of reasoning and evaluation.<sup>73</sup> The reasons should not be 'scrutinized upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.'<sup>74</sup>

102 I agree with the respondent's submission that the premise of this ground 'reflects a strained and artificial reading of the Decision.'<sup>75</sup> The appellant seeks to construe the Decision unfairly by finely examining select paragraphs which may only be properly understood in the context of the entire reasons. The Commission made express reference to the necessity to have regard to the proper development of the relevant industries.<sup>76</sup> The Commission expressly considered the development of the relevant industries.<sup>77</sup> Further, it is clear that the Commission had regard to consumer requirements in the context of the development of the relevant industries.<sup>78</sup> The part of the Decision that is impugned by the Appellant commences with a recital of s 5(1)(c). The Commission then expressly stated that the provision of liquor products and services in response to consumer requirements must be consistent and contribute

<sup>73</sup> *Hancock v Executive Director of Public Health* [2008] WASC 224 [72] - [80].

<sup>74</sup> *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, 272.

<sup>75</sup> First respondent's submissions [112].

<sup>76</sup> Reasons of the Commission [21] - [76(f)].

<sup>77</sup> Reasons of the Commission [61], [82], [86] - [94].

<sup>78</sup> Reasons of the Commission [95] - [100].



to the proper development of the liquor industry, the tourism industry and other hospitality industries.<sup>79</sup> The very next paragraph is impugned because the Commission, when referring to consumer requirements, did not once again recite the requirements of s 5(1)(c). It was not necessary for the Commission to do so. The Commission had previously recited s 5(1)(c) without error and in paragraph [98] had given a satisfactory statement of the meaning of that section. Similarly, the reference to the consumer requirement in paragraph [109] must be understood in the context of the previous paragraphs of the Decision. To read paragraph [109] in the way contended by the appellant is unfair.

103           Therefore, ground three has no merit and must be dismissed.

### **Conclusion**

104           Accordingly, I uphold grounds one and two and dismiss ground three. Therefore, the appeal must be allowed. The decision of the Commission is quashed and the matter must be remitted to the Commission to consider the Application according to law.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

DH

Research Associate/Orderly to the Honourable Justice McGrath

5 APRIL 2019

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<sup>79</sup> Reasons of the Commission [98].