

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : RE ROMATO; EX PARTE MITCHELL JAMES
HOLDINGS PTY LTD [2001] WASCA 286

CORAM : WALLWORK J
STEYTLER J
McLURE J

HEARD : 16 AUGUST 2001

DELIVERED : 19 SEPTEMBER 2001

FILE NO/S : CIV 2585 of 2000

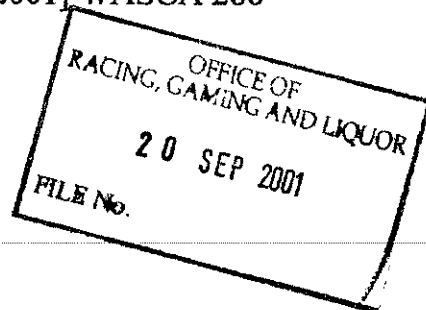
MATTER : An application for a writ of *certiorari* and a writ of
Mandamus against Eric Romato, the Acting Deputy
Director of Liquor Licensing

EX PARTE

MITCHELL JAMES HOLDINGS PTY LTD
Applicant

AND

DIRECTOR OF LIQUOR LICENSING
Respondent



Catchwords:

Administrative law - Application of policy of Director of Liquor Licensing concerning extended trading permits for Sundays - Whether policy lawful - Whether policy flexibly applied - Whether Acting Deputy Director acted under dictation or took into account irrelevant considerations - Whether Acting Deputy Director bound by doctrine of precedent

Liquor licensing - Application for extended trading permit under s 60(4)(g) of the *Liquor Licensing Act 1988* - Whether policy relating to extended trading permits for Sundays inconsistent with the *Liquor Licensing Act 1988*

Legislation:

Conciliation and Arbitration Act 1904 (Cth) s 31(1)

Interpretation Act 1984 s 58, s 59

Liquor Licensing Act 1988 s 5(1), s 5(2)(g), s 15, s 25(5), s 33, s 41, s 60(1), s 60(4)(g), s 76(1), s 76(2), s 97

Result:

Order *nisi* discharged

Category: B

Representation:

Counsel:

Applicant	:	Mr A D Wilson
Respondent	:	Mr G T W Tannin & Ms A Yates

Solicitors:

Applicant	:	Frichot and Frichot
Respondent	:	State Crown Solicitor

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

AG (NSW) v Quin (1990) 170 CLR 1

Ansett Transport Industries (Operations) Pty Ltd v Commonwealth (1977) 139 CLR 54

Australian Fisheries Management Authority v PW Adams Pty Ltd (1995) 61 FCR 314

British Oxygen Co Ltd v Minister of Technology [1971] AC 610

Commissioner of State Revenue v Royal Insurance Australia Ltd (1994) 182 CLR 51

Evans v Donaldson (1909) 9 CLR 140

Green v Daniels (1977) 51 ALJR 463

Legal Services Commission of New South Wales v Stephens [1981] 2 NSWLR 697
Marks v Shire of Swanhill [1974] VR 896
Minister for Immigration and Ethnic Affairs v Tagle (1983) 67 FLR 164
Perder Investments Pty Ltd v Lightowler (1990) 25 FCR 150
R v Anderson; Ex parte IPEC-Air Pty Ltd (1965) 113 CLR 177
R v Moore; Ex parte Australian Telephone and Phonogram Officers' Association (1982) 148 CLR 600
R v Port of London Authority; Ex parte Kynoch Ltd (1919) 1 KB 176
Randall v Council of the Town of Northcote (1910) 11 CLR 100
Re Drake v Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634
Re Stevenson v Commonwealth (1987) 13 ALO 524
Tang v Minister for Immigration and Ethnic Affairs (1986) 67 ALR 177

Case(s) also cited:

Agua Marga Pty Ltd v Minister of State for the Interior (1973) 22 FLR 136
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147
Belcaro Pty Ltd v Brisbane City Council (1963) 110 CLR 253
Executive Director of Health v Lily Creek International Pty Ltd (2000) 22 WAR 510
F Hoffman-La Roche & Co v Secretary of State for Trade & Industry [1975] AC 295
H Lavender & Son Ltd v Minister of Housing and Local Government [1970] 1 WLR 1231
Jericho Nominees Pty Ltd v Dileum Pty Ltd (1992) 6 WAR 380
Macksville & District Hospital v Mayze (1987) 10 NSWLR 708
O'Sullivan v Farrer (1989) 168 CLR 210
Padfield v Minister for Agriculture, Fisheries and Food [1968] AC 997
Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241
R v Fowler; Ex parte McArthur and Murray [1958] Qd R 41
R v Industrial Appeals Court; Ex parte Henry Berry & Co (Australasia) Ltd [1955] VLR 156
R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw [1952] 1 KB 338
Re Honourable G D Kierath, Minister for Heritage; Ex parte City of Fremantle (2000) 22 WAR 342
Re Perks and Australian National Railways Commission (1987) 13 ALD 133
Re Scott and Commissioner for Superannuation (1986) 9 ALD 491
Re Universal Bar & Grill (1994) 10 SR(WA) 71

WALLWORK J
STEYTLER J
McLURE J

- 1 WALLWORK J: I agree with the reasons for judgment of McLure J and with the orders proposed by her Honour. There is nothing I wish to add.
- 2 STEYTLER J: I have had the advantage of reading the reasons for decision to be published by McLure J. I agree generally with them and with her Honour's conclusion that the order *nisi* should be discharged.
- 3 I should add that I am troubled by the limited nature of the reasons expressed by the Deputy Director. While he has said what considerations were taken into account by him, he has by no means fully exposed his reasoning. However no point has been taken in that respect and, like McLure J, and generally for the reasons expressed by her, I am not persuaded that the applicant has succeeded in demonstrating any of the errors identified by the four grounds raised by the applicant.

McLURE J:

Introduction

- 4 This is an application for a writ of *certiorari* to quash a decision made on 20 September 2000 by the Acting Deputy Director of Liquor Licensing refusing an application by the applicant, Mitchell James Holdings Pty Ltd as licensee of the Civic Hotel, for an extended trading permit pursuant to s 60(4)(g) of the *Liquor Licensing Act 1988* ("Act"). The applicant also seeks a writ of *mandamus* commanding the Acting Deputy Director to grant the extended trading permit.
- 5 The applicant is the holder of a hotel licence for the Civic Hotel under s 41 of the Act. The hotel is situated at 981 Beaufort Street, Inglewood. The application for the extended trading permit ("ETP") was to extend its Sunday trading hours from 10 pm to 12 midnight in respect of parts of the Civic Hotel known as the Limelight Lounge Bar and Room Two Bar ("premises").
- 6 The applicant obtained an order *nisi* for a writ of *certiorari* and a writ of *mandamus* from Roberts-Smith J on 28 November 2000.

Grounds

- 7 The grounds on which the applicant seeks relief are that the Acting Deputy Director:

- (1) erred in law by taking into account irrelevant considerations and thereby concluding that, notwithstanding his finding that there was a subjective requirement for the Premises to trade beyond 10 pm on Sundays, which requirement he found to be objectively reasonable, the application should nevertheless be refused because of a policy of the Director of Liquor Licensing not to grant ETPs on Sundays unless specific conditions apply;
- (2) as decision-maker vested with the power of decision and all discretionary powers that attend that power is not entitled to abdicate the responsibility of making that decision by reference to a policy formulated by a third party. The Acting Deputy Director has, effectively, abdicated his duty by considering himself bound by what he perceived to be the policy of the Director;
- (3) erred in law by assuming that he was bound by the doctrine of precedent and must therefore follow decisions of the Director of Liquor Licensing in making his decision;
- (4) erred in law in construing the Act as requiring an applicant for the grant of an ETP to extend permitted trading hours on Sundays to discharge a special onus or establish special circumstances not applicable to the grant of an ETP in respect of other days of the week.

Background and Acting Deputy Director's Reasons

8 The applicant's application for the ETP was advertised. The local drug and alcohol adviser had no objection to the application and no response was received from the local authority or the Executive Director of Public Health. One objection was received. The objection was from a local resident, Mr Mark Diamond, and the ground of his objection was the noise created by bass music emanating from the hotel.

9 At a hearing before the Acting Deputy Director, the applicant relied on statements of evidence from Mr Nick Petroff, the approved manager of the hotel, Mr Peter Walters, the duty manager, letters of support, a petition signed by some 262 patrons, statements from patrons and other materials. The Acting Deputy Director refused the application. The material part of his written reasons is as follows:

"On the basis of information presented, particularly the written submissions and proofs of evidence from need witnesses, I am

of the opinion that, on the balance of probabilities, there is a section of the public resorting to these licensed premises who have a subjective requirement for the premises to trade beyond 10.00pm on Sunday. In this respect I note the decisions of the Director of Liquor Licensing submitted by the applicant, particularly in respect of Sunday trading. I am also aware of the Director's policy in respect of extended trading permits regarding Sunday trading which is sufficiently clear not to allow trading beyond the permitted trading hours unless specific conditions apply. In this respect, regarding metropolitan premises, in the majority of cases additional trading has been approved where liquor is sold and consumed by patrons while seated at dining tables or attending functions.

I also must take into consideration the recent decisions of the Director of Liquor Licensing, particularly decision number A45834 dated 31 July 2000 in respect of the Joondalup Inn, wherein in respect of Sunday, the Director, at page 2, stated:

...'Sunday night precedes the commencement of the working week for most people and it is generally accepted that Sundays should be treated as a quiet trading time for the liquor industry. Indeed, this is consistent with the reduced trading hour under section 97(3)(a) of the Liquor Licensing Act 1988. Not only is it in keeping with the intention of the legislation, but it is also a key consideration when determining whether late trading hours are in harmony with expectations of the public and the amenities of the area.'

In the circumstances, while I am of the view that the applicant has established the grounds that the application is necessary to provide for the reasonable requirements of a section of the public, I am not prepared to grant the application. Accordingly, pursuant to section 33(1) and (2) of the Act the application is refused."

- 10 As is usually the case in applications of this kind, there is an overlap in the grounds of appeal. The applicant says that in applying the Director's policy in relation to the grant of ETPs on Sundays, the Acting Deputy Director took into account an irrelevant consideration, abdicated his duty to exercise the relevant discretion or inappropriately regarded himself as bound by the doctrine of precedent. The final ground of appeal

is to the effect that the Acting Deputy Director wrongly construed the Act in reaching his decision to refuse the application. The starting point for the resolution of the questions at issue in this application are the relevant provisions of the Act.

The Liquor Licensing Act 1988

- 11 The applicant is the holder of a hotel licence under s 41 of the Act. The hours of trading under a hotel licence are governed by s 97 of the Act. Section 97 materially provides:

"(1) Subject to this Act and to any condition imposed by the licensing authority a licensee is authorised to sell liquor during -

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

as the licensee wishes to do so.

(2) On a day other than a Sunday, Good Friday, Christmas Day or Anzac Day, the permitted hours are -

- (a) under a hotel licence, or under a club licence other than a club restricted licence, ... —
 - (i) between 6 a.m. and midnight;

...

(3) On a Sunday, not being a Christmas Day or Anzac Day, the permitted hours are —

- (a) under a hotel licence —
 - (i) between 10 a.m. and 10 p.m."

- 12 Sections 60 and 76 of the Act deal with extended trading permits. Section 60(1) of the Act identifies what an extended trading permit authorises the licensee of the licence to do. It states:

"(1) An extended trading permit authorises the licensee of the licence to which it relates, subject to —

- (a) this Act;
- (b) any other written law; and
- (c) its conditions, which shall take effect as conditions of that licence,

to sell and supply liquor under that licence according to the tenor of the permit, upon such terms as are specified in the permit at times, in circumstances, or in a place, to which that licence would not otherwise apply."

13 Subsection (4) of s 60 identifies the purposes for which an extended trading permit may be issued. Paragraph (g) of s 60(4) provides:

"(4) The purposes for which an extended trading permit may be issued include —

...

- (g) extended hours, authorising the licensee to sell liquor under the licence at specified hours that would not otherwise be permitted hours, on such days other than a Good Friday as may be specified, which remains in force for the period specified;"

14 However, the purposes specified in subsection (4) are not exhaustive: s 60(5) of the Act. The hotel licence for the Civic Hotel has two extended trading permits notified on it. They do not relate to Sunday trading hours.

15 Section 76(1) of the Act provides for an ETP application to be lodged with the Director. Pursuant to s 76(2) of the Act:

"An application for the issue of an extended trading permit —

- (a) is not required to be advertised, unless the Director otherwise directs;
- (b) if not required to be advertised is not subject to objection, but may be made the subject of a submission or an intervention under section 69;

- (c) is not required to be heard, but may be determined by the Director at discretion; and
- (d) is not subject to review by the [Liquor Licensing] Court, or to appeal."

16 Section 5 of the Act identifies the primary and other objects of the Act. The primary objects are to regulate the sale, supply and consumption of liquor and to minimise harm or ill-health caused to people, or any group of people due to the use of liquor (s 5(1)). In addition to the primary objects, the licensing authority is required to have regard to other objects including "to facilitate the use and development of licensed facilities reflecting the diversity of consumer demand" (s 5(2)(c)).

17 The power to grant licences and other applications under the Act is given to the licensing authority. Section 33 of the Act materially provides:

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

(2) An application —

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

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

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

18 The term "licensing authority" is defined in s 3 to mean:

"a) in relation to an application or matter that is, under this Act, to be determined by the Court — the Court; and

(b) otherwise — the Director;"

19 Part 2 Div 3 of the Act deals with the office of the Director. Section 15 gives the Director the power to delegate any of the functions of the Director under the Act. Section 15 materially provides:

"(1) The Director, by an instrument in writing signed personally by the Director and either generally or as otherwise provided by that instrument, may —

- (a) delegate to an inspector or other officer appointed pursuant to section 14 any of the functions of the Director under this Act other than this power of delegation;
- (b) authorise any other person to carry out any of the functions —
 - (i) for which a person was, or may be, appointed to assist the Director pursuant to section 14(1)(b); or
 - (ii) which may be delegated under paragraph (a);"

20 An authorisation under par (b) and (c) of s 15 is deemed to be a delegation for the purposes of s 58 and s 59 of the *Interpretation Act 1984*.

21 Section 58 of the *Interpretation Act* provides that where the performance of a function by a person is dependent upon the opinion, belief, or state of mind of that person and that function has been delegated under a written law, the function may be performed by the delegate upon the opinion, belief, or state of mind of the delegate.

22 The Act provides for a review by the Court of decisions made by the Director. However, the review procedure does not apply to an application for an extended trading permit: s 25(5) and s 76(2)(d) of the Act. Further, the Director's decision in relation to the grant or refusal of an ETP is not subject to an appeal to this Court: s 76(2)(d) of the Act. The absence of an appeal right is a relevant factor to be taken into account in this Court exercising its discretion to grant prerogative relief.

Administrative Law Principles

23 This Court has a limited role in an application for prerogative relief in relation to an administrative decision. Its function is to determine whether the decision-maker has made an error of law. This Court does not perform a merits review of the decision. In the event a decision is quashed because of an error of law, it is usually the case that the decision-

maker is required to consider the matter again and decide it according to law: *Randall v Council of the Town of Northcote* (1910) 11 CLR 100, 105; *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 81.

24 There is no suggestion that the Acting Deputy Director was not duly authorised under s 15 of the Act to consider and determine the applicant's application for an ETP. He being duly authorised, it is he who must consider and determine the application. He will commit a reviewable error if he acted under dictation: *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54. The usual circumstance in which a person acts under dictation is where a third person has given a direction as to the manner of exercise of the power as in the *Ansett Transport Industries* case. However, at common law, dictation can also occur where a decision-maker felt obliged to decide a matter in a particular way because of another's conclusions in relation to the matter even though the other person had given no direction that such an approach should be followed: *Evans v Donaldson* (1909) 9 CLR 140.

25 The rationale for the rule against dictation is the same as that which prohibits delegation of a decision-making power in the absence of express or implied authority to do so. Both involve an improper abdication of decision-making responsibility.

26 However, the rule against dictation does not prohibit discretionary decision-makers developing policies which structure the exercise of the discretion. As Brennan J said in *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634:

"There are powerful considerations in favour of a minister adopting a guiding policy. It can serve to focus attention on the purpose which the exercise of the discretion is calculated to achieve, and thereby to assist the minister and others to see more clearly, in each case, the desirability of exercise in the power one way or another. Decision making is facilitated by the guidance given by an adopted policy, and the integrity of decision making in particular cases is the better assured if decisions can be tested against a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, enhance the sense of satisfaction with the fairness and continuity of the administrative process (at 640)."

- 27 Although decision-makers may have regard to a relevant policy, it cannot be treated as a fixed determinative rule regardless of the merits of an individual case: *Re Drake* at 641; *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 625. If a policy is applied as a fixed, determinative rule then there are a number of administrative law principles which can or may be infringed. For example, it has been said that by applying a policy in this way a decision-maker failed to have regard to relevant considerations: *Minister for Immigration and Ethnic Affairs v Tagle* (1983) 67 FLR 164. Further, there may be procedural fairness issues arising if a decision-maker "shut his or her ears" to submissions concerning the appropriateness or applicability of a policy to the particular case. Alternatively, a superior authority's imposition of policies controlling a decision-maker's discretion (or if the decision-maker felt obliged to decide a matter in a particular way) will infringe the rule against acting under a dictation: *R v Anderson; Ex parte IPEC-Air Pty Ltd* (1965) 113 CLR 177.
- 28 A policy which fetters all or part of a discretion is unlawful. However, where a decision-maker adopts a policy, it is entitled to apply that policy provided applicants are given an opportunity to show that there are exceptional reasons why it should not be applied in their case: *R v Port of London Authority; Ex parte Kynoch Ltd* (1919) 1 KB 176 at 184; *Perder Investments Pty Ltd v Lightowler* (1990) 25 FCR 150; *Legal Services Commission of New South Wales v Stephens* [1981] 2 NSWLR 697.
- 29 A policy will also be unlawful if it is based on an incorrect interpretation or application of legislation: *Green v Daniels* (1977) 51 ALJR 463; *Tang v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 177. For example, a policy may seek to give effect to purposes inconsistent with the purposes of the legislation (*Marks v Shire of Swanhill* [1974] VR 896) or may have been made because a mandatory relevant consideration was ignored (*Australian Fisheries Management Authority v PW Adams Pty Ltd* (1995) 61 FCR 314).
- 30 However, a court will not review the merits of a policy where it is lawful and has not been inflexibly applied because to do so would be an intrusion into the merits of the decision-making process: *AG (NSW) v Quin* (1990) 170 CLR 1.
- 31 The rule against acting under acting under dictation or those relating to the application of policies does not prevent principles similar to the doctrine of precedent from applying in certain circumstances: *R v Moore*;

Ex parte Australian Telephone and Phonogram Officers' Association (1982) 148 CLR 600; *Re Stevenson v Commonwealth* (1987) 13 ALO 524 at 529. This matter was considered by the High Court in *R v Moore*. The case concerned the proper construction of s 31(1) of the *Conciliation and Arbitration Act 1904 (Cth)*. The question in issue was whether a single Commissioner had failed to perform his duty to determine part of a dispute that had been referred to him because he decided it by reference to wage fixing principles, which were rules of policy determined by the Full Bench in cases involving other parties, rather than by reference to the individual merits of the case before him. It was said that the Commissioner was entitled to take the wage-fixing principles into account, but that they did not bind him and that he had the right to depart from them when the circumstances of the particular case required or justified it. Gibbs CJ at 612 - 613 said:

"It was submitted on behalf of the prosecutor that it was nevertheless the duty of the Commission in each matter before it where the question was raised to consider whether the circumstances of the case warranted a departure from the Wage Fixing Principles. 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. In *R v Port of London authority; Ex parte Kynoch Ltd* (23) Bankes LJ said:

'There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.'

He obviously meant that in a case of the second class there would be no real exercise of the discretion. In *British Oxygen*

CO Ltd v Board of Trade (24), Lord Reid, after citing this passage with approval went on:

'But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' ... I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say ...'

As the words of Lord Reid indicate, it would be wrong to apply literally to the situation of the Commission statements of principle enunciated in relation to the exercise by other tribunals or administrative bodies of discretionary powers different from those exercised by the Commission. The Commission stands in a special position, not directly comparable with that of other administrative or quasi-judicial tribunals. When the Commission has formulated a principle, such as that a particular figure should be adopted as a basic or minimum or total wage, or that wages should be increased only in accordance with particular guidelines, it may apply that principle consistently from case to case. If an application is made to it to depart from any such principle, it should hear the application."

- 32 The High Court in *Re Moore* was dealing with a system which provided for appeals from decisions of single members of a tribunal to a multi-member appellate tribunal. In that context, it decided the Commission did not have to consider whether the circumstances of the case warranted a departure from the policy determined by the Full Bench. It simply had to hear the application. In my opinion, it is not appropriate to apply the outcome in *Re Moore* to policies formulated and decisions made by the Director or decisions made by a duly authorised delegate of the Director.

- 33 What is meant by the inflexible application of policy without regard to the merits of a case in the context of this case is that the Acting Deputy Director cannot shut his ears to an applicant who wishes to make representations that its case is exceptional (so the policy ought not to apply) or to challenge the policy itself. The advantage of this approach is that it promotes the accountability of decision-makers as well as consistency and predictability whilst preserving the discretion.

The Application

- 34 There is a common factual base to the first three grounds said to invalidate the decision. It is the application by the Acting Deputy Director of the Director's policy in relation to Sunday trading. The legal position is straightforward. If the Director's policy was lawful and flexibly applied to the merits of the application, it follows that the Acting Deputy Director did not take into account an irrelevant consideration or abdicate his decision-making responsibility by acting under dictation (in either sense of actual or perceived direction from a third party) or improperly apply the doctrine of precedent.
- 35 The fourth ground raises an issue of construction of the Act which goes to the lawfulness of the policy. It is logical to deal with that matter first.
- 36 The fourth ground as formulated suggests that the Acting Deputy Director construed the Act as requiring an applicant for the grant of an ETP on Sundays to discharge a special onus or establish special circumstances. There is no basis for that conclusion in the Acting Deputy Director's reasons for decision.
- 37 The source for the suggestion appears to be the Director's reasons in the *Joondalup Inn* case quoted by the Acting Deputy Director in his reasons. The Director in the *Joondalup Inn* case says nothing more than for the stated reasons he treats Sunday differently than other days in relation to the grant of an ETP and that his approach is consistent with s 97(3) of the Act. The statement of consistency is correct as far as it goes. The statutorily permitted (fixed) trading hours on a Sunday are different from weekdays or a Saturday. For a hotel licence the weekday trading hours are 6 am to midnight whereas they are 10 am to 10 pm on a Sunday. I interpret the Director's reasons in the *Joondalup Inn* case (approved and adopted by the Acting Deputy Director) as identifying discretionary matters he has taken into account and noting that the discretionary matters are consistent with the scope and purpose of the Act.

That is an entirely appropriate approach to the issue. He does not say or suggest that his approach to the grant of an ETP for Sunday is mandated by the Act.

38 The applicant put its construction argument slightly differently at the hearing. In essence, the submission was that there was nothing in the provisions of the Act dealing with ETPs to support the conclusion that Sunday should be treated differently than any other day. It is correct that the provisions of the Act dealing with ETPs do not make any distinction between Sunday and any other day of the week (except Good Friday). However, there are three difficulties with the applicant's submission. Firstly, it is wrong to focus on the ETP provisions of the Act. Regard must be had to the Act as a whole. Secondly, it fails to take due account of the nature and scope of the Director's discretion. Subject to the Act, the Director has an absolute discretion to refuse an application for an ETP on any ground, or for any reason, that he considers in the public interest: (s 33). Thirdly, the ETP provisions of the Act do not require the Director to treat Sunday in the same way as other days of the week.

39 There is nothing in the purposes or objects of the Act which prevents the Director in the exercise of his discretionary powers differentiating Sunday from other days of the week insofar as trading hours are concerned. Indeed, to do so is, for the reasons discussed above, consistent with the Act. Accordingly, ground 4 fails.

40 Before addressing grounds 1, 2 and 3, it is necessary to attempt to identify the terms of the Director's policy relied on by the Acting Deputy Director. The Director has issued a policy document with an effective date of February 1997 (and review dates of 16 August 1999 and 16 March 2001) on extended trading permits under s 60(4)(g) of the Act. However, no mention is made in the policy document of the grant of ETPs for Sundays. In this case the scope of the Director's policy has to be discerned from the Acting Deputy Director's reasons for decision.

41 Firstly, he refers in his reasons to the decisions of the Director submitted by the applicant. Only one of the decisions relates to a hotel (the Mangrove Hotel in Broome) which I assume has a hotel licence and for which an ETP was granted for Sundays. The other decisions to which the applicant referred the Acting Deputy Director were decisions relating to special facility licences under s 46 of the Act. In the course of one of the decisions concerning a special facilities licence, the Acting Deputy Director referred to the Director's policy in the following terms:

"I note the Director of Liquor Licensing's policies in respect of Sunday trading and previous decisions made by the Director in respect of extended trading permits granted on Sundays to licensees of hotel licences, which in essence allow an extension of trading on Sunday under specific trading conditions."

- 42 In this case the Acting Deputy Director referred to the policy in negative terms, that is, as not allowing trading beyond permitted trading hours on Sunday unless specific conditions apply. The specific conditions are not expressly identified. However, after referring to the specific conditions, the Acting Deputy Director went on to state:

"In this respect, regarding metropolitan premises, in the majority of cases additional trading has been approved where liquor is sold and consumed by patrons while seated at dining tables or attending functions."

- 43 It is not possible from the material provided in the application books to conclude that the Director's policy unlawfully fetters, in whole or in part, the discretion to grant an ETP. A policy that an ETP shall not be granted on Sunday unless specified conditions are fulfilled is not necessarily an unlawful fetter. It would not be unlawful if it was, in effect, a statement of general principle. It is possible that one of the specified conditions may, on its proper construction, have that effect. Indeed, counsel for the applicant in his oral submissions to the Acting Deputy Director stated that the view of the licensing authority was "that extended trading permits on Sunday evenings should not generally be granted".

- 44 Whether or not the Acting Deputy Director as a matter of fact inflexibly applied the policy is also a matter to be considered when addressing grounds 1 to 3 of the application.

- 45 In his reasons, the Acting Deputy Director refers to the Director's policy (in terms which do not enable a judgment to be made as to its precise parameters) and states that he must take into account recent decisions of the Director (and refers to the *Joondalup Inn* decision). He then concludes that "in the circumstances" (not expressly identified) and notwithstanding his view that the applicant had established that the application is necessary to provide for the reasonable requirements of a section of the public, said he was not prepared to grant the application.

- 46 I infer from the Acting Deputy Director's reasons that he found as a fact that there was a subjective requirement for the premises to trade

beyond 10 pm on Sunday and that the subjective requirement was reasonable. These matters appear to go to the "subsidiary" object in s 5(2)(d) of the Act. However, those factors in favour of the grant were outweighed by other matters, which in context, can only relate to the Director's policies identified earlier in the reasons. I accept that the Acting Deputy Director gave great weight to the existence of and grounds for the Director's policy but he is entitled to do so. However, I am not prepared to infer from the reasons that the Acting Deputy Director inflexibly applied the policy without regard to the merits of the applicant's case.

47 The applicant's case on grounds 1 to 3 was made difficult by the opacity of the Acting Deputy Director's reasons for decision. However, as this is not a ground of challenge to the Acting Deputy Director's decision, I say nothing further about it.

48 As I am not persuaded from the material that the Director's policy was unlawful or inflexibly applied, I would refuse the grant of a writ of *certiorari* in this case. The applicant having failed in its application for a writ of *certiorari*, it follows that the application for a writ of *mandamus* must also fail. It is unnecessary to consider the issues relating to nature of the relief sought in the claim for a writ of *mandamus* that would have arisen in the event of a grant of a writ of *certiorari*.

49 Accordingly, I would discharge the order *nisi* for the writ of *certiorari* and the writ of *mandamus*.