

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

**Applicant:** Liquorland (Australia) Pty Ltd trading as Liquorland  
Mandurah Forum  
(represented by Mr Paul D Evans of Freehills)

**Other Parties:** Director of Liquor Licensing, Intervener  
(represented by Ms Naomi Eagling of State  
Solicitor's Office)

**Commission:** Mr Jim Freemantle (Chairperson)  
Ms Helen Cogan  
Mr Eddie Watling

**Date of Hearing:** 30 April 2009

**Date of Determination:** 2 June 2009

**Premises:** Liquorland Mandurah Forum (Liquor Store)

**Matter:** Application for Review, Section 25 of the *Liquor  
Control Act 1988* ("the Act")

**Legislations:** *Liquor Control Act 1988*  
*Interpretation Act 1984*

**Authorities referred to by the Applicant:**

- *Re Romato; Ex Parte Mitchell James Holdings Pty Ltd* (2001) WASCA 286
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Palace Securities v Liquor Licensing* (1992) 7 WAR 241
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- Decision of the Director of Liquor Licensing A176592- Paddington Ale House
- Decision of the Director of Liquor Licensing A163271- Greenfields Liquor Store

**Authorities referred to by the Intervener:**

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Palace Securities v Liquor Licensing* (1992) 7 WAR 241
- *Re Romato; Ex Parte Mitchell James Holdings Pty Ltd* (2001) WASCA 286
- *Executive Director, Public Health v Meers* [2007] WASCA 187

**Decision of the Commission**

The appeal is allowed and the Application for an Extended Trading Permit is granted.

## **1. Background**

- 1.1 On 17 July 2008, pursuant to section 60(4)(g) of the Act, an application was lodged by Liquorland (Australia) Pty Ltd trading as Liquorland Mandurah Forum ("the Applicant") for an Extended Trading Permit ("ETP") to authorise trading at the premises known as Liquorland Mandurah Forum ("the Premises") between 10am and 5pm on those Sundays on which the Centro Mandurah Shopping Centre ("the Mandurah Forum Shopping Centre" or "the Centre") in which the Premises are situated, is open to the public and authorised to trade, namely:
- each Sunday during the prescribed school holiday periods;
  - each Sunday during the prescribed holiday long weekends;
  - from the first Sunday in December to the last Sunday in April inclusive.
- 1.2 On 19 December 2008, the Director of Liquor Licensing ("the Director") refused the application for an ETP (Decision A191533).
- 1.3 On 5 February 2009, pursuant to section 21(1) and 25(5)(a) of the Act the Applicant lodged an application for review of the Director's decision to refuse the application for an ETP.
- 1.4 On 13 February 2009, the Director lodged a Notice of Intervention in the matter for the purpose of making submissions.

## **2. Application for Review**

- 2.1 The Application for review was treated as a re-hearing of the matter taking into consideration all the evidence and other materials that were before the Director. Hence the Commission sets out in some detail essential and relevant issues relating to the determination of the matter on the basis that where there is a conflict in evidence which is significant to the outcome, it is necessary for the Commission to refer to the conflicts in evidence and to explain why one set of evidence is preferred over another and similarly where there is a conflict in submissions which is significant to the outcome, it is necessary for the Commission to set out the differing positions advanced by the parties and the reasons why it prefers one position over another. *Hancock v Executive Director of Public Health* (2008) WASC 224 at para 69 on page 24.

2.2 The Applicant is dissatisfied with the Decision of the Director of Liquor Licensing and seeks a review of the decision for the following reasons;

2.2.1 There are “exceptional” reasons why the Director’s discretion under section 33 of the Act should be exercised in this instance.

2.2.2 Granting the application is in the public interest and in accordance with the objects of the Act, in particular:

- To cater for the requirement 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; and
- To facilitate the use and development of licensed facilities... reflecting the diversity of the requirements of consumers in the State.

### **3. Director’s Decision**

The Director’s Decision (A191533) to refuse the application for the ETP referred to the following matters:

#### **3.1 Merits of the Application**

3.1 The Director referred to the Public Interest Assessment (“PIA”) lodged by the Applicant in support of the application for the ETP and its contents, summarised as follows:

3.1.1 The location of Mandurah in the Peel region;

3.1.2 The present population of Mandurah (60,000) and its’ rapid growth and its popularity as a tourist destination;

3.1.3 The nature and size of the Mandurah Forum Shopping Centre;

3.1.4 The fact that the Mandurah Forum Shopping Centre caters for the requirements of the public in a wide area and services a very wide catchment, is a major shopping destination in the region for those living and working in the locality and caters for a large number of tourists with Mandurah being a “key” tourist destination.

- 3.1.5 The Mandurah Council has approved Sunday trading for retail shops in the tourism period.
- 3.1.6 The Mandurah Forum Shopping Centre attracts very large numbers of people on a regular basis and provides them with an extremely wide and diverse range of goods and services to meet their needs, including requirements for packaged liquor other than on Sundays when the Centre is open, so the requirements of consumers for packaged liquor cannot be met on those Sundays although the Centre is open for trade.
- 3.1.7 Mandurah does not fall within the metropolitan area for the purposes of the Act, but on a practical level can be viewed as part of the "greater Perth metropolitan area".

### **3.2 Legislative Provisions**

3.2.1 The Director referred to the provisions of:

- Section 60 of the Act which provides for the issue of ETP's;
- Section 67 of the Act which provides for advertisement of applications;
- Section 38 of the Act which provides that the applicant must satisfy the licensing authority that granting the application is in the public interest;
- Section 98D of the Act which specifies the permitted hours for trading under a liquor store licence and provides that Sunday trading is permitted only in liquor stores in the metropolitan area;
- Section 33 of the Act which provides for an absolute discretion for the licensing authority (relevantly the Director or the Commission as the case may be) to grant or refuse an application under the Act- such discretion not to be 'arbitrary' or 'unlimited' but to be exercised having regard to the objects of the Act and section 38(2) of the Act relating to the public interest;
- Section 97(1) of the Act which provides for permitted trading hours, relevantly as may be specified under an ETP;

- Section 76 of the Act which provides for the making of an application for an ETP;
- The Director also referred to the history of the public interest test for the grant of an ETP for liquor stores outside of the metropolitan area to trade on Sundays and referred to and quoted an extract from the Second Reading Speech of the *Liquor and Gaming Legislation Amendment Bill 2006* where the Minister referred to the differentiation between the metropolitan area (Sunday trading permitted) and non metropolitan areas (liquor stores explicitly not allowed to trade on Sundays) but went on to refer to the ability of the licensing authority to grant ETP's to liquor stores in non metropolitan areas to trade on Sunday in certain circumstances;
- The Director also referred to the Policy document dated 7 May 2007 issued by the Department of Racing, Gaming and Liquor ("the Policy") which states, inter alia, that;

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

*In this regard , it may not be unreasonable for the public to have to travel a total distance of approximately 20 kilometres to/from the nearest licensed premises that sells packaged liquor."*

- In relation to the issue of taking the Policy into account in determining an application for an ETP the Director referred to the judgement of McClure J in *Re Romato: Ex Parte Mitchell James Holdings Pty Ltd* (2001) WASCA 286, at [27], [28], [38] and [43] and the judgement of Templeman J in *Hermal Pty Ltd v Director of Liquor Licensing* (2001) WASCA 356 at [37].

3.2.2 The Director accepted that Mandurah is an established tourist destination within the State's Peel region, but stated that it is outside the metropolitan area and there is an onus on the applicant to demonstrate that the grant of the application is in the public interest.

3.2.3 The Director stated that after considering the Applicant's submissions he was of the opinion that on the balance of probabilities the liquor merchants in the Mandurah area authorised to sell packaged liquor on Sundays, can cater for the requirements of consumers for packaged liquor. The Director stated that the Applicant had not satisfied him that on the balance of probabilities, the grant of the application was in the public interest and accordingly the application for an ETP was refused.

## **4. The Review Hearing**

### **General**

- 4.1 All the evidence and material before the Director was available to and considered by the Commission.
- 4.2 The Commission considered all submissions written and oral by the Applicant and the Intervener, including the written submissions made on 11 December 2008 by the Applicant in response to the Director's notice given to the Applicant on 12 November 2008 of a possible adverse finding based on the following:
- the premises does not fall within the metropolitan area and therefore the Licensing Authority is entitled to treat it differently on a Sunday;
  - there are other licensed premises in the Mandurah business district where packaged liquor can be purchased on a Sunday; and
  - licensees are entitled to apply for one-off Extended Trading Permits for the Christmas period and other special events.
- 4.3 The Commission notes that all the written and oral submissions made by the Applicant and the Intervener were detailed, thorough and useful.
- 4.4 The Commission accepts that essentially there are no issues between the Applicant and the Intervener in relation to the following matters:
- 4.4.1 The premises is not in the metropolitan area as defined by the Act;

- 4.4.2 The premises is in Mandurah which is a heavily populated regional area and a tourist destination;
- 4.4.3 There were no objections to the application for the ETP;
- 4.3.4 Applications for Sunday ETP's in areas outside the metropolitan area have previously been both granted and refused;
- 4.4.5 Packaged liquor is available for sale on Sundays in Mandurah;
- 4.4.6 That unlike the larger retail stores (in the city, but not the suburbs) in the metropolitan area, those trading in Mandurah have approval to trade on designated Sundays – refer 1.1.
- 4.5 The relevant provisions of the Act are as follows:
- Section 5 (objects)
  - Section 33 (absolute discretion of Licensing Authority- subject to Act)
  - Section 38(1)(b), (2) and (4) (requirement for applicant to satisfy the public interest test)
  - Section 60 (extending trading permits)
  - Section 97 (permitted hours of trading)
  - Section 98D (permitted hours under a liquor store licence)
  - Section 19 of the *Interpretation Act 1984*

### **Applicants Submissions**

- 4.6 The Applicant made written and oral submissions in relation to the relevant issues, summarised as follows;
- 4.6.1 The premises not falling in the metropolitan area- while agreed, the Licensing Authority has a discretion to issue an ETP where it is in the public interest to do so and Mandurah is in practical terms part of Perth's greater metropolitan area and as such should be treated differently , having regard particularly to the operation of the railway line ;
- 4.6.2 4.6.2.1 Mandurah should be considered to be, effectively, part of the metropolitan area for the purposes of the application;



- 4.6.2.2 The Sundays when the Centre is open (namely during school holidays, holiday long weekends and December to April inclusive) should be treated differently from other Sundays;
- 4.6.2.3 The liquor merchants in the Mandurah area authorized to sell packaged liquor on Sundays do not cater for the requirements of consumers of packaged liquor who visit the Centre on Sundays.
- 4.6.3 The Director should not be fettered by policy considerations;
- 4.6.4 The Policy- while the Licensing Authority may have regard to a relevant policy, a Policy which fetters a discretion is unlawful and applicants must be given the opportunity to show that there are exceptional reasons why it should not be applied;
- 4.6.5 The Licensing Authority should not follow the Policy in the circumstances of the Application;
- 4.6.6 Mandurah Forum Shopping Centre- it would be in the public interest to have an ETP for the Premises so that its' trading hours for all traders in the Centre can be uniform;
- 4.6.7 Other Licensed premises in the Mandurah area able to sell packaged liquor on Sundays- patrons of the Centre are greatly inconvenienced by being required to travel some distances from the Centre to buy packaged liquor;
- 4.6.8 One-off ETP's- The Application is limited to those Sundays when the Centre is open for trading- those Sundays being the days when demand is greatest;
- 4.6.9 Granting the Application is in the public interest- the issues referred to in Section 38(4) of the Act, such as the harm or ill health which may be caused by the use of liquor, the impact on the amenity of the relevant locality and whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the Premises, are not applicable in the circumstances of the Application;
- 4.6.10 The granting of the ETP will enhance the development of the tourism industry in Mandurah;
- 4.6.11 In all the circumstances the granting of the Application is in the public interest and is in accordance with the objectives of the Act.

## **Intervener's Submissions**

4.7 The Intervener made written and oral submissions in relation to the relevant issues summarised as follows;

4.7.1 The discretion of the Licensing Authority in Section 33(1) of the Act is an "absolute discretion", confined only by the scope and purpose of the Act.

4.7.2 The ETP provisions of the Act do not require the Licensing Authority to treat Sundays in the same way as other days of the week.

4.7.3 The Licensing Authority correctly referred to sections 33(1) and 38 of the Act and stated that "the test to be applied in the determination of this application is a public interest test".

4.7.4 The Licensing Authority correctly identified that the scheme of the Act is that non-metropolitan liquor stores are not able to trade on Sundays except in certain circumstances.

4.7.5 The Licensing Authority had regard to the Policy.

4.7.6 Where a decision maker adopts a policy, it is entitled to apply that policy provided that applicants are given an opportunity to show that there are exceptional reasons why it should not be applied in their case.

4.7.7 In the reasons for decision the Licensing Authority:

- correctly identified that Mandurah is located outside the metropolitan area;
- recognized that there was an onus on the Applicant to demonstrate that the grant of an ETP was in the public interest;
- considered that Mandurah was already serviced by other liquor merchants who could cater for the requirements of consumers for packaged liquor;
- in exercising his discretion not to grant the ETP the Director correctly applied the provisions of the Act and had proper regard to the Policy.

## **5. Reasons for Decision of the Commission**

- 5.1 Section 98D of the *Liquor Control Act 1988* sets out clearly the permitted trading hours under a liquor store licence. It specifically excludes non-metropolitan liquor stores from trading on Sundays.
- 5.2 Section 60(4)(g) of the Act provides for Extended Trading Permits to be granted “authorising the licensee to sell liquor under the licence at specified hours that would not otherwise be permitted”.
- 5.3 Section 60 of the Act should not be used to subvert the clear intent of the legislation expressed at section 98D. The Licensing Authority must therefore be satisfied that it is in the public interest to grant an ETP as prescribed by Section 38(2) of the Act.
- 5.4 The Commission is not bound to find error in the Director’s decision nor is it restricted to doing so in order to find differently on the material before the Director. In this application the Commission exercises its power under section 25(4)(b) of the Act.
- 5.5 In respect of non-metropolitan (country areas) liquor stores selling liquor on Sunday the Minister said in the Second Reading Speech:

*“In terms of the packaged liquor market, the Bill permits metropolitan liquor stores to trade on Sundays between the hours of 10.00am and 10.00pm – the same trading hours as hotels.*

*In country areas the status quo will continue whereby liquor stores are not explicitly able to trade on Sundays. However, the Director of Liquor Licensing is able to grant extended trading permits to liquor stores to trade on Sunday in certain circumstances.”*

- 5.6 Section 3(1) of the Act defines *metropolitan area* as:
  - a) The part of the State that was at 1 June 1988 described in the Third Schedule to the *Metropolitan Region Town Planning Scheme Act 1959*; and
  - b) Such other area as may be prescribed.

It is this definition that the Director followed in determining the original application.

The Director as an intervening party argued that his decision correctly identified Mandurah as located outside the metropolitan area.

- 5.7 The Applicant submitted that although Mandurah does not fall within the 'metropolitan area' as defined in the Act, Mandurah is, in practical terms, part of Perth's greater metropolitan area and as such should be treated differently from other 'non-metropolitan' areas.
- 5.8 The Applicant submitted that the expansion of Perth, the growth of Mandurah, the construction of the Perth to Mandurah railway line and the pending completion of the southern extension of the Kwinana freeway to Mandurah have, for all intents and purposes, extended Perth's southern suburbs to include Mandurah. As such, the Applicant submits that, for the purposes of this application, Mandurah should be treated by the Director of Liquor Licensing as if it were part of the metropolitan area, albeit a part having unique and seasonally affected characteristics.
- 5.9 Mandurah Forum Shopping Centre:
- 5.9.1 The Applicant submitted that it would be in the best interests of the public to authorise the Premises to open and trade on those Sundays when the Centre is open, namely during school holidays, holiday long weekends and December through to April inclusive.
- 5.9.2 The Applicant submitted that these Sundays should be treated differently from any other Sunday. This is because the Centre is open on Sundays during these 'holiday' periods to cater for the increased demand from both the local community and from the influx of holidaymakers who create a large seasonal increase in population in the summer months.
- 5.9.3 Over the past three years an average of over 1.7 million tourists have visited Mandurah each year. The majority of tourists come on short trips, many during the holidays or on the weekends during the summer and early autumn when the Centre is open. Apart from shopping as a leisure activity, short stay tourists tend to shop "little and often" for their basic requirements, including alcohol, and when shopping for necessities may be expected to seek to minimise the transaction time in shopping (which detracts from the principal purpose of their presence in Mandurah, which is leisure).
- 5.9.4 Accordingly, there is an increased seasonal demand for shopping outlets in Mandurah in order to satisfy the increased

seasonal demand for groceries and other shopping requirements, including packaged liquor. Consequently, in addition to being of benefit to the local community, the granting of this application will contribute to the proper development of the tourism industry in the locality in accordance with the objects of the Act.

5.9.5 It was submitted that consumers' requirements for packaged liquor are not currently being met on those Sundays when the Centre is 'authorised' to open to the public and the Premises at the Centre are not. The location of the Premises within the Centre would enable the public easily to satisfy their requirements for packaged liquor while shopping at the Centre, and enable them to meet all of their household and other shopping requirements. There is no liquor outlet at the Centre which currently trades on those Sundays the Centre is open.

5.10.1 The Commission is guided in its proceedings by Division 5 section 16(7) of the Act.

The *Evidence Act 1906* does not apply to the proceedings of the licensing authority, however constituted, and the licensing authority -

- a) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply; and
- b) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; and
- c) is to act as speedily and with as little formality and technicality as is practicable.

5.10.2 Applying the principles of section 16(7) within the context of the principles established by the primary objects of the Act the Commission considers that the definition of "metropolitan area" contained in the Act at Part 1 section 3 should be used in the circumstances and for the purposes of this determination Mandurah is regarded as non-metropolitan.

5.10.3 However, recognition under other legislation that allows for designated Sunday trading by the larger retail centres in the city acknowledges the consumer shopping needs of Mandurah and the importance of the tourism industry in that region.

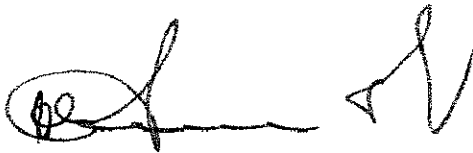
5.10.4 Accordingly there is a case for a consistent approach in relation to the trading hours that the applicant seeks, particularly as they are to be the same as the Centre in relation to Sundays.

5.10.5 The Commission is, however, particularly cognisant of the fact that the definition of metropolitan area in Part 1 section 3 of the Act is relevant to a situation very far removed from that extant in 2009. That having been said the Commission does not consider that it should take on itself the redefinition of metropolitan area in the Act but accepts that Mandurah is to be acknowledged as a special case in respect of retail trading hours.

Further in this instance the proposed Sunday trading hours being sought by the applicant are consistent with the established and approved Sunday trading hours of the Centre which restricts the number of Sunday trading days to be in accordance with the recognised market demand.

5.10.6 The Commission thus finds that the Applicant has met the requirements of section 38(2) of the Act and it follows that on this ground alone the application should be allowed and the ETP granted.

5.10.7 The Commission has not considered the other grounds in the application lodged by the Applicant as the decision in respect of this ground alters the sense, context and logic of the other grounds as they were directed at the particular circumstances of a non metropolitan liquor outlet which fall away by virtue of the Commission's decision.



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**MR JIM FREEMANTLE**  
**CHAIRPERSON**