

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** The Commissioner of Police
(represented by Mr Peter Slater)
- Respondent:** Mr Rhys Howell
- Commission:** Mr Jim Freemantle (Chairperson)
Mr G Joyce
Mr E Watling
- Matter:** Application under section 25 of the *Liquor Control Act 1988* for a review of decision number A199291 by the Delegate of the Director of Liquor Licensing dated 11 November 2009 approving Mr Howell as an Approved Manager.
- Date of Hearing:** 16 April 2010
- Date of Determination:** 5 May 2010
- Determination:**
1. Decision A199291 to approve Mr Rhys Howell as a Manager under section 35B of the *Liquor Control Act 1988* in respect of the premises licensed as a Restaurant and known as "Table 78" is hereby quashed.
 2. The matter is remitted to the Director of Liquor Licensing for determination in light of the reasons stated in this decision.

Introduction

1. On 22 October 2008, Erindel Nominees Pty Ltd, the licensee of the premises known as Table 78 and situated at 80 Outram Street West Perth lodged an application for the approval of Mr Rhys Howell as a manager under Section 35B of the *Liquor Control Act 1988*.
2. On 27 February 2009, the WA Police lodged a Notice of Intention opposing the application.
3. On 11 November 2009, the Delegate of the Director of Liquor Licensing granted the application.
5. On 11 December 2009, the Commissioner of Police sought a Review of the Director's decision under Section 25 of the Act.

Determination

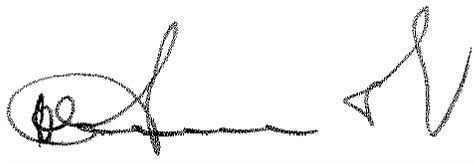
6. It should be stated at the outset that pursuant to section 25(3) of the Act the Commission is not empowered to review a finding of fact by the Director as to whether an applicant is a fit and proper person. In the case of Mr Howell, the Director found him to be a fit and proper person and the Commission is bound by that finding.
7. The basis of the application for review under section 25 by the Commissioner of Police relates to a question of law, not the actual determination in respect of Mr Howell. The Commission is of the view that it has jurisdiction to hear the application.
8. The Commissioner's substantive grounds for seeking the review are:
 - (i) A denial of natural justice in that material which was before the Delegate of the Director and on which he apparently relied was not made available to the Commissioner of Police and the Commissioner was thus denied procedural fairness.
 - (ii) There was no evidence that the applicant satisfied the requirements of section 33(6b)(c) of the Act and no evidence the Delegate of the Director

had exercised his specific powers under section 33(6b) to waive the requirements of section 33(6b)(c) and (d) – in this case section 33(6b)(c) specifically.

8. The Commission finds that there was a denial of natural justice in that the following material was not made available to the Commissioner of Police prior to the determination being made and thus the Commissioner was denied the opportunity to respond:
 - Letter of 6 September 2009 by Mr Howell to Office of Racing Gaming and Liquor (encl. reference by Mr Rooke)
 - Email of 10 November 2009 by Mr Howell to Mr Toyne.
9. Arguably any response the Commissioner of Police might have made would not have made any difference to the decision of the Delegate of the Director. Equally it could be argued by the Delegate of the Director that the material in the correspondence cited in 8 above was inconsequential, however that is not the issue. These two documents should have been made available to the Commissioner of Police and in denying them to the Commissioner there has been a sufficient breach of the principles of natural justice for the Commission to arrive at the decision to quash the decision.
10. Where the Commission finds that the Director (or his delegate) has denied a party to proceedings natural justice the general cure would be to remit the matter to the Director for re-determination (refer *Hancock and the Executive Director of Public Health 2008 WASC 224 para 46*) and the Commission so remits the matter to the Director.
11. In addition, the Commissioner of Police argued that a specific condition precedent prescribed by the Act when determining the suitability of Mr Howell as an approved manager has not been met; that is the requirements of section 33(6b)(d) had been met but not section 33(6b)(c). The Act is clear that these conditions precedent must be met unless the Director specifically exercises the discretion granted to him to waive the requirement. The decision of the Delegate of Director did not specifically indicate that the

“Director otherwise approves” Mr Howell notwithstanding that he had not satisfied one of the conditions precedent to the application being determined. The Commission therefore is of the view the Delegate of the Director did not properly waive the requirements of section 33(6b) and gave no indication in his reasons that he had done so. Section 33(6b) is strongly worded and very clear”unless the Director otherwise approves, a determination cannot be madeunless the person has successfully completed (c) a course of training or an assessment approved by the Director in the management of licensed premises”

12. The Commission also took into account the clear intent in respect of training expressed in the Second Reading speech of Minister McGowan on 20 September 2006 “the bill amends the Act to require licensees and approved managers to be trained in the liquor laws and in the responsible service of alcohol”, and clause 28 of the Explanatory Memorandum which states “applicant must, unless the Director otherwise approves, successfully complete an approved course in the management of licensed premises”.
13. There is nothing in the decision of the Delegate of the Director that can reasonably be interpreted as complying with the requirements of the Act at section 33(6b).
14. The Commissioner considers section 33(6b) is clear and unequivocal in its statement of the prerequisites of approval as an approved manager. Thus there is a demonstrable flaw in the process of approving Mr Howell as an approved manager which also raises a question of law.



**JIM FREEMANTLE
CHAIRPERSON**