

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Cellsan Pty Ltd
(represented by Mr Gavin Crocket of Cullen Babington McLeod)

Intervener: Director of Liquor Licensing
(represented by Mr David Leigh of State Solicitor's Office)

Commission: Mr Seamus Rafferty (Deputy Chairperson)
Mr Evan Shackleton (Member)
Mr Greg Joyce (Member)

Date of Hearing: 17 April 2013

Date of Determination: 17 April 2013

Date of Reasons for Determination: 24 June 2013

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

Determination: The application for review is granted and the matter referred back to the Director of Liquor Licensing for determination.

Authorities referred to in the determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224

Introduction

- 1 Cellsan Pty Ltd (“the applicant”) holds liquor licence number 6030120551 which allows it to conduct a liquor store business known as Sandringham Cellars located at 88 Great Eastern Highway, Belmont. The licence authorises the applicant to sell packaged liquor on and from the licensed premises on the conditions set out in the licence.
- 2 On 20 July 2012, the applicant lodged an application to vary the conditions of the licence. The application was made pursuant to section 4(6) of the *Liquor Control Act 1988* (“the Act”) for approval to store packaged liquor at an additional storage facility. The facility is a warehouse located at 28 Robinson Avenue, Belmont.
- 3 By letter dated 2 January 2013, the Director of Liquor Licensing (“the Director”) refused the application. The refusal was set out in a letter from the Director Liquor Regulation, Ms Nicola Perry. The stated reason for the refusal of the application was that,

“based on the advice of the State Solicitor, the Director of Liquor Licensing has affirmed his position in that “on or from” is to be read as a composite phrase, separate and distinct from “on and from” so that sections 4(5) and 4(6) of the Act do not apply to liquor store licences. Accordingly, there can be no application for off-site approval for a liquor store licence.”
- 4 By way of an application dated 1 February 2013, the applicant seeks to review the Director’s decision pursuant to section 25 of the Act.
- 5 The Director of Liquor Licensing intervened in the proceedings before the Liquor Commission (“the Commission”) pursuant to section 69(11) of the Act.
- 6 The hearing was conducted before the Commission on Wednesday, 17 April 2013.

Legal Principles Governing Review

- 7 The Commission is not constrained by the need to find error at first instance but is to undertake a full review of the materials before the Director by way of a rehearing. The Commission is to make its own determination of the merits of the application based solely on those materials (see *Hancock v Executive Director of Public Health* [2008] WASC 224, [53] per Martin CJ).
- 8 In determining the review pursuant to section 25(4) of the Act the Commission may do any of the following, namely:
 - a) affirm, vary or quash the decision;
 - b) make a decision in relation to any application or matter that should in the opinion of the Commissioner be made in the first instance;
 - c) give directions as to any questions of law reviewed or to the Director to which effect will be given; or
 - d) make any incidental or ancillary order.

- 9 The issue to be determined in this instance is whether the Director has the power to grant an off-site application in respect to a liquor store licence.

Relevant Provision

- 10 The relevant provisions determining this application are set out in sections 4(5) and 4(6) of the Act. Those provisions state that:

(5) *Where the sale of liquor is authorised under a licence on or from the licensed premises and not otherwise, liquor may be supplied and delivered to the purchaser from the stock of the liquor kept on those premises, or on premises to which approval under subsection (6) relates, and not otherwise.*

(6) *On application by a licensee, the Director may, in writing, approve premises other than the licensed premises for the purposes of this subsection, and the licensee is then authorised to store liquor on the approved premises and to supply or deliver liquor from those premises, whether or not the licence includes a condition that the liquor be sold only on the licensed premises.*

Submissions on behalf of the applicant

- 11 Counsel for the applicant filed detailed written submissions dated 3 April 2013. The applicant's submissions in respect to the relevant provisions are as follows, namely:

- a) there exists no reason, or provision of the Act which suggests sections 4(5) and 4(6) do not apply to liquor store licences;
- b) it follows, the applicant is entitled to make an application for off-site storage under section 66 read with sections 4(5) and 4(6) of the Act;
- c) in refusing to consider the application on the grounds that sections 4(5) and 4(6) do not apply to liquor stores, the Director was in error;
- d) in excluding the right of a liquor store licensee to use an off-site storage facility whilst permitting other classes of liquor licences to do so, reflects the Director failed to discharge his statutory duty and apply the policy directive which is contrary to the provisions of the Act;
- e) the Director did not make a proper inquiry on the application by failing to determine the application on its merits as required under section 33 of the Act, and failed to place the proper interpretation on the plain meaning of the words in sections 4(5) and 4(6) of the Act.

- 12 In support of the application, the applicant provided the Commission with the Explanatory Memorandum attached to the *Liquor Licensing Amendment Bill 1997* which repealed the previous section 4(6) and inserted a redrafted section 4(6). The explanatory memorandum stated that the previous provision had been repealed and redrafted, "*to enable the Director to approve the storage and delivery of liquor from premises other than a licensed premises for any licence category [emphasis added].*"

Submissions on behalf of the Director of Liquor Licensing

- 13 The submissions of the Director can be summarised as follows, namely:
- a) section 4(5) of the Act applies, *“where the sale of liquor is authorised under a licence on or from the licensed premises and not otherwise”*. A liquor store licence authorises the sale of liquor “on and from” the licensed premises. Therefore, section 4(5) of the Act does not apply;
 - b) A construction of section 4(5) of the Act that employs the disjunctive meaning of “or” renders the words “and not otherwise” otiose. This strongly indicates that the words “on or from” must be read as a single, composite phrase;
 - c) The phrase “on and from” is used consistently throughout the Act to denote liquor store licences and hotel licences (in respect of packaged liquor), whereas “on or from” is used consistently to denote producer’s licences and wholesaler’s licences;
 - d) The legislative history of the licence provisions shows that the use of the phrases “on and from” and “on or from” discussed in the previous point was the result of deliberation by Parliament;
 - e) A construction of section 4(5) of the Act that allowed an off-site application to be made in respect of any kind of licence would undermine a discernible purpose of the Act, which is to regulate sale, supply, and consumption of liquor using a system of discrete and distinct kinds of licences;
 - f) The construction of section 4(5) of the Act that allowed an off-site application to be made in respect of any kind of licence would give rise to absurd consequences.

Determination

- 14 Section 19(1) of the *Interpretation Act 1984* states that,

“...in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material –

- (a) *to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or*
- (b) *to determine the meaning of the provision when –*
 - (i) *the provision is ambiguous or obscure; or*
 - (ii) *the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or is unreasonable.”*

- 15 Further, the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the time when the provision was enacted.
- 16 For the purposes of this determination, the Commission has considered the explanatory memorandum to the *Liquor Licensing Amendment Bill 1997*. That memorandum makes it explicitly clear that section 4(6) of the Act applies to any licence category.
- 17 At the hearing of the application, counsel for the Director made the submission that the Minister for Racing and Gaming, the Honourable Max Evans had made an error in stating that section 4(6) applied to any licence category. The submission was predicated on the basis of the use of the words “licence on or from” in section 4(5) of the Act. It was submitted that this phrase was peculiar to producers and wholesalers licences. That is, only licences issued pursuant to sections 55(1) and 58(1) of the Act grant an authority to sell liquor “on or from” the licensed premises.
- 18 Having regard to the clear intention of Parliament, the Commission does not accept that sections 4(5) and 4(6) only apply to producers and wholesalers licenses. To adopt such a position would run contrary to the clear intention of Parliament. If the legislature had intended such a position, then it would have been clearly enunciated at the time that the section were enacted.
- 19 Accordingly, the Commission gives a direction to the Director that the application pursuant to section 4(6) of the Act made by the applicant can be considered on its merits and be reconsidered according to the relevant provisions of the Act.



SEAMUS RAFFERTY
DEPUTY CHAIRPERSON