

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Wendy Joan Naude
(represented by Mr Peter Fraser of Dwyer Durack
Lawyers)

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

Objectors: Mr Charles Fleming
Mr Geoffrey Sharpe
Mrs Audrey Sharpe
Mr Alan Davies
Ms Pauline Hunter
Ms Sharna Hunter
Ms Janine Hoskins
Mr Stanley Kelson
Mr John Musty
Mr Martin Quiterio
Ms Audrey Hunter

Commission: Mr Michael Egan (Presiding Member)
Ms Elanor Rowe (Member)
Mr Paul Shanahan (Member)

Matter: Application pursuant to section 25 of the *Liquor Control
Act 1988* for a review of a decision by the delegate of
the Director of Liquor Licensing to refuse an application
for the grant of a small bar licence.

Premises: Pony Express O, 21 Mayfair Street, West Perth

Date of Hearing: 1 May 2018

Date of Determination: 15 May 2018

Determination: The application is refused

Authorities referred to in Determination

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Re Romato; ex parte Mitchell James Holdings Pty Ltd* [2001] WASC 286

Background

- 1 On 3 May 2017, Wendy Joan Naude ("the applicant") applied for the grant of a small bar licence pursuant to sections 41 and 68 of the *Liquor Control Act 1988* ("the Act") in respect of premises at 21 Mayfair Street, West Perth trading as Pony Express O ("the applicant's premises").
- 2 As the applicant is required to demonstrate the grant of the application is in the public interest, the application is accompanied by a Public Interest Assessment ("PIA").
- 3 A number of objections opposing the grant of the application have been lodged pursuant to section 73 and 74 of the Act on one or more of the grounds specified in sections 74(1)(a), 74(1)(b) and 74(1)(g)(i) of the Act ("the objections").
- 4 On 15 January 2018, the delegate of the Director of Liquor Licensing ("the Director") refused the application (decision reference: A000234434) on the basis the applicant's premises do not comply with the Director's policy on the Standard of Licensed Premises ("Director's Policy") because:
 - a. the applicant does not have the exclusive right to use toilets adjacent to the applicant's premises; and
 - b. if the application were granted, the toilets would not form part of the licensed premises over which the applicant has exclusive control.
- 5 The applicant lodged an application with the Liquor Commission of Western Australia ("the Commission") on 5 February 2018 seeking a review of the Director's decision.
- 6 On 1 March 2018, the Director lodged a Notice of Intervention in accordance with section 69(11) of the Act.
- 7 The Commission conducted a hearing of the application on 1 May 2018.

Applicant's Evidence and Submissions

- 8 The applicant operates a coffee house/café which serves coffee only.
- 9 The proposed licensed premises are intended to provide:
 - a. a bar servery area of approximately 13m²;
 - b. an internal patron area of approximately 24m²; and
 - c. a covered courtyard area of approximately 24m²,all of which are currently in use.
- 10 It is also proposed to convert an existing area outside the rear entry into the café to an al fresco courtyard of approximately 22m².
- 11 The licensed premises, if the application is granted, will accommodate 50 people.

- 12 According to the PIA:
- a. the coffee house is a meeting place for West Perth's local workforce and residents;
 - b. if licensed, the premises will:
 - i. cater to primarily young aspirational residents (apartment living) and the resident white collar workforce, as well as tourists;
 - ii. further activate the precinct as a mixed use hub of restaurants, cafes, small bars and retail; and
 - iii. enhance the amenity of the locality by further adding vibrancy and night time activation to the precinct;
 - c. the heritage significance of the building in which the applicant's premises are located will continue to be recognised and will add to the cultural significance of West Perth;
 - d. the young (20-35 years) residents and broad white collar workforce are not considered to be "at risk" groups;
 - e. by virtue of the increased activity, especially in the evening and at night, the premises will contribute to reducing vandalism and anti-social behaviour due to the greater level of legitimate activity and passive surveillance; and
 - f. by limiting the operating hours (12:00 pm - 9:00 pm on Tuesday and Wednesday, and 12:00 pm - 10:00 pm on Thursday, Friday and Saturday) the risk of any harm or ill-health will be minimised.
- 13 The application is well supported by a petition signed by 122 existing customers of the coffee house, 49 responses to a survey and 29 letters of support from a range of individuals and businesses, including the Member for Perth, Mr John Carey MLA.
- 14 The applicant is one of two tenants occupying a building accessible from, and facing onto, Mayfair Street.
- 15 The applicant occupies the rear half of the building.
- 16 The other tenant operates a boutique hairdressing business in the front half of the building, which is accessible directly off Mayfair Street.
- 17 The applicant's premises are accessed at the rear of the building through an adjacent large on-grade car park entered from Mayfair Street as well as via a pedestrian lane way on the opposite side of the building. The lane way also provides access into, and separates the building (including the applicant's premises) from, a relatively large block of residential units next door.

- 18 Both the applicant's cafe and the hairdressing business utilise a common area in the central part of the building between the two businesses. This common area comprises separate male and female toilets and an adjacent common facilities area ("the common facilities area").
- 19 The applicant has indicated that the common facilities area will be renovated to incorporate a necessary glass washing machine should the application be granted.
- 20 The applicant submits that although section 37(5) of the Act requires that a licensee occupy and retain the right to occupy the licensed premises to which the relevant licence relates, it does not require a licensee to have the right of exclusive possession over toilets in circumstances where those toilets do not form part of the licensed premises.
- 21 Whilst the applicant concedes the proposed toilets do not comply with the Director's Policy in that the toilets would not be part of the licensed premises, the toilets are, nevertheless, accessible from within, and are immediately adjacent to, the applicant's premises, and are protected from the elements.
- 22 Moreover, although the applicant does not have the right to exclusive possession, the applicant's lease of the premises as it applies to the toilets and common facilities area provides that the applicant may use the toilets "at will" (in common with the adjacent hairdressing business).
- 23 The applicant submits that the Director's Policy should not be applied to the applicant's premises for a number of reasons, including that:
 - a. it is not possible for the applicant to construct toilets because of the heritage listing of the building;
 - b. the toilets are readily accessible and immediately adjacent to the proposed licensed area;
 - c. the toilets comply with the requirements of the City of Perth and are sufficient in number to cater for both the applicant's premises and the adjacent hairdressing business;
 - d. the applicant's premises are a "small" small bar accommodating up to a maximum of 50 people only;
 - e. there is no evidence consumers have an expectation that toilets will be located on licensed premises; and
 - f. the toilets have satisfactorily met the requirements of current customers who, it is reasonable to infer, will comprise a significant proportion of the trade of the proposed licensed premises.

- 24 The applicant has also made extensive legal submissions on Supreme Court and Commission decisions providing guidance on the consideration of sections 5(1)(b), 5(1)(c) and 38(4) of the Act, and submitted there is considerable evidence demonstrating a range of matters, including that:
- a. there is a consumer requirement for the liquor service proposed;
 - b. the grant of the application would be consistent with the proper development of the liquor industry by providing more choice and greater diversity;
 - c. the category of consumers expected to utilise the applicant's premises, if licensed, are rarely associated with anti-social or criminal behaviour; and
 - d. the application should be granted.

Objectors' Submissions

- 25 Objections to the application have been lodged by: Alan Davies, Charles Allan Fleming, Janine Hoskins, Audrey May Hunter, Pauline Hunter, Sharna K Hunter, Stanley Crispin Kelson, John Edward Musty, Martin Carl Quiterio, Geoffrey Lawrence Sharpe and Audrey Fay Sharpe.

Charles Allan Fleming

- 26 Mr Fleming owns and operates the hairdressing salon in the same building as, and adjacent to, the applicant's premises providing services to mostly female clients of all ages.
- 27 The hairdressing business operates most days from 10.00 am to at least 6.00 pm, but sometimes later up to 7:00 pm, 8:00 pm and 9:00 pm. Some of these later closing times are disputed by the applicant.
- 28 Mr Fletcher's Notice of Objection asserts that the common facilities area is used for general storage, mixing of colour hair dye, and laundry and kitchen facilities, which has not been disputed by the applicant.
- 29 Mr Fletcher has also asserted that:
- a. the shared toilet facilities are inadequate to support a licensed premises;
 - b. there are genuine security concerns for Mr Fletcher's clients who may be affronted by intoxicated patrons;
 - c. the lack of adequate toilet facilities may lead to people toileting in the general car park and surrounds; and
 - d. the amenity of the area may be affected by noise and threats to physical safety.
- 30 Mr Fletcher lodged a petition signed by 40 persons, who appear to be clients of the hairdressing salon, objecting to the grant of the application.

Geoffery Lawrence and Audrey Fay Sharpe ("the Sharpes")

- 31 In support of the ground of objection that the grant of the application will result in undue offence, annoyance or inconvenience to persons who reside in the vicinity, the Sharpes, who live opposite the applicant's premises, submit:
- a. 61 units with mostly elderly and other disadvantaged occupants are located next to the applicant's premises;
 - b. a further 32 residents live in close proximity; and
 - c. the customers of the applicant's premises "toot their horn" for the rope gate to be opened in the car park adjacent to the applicant's premises to gain access (creating a disturbance).

Audrey May Hunter

- 32 This objection, which essentially mirrors the Sharpes' objection, attaches a "petition" against the grant of the application signed by 11 signatories, some of whom are also objectors to the application.

Remainder of Objectors

- 33 The remainder of the objectors have not lodged any evidence or submissions in support of their objection.

Intervention and Submissions by the Director

- 34 The Director has intervened to make representations in support of the Director's decision to refuse the application and the Director's finding that formed the basis of that refusal, being that the applicant's premises are not suitable to be licensed because they do not meet the standard and requirements set out in the Director's Policy.
- 35 The Director's Policy provides guidance as to the requirements of sections 37 and 33(7) of the Act.
- 36 Section 37 of the Act stipulates that the licensing authority shall not grant an application for a licence (with some exceptions) unless it is satisfied that the premises to which the application relates are of a sufficient standard and suitable for the conduct of the business.
- 37 Section 33(7) provides that in determining that particular issue the licensing authority should consider as relevant, among other things, the customary requirements of those persons from whom the applicant would ordinarily be expected to derive trade.
- 38 The Director has referred to the general section of the Director's Policy and that part of the Director's Policy specifically addressing the construction and provision of toilets.

39 Among other considerations to be taken into account in assessing the standard and suitability of the licensed premises, the Director's Policy states:

- a. *licensed premises must be completely separate and distinct venues which are able to operate independently of any other revenue; and*
- b. *in respect of toilets:*
 - i. *separate male and female toilet facilities, which include hand-wash basins, are required for all licensed premises; and*
 - ii. *toilets in respect of all licences shall be located on the licensed premises and entered from within, or in the case of existing premises, immediately adjacent to the licensed premises and protected from the elements.*

40 In response to the submission from the applicant that the intent of the Director's Policy is to ensure that patrons have ready access to toilets, the Director submits the intent of the policy is much broader as the policy makes it clear that "*licensed premises must be completely separate and distinct venues which are able to operate independently of any other venue*".

41 The Director also submits that it is clear the "*customary requirements*" that have been adopted in Western Australia over many years are reflected in the Director's Policy to the effect licensed premises should have toilet facilities.

42 Further, the Director submits that it is no answer to assert customers are presently utilising the existing toilets, which have satisfactorily met their requirements as:

- a. it is a notorious fact that drinking alcohol makes people visit the toilet more frequently; and
- b. the existing toilets were built with the requirements of the current tenants of the building in mind, not the requirements of members of the general public who have been consuming alcohol in a small bar.

43 The Director submits that in arriving at the decision to refuse the application, the Director was entitled to apply the Director's Policy and form the view:

- a. there are no exceptional reasons why the policy should not apply to the application; and
- b. as the premises do not comply with the Director's Policy in relation to toilet facilities, the applicant's premises are unsuitable to be licensed as a small bar.

44 The Director has also made legal submissions on the requirement of the applicant to demonstrate that the grant of the application is in the public interest. However, that matter was not determined by the Director at first instance because it was unnecessary to do so (having found that the applicant's premises are unsuitable to be licensed). Accordingly, the Director's submissions are limited to those legal submissions.

Legislative Framework governing a Review of the Director's Decision

- 45 The Commission is not required to find error on the part of the Director, but rather is to undertake a full review and make a determination on the basis of the materials before the Director when the decision was made (*Hancock v Executive Director of Public Health* [2008] WASC 224).
- 46 On a review under section 25 of the Act, the Commission may:
- a. affirm, vary or quash the decision subject to the review; and
 - b. make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and
 - c. give directions:
 - i. as to any question of law, reviewed; or
 - ii. to the Director, to which effect shall be given; and
 - d. make any incidental or ancillary order.
- 47 When considering a review of a decision made by the Director, the Commission is required to have regard to only the material that was before the Director at first instance (section 25(2c) of the Act).
- 48 Section 16 of the Act prescribes that the Commission may make its determinations on the balance of probabilities.
- 49 Pursuant to section 33(1) of the Act the Commission has an absolute discretion to grant or refuse an application on any ground, or for any reason, that it considers in the public interest, such discretion only being limited to a consideration of the scope and purpose of the Act.
- 50 Section 38(2) of the Act requires an applicant to satisfy the Commission that the granting of an application is in the public interest.
- 51 When determining whether an application is in the public interest the Commission must take into account the primary and secondary objects of the Act set out in sections 5(1) and 5(2) of the Act.
- 52 The factual matters which the Commission may also take into account in determining whether the grant of an application is in the public interest are set out in section 38(4) of the Act and include the harm or ill-health that may be caused to people, the impact on the amenity of the locality and whether offence, annoyance, disturbance or inconvenience might be caused to people if the application is granted.
- 53 Section 73(10) of the Act requires that any objector must make out the validity of the objection.

Determination

- 54 The applicant has applied for a small bar licence in respect of the applicant's premises.
- 55 A small bar licence is a sub-category of hotel licence subject to a condition prohibiting the sale of packaged liquor and limiting the number of persons who may be on licensed premises to a maximum of 120 (section 41(1aa) of the Act).
- 56 It is a prerequisite to the grant of a licence, other than an occasional licence or special facility licence, that the licensing authority be satisfied the proposed licensed premises are of a sufficient standard and suitable for the proper conduct of the business to be carried on under the licence applied for, in this case a small bar licence.
- 57 Accordingly, unless the Commission is satisfied that the applicant's premises are of a sufficient standard and suitable for the proper conduct of the business contemplated, a consideration of whether the grant of the application is in the public interest is not material or relevant to a determination of the application by the Commission.

- 58 Section 37(1) of the Act states:

An application to the licensing authority for the grant of a licence, for approval to the transfer of a licence, or a permit to be issued, shall not be granted by the licensing authority unless the licensing authority is satisfied –

- (f) except where paragraph (e) applies (paragraph (e) relates to occasional licences, special facility licences and extended trading permits) –*

that the premises to which the application relates are, or when constructed will be, of a sufficient standard and suitable for the proper conduct of the business to be carried on there.

- 59 Section 33(7) of the Act states:

Where the licensing authority is to determine whether any premises are of a sufficient standard or suitable for the proper conduct of any business –

- a) the class of licence or kind of permit sought, and the obligations thereby imposed and the accommodation and facilities required; and*
- b) the customary requirements of those persons from whom the applicant would ordinarily be expected to derive trade; and*
- c) any requirements made known, or reasons appearing, in a certificate under section 39 or section 40; and*
- d) any report submitted, or intervention made, under section 69,*

shall be taken to be relevant and amongst the matters to which consideration should be given.

- 60 Section 66 of the Act also requires an application for a licence, other than an occasional licence, to be accompanied by plans of the premises to which the application relates, and regulation 11(1b) of the *Liquor Control Regulations 1989* ("the Regulations") requires floor plans of the building forming part of the relevant premises (defined as the proposed licensed premises) to show, among other things, the fit out details of all toilets.
- 61 Although not definitive, the Regulations appear to contemplate the provision of toilets as part of licensed premises.
- 62 The applicant's submissions are directed, principally, at the location of the toilets relative to the applicant's premises and their lack of compliance with the Director's Policy.
- 63 One of the stated aims of the Director's Policy is to provide guidance as to the legislative requirements and criteria that will be used when considering the suitability of premises to be licensed under the Act.
- 64 As alcohol is not an ordinary product and is subject to a strict regulatory framework under the Act, the Director's Policy recognises that the consumption of alcohol in public places may require more than compliance with the National Construction Code and the Public Health Act in order to achieve good safety outcomes for patrons and the community.
- 65 With this in mind, the Director's Policy specifies what toilets are to be provided, how the toilets are to be constructed and where the toilets are to be located.
- 66 The Director's Policy has been in operation for a lengthy period and the Commission understands that the Director's Policy has been adhered to in respect of all small bar licences granted by the licensing authority.
- 67 Although there was some discussion at the Commission hearing on the wording of the Director's Policy as it relates to the location of toilets for existing premises, again, the Commission understands that the interpretation of the policy adopted by the Director in refusing the present application has been consistently applied in respect of all small bar licences to require toilets to be on licensed premises and under the control of the licensee.
- 68 As the applicant has submitted, neither the Director nor the Commission is bound to adhere to the Director's Policy. Indeed, the Director and the Commission would fall into error by doing so as the policy cannot be treated as a fixed determinative rule regardless of the merits of the application.
- 69 Nevertheless, as the applicant also pointed out, the Director and the Commission are entitled to apply the Director's Policy provided the applicant is given an opportunity to show that there are exceptional reasons why the policy should not be applied to the present application (*Re Romato; Ex Parte James Holdings Pty Ltd* [2001] WASCA 28).
- 70 The Commission is not persuaded that the reasons articulated by the applicant, summarised at paragraph [23] above, are sufficient to warrant a departure or deviation from the Director's Policy in this particular case.

71 However, irrespective of the Director's Policy, the Commission has serious concerns about the proposed licensed premises and, on the basis of those concerns, is not satisfied the premises to which the application relates are of a sufficient standard or suitable for the proper conduct of the business contemplated as required by section 37 (1)(f) of the Act.

72 In the Commission's view, it is important that the licensee of a small bar, which is a sub-category of a hotel licence, be responsible and accountable under the Act for the conduct of the business and the provision of essential services associated with the business, such as adequate and suitable toilets.

73 The proposed toilets are not under the direct control of the applicant. The proposed toilets are also immediately adjacent to a common facilities area which is used for a range of purposes associated with the "back of house" operation of both the applicant's business and the adjoining hairdressing business.

74 Although the applicant's lease provides for the use of the toilets by the applicant's customers, the toilets and common facilities area are likely to be occupied and utilised by staff and clients of the hairdressing business at times when the staff and customers of the applicant's business are also seeking to use those facilities.

75 Under the arrangement between the applicant and the operator of the hairdresser's business, control over the maintenance and cleaning of the toilets and common facilities area is shared. The use of the common facilities area is also shared, and some of the activities which may be conducted in that area may impede access to the toilets and/or affect the quality of the amenities provided by the toilets. As a consequence, any dispute that may arise between the applicant and the hairdressing business as to:

- a. maintenance, cleaning or use of the toilets by clients, customers and staff of the two businesses;
- b. maintenance, cleaning or use of the common facilities area by those people; and/or;
- c. the occupational, health and safety risks which those matters (i.e. a and b above) pose to those people,

would need to be resolved between the applicant and the hairdressing business. That resolution process may take some time, and is likely to prevent any urgent issues which arise in relation to those matters (i.e. a, b and c above) from being resolved in a timely manner. That resolution process may also create difficulties in relation to ultimately assigning responsibility for injury, neglect or the inadequate provision of hygienic and adequate toilet facilities.

76 Although the current arrangement regarding the use of the toilets may be adequate to service both existing businesses, the nature and character of the applicant's business would be expected to change if the small bar licence is granted.

- 77 As the Director has submitted, the toilets shared between the applicant's business and the adjoining hairdresser's business were designed to meet the requirements of the two tenants. Those toilets and the common facilities area are not designed to meet the requirements of both a hairdresser's business and a small bar in which members of the public may consume alcohol at any time, and for any period, during the proposed operating hours.
- 78 The provision of toilets in circumstances such as those under consideration in this application where customers consume alcohol, elevates the significance and importance of adequate and suitable toilets. Such facilities are an essential and integral component of all licensed premises. The licensing authority and the public must be able to hold the licensee responsible for the provision of those facilities.
- 79 The applicant's PIA anticipates the proposed small bar will generate vibrancy and night time activation and will be frequented by primarily young residents (20 - 35 years) as well as the residential white collar workforce.
- 80 The Commission acknowledges there is no evidence that this target market comprises "at risk" groups. However, it is reasonable to infer, having regard to the likely customer profile and hours of operation, that customer demand for use of the toilets will increase, and potentially increase significantly, if the application is granted.
- 81 The Commission also notes in this regard that the applicant proposes to host functions, which would be likely to place additional pressure on those limited toilet facilities.
- 82 The applicant has submitted that the common facilities area will be renovated to include a glass washing machine. Putting to one side the hygiene considerations of such a proposal, it is not clear exactly what facilities will be located and used within the common facilities area in the future by the applicant and by the hairdressing business.
- 83 The applicant has not contradicted Mr Fletcher's evidence that the common facilities area is currently used for general storage, mixing of colour hair dye, and laundry and kitchen purposes. It seems to the Commission that some, if not all, of these activities are incompatible with, and not conducive to, the adequate provision of toilet facilities in the same area for use by members of the public who have been consuming alcohol.
- 84 Increased use of the toilets by customers of the applicant's business could also lead to confusion and even conflict between the applicant's customers and the hairdresser's clients.
- 85 It is reasonable to infer from past practice, and from the history of the operation of small bar licences, that consumers of liquor in small bars in Western Australia expect the toilets associated with the business conducted under the licence to be maintained and controlled by the licensee to the exclusion of other businesses.
- 86 There is no reason to conclude that the applicant would not operate and conduct the business responsibly. However, if the application is granted, there is a not-insignificant risk that the licensed premises would attract some anti-social and unacceptable behaviour, which would potentially impact the hairdressing business and that business's clients.

- 87 The applicant has pointed to two previous decisions of the Commission where the toilets associated with the licensed premises are not on licensed premises. However, both of those decisions concerned applications for licences for restaurants and those decisions provide little or no guidance to the Commission.
- 88 The abovementioned inadequacies of the applicant's proposal to utilise toilets in the manner proposed are sufficiently concerning for the Commission to conclude and determine that the proposed licensed premises are not of a standard or suitable for the proper conduct of the business contemplated under a small bar licence.
- 89 The Commission notes that the following matters are also potential concerns in any assessment of the suitability of the applicant's premises, although the Commission did not rely on any of these matters in arriving at its determination:
- a. In the Commission's view, there is a very real risk of noise emanating from the applicant's premises potentially impacting on the adjoining hairdressing business and the residential units next door.
 - b. Although the applicant has indicated noise will be well controlled and will meet any noise regulations or requirements, the building in which the applicant's premises are located has limited or no noise attenuation characteristics. In fact, the wall separating the existing courtyard in the applicant's premises and the residential units next door comprises a wooden fence.
 - c. The applicant may have the best of intentions to control the level of music played during normal operations and at functions; however, this is sometimes difficult to achieve particularly if the premises have limited or no noise attenuation characteristics.
 - d. It was acknowledged at the Commission hearing that the applicant will take steps to limit access (by signage) to the premises via the laneway off Mayfair Street to customers utilising a wheelchair. However, it is not possible to prevent other customers from utilising this entrance.
 - e. It is not clear how persons entering through that entrance would be monitored and controlled.
 - f. If the licensed premises were to include the courtyard area outside the current entry at the rear of the building, as the applicant has proposed, then entry onto the proposed licensed premises in that area would not be visible from inside the building and the applicant's premises.
 - g. It would be very difficult to adequately monitor and control persons entering licensed premises until they were actually inside the building.

- 90 Given the Commission's finding that the applicant's premises are not of a sufficient standard and are not suitable for the proper conduct of the business proposed to be carried on under a small bar licence, the Commission is not required to assess and determine if the applicant has discharged its obligation under section 38(2) of the Act.
- 91 For the same reasons, it is not necessary to determine if the objectors have discharged their burden of establishing the validity of the objections as required by section 73(10) of the Act.
- 92 The application is dismissed and the decision of the Director confirmed.



MICHAEL EGAN
PRESIDING MEMBER