

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

Applicant:	Bushtree Holdings Pty Ltd (<i>represented by Mr Phil Cockman of Canford Hospitality Services Pty Ltd</i>)
Intervener:	Director of Liquor Licensing (<i>not represented</i>)
Commission:	Ms Emma Power (Chairperson) Mr Nicolas van Hattem (Deputy Chairperson) Ms Mary Brown (Member)
Matter:	Application pursuant to section 25 of the <i>Liquor Control Act 1988</i> for review of the decision of the Director of Liquor Licensing to refuse an application to add, vary or cancel a condition of a licence or permit.
Premises:	Jarrah Shop 64 Sorrento Quay 28 Southside Drive, Hillarys Boat Harbour, Hillarys WA 6025
Date of lodgement of Application:	14 March 2024
Date of Hearing:	27 August 2024
Date of Determination:	9 June 2026
Determination:	The decision of the Director of Liquor Licensing is quashed and the Application to Add, Vary or Cancel Condition of a Licence or Permit is granted. In Condition 4 of Restaurant Licence no. 606213519019, the words <i>“Therefore, the sale and supply of liquor to patrons is restricted to table service by staff of the licensee”</i> are removed.

In Condition 6 of Extended Trading Permit - Liquor Without A Meal Permit No. 0213628919, the words *“Therefore, the sale and supply of liquor to patrons is restricted to table service by staff of the licensee”* are removed.

Condition 2 of Extended Trading Permit - Extended Area Permit No. 0218120622 is deleted.

The remaining conditions of the Licence and the Permits otherwise remain in full force.

Authorities referred to in determination:

- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *O'Sullivan v Farrer* [1989] HCA 61
- *Carnegies Realty Pty Ltd, Director of Liquor Licensing* [2015] WASC 208

BACKGROUND

1. Bushtree Holdings Pty Ltd is the licensee of Jarrah, a restaurant licence (licence number 606213519019) operating at Shop 64, Sorrento Quay, Hillarys Boat Harbour (**“the premises”**). The licence is subject to an extended trading permit authorising the sale of liquor without a meal (permit number 0213628919), which includes a condition requiring liquor to be sold and supplied exclusively by way of table service, with consumption limited to patrons seated at tables or fixed structures used as tables (**“the Condition”**).
2. On 20 December 2022, the Applicant applied to vary both the restaurant licence and the extended trading permit, pursuant to section 64 of the *Liquor Control Act 1988* (**“the Act”**) to remove the table service Condition, thereby permitting patrons to purchase liquor other than by table service. In support of the application, the Applicant lodged a Public Interest Assessment and a community survey intended to demonstrate that the proposed variation would meet consumer expectations and be in the public interest.
3. The application was referred to the Commissioner of Police and the Chief Health Officer in accordance with statutory requirements. No objection or intervention was received.
4. In support of the variation, the Applicant submitted that the table service Condition does not achieve its intended regulatory purpose, imposes unnecessary operational costs, and causes inconvenience to patrons. It was argued that the method by which liquor is delivered to patrons does not materially affect consumption behaviours, and that retaining a condition which is said to be redundant is not in the public interest. The Applicant also relied on a petition in support of the application, although that material primarily referred to the grant of a tavern restricted licence and is of limited relevance to the present application.
5. The application arose against a background of compliance concerns. The Applicant had been identified by both the then Department of Local Government, Sport and Cultural Industry’s Inspectors and WA Police as having committed multiple breaches of the Act and licence conditions, including breaches of the table service requirement, resulting in the issue of infringement notices.
6. Further, on 10 October 2023, the Commissioner of Police lodged a complaint under section 95 of the Act alleging improper conduct and management of the licensed premises, contraventions of licence conditions, conviction of an offence under the Act, and that the licence has not been exercised in the public interest.
7. In addition, the Applicant lodged an application for a tavern restricted licence in June 2023 and appears to have operated the premises in a manner akin to a tavern while that application remains undetermined, pending required third-party consents.
8. On 15 February 2024, the Delegate of the Director of Liquor Licensing (**“the Director”**) determined to refuse the application on the grounds that granting the application was not in the public interest, for the following reasons:
 - a) The Applicant has committed multiple breaches of the Act and conditions of the restaurant licence and permit conditions (including breaching the licence/permit Condition requiring liquor to be sold and supplied by way of table service), resulting in infringements being issued to the Applicant on several occasions.

- b) In light of the ongoing section 95 disciplinary proceedings and the compliance history of the Applicant, the submissions and evidence lodged by the Applicant is not sufficient to demonstrate that the Applicant will be able to effectively manage the licensed premises if the relevant Condition is removed.
- 9. On 14 March 2024, the Applicant applied for a review of the Decision pursuant to section 25 of the Act.
- 10. The Director did not intervene in the Review Application.

SUBMISSIONS BY THE APPLICANT

- 11. The Applicant lodged an application on 20 December 2022 seeking the removal of a table service Condition attached to its licence. By letter dated 8 February 2023, the Director acknowledged receipt of the application and advised that, pursuant to section 67(5) of the Act, the application would be advertised. Contrary to that advice, the application was not advertised and the Applicant was not notified of any change in approach.
- 12. The only consultation undertaken was correspondence from the licensing authority to the Department of Transport on 9 November 2023, providing 13 days to respond. The Applicant was not provided with any response from the Department of Transport, although the Applicant had already lodged a letter of support from the Department with the application. The Applicant was not aware of any objections or interventions being received, nor was it advised whether the application was referred to the Commissioner of Police or the Chief Health Officer.
- 13. No objection or intervention was received from the Commissioner of Police, the Chief Health Officer, or the Department of Transport. In the absence of any such intervention, it was open to conclude that those agencies held no concerns with the application.
- 14. On 15 February 2024, almost 15 months after lodgement, the Director issued a two-page decision refusing the application, which was confirmed to include the Director's reasons.
- 15. The Applicant seeks review on the basis that the decision should be quashed and remade once the Liquor Commission properly considers all the material that was before the Director. The Applicant contends that the decision-making process was affected by error and a failure to properly engage with the evidence.
- 16. A substantial portion of the decision and reasons addressed matters unrelated to the application, including reference to a proposed section 95 complaint brought by WA Police against the Applicant and Mr Wesley D'Arcy. That complaint sought findings that the licensee was not fit and proper.
- 17. Subsequently, by orders issued on 19 February 2024, the Commission issued only a reprimand and fine and imposed amended trading conditions at Jarrah and Mister D'Arcy that were largely favourable to Mr D'Arcy. The Applicant submits that reliance on matters forming part of a complaint that was ultimately rejected was misplaced.
- 18. The reasons for decision are confined to brief assertions that the application was not in the public interest, that the table service Condition is routinely imposed under section 53 of the Act, and that the Applicant failed to demonstrate effective management if the Condition were

removed. The decision provides no explanation of how the evidence was assessed, why the Applicant's submissions were rejected, or how the conclusions were reached.

19. In particular, the decision does not explain why supporting evidence, including witness material, community comments, correspondence from the Department of Transport as head lessor, and written support from the Honourable Pam Beggs, was rejected or afforded no weight.
20. The Applicant further submits that the Director failed to consider other regulatory mechanisms available to ensure restaurant-style operation, including requirements relating to venue presentation, table layout, kitchen operation, menu availability, seated consumption and advertising restrictions. These measures demonstrate that the table service Condition is not the only means by which the regulatory objective may be achieved.
21. On a proper analysis of the evidence, the Applicant submits that the table service Condition does not achieve its intended purpose and is therefore redundant. The Condition operates solely as an impost on the business, increasing costs and causing patron frustration without demonstrable public benefit. Its continued imposition is therefore not in the public interest.
22. There is no section 95 complaint currently on foot, and as recently as 19 February 2024, the Commission has determined that Mr D'Arcy is a fit and proper person to hold a position of authority in a licensee company.
23. For these reasons, the Applicant submits that the Director's decision should be quashed and remade. It is open to the Commission to find that granting the application promotes the objects of the Act, does not give rise to a significant or unacceptable increase in harm, and results in no greater level of harm than is commonly accepted within the community. The Applicant relies on all material lodged in support of the original application in support of this Review Application.

Legal And Statutory Framework For Review

24. When conducting a review of a decision made by the Director (or the Delegate), the Commission constitutes the 'licensing authority' (section 7(1) of the Act). In this capacity, the Commission undertakes a review of the Delegate's decision on its merits as and by way of a rehearing.
25. The Commission is to undertake a 'full review' of the materials before the Delegate and to make its own determination on the basis of those materials. In so doing, the Commission must adopt a rational process of decision making and is bound to examine the evidence in order to make findings and/or draw inferences which, in a rational manner, should be drawn from the materials before it (*Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 at [28]-[29]).
26. The Commission is not required to find error on the part of the Delegate when undertaking a review under section 25 of the Act, but the Commission instead, undertakes a full review and makes a determination on the basis of the same materials that were before the Delegate when the decision was made (*Hancock v Executive Director of Public Health* [2008] WASC 224).

27. Section 25(4) of the Act states that 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.
28. Section 16 of the Act prescribes that the Commission:
- a) may make its determinations on the balance of probabilities (section 16(1)(a)(ii)); and
 - b) 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 (section 16(7)(a)); and
 - c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms (section 16(7)(b)); and
 - d) is to act speedily and with as little formality and technicality as is practicable (section 16(7)(c)).
29. One effect of these provisions is that the Commission must give proper and fair consideration to any submissions made by parties to a review, and to any evidentiary material referred to in those submissions, whether or not it appears the Director (or the Delegate) gave these materials such consideration.
30. Although not bound by the formal rules of evidence, the Commission must act upon materials which have rational probative force (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2017] WASC 88 at [19]).
31. The Commission is required to give reasons for its decision, at least when there is a right of appeal to the Court (*Hancock* at [64]).
32. Where there is a conflict in evidence which is significant to the outcome, the reasons must refer to the conflicting evidence and explain why one set of evidence is preferred over another. 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* at [69]).
33. In addition, the Director is obliged to comply with the requirements of procedural fairness when exercising the powers conferred by the Act (*Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356).

34. The Director (or the Delegate) and the Commission also:
- a) must take into account those matters relevant to the objects of the Act; and
 - b) may take into account the matters set out in section 38(4) of the Act.
35. In determining the review, the Commission may:¹
- 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 Commission, have been made in the first instance;
 - c) give directions as to any questions of law or give directions to the Director; or
 - d) make any incidental or ancillary order.
36. The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer* [1989] HCA 61).
37. When determining whether an application is in the public interest, the Commission must take into account:
- a) the primary objects of the Act set out in section 5(1):
 - i) to regulate the sale, supply and consumption of liquor; and
 - ii) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - iii) to cater for the requirements 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
 - b) the secondary objects of the Act set out in section 5(2):
 - i) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and
 - ii) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - iii) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

¹ LC Act, s 25(4).

38. Section 38(4) provides that the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include:
- a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor (subsection (a));
 - b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated (subsection (b));
 - c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises (subsection (c)); and
 - d) any other prescribed matter (subsection (d)).
39. No 'other ... matter' has been prescribed pursuant to section 38(4)(d).

DETERMINATION

40. The Commission has considered all materials available to the Director including the Decision.
41. It is noted that in early August 2024, the Director announced an overhaul of policy with respect to Liquor Without a Meal Permits. Subsequently, the table service only Condition was not imposed on any new licences and the vast majority of existing licenses have had the same removed.
42. It is acknowledged that the Applicant was a party to certain disciplinary hearings under the 95 of the Act and that, in part, such disciplinary proceedings arose from the breach of the table service Condition under the Permit. However, those proceedings were resolved and determined and the Applicant has accounted for any such breach of the Act.
43. The Commission does not regard the existence of prior disciplinary proceeding as being enough, on its own, to come to a conclusion that the premises cannot be appropriately managed in the event the Condition was removed. The Commission notes that the only breach of the Act for these particular premises related to non-compliance with the Condition and the Commission has no other evidence to indicate that the premises are not otherwise appropriately managed in accordance with the Act.
44. The primary considerations for the Commission in this case are whether:
- a) the application satisfies the primary and secondary objects of the Act; and
 - b) the application is in the public interest;
45. The Commission finds that the application satisfies the primary and secondary objects of the Act, in particular the ability for patrons to order and retrieve their own drinks reflects current consumer expectations of liquor service standards in like venues without adversely impacting the regulation of the sale, supply and consumption of liquor or create any increase in the ill-health or harm caused by the consumption of liquor in the premises.

46. It is clear from the supporting petitions and the evidence shown from patron interactions that the ability to collect drinks directly from the bar or service area reflects current consumer requirements and expectations. The Commission further notes that the subsequent removal of similar conditions across the industry reflects the notorious fact that this manner of service is a reflection of modern standards in the industry.
47. In respect to ill-health or harm that may be caused by the removal of the Condition of table service, when considering the four step test in *Carnegies Realty Pty Ltd, Director of Liquor Licensing* [2015] WASC 208, the Commission is satisfied to the required standard that the likely degree of harm to result from the removal of the Condition is nil or negligible and that when weighed with other relevant factors, such as the existence of other applicable conditions relating to meal service and availability on the licence and the usual obligations under the Act relating to the responsible service of alcohol, that the removal of the Condition is in the public interest in so far as it relates to ill-health or harm.
48. The Commission further finds that the removal of the Condition will not lessen the amenity of the locality of the licensed premises. The Commission considers that the venue is longstanding and established and that the manner of carriage of drinks to tables for consumption will not adversely affect the level of liquor consumption, noise emissions nor result in negative patron behaviours when inside or leaving the premises in a manner that would affect the amenity of the locality.
49. In respect to the issue of possible undue offence, annoyance, disturbance or inconvenience to people who reside, or work in the vicinity of the licensed premises, for largely the same reasons as set out in the preceding paragraph, the Commission finds that the manner of service of liquor that would occur if the Condition was removed would not have any real potential to negatively affect the people who reside, or work in the vicinity of the licensed premises.
50. The Commission notes that the Applicant also raised the issue of staff efficiency and costs, however, although the Commission can see how table service may create service issues, at the time the Condition was initially imposed, this was essentially standard throughout the industry. As such, the Commission does not find this a compelling reason, when considered independently, for the Condition to be varied.
51. Given the totality of the above, the Commission cannot see any compelling reason for the Condition to be retained, especially given that similar conditions, from August 2024, are no longer routinely imposed on similar premises. The Commission cannot see any sufficient reason why the premises should not be treated in the same manner to other similar venues in the State with respect to the Condition.
52. In particular, the Commission considers that the existence of the remaining conditions on the licence including that:
- a) the restaurant must always be set up and presented for dining;
 - b) tables cannot be removed or shifted in order to create dance floors;
 - c) the kitchen must be open and operating at all times liquor is available and the restaurant's regular full menu must be available at all times;

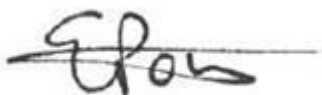
- d) liquor may only be consumed by patrons seated at a dining table; and
- e) the venue can't be advertised as anything but a restaurant;

operate to limit any possible use of the premises in a manner not intended by the type of licence granted (i.e., being predominately a restaurant) and to ensure that food is always available for consumption and that drinks are appropriately consumed at tables.

- 53. The Commission finds that these existing conditions on the licence act to sufficiently regulate the sale and consumption of liquor in accordance with the objects and requirements of the Act.
- 54. Given the above, the Commission finds that is appropriate to remove the words "*Therefore, the sale and supply of liquor to patrons is restricted to table service by staff of the licensee*" from each relevant place in the licence and extended trading permits for the Premises.
- 55. However the licence is still a restaurant licence and, therefore, it is appropriate to retain the conditions on the licence which only permit consumption of liquor from by patrons while seated at a table, or a fixed structure used as a table. The licensee must put in place adequate measures to ensure that patrons consume liquor in accordance with this requirement.

Orders

- 56. The Application for Review is allowed and the decision of the Director is quashed.
- 57. In Condition 4 of Restaurant Licence no. 606213519019, the words "*Therefore, the sale and supply of liquor to patrons is restricted to table service by staff of the licensee*" are removed.
- 58. In Condition 6 of Extended Trading Permit - Liquor Without A Meal Permit No. 0213628919, the words "*Therefore, the sale and supply of liquor to patrons is restricted to table service by staff of the licensee*" are removed.
- 59. Condition 2 of Extended Trading Permit - Extended Area Permit No. 0218120622 is deleted.
- 60. The remaining conditions of the licence and the extended trading permits otherwise remain in full force.



EMMA POWER
CHAIRPERSON



NICHOLAS VAN HATTEM
DEPUTY CHAIRPERSON



MARY BROWN
MEMBER