

TASMANIAN LIQUOR and GAMING COMMISSION – IVORY LOUNGE BAR

REASONS FOR DECISION

On 2 May 2022, the Tasmanian Liquor and Gaming Commission allowed this appeal and stated that it would publish reasons for its decision later. These are the reasons for that decision.

Background

1. On 28 February 2021, the Commissioner issued an Out of Hours Permit to the appellant concerning the licensed premises operating as Ivory Lounge Bar at 121 Collins Street. That permit authorised the sale of liquor during the hours of midnight until 4.00 a.m. each day of the week, and was in force until 9 February 2022.
2. On 7 June 2021, the appellant applied for an Out of Hours Permit to operate from the hours of midnight until 5.00 a.m. each day of the week. That application was in effect, and was considered by the Commissioner as, an application to extend the hours of the existing permit.
3. For reasons that are not apparent to the Commission, the appellant's application was not determined until 9 December 2021. On that date, the Commissioner refused the application.
4. On 24 December 2021, the appellant lodged this appeal against the Commissioner's refusal.
5. For reasons not apparent to the Commission, the appeal was not placed before the Commission until April 2022, and the Commission then listed it for hearing on 2 May 2022.
6. In the period between the filing of the appeal and its listing for hearing, the appellant lodged a renewal for the existing permit, which was granted and a new Out of Hours Permit was issued for the period 12 February 2022 until 11 February 2023.
7. The effect of this was that the existing permit expired and was replaced by a later permit, during the appeal period. However, the Commissioner advised the appellant that the outcome of this appeal would apply to the later permit issued on 12 February 2022. The Commission accepts that to be an appropriate advice because of the delays that have occurred

Permits

8. The requirements to be met for the granting of a permit are set out in s34 of the *Liquor Licensing Act 1990*, which provides:

34. Requirements for permits

(1) *In considering an application for a liquor permit, the Commissioner must make a decision which, in his or her opinion, is in the best interests of the community.*

(2) *The Commissioner must not grant an out-of-hours permit in respect of licensed premises unless the licensee satisfies the Commissioner that the sale of liquor on those premises in accordance with the permit sought would not –*

- (a) *cause undue annoyance or disturbance to –*
 - (i) *people living or working in the neighbourhood of the premises; or*
 - (ii) *customers or clients of any business in the neighbourhood of the premises; or*
 - (iii) *people conducting or attending religious services or attending a school in the neighbourhood of the premises; or*
- (b) *cause the occurrence of disorderly conduct –*
 - (i) *in the premises; or*
 - (ii) *in the neighbourhood of the premises.*

9. The phrase “best interests of the community” is defined in the *Liquor Licensing Regulations 2016* as:

4. Best interests of the community

For the purposes of the definition of best interests of the community in section 3 of the Act, the following interests are prescribed:

- (a) *the general costs and benefits to the community of the supply, or proposed supply, of liquor;*
- (b) *whether the supply or proposed supply of liquor might cause undue offence, annoyance, disturbance or inconvenience to people who, in the area of the supply or proposed supply –*
 - (i) *reside or work; or*
 - (ii) *attend schools or other facilities frequented by children; or*
 - (iii) *attend hospitals or facilities where people receive treatment for alcohol dependence or other addictions; or*
 - (iv) *attend places of worship;*
- (c) *possible adverse effects on the health and safety of members of the public due to the supply of, or proposed supply of, liquor.*

10. The “best interests of the community” are referred to in s34(1), and also in s24A(1) which sets out the requirements to be met for the granting of a liquor licence.

11. The Commission considers that the “best interests of the community” test is to be applied when a licence is applied for or a permit is applied for, except where an out of hours permit is sought for existing licensed premises. That is because s34(2) expressly provides for the satisfaction that the Commissioner

must hold in such a case. This is a provision that refers to a specific type of permit, whereas s34(1) is referring generally to permits.

12. This is a case for the application of the principle *generalia specialibus non derogant*, which essentially means that statutory provisions of a general nature give way to specific statutory provisions.
13. The application of that principle removes the obvious conflict between the two subsections created by the different tests contained within them. Also, where an out of hours permit is sought for existing licensed premises, the test of best interests of the community will likely have been considered at the time the licence was issued, and certainly would have been where the licence was first issued after the *Liquor Licence Regulations 2016* came into force.
14. In dealing with the appellant's application, the Commissioner was therefore required to consider whether he was satisfied that the sale of liquor on the appellant's premises in accordance with the permit sought would not –
 - (a) cause undue annoyance or disturbance to –
 - (i) people living or working in the neighbourhood of the premises; or
 - (ii) customers or clients of any business in the neighbourhood of the premises; or
 - (iii) people conducting or attending religious services or attending a school in the neighbourhood of the premises; or
 - (b) cause the occurrence of disorderly conduct –
 - (i) in the premises; or
 - (ii) in the neighbourhood of the premises.
15. As referred to above, "the permit sought" by the appellant was, in effect, an application to extend the hours of operation of the existing permit by one hour.

The refusal

16. The Commissioner in his reasons for refusal of the appellant's application made 7 June 2021 commented on a number of matters:
 - (a) Firstly, he referred to an earlier decision of his concerning these premises and a subsequent appeal decision of the Commission made in 2019 which summarises a history of "issues relating to the permit". He also referred to a comment made by the Commissioner on relaxing, as at 24 June 2020, some conditions of an out of hours permit for the premises. Those comments were that the relaxation was an opportunity to demonstrate improvements in the management of annoyance and disturbance in the vicinity of the premises.
 - (b) Secondly, he commented that in summary there had been long standing issues and ongoing complaints of undue annoyance and disturbance in the vicinity of the premises and that was why the permits which had been

granted were limited in hours of operation and were subject to a number of conditions. The Commission notes that conditions included relevantly a 3.00 a.m. "lockout".

- (c) Thirdly he stated that he continued to receive complaints about the behaviour of patrons and disturbances in the vicinity of the premises. He went on:

"I obtained from you surveillance footage of the front of your premises in order to assess whether issues continue to occur. The footage was recorded on the 8th and 15th of August of this year and showed a number of incidents that support complaints about annoyance and disturbance. At a little before 12.30 am on the 8th a person was ejected from the premises requiring four security guards to carry him from the premises and restrict his re-entry. After a struggle he was taken further down Collins Street and two police vehicles were required to attend. I observed persons who appeared to be intoxicated, one of whom, on the 15th at around 1.00am, vomited in the gutter at the front of the building. At around 1.48 am on the 15th a fight started and escalated to involve multiple people, attracting a crowd of onlookers and blocking both lanes of Collins Street. Patrons exited the premises to get involved and again police attendance was required. In the footage I reviewed there were frequently people loitering outside in groups".

- (d) Finally, he concluded that while the level of disturbance has improved since 2018, the occurrences that he observed in the limited footage that he reviewed contradict the submission that matters are largely resolved and he was not satisfied that there has been a sufficient improvement that he could extend the hours of the permit.

Appeal

17. Ground of appeal 1 is that the Commissioner erred in his application of the test in s34(2).
18. Ground of appeal 2 is that the Commissioner failed to undertake a proper consideration of the application pursuant to s32 of the Act. In the Commission's view, s32 does not impose any obligation on the Commissioner as maintained in this ground. It sets out the requirements for the content of an application, not how that application is to be considered, which is contained in s34(2). The particulars referable to the s32 ground concern the Commissioner's use of video footage. In the Commission's view these particulars should be considered to be further particulars of the alleged error in applying s34(2).
19. Ground of appeal 3 alleges a failure to afford procedural fairness by relying on information or analysis, notice of which had not been provided to the appellant.

Ground 1

20. The Commissioner was required to be satisfied, relevant to this particular application, to consider whether the permit applied for, being a permit extending the hours of operation from 4.00 a.m. to 5.00 a.m., would not:
- (a) cause undue annoyance or disturbance to people living or working in the neighbourhood or customers or clients of businesses in the neighbourhood; or
 - (b) cause the occurrence of disorderly conduct in the premises or in the neighbourhood.
21. The Commissioner did not, in the Commission's view, consider this requirement. Instead, he approached the application on the basis that there had not "been sufficient improvement" from matters he detailed in an earlier decision. That amounts to an error in the application of the required test.
22. The Commissioner based his decision on two pieces of security camera footage on 8 and 15 August 2021. This footage was obtained from the appellant pursuant to a request made by a Liquor and Gaming Branch inspector dated 19 August 2021. The request was for footage from 12 a.m. to 1 a.m. on 8 August and 12 a.m. to 2 a.m. on 15 August.
23. It is not apparent to the Commission why footage from these specific two dates was sought. The Commission has seen a log of complaints from the RACV Hobart Hotel for the period January 2021 to June 2021. The two specific dates do not fall within this period.
24. Further, the appellant's submission dated 28 April 2022 identifies that this log of complaints had not been provided to the appellant by the Commissioner. The Commissioner should have provided this log to afford procedural fairness to the appellant if it supports an adverse inference on the application. It does not appear from his reasons that he relied on it, and the Commission will not consider it, other than to note that the period it covers ends more than 5 months before the Commissioner's decision.
25. The Commission has seen comments received from Tasmania Police on 30 June 2021 regarding the application. The appellant's submission dated 28 April 2022 identifies that these comments were not provided to the appellant. They should have been provided if they supported an adverse inference on the application, but in the Commission's view if anything they support the application. Those comments disclose no complaints or reports between January and 1 July 2021, and that Tasmania Police's only concern was that at 5 a.m. when they spill out there will be many drunken revellers in the CBD.
26. The Commission has said that it is not apparent why the two pieces of security footage were sought. If they were sought as a result of information obtained by the Commissioner, that should have been provided to the appellant also. The Commission has viewed that footage and will take it into consideration because the footage does not in the Commission's view provide evidence

that extending the permit operation to 5 a.m. will cause undue annoyance or disorderly conduct.

27. The incidents referred to by the Commissioner occurred between 12.30 and 1.48 a.m. The Commission does not see how this is relevant to consideration of the "permit sought" which is in effect an extension from 4 a.m. to 5 a.m. These incidents occurred well before that time. The Commission considers that the video footage shows that the security arrangements the appellant had in place appeared to be working satisfactorily. The Commission accepts that the appellant had available some 1560 hours of footage, and that the Commissioner was in fact provided with 39 hours of footage (despite his very limited request).
28. Further, the fact that someone on the footpath in front of the building vomited in the gutter, while unpleasant, is in the Commission's view not an unexpected event in the vicinity of licensed premises.
29. Section 34(2) does not require satisfaction that no annoyance or disturbance will be caused, but that "undue annoyance" will not be caused. It is reasonably anticipated that there may be some annoyance or disturbance in the vicinity of any licensed premises from time to time, but that does not make it "undue". In the Commission's view, the video referred to in the reasons for refusal does not demonstrate undue annoyance or disturbance in any event.
30. The appellant's application sets out in detail the security arrangements (at part 4.3), patron management (4.4) and movement in, out and around the venue (4.5). There is a 3.00 a.m. lockout condition, which prevents new patrons entering the premises after 3.00 a.m. In her appeal, the appellant states that she wants the extended hour to reduce the number of patrons exiting the premises at one time, and allowing a graduated exit of patrons between 4.00a.m. and 5.00 a.m.
31. The Commission is satisfied that these arrangements are such that the extension of one hour as sought in the application would not cause undue annoyance or disturbance in the neighbourhood, nor cause the occurrence of disorderly conduct in the premises or in the neighbourhood.

Ground 3

32. Because of the conclusion reached by the Commission with respect to ground 1, it is not necessary to make findings concerning ground 3 or consider it further. The Commission has previously stated that procedural fairness requires that any information or materials upon which the Commissioner may rely to make a finding adverse to an applicant, or to make an inference adverse to an applicant, should be provided to the applicant with sufficient time to enable the applicant a reasonable opportunity to respond to that information or those materials.

Conclusion

33. The appeal is allowed.
34. The permit sought in the application made on 6 June 2021 should have been granted, and the hours of operation extended by one hour. As a consequence of the advice given to the appellant by the Commissioner as referred to in paragraph 7 above, the current permit held by the applicant should also have the same hours of operation.
35. Accordingly, the Commission, pursuant to s214(c)(iii) of the Liquor Licensing Act 1990 directs the Commissioner for Licensing to grant an Out of Hours Permit to Sancia Peta Porretta for the premises Ivory Lounge Bar, for the hours of midnight to 5.00a.m., 7 days a week for the period 12 February 2022 to 11 February 2023. The permit is to contain all of the conditions of the permit issued in February 2022 (including the 3.00 a.m. lock-out).

Jenny Cranston (Chair), Andrew Walker (member)