

Tasmanian Liquor and Gaming Commission

Appeal against a determination of the Commissioner for Licensing made 8 February 2019

Sancia Peta Porretta

Appellant

V

Commissioner for Licensing

Respondent

Reasons for Decision

1. The Appellant is the licensee of premises at 121 Collins Street Hobart operated as The Ivory Lounge. The premises are located in the central business district of Hobart.
2. Those premises had an out of hours permit (no 54019) granted on 22 January 2018 for the sale of liquor from midnight to 4.00 am for 7 days a week. The permit was to expire on 9 February 2019. The permit also contained a condition that no patrons are to enter or re-enter the premises after 3.00 am. This condition has been referred to by the appellant as a “lockout” and for convenience will be so referred to in this decision.
3. On 10 December 2018 the Appellant applied for an out of hours permit for the sale of liquor from midnight to 4.30 am for 7 days a week. The application also, in effect, sought removal of the lockout condition. The appellant’s application included an 8 page document headed “Item 8”, which set out a number of submissions in support of the application, including why the lockout condition was “problematic and unnecessary”.
4. The Commissioner determined on 8 February 2019 not to issue the permit sought, and instead to issue to the appellant an out of hours permit for the premises for the period 10 February 2019 to 9 February 2020 with the same hours of operation and with the same lockout condition as in the existing permit.
5. On 22 February 2019, the appellant made an appeal in writing to the Commission pursuant to section 211 of the *Liquor Licensing Act 1990* (Tas) (“the Act”).
6. The Commission considered the appeal on 10 May 2019 and determined it solely on the basis of written evidence pursuant to section 213 (4A) of the Act. The written evidence considered is set out in attachment A to these reasons.

Grounds of appeal

7. The appellant raised the following grounds:
 - 7.1 The Commissioner erred in determining that the appellant had not satisfied the requirements of section 34 of the Act to be granted a permit in the terms sought;
 - 7.2 The Commissioner erred when finding that the grant of a permit in the terms sought by the appellant was not in the best interests of the community;
 - 7.3 The Commissioner erred by imposing conditions under s34A that were inconsistent with the appellant's application.
 - 7.4 The Commissioner did not afford the rules of natural justice (procedural fairness) because he considered information that was not disclosed to the appellant and/or the appellant was not given an opportunity to address "concerns or incidents" that the information may have raised;
 - 7.5 The Commissioner considered irrelevant material in the form of an earlier determination made by the Commissioner on an application to vary the previous year's permit.
 - 7.6 The Commissioner erred in requiring, in effect, the appellant to provide evidence to demonstrate that previous matters of concern would not return to unacceptable levels or that longer hours of operation and removal of the lockout condition would be in the best interests of the community, when there was no statutory basis for him to do so.
 - 7.7 The Commissioner failed to take into account relevant information in the form of submissions made by the appellant concerning CCTV footage, and incident reports provided by the appellant;
 - 7.8 The Commissioner by acting above in making his determination acted capriciously, arbitrarily and erroneously.

Legislation

8. Section 34 of the Act provides that:
 - "(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 section 3 of the Act, to mean interests that are prescribed for the purpose of that definition. The prescribed interests are in Regulation 4 of the Liquor Licensing Regulations 2016 and are:
 - "(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 Commission takes into account for the purposes of Regulation 4 that in the area of the proposed supply there are no schools. There is a theatre academy Exit Left, providing services to children up to grade 12, which is in the area of the supply, but this does not operate at the time of day relevant to this application. There are no hospitals or alcohol treatment facilities in the area of the supply, nor places of worship.
11. Therefore, the best interests of the community, in this particular case, require consideration of the general costs and benefits of the supply, the possible adverse effects on the health and safety of members of the public due to the supply, and whether the supply might cause undue offence, annoyance, disturbance or inconvenience to people who reside or work in the area of supply.
12. The first matter to be considered in section 34 is the prohibition in subsection (2). If the Commissioner is not satisfied of the matters referred to there, then he must not issue a permit, and the application should be refused. However, as an alternative to refusing the application, the Commissioner may determine to impose conditions as he sees fit on a permit, where those conditions will in the Commissioner’s view, satisfy him of the matters in subsection 34(2). In imposing such conditions, he must take into account the best interests of the community.

Ground I

13. The Commissioner was required, under subsection 34(2) to be satisfied that the proposed permit would not cause undue annoyance to people living and working in the neighbourhood, or to customers or clients of any business in the neighbourhood or cause the occurrence of disorderly conduct in the premises or the neighbourhood. That is what the Commission now must be satisfied of.
14. The permit that was issued in January 2018 contained conditions, including hours of operation and the lockout. These conditions had been in place since 2017. The appellant has previously made applications, the effect of which was to remove these conditions, in February 2017 and February 2018. Both applications were determined on the basis that the conditions would not be changed. These earlier decisions are not irrelevant to the appellant’s application. They identify matters showing the type of annoyance or conduct which had occurred or was occurring and because of which those applications did not satisfy the matters referred to in paragraph 13 above.

15. The appellant's application is comprehensive and sets out some of the history of the premises and sets out in detail descriptions of the security and patron management procedures that are currently in place. It includes great detail about the "core values" of the operators of the premises.
16. The appellant also identified in paragraph 3 of her "Item 8" document that the current permit conditions were "directly impacting on the Ivory's ability to compete in the market, its financial sustainability and ability to grow its business...no other late-night venue...is subject to the same 3.00 lockout condition". This, however, is not relevant to the fundamental question of whether the application satisfies the matters referred to paragraph 13 above.
17. The appellant was given the opportunity to provide additional evidence to the Commission and did so by providing copies of the Ivory's crowd control book from December 2018 shortly after the new security company commenced, and by providing a copy of the list of people "unwelcome at Ivory due to physical/verbal abuse". These demonstrate that the appellant has taken, and is taking, the issues of patron control seriously, which is to be commended, but at the same time is to be expected of licensees.
18. The Commission considers that the changes to security and patron engagement described in the appellant's application are likely to have had the effect of reducing the occurrence of annoyance or conduct which has been established in the past. The Commission also considers that the conditions contained in the existing permit are also likely to have had that effect. But the issue now is whether all of the appellant's material satisfies the Commission that the permit sought *would not* cause undue annoyance or disturbance to people living or working in the neighbourhood or to customers or clients of any businesses in the neighbourhood or cause the occurrence of disorderly conduct.
19. The Commission is not satisfied of this. The improved security arrangements have been in place since mid-November 2018. At the time of the appellant's application, they had been in place for only one month. The Commission considers that the effectiveness of the security and patron management changes in preventing, not just reducing, the incidence of undue annoyance or disturbance needs to be considered over a longer period. Section 34 requires satisfaction that the permit would not cause such annoyance or disturbance, not that there would be less chance of it happening. This ground of appeal is therefore not made out.
20. The Commission notes that in the Commissioner's determination dated 8 February 2019, he referred to advice he had received from his compliance unit and Tasmania Police which showed that disturbance complaints are still occurring. This advice should have been provided to the appellant if the Commissioner was intending to refer to it. It was not provided. The Commission in this appeal has not considered any documents that contain any such advice.

21. Before proceeding to consider whether the Commission is satisfied that a permit should have been granted containing the same conditions as in the permit that was in force at the time of the application in December 2018, it is necessary to address each of the other grounds of appeal.

Ground 2

22. This ground of appeal is not made out. Because the Commission is not satisfied of the matters referred to in paragraphs 18 and 19 above, it is not necessary to consider whether the grant of a permit *in the terms as sought by the appellant* was not in the best interests of the community. That is because a permit in those terms must not be granted, pursuant to section 34(2).

Ground 3

23. The appellant claims that the Commissioner erred by imposing conditions under s34A that were inconsistent with the appellant's application. This ground is misconceived. It presupposes an entitlement in an applicant to obtain only the permit it seeks. That completely ignores the plain words of s34A and the unfettered discretion given by the words "as the Commissioner sees fit". This ground is not made out.

Ground 4

24. This ground raises the issue referred to in paragraph 20 above. The Commission has not, in considering this appeal, taken any such information into account. Any such information has had no effect on the outcome of this appeal.

Ground 5

25. This ground is not made out, for the reasons addressed in paragraph 14 above.

Ground 6

26. The appellant carries the burden, under s34(2) to satisfy the Commissioner that the permit *would not* cause the relevant annoyance or conduct. It is up to the appellant to provide sufficient evidence to enable that satisfaction to be established. If the appellant was not able to, or did not, show that the permit sought would address sufficiently the previously established matters of concern, then the appellant could not satisfy the Commissioner. The previously established matters of concern form an obvious basis upon which the "annoyance and conduct" test is relevantly applied to these premises. This ground is not made out.

Ground 7

27. The Commission does not consider that CCTV footage would have any relevant weight concerning the matters that are required to be satisfied. It may be relevant to whether a particular incident occurred, but that is not being alleged here. This ground is not made out.

Ground 8

28. Given the Commission's determination on the other grounds of appeal, this ground is not made out.

Conditions other than those applied for

29. The Commission has decided that the Commissioner was correct to be not satisfied that a permit in the terms as sought would not cause undue annoyance or disturbance to people living or working in the neighbourhood or to customers or clients of any businesses in the neighbourhood or cause the occurrence of disorderly conduct. Prima facie, the Commissioner could not grant that permit. However, section 34A enables a permit to be issued subject to such conditions as the Commissioner thinks fit. The Commissioner makes a decision to impose any such conditions. That decision is one which must be, in the Commissioner's opinion, in the best interests of the community, pursuant to section 34(1).
30. The question then becomes are there conditions, other than any that were sought in the appellant's application, that could be imposed that would be in the best interests of the community? The Commission is satisfied that the conditions of the permit that was in force when the appellant's application was made were likely to have had the effect of reducing the occurrence of annoyance or conduct which had been established in the past. It is, in the opinion of the Commission, in the best interests of the community that those conditions continue to apply so as to enable that improvement to continue, or at least be maintained. The Commissioner was justified in coming to that conclusion in his determination.
31. The Commission confirms the decision of the Commissioner dated 8 February 2019.

Decision made by the Commission on 10 May 2019.

ATTACHMENT A

Ivory Lounge Bar Appeal Decision

For the purposes of *Liquor Licensing Act 1990*, and particularly section 213(4A) of the Act, in making its decision, the Commission considered the following file folios:

1. Out-of-Hours Permit (OOHP) (10 February 2019 to 9 February 2020)
2. Letter from the Commissioner for Licensing to the appellant dated 8 February 2019
3. Appeal documentation lodged by the appellant on 22 February 2019
4. Extract – sections 213 and 214 of the *Liquor Licensing Act 1990*
5. Following documentation:
 - a) Most recent application for an OOHP (dated 10 December 2018) and submission from the licensee in support of the application for an OOHP.
 - b) OOHP dated 8 February 2019.
 - c) Previous Reasons for Decision of an OOHP dated 6 July 2018.
 - d) Previous OOHP application dated 22 February 2018 and submission from the licensee in support of the application for an OOHP; letter from Mr Steven Chopping dated 20 February 2018; Department of Justice Notices of Fines (x 5) issued on 16 February 2018 and copy of payment; street view of venue; letter from the Commissioner for Licensing dated 28 June 2017; emails to and from the Commissioner for Licensing dated 10 February 2017 (Groom Kennedy Lawyers & Advisors); letter from Tasmania Police dated 26 March 2018; letter from the RACV dated 20 March 2018; letter from Robert & Teresa's City News dated 26 March 2018; letter from the Hobart City Council dated 29 March 2018; additional response from Steven Chopping dated 24 April 2018; further response to objections from the licensee (undated); transcript of Magistrate's determination of 15 February 2018; Hobart City Council Building Notice dated 14 December 2017; Hobart City Council Building Order dated 6 March 2018; Planning Permit dated 27 June 2018; application for transfer of a liquor licence dated 5 June 2013; application for transfer of a liquor licence dated 2 February 2017; email from Sancia Porretta to the Liquor and Gaming Branch (LAGB) dated 30 January 2017; and email from Sancia Porretta to the LAGB dated 20 January 2017.
6. Letter to the Appellant from the Commission dated 2 April 2019
7. Further documentation provided by the Appellant on 26 April 2019 in support of the grounds for appeal:

- a) Undated explanatory message to the Commission, in relation to the additional supporting documents.
- b) Alphabetical list of barred persons.
- c) Photographic records of barred persons.
- d) Document - Crowd Control 1
- e) Document - Crowd Control 2
- f) Document - Crowd Control 3