

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: All Night Long Pty Ltd
(represented by Mr Phil Cockman of Canford Hospitality Consultants Pty Ltd)

Respondent: Hippocampus Memorable Drinks Pty Ltd
(represented by Ms Jessica Patterson of Lavan Legal)

Intervener: Commissioner of Police
(represented by Ms Rosie Hill of State Solicitor's Office)

Objectors: Mr Hasan Ehdeyhed
Mr Yinhez He
Mr Bradley Abbott
Dr Rishi Kotecha
Mr Timothy Bradsmith
Ms Ruth Cahill (represented by Mr Phil Cockman)
Mr William Brooks
Ms Deborah Moltoni (represented by Mr Phil Cockman)
Mr Sean Quartermaine
Mr Guat Lay Soh

Commission: Ms Helen Cogan (Presiding Member)
Dr Eric Isaachsen (Member)
Mr Alex Zilkens (Member)

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 to approve the conditional grant of a tavern licence for premises to be known as Hippocampus Metropolitan Distillery.

Premises: Hippocampus Metropolitan Distillery, 19 Gordon Street,
West Perth

Date of Hearing: 25 August 2015

Date of Determination: 2 February 2016

Determination: The application for review is refused.

Authorities referred to in the determination:

- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384

Background

- 1 On 12 June 2014 an application, pursuant to sections 41 and 62 of the *Liquor Control Act 1988* (“the Act”), was lodged by Hippocampus Memorable Drinks Pty Ltd (“the licensee”) for the conditional grant of a tavern licence for premises to be known as Hippocampus Metropolitan Distillery and located at 19 Gordon Street West Perth (“the premises”). At that time the licensee held a producers’ licence for the premises.
- 2 The licensee complied with all statutory requirements and lodged the necessary and required documentation for its application for the grant of a tavern licence, including a Public Interest Assessment (“PIA”). The application was duly advertised in accordance with instructions issued by the licensing authority.
- 3 On 4 August 2014 the Commissioner of Police (“the Police”) lodged a notice of objection pursuant to section 73(1)(d) of the Act; however, on 30 March 2015, the Police withdrew that objection and on 31 March 2015 lodged a notice of intervention.
- 4 During August 2014, notices of objection were lodged by the objectors listed in the application, including the applicant in the review application.
- 5 Submissions and responsive submissions were received from parties to the proceedings.
- 6 The Delegate of the Director of Liquor Licensing (“the Delegate”) considered the application on the papers pursuant to sections 13 and 16 of the Act and determined to approve the application, with the licence to be subject to conditions. The decision with reasons was published on 29 May 2015 (Decision No: A000056890).
- 7 On 17 June 2015 All Night Long Pty Ltd (“the applicant”), the licensee of the premises known as Liquor Barons Perth, which is adjacent to the subject premises, lodged an application pursuant to section 25 of the Act for review of the decision of the Delegate to approve the application and grant the conditional licence.
- 8 The grounds for review stated by the applicant were:
 - 1) the Delegate should have found that the proposed premises were not suitable and of insufficient standard for the proposed licensed business;
 - 2) resident objectors’ concerns were not given due weight; and
 - 3) the Delegate did not assign proper weight to the potential for harm and ill-health.
- 9 In the period leading to the hearing of the review application, parties to the review application (with the exception of the following objectors, Hasan Ehdeyhed, Yinhez He, Bradley Abbott, Dr Rishi Kotecha, Timothy Bradsmith, William Brooks, Sean Quartermaine and Guat Lay Soh) lodged submissions, responsive submissions and closing submissions.

- 10 A hearing of the review application before the Liquor Commission (“the Commission”) was held on 25 August 2015. The applicant, the respondent and the Police made oral submissions at that hearing.

Submissions on behalf of the applicant

- 11 The applicant is seeking a review of the decision of the Delegate on the grounds set out in paragraph 8 above.

- 12 The applicant originally objected to the grant of the licence on the following grounds:

1) Ground 1

The grant of the application would not be in the public interest and the particulars given for this ground referred to the following (in summary):

- a) the PIA lodged by the licensee contained no research of the competing packaged liquor outlets in the locality which were particularised;
- b) the licensee’s objective evidence was minimal and was not objective or representative of the public and the letters of support lodged came from existing clients of the respondent, was pro forma in nature, akin to a petition and could not be said to establish that the grant of the licence was in the public interest;
- c) the evidence presented by the licensee was neither compelling nor probative and should be given no weight by the licensing authority;
- d) no information was provided as to how the petition was conducted i.e. what information or documentation was provided to the petitioners prior to signature, how many people refused to sign, where the petition was conducted, over what period of time and by whom;
- e) alternatively the petition was inconsistent with the stated method of trade described in the PIA;
- f) the 6 letters of support were identical to each other and should be disregarded;
- g) there are serious concerns as to the objectivity and independence of the signatories to the letters and none of the signatories indicate a desire or likelihood to use the services proposed to be offered at the premises;
- h) the number of signatories to the petition is low and not indicative of any level of support in the local community for the premises;

- i) given the minimal number of flawed witnesses' evidence provided , the assertion in the PIA that there is a strong demand for locally produced craft spirits of the type to be produced on (the premises) cannot be taken seriously and remains simply an assertion;
- j) the statements in the PIA concerning the attracting of tourists and local visitors, consumer demand for craft and artisanal spirits and increasing demand for high quality locally produced spirits are not supported by convincing supportive evidence and should therefore be disregarded and, in any event, Gordon Street is not a known tourist precinct and not a single customer has actually indicated they would like to buy and consume the products proposed to be offered for sale;
- k) the respondent is motivated by self-interest not by the public interest; and
- l) if the licensing authority decides to grant the licence, which the applicant says it should not, it should be subject to conditions, which were particularised.

2) Ground 2

The grant of the application would cause undue harm or ill health to people, or any group of people, due to the use of liquor particularised as follows:

- a) the proposal to offer spirits for sale and consumption – spirits, by their very nature, have a high alcohol content and the applicant has not taken or had sufficient regard to the impacts and effects that spirits may have on consumers and others in the locality, in its harm minimisation plan, has no specific strategies addressing the consumption of spirits of a high alcohol content;
- b) the premises do not have a kitchen and no food menu has been provided, nor has a beverage list or price list, nor information on any low alcohol or non-alcoholic products it will offer and there is no undertaking not to serve jugs of spirits;
- c) no details have been provided in relation to the applicant's proposed "robust after hours security";
- d) the locality lacks public transport options and is therefore unsuitable for an on premises licensed venue;
- e) there are many large residential developments close to the subject site;
- f) there are limited options in terms of CAT buses;
- g) the nearest taxi rank is 500 metres from the premises;

- h) questions arise and were not answered by the application in relation to detail as to liquor display, points of sale, browsing opportunities, potential for theft of high value spirit stock and juvenile access to displays of spirits;
- i) there were issues in relation to advertising the application including the alleged failure to give the required notice to Scouts Australia (WA branch) at whose premises, 155 metres from the premises, young people gather; and
- j) there was a lack of detail in the PIA concerning proper monitoring of liquor displays, what would be locked, the number of CCTV cameras and numbers of staff members on duty at any one time.

3) Ground 3

If the application were granted undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons who are travelling to or from an existing place of public worship, hospital or school, would be likely to occur, particularised as follows:

- a) repetition of previous comments concerning the self interest of the applicant and the possibility of the premises being a stepping stone to much larger premises at the location and being a catalyst to a new entertainment precinct in West Perth; and
- b) repetition of previous comments on conditions which should be imposed if the licence were to be granted or any application were made to alter or redefine the premises.

4) Ground 4

If the application were granted, the amenity, quiet or good order of the locality in which the premises or the proposed premises are, or are to be, situated could in some other manner be lessened particularised as follows:

- a) as an owner of a licensed premises in the locality the applicant (which is an objector) makes it clear it has a vested interest in the amenity and quiet good order of the street.

5) Ground 5

The grant of the application would otherwise be contrary to the Act (section 74(1)(j)) particularised as follows:

- a) the licensee's method of trading is confused and unclear;
- b) the licensing authority has consistently stated that it should not approve liquor licences for applicants who just have a good idea, unsubstantiated by cogent and probative objective evidence;

- c) previous decisions of the licensing authority were cited. The licensing authority, in assessing the application by virtue of previous decisions, may find that the applicant had not even had a good idea, as the concept and proposed trading method were poorly researched and poorly explained.

13 Attached to the applicant's notice of objection were a list of high end spirits ranged by the applicant, images of liquor stores in the locality, nearby residential properties, CAT bus times and images of Scouts Australia (WA) branch.

Submissions on behalf of the other objectors

14 These were properly summarised in the Director's decision as follows:

Hasan Ehdeyhed

According to Mr Ehdeyhed the grant of the application is not in the public interest because the proposed premises will be located in a high density residential area and this is likely to result in an increase in noise and anti-social behaviour which will negatively impact on the amenity of the locality. The operation of a tavern in the area will only increase the existing problems because:

- a) *there has been a significant increase in noise and anti-social behaviour since the opening of the Gordon Street Garage restaurant;*
- b) *there has been an increase in graffiti in the area;*
- c) *there has been an increase in break-ins and damage to property; and*
- d) *there is insufficient parking in the area, especially Gordon Street and Coolgardie Street due to the Gordon Street Garage, Harbour Town (now Watertown) and the Perth Arena.*

Yinhuz He

It was submitted that the grant of the application will increase the existing anti-social behaviour in the area.

Bradley Abbot

Mr Abbott is a partner in a Chartered Accounting business located approximately 150 metres from the applicant's premises. According to Mr Abbott, the operation of the existing Gordon Street Garage premises negatively impacts on the amenity of the surrounding area due to increased traffic, which diminishes parking for his staff and clients, patron noise, as well as noise from staff of the Gordon Street Garage utilising the bins at the rear of the restaurant. It was submitted that any increase in vehicular traffic, which may result from the grant of this application, will further diminish available parking in the area which will have a flow on effect of decreasing client access

and harming his business. Mr Abbott claims that when he has arrived at work on weekends, his private parking bays are often occupied by patrons of the Gordon Street Garage or Harbour Town (now Watertown).

Mr Abbott also claims that when he arrives at work there is sometimes vomit on the front doorstep of his business. Consequently, it was submitted by Mr Abbott that a fully operating tavern in the area will only compound these existing problems.

Dr Rishi Kotecha

Dr Kotecha submitted that the grant of the application would increase and encourage alcohol-fuelled behaviour and problems in West Perth, affecting residents, businesses and hospitals in the locality.

Timothy Bradsmith

Mr Bradsmith is a lighting engineer who often works at the Perth Arena and parks his car several blocks from the Arena. He is concerned that if the application is granted it will be harder for him to find parking in the area or when he is walking to and from his car via Gordon Street, people who have been consuming alcohol may be misbehaving or acting in a threatening manner. Already he has seen people affected by alcohol or other substances in the area.

Ruth Cahill

Ms Cahill is a registered nurse with 24 years' experience specialising in Mental Health. Ms Cahill is concerned that the grant of the application will contribute to undue harm and increase the burden on the police, ambulance, triage, youth support services and the mental health system. Ms Cahill also submits that there is a lack of transport options in the area and the foot path outside the proposed premises is steep by pedestrian standards and would present a risk to people during wet weather, particularly if they have been consuming alcohol.

William Brooks

Mr Brooks often attends meetings in West Perth and parks in and around Gordon Street. It is currently difficult to find parking and a further tavern in the area will make this worse. According to Mr Brooks there are already ample establishments in West Perth that provide liquor beverages and food and a further tavern is not required. Mr Books is of the view that the applicant's current producer's licence should suffice.

Deborah Moltoni

Ms Moltoni owns an apartment which is a short distance from Gordon Street. Ms Moltoni has experienced people in the area who appear to be visibly affected by substances and, with limited transport options in the area, she is concerned that people drinking at the proposed tavern will hang around

making noise and a nuisance of themselves or walk to the train station, which is next to where she lives.

Sean Quartermaine

Mr Quartermaine lives in Coolgardie Street, West Perth and has witnessed the problems associated with alcohol when drunks from the CBD walk up Murray Street looking for transport on a Saturday or Sunday night. He has witnessed confrontations with taxi drivers, damage to property, domestic issues and damage to his residential complex. According to Mr Quartermaine, assault rates in the CBD have exploded since the creation of small bars throughout the city and the proposed venue will simply serve as another stepping stone for many of the people who currently create problems in the residential area.

All Night Long Pty Ltd

All Night Long Pty Ltd is the licensee of Liquor Barons Perth City, located next to the applicant's proposed tavern. It was submitted that there are a number of licensed venues within walking distance of the proposed tavern capable of selling packaged liquor and the applicant has undertaken no analysis of the liquor products available at these premises. According to this objector, the evidence presented by the applicant is not compelling and should be given no weight by the licensing authority. Also, it was asserted that the applicant has not had sufficient regard to the impacts and effects that spirits may have of consumers and therefore the grant of the application may contribute to alcohol-related harm.

Consequently, it was submitted that the application is based upon general assertions not supported by evidence and the application was motivated by self-interest, not the public interest.

Guat Soh

This objector is the owner of an apartment at 611 Murray Street, West Perth and does not wish to expose her tenants to anti-social behaviour and noise which may result from the grant of the application.

Submissions on behalf of the Commissioner of Police

- 15 The Police intervened for the purpose of making representations regarding trading conditions that might be imposed if the application were granted in order to preserve the current good order of the locality and to minimise any potential harm. In addition to the conditions proposed by the applicant the Police proposed conditions relating to trading hours, music that can be played at the venue and responsible service of alcohol practices.

Submissions on behalf of the licensee

- 16 The licensee's PIA (as supplemented/amended and with its annexures) contained, in addition to other documentation:
 - 1) locality maps;
 - 2) list of licensed premises in West Perth;
 - 3) list and contact details of community service organisations in West Perth;
 - 4) harm minimisation documents – House Management Policy, Code of Conduct, House Management Plan; and
 - 5) letters of support together with the survey responses regarding the application and public questionnaires.
- 17 The licensee submitted that the premises would be a unique small scale distillery producing artisan spirits from Australian sourced ingredients where visitors and consumers would be able to see how spirits are made and taste and purchase those spirits.
- 18 The licensee operates the business pursuant to a producers licence but the limitations of such a licence prevent the respondent from meeting the requirements of the public and being able to showcase the spirits in the normal manner intended which involves the consumption of the product and accordingly to maximise the potential of the premises and so seeks a tavern licence to replace the producers licence.
- 19 The proposed tavern will be a small intimate venue for no more than 50 patrons at any one time with food and seating provided for patrons.
- 20 The licensee proposed certain conditions be imposed on the licence if granted to ensure that the premises operate in the manner proposed and do not negatively impact on the community.
- 21 The licensee also submitted a statutory declaration by Jason Felton Markwart, its company secretary and a shareholder which dealt comprehensively with matters concerning:
 - 1) the proposed business including the distilling process and product information;
 - 2) how the tavern licence (if granted) would complement the production business;
 - 3) the site of the premises (which is approximately 531 square metres total);
 - 4) parking, public transport and related matters;

- 5) objections received to the application, in particular the objection received from the applicant in the review proceedings and the submissions made in that objection were dealt with in detail in Mr Markwart's statutory declaration.
- 22 On 12 March 2015 the licensee lodged further submissions and evidence in support of the application and response to the objections which included:
- 1) further proposed special trading conditions;
 - 2) submissions in relation to key issues concerning the premises included the proposed manner of trade and trading conditions, the suitability and location of the premises, the effect of the premises on the amenity of the locality in which the premises are situated;
 - 3) submissions in relation to the locality in which the premises are situated;
 - 4) submissions in relation to objections lodged to the application including the objection lodged by the Police (later withdrawn and substituted by a notice of intervention);
 - 5) submissions in relation to outlet density in the 2km locality area;
 - 6) submissions in relation to the grant of the application being in the public interest;
 - 7) submissions in relation to the relevance of section 33 of the Act to the application; and
 - 8) concluding submissions as follows:
 - 8.1 *The concerns raised by the objectors are largely speculative, generalised and carry very little weight against the strongly supported and diverse proposal. The opposition is not persuasive given all of the relevant circumstances and should not prevent the grant of the application. The Non-Compliant Objections should not be heard for the reasons provided. The Licensee Objection is highly questionable and lacks any credibility;*
 - 8.2 *The application is supported by a representative volume of probative evidence;*
 - 8.3 *Whilst the potential for harm or ill-health to occur as a consequence of the application being approved is potentially possible, as with any new licence, it would most likely, if at all, be only very limited and minor in the context of the unique small business proposed. Such a small risk is far outweighed by the harm minimising features of the proposal coupled with factors arising out of the objects provisions in the Act which strongly favour the granting of the licence as proposed;*
 - 8.4 *Based on sheer weight of evidence, the applicant's proposal far outweighs the oppositions' arguments;*

8.5 *The licensing authority is respectfully invited to approve the application and conditionally grant the tavern licence.*

23 Responsive submissions were lodged by:

- 1) Deborah Moltoni;
- 2) the applicant – these submissions included detailed and comprehensive replies to submissions made by the licensee.

Closing submissions on behalf of the applicant (in the review proceedings)

24 These detailed submissions addressed the submissions made by the licensee (in the original application)

Closing submissions on behalf of the licensee

25 These detailed submissions addressed the objectors' and intervener's submissions and emphasised that the true nature of the application was anything but a tavern in a colloquial or traditional sense.

Submissions on behalf of the Commissioner of Police

26 The Police lodged a notice of intervention for the purpose of making representations on the grounds that:

- 1) on the question of whether, if a particular application was granted, public disorder or disturbance would likely result (section 69(6)(c)(ii) of the Act); and
- 2) any other matter relevant to the public interest (section 69(6)(c)(iv) of the Act).

27 Included with the notice of intervention by the Police was a report by Senior Constable D'Souza outlining the grounds for the intervention.

28 The Police grounds and submissions included the following:

- 1) the intent of the intervention is to propose trading conditions which are considered appropriate, having regard to the class of licence applied for and the location of the premises and perceived harm which may result if the application is approved;
- 2) the Police do not oppose the approval of the application but if it is approved in order to preserve the current good nature of the locality and to minimise any potential harm, the imposition of trading conditions is necessary;
- 3) the Police acknowledged the intent of the application and the harm minimisation strategies suggested by the applicant and agreed with the applicant's contention

that there is “...*the potential for harm or ill health to occur as a consequence of the application being approved is potentially possible*”;

- 4) submissions in relation to entertainment on the premises, the ‘special trading conditions’ proposed by the applicant, rapid consumption of alcohol and energy drinks, seating and patron capacity and outlaw motorcycle gangs; and
- 5) the Police invited the Director to consider conditions to be imposed if the licence were to be granted under the following headings:
 - a) CCTV;
 - b) Entertainment;
 - c) Food;
 - d) Seating and Capacity;
 - e) General Conditions (encouragement of rapid consumption and no mixing with energy drinks); and
 - f) Dress Standards.

Submissions in the review application

29 Submissions in the review application were made by:

- 1) the Police;
- 2) the applicant (licensee objector);
- 3) Ms Deborah Moltoni (objector);
- 4) Ms Ruth Cahill (objector); and
- 5) The licensee (the applicant in the original application).

Police

30 The Police submissions can be summarised as follows:

- 1) before the Delegate, the Police intervened only to propose conditions that should be imposed if the licence were to be granted so as to ensure that the likelihood of any harm arising as a result of the grant of the licence would be reduced or mitigated;

- 2) the Police made no representations in relation to the submissions of the applicant (being a licensee objector);
- 3) in these proceedings and these submissions the Police only intend to assist the Liquor Commission with the law and also provide representations as to conditions which ought to be imposed on the licence;
- 4) the fact that the Police do not make a submission as to any other aspect of the review proceedings or grounds of review of the objector should not be taken to be an indication that the Police either support or oppose the position taken in these proceedings by either the applicant or the respondent;
- 5) the Police set out legal principles governing review, public interest issues and the detailed conditions (and the reasons for the same) they proposed be imposed on the licence if granted.

Deborah Moltoni

31 Ms Moltoni relied on her submissions made in the original application and stated that:

- 1) the balcony of her residence overlooks the route taken by people walking to and from the train station and the premises and the grant of the licence will severely impact on her quiet enjoyment of her balcony which may also be impacted by the late disposal of glass waste and an increase in delivery vehicles to the premises;
- 2) bars and taverns should not be located in residential areas, but in designated entertainment precincts;
- 3) the persons associated with the applicant have previously owned and managed substantial licensed premises and the present premises are small and this has all the hallmarks of being a vanguard for much more substantial premises in the future;
- 4) the locality has a substantial young demographic and it is easy to predict an intolerable level of noise from the street caused by persons leaving the venue;
- 5) adding a tavern to this residential area may result in an escalation of anti-social behaviour;
- 6) the subject of food has not been adequately addressed – high strength spirits apparently will be consumed with bar snacks only not substantial food.

Ruth Cahill

32 Ms Cahill, a registered nurse with 24 years' experience, relied on her submissions made in the original application which concerned the effect of increased availability of alcohol on alcohol consumption and a corresponding increase in alcohol related harm

and the materials which accompanied those submissions and submitted further materials which the Commission determined were not 'new material' and could be considered in the review proceedings.

- 33 Ms Cahill's submissions also referred to her reservations concerning the lack of food to be provided on the premises, and the lack of taxi and public transport facilities.

The applicant (licensee objector)

- 34 The applicant relied on previous submissions, documentation and materials before the Delegate and made the following submissions (summarised):

- 1) the facts of the interactions between Mr Lawson Douglas (of the licensee objector) and Mr Jason Markwart (of the licensee) are not correct, the initial approach was made by the licensee;
- 2) resident objectors concerns were not given due weight by the Delegate;
- 3) the opinion of respondents to the licensee's survey were flawed and were given significant weight by the decision maker and yet the opinions of residential neighbours were dismissed as "largely speculative and not supported by any probative evidence";
- 4) details of recommendations of the recent review of the Act were referred to and stated to highlight that the review recognised that the opinions of residential neighbours were very often not heard and not given the weight they should be;
- 5) the licensee's PIA was flawed, brief, contradictory and inadequate;
- 6) the licensee's objective evidence was well short of the required standards previously considered by the licensing authority to be required and the evidence relating to the surveys and questionnaires failed to state:
 - a) over what time period the same were collected;
 - b) how many people had a contrary view;
 - c) what information was provided about the proposed premises – the applicant has a history of not divulging its intended manner of trade;
 - d) how many people refused to complete the survey or questionnaire;
 - e) were any inducements offered.
- 7) the plans of the premises lacked even basic detail;

- 8) the application was not advertised properly to the extent that the requirement to advertise the manner of trade was ignored;
- 9) the licensee has not shown evidence of contrary views or those who have concerns about the proposed liquor licence;
- 10) there were no or no sufficient reasons given for the Delegate's decision particularly in relation to:
 - a) the potential negative aspects of the application that were weighed;
 - b) how the conclusion was reached that there was no likelihood of increased and undue harm and ill health if the application was granted;
- 11) the Commission should not grant the licence because it 'likes the idea' of the premises being proposed – that is not enough and does not excuse the applicant from the established standard of liquor licence applications;
- 12) without proper plans, without following set down advertising protocols and without robust objective evidence, it is not possible to reach the conclusion that the application satisfies the public interest test;
- 13) the quality of the documents, materials and evidence lodged with the application for the licence fall so far short of the standards which have been carefully established by the licensing authority over the last 8 years that if this licence were granted it would undermine the authority of the liquor licence application process and reduce the integrity of the public interest test.

The licensee

- 35 The licensee relied on previous submissions and documentation and materials before the Delegate and made the following submissions (summarised):
- 1) the application for review has not been motivated by the public interest but relevantly as found in the Delegate's decision "appears to be nothing more than an attempt to restrict competition and protect its market share";
 - 2) the premises proposed and subsequently completed comply with the requirements of the Act;
 - 3) there was nothing before the Delegate when making his decision to question the suitability or sufficiency of the standard of the premises and further and most relevantly in this case findings of fact by the Delegate as to "the adequacy or suitability of any premises" shall not be reconsidered on review (section 25(3)(b));

- 4) there is no basis for the ground of review that resident objectors concerns were not given due weight, the Delegate's decision specifically stated that "the concerns of the resident objectors are genuinely held" and the Delegate's decision in imposing conditions on the licence clearly revealed that due weight was given to the resident objectors' concerns, even though it was found that they failed to make out their grounds of objection;
- 5) the relevant locality in this case was thoroughly addressed in the application and its objective features more than justify the grant;
- 6) the ground of review that the Delegate did not assign proper weight to the potential for harm and ill health cannot be substantiated and the submissions referred to above in this paragraph in respect of ground 2 for the review (the suitability of the premises) are relevant;
- 7) the Delegate attributed more than sufficient weight to the issue of harm and ill health including by:
 - a) clearly identifying the important issue;
 - b) evaluating the particular manner of trade in question;
 - c) determining that the premises were "very small by industry standards";
 - d) granting the application subject to special conditions because the potential for harm and ill health is indeed minimised;
- 8) the "mere possibility of harm" is certainly relevant but the primary object of the Act (section 5(1)(b)) is to "minimise" harm or ill health, not to prevent harm or ill health absolutely;
- 9) the manner of trade in question is very low risk and low impact, the premises are operated by experienced people and in all the circumstances the business has very little capacity to cause harm or ill health;
- 10) the grant of the application is in the public interest as previously submitted, in particular:
 - a) the premises are a high quality and unique and intimate venue capable of meeting requirements of local and tourist consumers;
 - b) the premises are not a traditional pub, barn style stand up drinking facility or late night entertainment venue;
 - c) the respondent's evidence and submissions show the premises as diverse, advance the liquor industry, cater for tourism and meets demands of consumers ; the evidence from the public in support of the application is considerable and much more than a mere representative sample;

- d) there are key factors outlined in the submissions which establish that the proposal will minimise harm and ill health;
- e) the small prospect of some harm or ill health occurring is far outweighed by the significant benefits to the wider public, the City of Perth, the proper development of the liquor industry and the tourist industry;
- f) in the event that the Commission is not persuaded to affirm the Delegate's decision, it should exercise the overriding discretion under section 33 of the Act in favour of affirming that decision. This proposition is based on a weighing and balancing of all circumstances which are overwhelmingly in favour of affirming the Delegate's decision;
- g) based on sheer weight of evidence the case for the grant of the licence far outweighs the case presented by the opponents.

Determination

- 36 Under section 25(2c) of the Act, when considering a review of a decision made by the Delegate, the Commission may have regard only to the material that was before the Delegate when making the decision.
- 37 On a review under section 25 of the Act, the Commission may –
- 1) affirm, vary or quash the decision subject to the review;
 - 2) 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;
 - 3) give directions –
 - a) as to any question of law, reviewed; or
 - b) to the Delegate, to which effect shall be given; and
 - 4) make any incidental or ancillary order.
- 38 In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Delegate, but is to undertake a full review of the material before the Delegate and make its own decision on the basis of those materials (refer *Hancock v Executive Director of Public Health [2008] WASC 224*).
- 39 Pursuant to section 38(2) of the Act, an applicant for the grant of a licence must satisfy the licensing authority that granting the application is in the public interest.

40 To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.

41 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175 and *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241). The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 where he said:

- i. *“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.*
- ii. *The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”*

42 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities Ltd supra*). The primary objects of the Act are:

- 1) to regulate the sale, supply and consumption of liquor; and
- 2) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
- 3) to cater for the requirements of consumers of liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

43 Section 33(1) of the Act gives the Commission an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was recently considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [32]:

“[Section] 33(1) is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole. Section 5(2) in

requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest to make those objects the exclusive consideration nor the sole determinants of the public interest’.

- 44 Each application must be considered on its merits and determined on the balance of probabilities pursuant to section 16 of the Act. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WACA 258*).
- 45 Longer trading hours are permitted under the type of licence for which the licensee applied. However, the respondent sought more limited hours in its application.
- 46 The Commissioner of Police submitted that certain conditions be imposed on the licence (for example, limits on trading hours, entertainment, special trading conditions) as this would assist to minimise harm and ill health that may arise by virtue of the licence, for example, by reducing the times in which customers can consume liquor and decreasing the likelihood of a younger demographic attending the premises. The Commission agrees with these conditions being imposed on the licence as those conditions will likely minimise harm and ill-health to the community.
- 47 Further, conditions are to be imposed as to the type of packaged liquor to be sold (to be the licensee’s own produced liquor), the prohibition of sales of liquor after 8pm, the maintenance of a closed circuit television system, and the availability of other low or mid-strength and non-alcoholic drinks..
- 48 At the hearing before the Commission, it was agreed by all parties that the issues raised in relation to the objector Bradley Abbot had been settled satisfactorily and did not need to be pursued further.
- 49 Some of the objections related to the fact that the owners of the business being conducted at the premises had prior experience in operating larger premises (which are successful). The licensee submitted at the hearing that the premises could not grow in the location as the location itself was gridlocked, and therefore there will only be a small number of patrons on the premises at any one time (being a maximum of 50 customers). Further, the licensee submitted that the business is operated by experienced people in the liquor industry. The Commission considers that as the owners are experienced operators, the owners of the business would be aware of the particular harm minimisation and ill-health issues that pose problems to licensed premises and that prior experience in operating larger premises would assist the owners in properly managing smaller sized licensed premises such as the distillery subject to the application under this review.

- 50 Some of the objections related to concerns that the owners of the business being conducted at the premises had prior experience in operating larger premises, and may wish to later expand the current premises. The licensee submitted at the hearing that the premises could not grow in the location as the location itself was gridlocked, and there will only be a maximum of 50 patrons on the premises at any one time.
- 51 The grant of the licence to the licensee is positive for the local wine industry and adds to the diversity of the licensed premises available generally in the locality, catering to local customers and tourists. The proposed premises are unique, intimate, and not a traditional pub or tavern. The grant of the a conditional tavern licence for a spirit producer's business will add diversity to and advance the liquor market in the area.
- 52 The Commission considered all the submissions in relation to the potential for harm and ill-health should the licence be granted. The licensee covered these aspects in the PIA and further submitted that the business is operated by people experienced in the liquor industry. The applicant made lengthy submissions on the adequacy of this material. The Commission is of the view that the potential for harm and ill-health is limited given the size of the premises and the intended manner of business, nevertheless it considers that particular conditions will reduce this potential.
- 53 The Commission considers that the Delegate attributed sufficient weight to the issue of harm and ill-health in the Delegate's decision to grant the licence, subject to particular conditions which will minimise harm and ill-health to the surrounding community.
- 54 The Commission is not persuaded that the objections raised outweigh the benefits to the public, the City of Perth, the proper development and advancement of the liquor and tourist industries if the licence was granted subject to the particular conditions.
- 55 After a consideration of all the circumstances and evidence provided to the Commission, the Commission is satisfied that the grant of the licence is in the public interest.
- 56 The Commission is satisfied that, on the basis of materials which were before the delegate of the Director of Liquor Licensing, the respondent produced sufficient evidence to establish that the grant of the licence is in the public interest and that any negative impacts of the application are sufficiently outweighed by the positive impacts.
- 57 The Commission is satisfied that the concerns that the applicants have in relation to the grant of the licence will be met by the conditions imposed on the licence.
- 58 Accordingly, the application for review is refused and the decision of the Director of Liquor Licensing is affirmed.


HELEN COGAN
MEMBER