

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Circuit Niteclub Pty Ltd
(represented by Mr John Prior, instructed by
Mr Peter Fraser of Dwyer Durack)

First Intervener: Director of Liquor Licensing
(represented by Ms Sarah Kavanagh of
State Solicitor's Office)

Second Intervener: Commissioner of Police
(represented by Ms Leanne Atkins and
Ms Carolyn Petroboni of WA Police)

Commission: Ms Helen Cogan

Date of Hearing: 21 April 2011

Date of Determination: 21 April 2011

Date Reasons Published: 5 May 2011

Premises: The Up Nightclub
60 Fitzgerald Street
Geraldton

Matter: Application pursuant to Section 25 of the *Liquor Control Act* for review of decision number A218073 dated 12 April 2011 by the Director of Liquor Licensing suspending the operation of nightclub licence 6070025114 effective 12 April 2011.

Authorities referred to by parties to proceeding and considered in the reasons for the Determination

- *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing* [2010] WASC 345
- *Palace Security Pty Ltd v Director of Liquor Licensing* [1992] 7WAR241 AT 249
- *Salemi v Minister for Immigration and Ethnic Affairs* [2] [1977] 14ARL1
- *Purcell v Electricity Commn of New South Wales* [1985] 60 ALR 652 at 657
- *Reseck v FCT* [1975] 133CLR45 at 534
- *Wood v Riley* [1867] ALR3CP26
- *Lyons v Registrar of Trademarks* [1983] 50 ALR 496 AT 508
- *Mt Isa Mines v FCT* [1976] 10ALR629
- *Leon Fink Holdings Pty Ltd v Australian Film Commission* [1979] 24 ALR 513
- *The Commissioner of Police v Ronimi Engineering Pty Ltd “Seoul Karaoke Restaurant* [LC9/2008]
- *The Commissioner of Police v The Bog [Northbridge] Pty Ltd “the Rock Night Club”* [LC07/2009]
- *Minister for Immigration v Nystrom* [2996] 228 CLR 566 [“Nystrom”]
- *Dolheguy v Becker* [2009] 52 MVR 462
- *Minister for Resources v ex parte Cazaly Iron Pty Ltd* [2007] WASCA 175
- *Minister for Immigration v SZKTI* [2009] 238 CLR 489 at 502-504

Introduction

1. On 2 March 2011, a Complaint dated 24 February 2011 and served on Mr Shane Gerald Van Styn on 27 February 2011 was filed with The Liquor Commission (“the Commission”) which on the same day lodged the Complaint with the Director of Liquor Licensing (“the Director”).
2. On 3 March 2011 the Director wrote to the Applicant:
 - referring to the Complaint; and
 - referring to the provisions of Section 91 of the Act which enables the Director at discretion to suspend the operation of any licence for such a period as the Director considers it is in the public interest to do so; and
 - stating that having considered the evidence submitted by the Commissioner of Police in support of the Complaint, the Director considered that it was in the public interest to suspend the operation of the Applicant’s nightclub licence until such time as the health, safety or welfare of persons who may resort to the licensed premises are not at risk; and
 - affording the Applicant the opportunity to provide submissions on the matter and to show cause why the nightclub licence should not be suspended pursuant to section 91 of the Act.
3. On 4 April 2011, the Applicant made written submissions through its solicitors to the Director, opposing the proposed suspension.
4. On 12 April 2011, the Director handed down his decision (“the Decision”) suspending (with immediate effect) the operation of the nightclub licence number 6070025114.
5. In the Decision the Director stated, inter alia, that having considered the evidence submitted by the Commissioner of Police in support of the Complaint, in accordance with section 91(1) of the Act, he considered that it was in the public interest to suspend the operation of the nightclub licence until such time as the health, safety and welfare of persons who may resort to the licensed premises is not at risk.
6. On 14 April 2011, an application pursuant to section 25 of the Act for a review of the Decision was lodged with the Commission.

7. On 15 April 2011, the Director lodged a notice of intervention in the proceedings before the Commission.
8. On 18 April 2011, the Commissioner of Police lodged a notice of intervention in the proceedings before the Commission.
9. On 21 April 2011, the matter of the application for review of the Decision was heard and I made and published my Determination and indicated to the parties that the reasons for the Determination would be published in due course.
10. The Determination made and published by me was as follows;
 1. The suspension effected by decision number A218073 of the Director of Liquor Licensing is itself suspended until publication of the Liquor Commission's determination of the relevant section 95 complaint which will be heard on a date earlier than 15 June 2011 mutually convenient to the parties and the Liquor Commission.
 2. I note (and this matter will be referred to in my written reasons for the determination) that the provisions of section 91(1) of the *Liquor Control Act 1981* which gives discretion to the Director of Liquor Licensing to suspend the operation of a licence is unfettered by the issue of whether or not a relevant section 95 complaint has been lodged with the Liquor Commission.
 3. Written reasons for the determination will be published in due course.
11. The Reasons for the Decision are set out below. It is noted that at the hearing it was agreed by the parties that the only material before the Director when he made the Decision (apart from the Directors letter to the Applicant dated 3 March 2011 and the Applicant's written submissions dated 4 April 2011) was the Complaint (with its supporting evidence).

Submissions by the Applicant

12. On 4 April 2011, the Applicant made written submissions to the Director, and on 19 August 2011 made written submissions to the Commission, and on 21 April 2011 made oral submissions at the hearing.
13. The Applicant's written and oral submissions were detailed and thorough, were considered by the Commission and read together can be summarised as follows
 - Reference to the detailed provisions of sections 91(1) and 95(6) of the Act respectively stated to be a general power and a specific provision respectively.

- Section 95(6) of the Act, is a specific provision which sets out the Director's powers upon the lodgement of a complaint (such as the Complaint) which powers include the ability to impose a condition on, or vary or suspend the operation of a previous condition imposed on, a licence to have effect pending determination of the complaint.
- Section 91(1) grants a general power to suspend a licence.
- Section 95(6) limits the Director's powers on lodgement of a complaint to suspension, imposition or variation of a condition previously imposed upon a licence and does not include the power to suspend a licence.
- The limited powers granted to the Director pursuant to section 95(6) of the Act give rise to a conflict with the general power granted by section 91.
- Authorities cited for legal rules where a conflict arises between general and specific provisions of statutes and the 'rule of last resort' when it is not possible to reconcile two sections in an Act, being that the later section prevails over the earlier.
- As the Commissioner of Police has lodged the Complaint (under section 95 of the Act) the powers which may be exercised are those specified in Section 95(6) of the Act.
- In the event that it is determined that section 95(6) of the Act does not operate to exclude the Director's power to suspend the licence, the suspension would not be in the public interest.
- The suspension would not be in the public interest, the Applicant's financial position being such that if the licence is suspended pending determination of the Complaint the Applicant would not be able to pay its debts when called upon to do so and would therefore be forced into insolvency, and if that event occurred the Applicant would not be permitted to trade.
- If the Applicant is ultimately successful in its defence of the Complaint, or if the Complaint is found to be made out but cancellation (which is a possibility) or suspension of the licence is not ordered the Applicant's insolvency would prevent it from recommencing trading and it is not in the public interest for the Applicant to be placed in the position whereby a successful defence of the Complaint is rendered null and void by the suspension made by the Director.

- It is not in the public interest for the Applicant to be placed in the position whereby a successful defence of the Complaint is rendered null and void by virtue of the Director's decision to suspend the licence.

Submissions by the First Intervener

14. Following legislative provisions were referred to:
 - Section 91(1) is located in Division 11 of Part 3 of the Act entitled "Suspensions".
 - Section 95(6) is located in Division 13 of Part 3 of the Act entitled "Disciplinary Matters".
 - The Commissions disciplinary powers are set out in section 96(1) and include the power to suspend the operation of a licence until further order or for a specified period.
15. In the present case there is no identity of nature or purpose between sections 91(1) and 95(6) of the Act , the former allows for suspension of a licence, the latter does not; the former can be exercised on the basis of any relevant "public interest", the latter can only be exercised if "the safety, health or welfare of the public" so requires; the former can be exercised at any time; the latter can only be exercised during the period from the lodging of a complaint until determination.
16. Further, if the rules governing conflict between general and specific provisions were to apply, the Director could never exercise the section 91(1) power to suspend a licence, during any period for which a licensee was the subject of a previous complaint i.e. no matter how long its determination might take, and whether or not the complaint was made by the Director.
17. Such an outcome would be absurd and cannot reasonably be assumed to have been included by Parliament; it would be allowing section 95(6) to substantially interfere with a power that was clearly meant to be available at any time that the "public interest" might in the judgement of the Director, demand.
18. As to the issue of conflict between earlier and later sections, section 95(6) in its current form was an "original provision" of the *Liquor Licensing Act 1988* ("LLA") (as it was then titled) upon its enactment in 1988. Section 91(1) of the Act was also enacted (LLA section 91) in an almost identical form, but references to the Director's power to suspend a licence "by reason of the requirement of public order or safety" – in 2006 those words quoted were replaced with the words "if the Director thinks it is in the public interest to do so".

19. A construction of the Act based on section 95(6) as a later, i.e. more recent provision is impossible to sustain – both provisions were enacted at the same time and so far as it goes section 91(1) is the more recent provision having at least been amended once since enacted.
20. In relation to the issue of the requirement for the Director to consider whether the suspension of the licence would be in the ‘public interest’ the submissions referred to authority for the interpretation of the term ‘public interest’ when used as a criterion for the exercise of a statutory discretion as being a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation.
21. Reference was made to the objects of the Act particularly section 5(1)(a) (regulating the sale supply and consumption of liquor) and section 5(1)(b) (minimising harm or ill health caused to people, or any group of people due to the use of liquor).
22. The commercial viability of the Applicant’s business is not a factor relevant to a determination of what is in the public interest.

Submissions by the Second Intervener

23. The legislative provisions – the provisions of section 91 and section 95(6) were referred to.
24. The power to suspend a licence under section 91 of the Act is not stated to be limited by or made subject to any other provision within the Act.
25. Section 95(6) of the Act is limited in its application to where a complaint has been laid under section 95. It does not preclude the operation of section 91.
26. In relation to the issue of whether the more restrictive provisions of section 95(6) should prevail over the general provision of section 91, the intent of the legislation should be the determining factor such intent being disclosed in the objects cited in section 5 of the Act.
27. The provisions (of section 91(1) and section 95(6)) are separate and distinct appearing in different Divisions of Part 3 (of the Act).
28. Section 91(1) and section 95(6) can be reconciled as they relate to different powers that may be utilised by the Director.

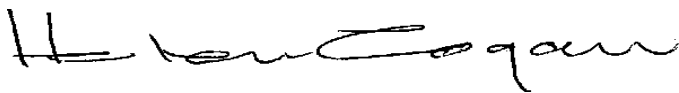
Reasons for Determination

29. It is noted that there is no dispute between the parties as to the following matters:
- 29.1. All relevant provisions of the Act including but not limited to the provisions of section 25(2) (c) providing for the Commission to have regard only to the material before the Director when making his decision.
- 29.2. The chronology of events leading to the making of the Director's Decision.
- 29.3. The material before the director when making the Decision, namely;
- The Complaint (with its supporting material);
 - The Director's letter to the Applicant dated 3 March 2011;
 - The Applicant's Solicitors letter to the Director dated 4 April 2011.
30. I consider that the statement of Mr Shane Van Styn dated 20 April 2011 lodged with the Commission is an expansion of material before the Director, namely the statement of Shane Van Styn dated 4 April 2011 which accompanied the Applicant's Solicitors letter dated 4 April 2011 to the Director and accordingly can be considered by the Commission (*Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing [2010] WASC 345*)
31. On the basis of the material which was before the Director when he made the Decision, in particular the Complaint with its supporting material and having considered the same and having considered the written and oral submissions made by each of the parties to the proceedings before the Commission I have concluded that there are grounds for finding that:
- 31.1. Notwithstanding that the complaint and its supporting material is untested and has yet to be addressed by the Applicant in detail, it is open to the Director to exercise the discretion given in section 91(1) of the Act to suspend the operation of the license as the Director considers it is in the public interest to do so.
- 31.2. The Director is not fettered in his ability to exercise the discretion in section 91(1) by the provisions of section 95(6) which relate in the circumstances contemplated in that section to the ability to impose a **condition** (my emphasis) on or vary or suspend the operation of a

previous **condition** (my emphasis) imposed on a license to have effect pending the determination (of the complaint).

31.3. I do not accept the submissions that there is a conflict between the provisions of Section 91(1) of the Act and section 95(6) of the Act such as to prevent the Director from exercising his power to suspend the operation of a license pursuant to section 91(1) if it is considered in the public interest to do so. The provisions of section 91(1) and section 95(6) are reconcilable – they relate to different and specific circumstances.

31.4. However I am of the view that the suspension by the Director of the Licence for what could be an indefinite period of “until such time as the health, safety or welfare of persons who may resort to the licensed premises is not at risk” is not appropriate and that suspension of the operation of the Licence for that period should itself be suspended pending the hearing of the Complaint. I have accordingly made a determination varying the Director’s Decision as set out in Para 10 of these reasons.



HELEN COGAN
MEMBER