

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Terri and Cameron Aird

Respondent: Linx Nominees Pty Ltd

Commission: Mr Jim Freemantle (Chairperson)
Mr Greg Joyce (Member)
Mr Evan Shackleton (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the Delegate Director of Liquor Licensing to grant an application for a small bar liquor licence.

Premises: Corner Room situated at 211 South Terrace, South Fremantle

Date of Determination: 23 April 2013
(determined on the papers)

Determination: The application for review is dismissed.

Authorities referred to in the determination:

- *Hancock v Executive Director Public Health [2008] WASC 224*
- *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384*
- *Executive Director of Health v Lily Creek International Pty Ltd (2000) 22 WAR 510*
- *Russell Patterson v Dale Jeffrey Harris, licensee of Guildford Indoor Sports (LC28/2010)*

Background

- 1 On 21 May 2012, Linx Nominees Pty Ltd (“the respondent”) lodged an application before the Director of Liquor Licensing for the conditional grant of a small bar licence for premises to be known as Corner Room (“the premises”) situated at 211 South Terrace, South Fremantle. The application was made pursuant to sections 41 and 68 of the *Liquor Control Act 1988* (“the Act”).
- 2 On 27 June 2012, a notice of intervention was lodged by the delegate of the Commissioner of Police pursuant to sections 3(6) and 69(6)(c)(ii) and (iv) of the Act for the purpose of making representations in respect of the application.
- 3 On 10 July 2012, a notice of objection was lodged by Terri and Cameron Aird pursuant to section 73(4) of the Act opposing the application. This notice included an attachment in the form of a petition containing 38 signatories.
- 4 On 11 July 2012, a notice of objection was lodged by Dr Anne Pederson pursuant to section 73(4) of the Act opposing the application.
- 5 As part of the assessment process the Department of Racing, Gaming and Liquor (“the Department”) requested an application for an Extended Trading Permit in accordance with section 60(40)(h) of the Act in respect of the proposed alfresco dining and on 25 July 2012 the respondent lodged this application with the department.
- 6 The Delegate of the Director of Liquor Licensing (“the Director”), pursuant to sections 13, 15 and 16 of the Act, determined the application on the papers on 27 December 2012 and granted the application subject to a range of conditions contained in decision no. A221391.
- 7 On 25 January 2013, the applicant lodged an application with the Liquor Commission (“the Commission”) for a review of the decision of the Director pursuant to section 25 of the Act. By operation of section 16 of the Act the Commission has determined this matter on the papers.

Submissions by the applicant

- 8 The applicants, whose residence is contiguous to the proposed premises, were originally objectors to the application before the Director and have claimed that the grant of a licence is not in the public interest for the following reasons:
 - The licence would cause ill health to local residents. Terri Aird said her son was having difficulty sleeping because of the noise from the Corner Room and this was interfering with his school attendance. In addition smokers using the outdoor area of the Corner Room caused smoke to penetrate her dwelling causing harm and aggravating her son’s asthma.
 - There is undue offence and annoyance or inconvenience to persons living in the vicinity of the Corner Room. Three examples were cited under this heading. There is limited parking in the vicinity and this causes congestion and deprives

residents of the ability to park. Secondly, the use of the alfresco area by patrons late at night causes excessive noise and smoke. Thirdly, the delivery trucks use the Ada Street access next to the applicants' dwelling causing inconvenience. The Corner Room's servicing and cleaning areas are approximately 10 metres from the applicants' bedroom.

- The good order of the locality is compromised because patrons have been urinating on the applicants' front fence, patrons have been thrown/pushed into the applicants' hedge causing damage and there are disturbances at closing time. There have been attempted break-ins and rubbish, including broken bottles, left lying around.
- The applicants have collected a petition consisting of 38 signatories opposing the grant of licence. The petitioners represent every household in a 100 metre radius in the vicinity of the Corner Room. The primary concern is that a liquor outlet causes problems in a residential area. The area is already saturated with liquor outlets and many businesses are experiencing financial difficulties because of the competition. In addition there is also a brothel in the area which causes similar problems.
- The grant of a small bar licence will cause property values to fall. The applicants have been trying to sell their house for some time, it has now been sold.
- All residents in the vicinity are shocked, disappointed and surprised that the Director has approved the licence. None of the residents were contacted by the respondent in the preparation of the Public Interest Assessment ("PIA").

Submissions by the respondent

9 The respondent made the following points in respect of the application for a small bar licence:

- The City of Fremantle supports the application for a small bar. The Mayor, Dr Brad Petit, has written to the Director *"wholeheartedly supporting the proposal. The City of Fremantle has a clear position of supporting small bars as a way of encouraging responsible consumption of alcohol in Fremantle by a greater diversity of people."*
- The City of Fremantle has issued section 39 and section 40 certificates in respect of the proposal. This means the local authority is satisfied the proposal complies with all the stipulated statutory requirements of the Act and the planning laws of the City. The respondent has also obtained an outdoor eating area licence from the City for its current operations.
- The Corner Room currently complies with the noise requirements of the City of Fremantle and there has never been any action on this matter.
- Parking control is the responsibility of the City of Fremantle and its action of approving the proposal indicates parking is not an issue.

- The respondent indicated deliveries are made between the hours of 8am to 4pm and are accessed by South Terrace and should not cause disturbance to neighbours.
- The respondent will comply with all of the suggested conditions set down by the Commissioner of Police.
- The respondent has provided a petition of 160 people who support the establishment of a small bar licence.
- The Corner Room currently trades as an unlicensed cafe/restaurant. It has established a reputation for great coffee, good food and courteous service. It currently averages 2400 coffees and 1200 meals per week.
- The respondent recognises the potential harm excessive use of alcohol can do and has taken measures through its management plan to address these issues.

Submissions by objector Dr Anne Pederson

10 Dr Anne Pederson, who is a resident nearby in South Terrace, made the following points in her objection:

- It is not in the public interest to approve the application, there is not one resident in the vicinity that approves of this application.
- It will cause undue harm to residents residing in close proximity to the premises. There have been a number of incidents from the nearby Seaview Hotel such as screaming and drinking outside her window, a man urinating on her wall and trying to break in, dirty underpants put in her letterbox and bottles smashed against her wall.
- The proposed bar will cause great inconvenience to the people in the vicinity. A major issue is the lack of parking on weekends where motorists park and block her in or alternatively she is unable to park in her residence.

Submissions of the Commissioner of Police

11 The Commissioner of Police (“the Police”) intervened in the matter and made the following points:

- The respondent has not met the public interest test. The respondent has failed to address what are the benefits to the local community. There is no evidence to suggest the respondent has engaged the local community.
- The Fremantle area attracts a large number of “at risk” groups such as indigenous and fly in fly out workers and the proposed change from an unlicensed cafe/ restaurant to a licensed small bar may see the clientele change and attract these groups.

- There already exists alcohol related harm and offences in the area. Between June 2011 and May 2012 there were 92 reported crimes in the South Fremantle area, of these 14 were alcohol related crimes. The offences were primarily assaults, disturbances and anti- social behaviour. Between June 2011 and May 2012 there were 391 police attendances, primarily on the weekend, in South Fremantle relating to anti-social behaviour and disturbances, of those 74 were within a 250 metre radius of the proposed premises.
- The location of the proposed premises borders on the Fremantle entertainment precinct and the outlet density of that locality should be taken into consideration. In the suburb of South Fremantle there are 12 existing licensed premises and in the Fremantle entertainment precinct there are 144 licensed premises.
- The Fremantle liquor accord is a positive mechanism designed to improve communication between all stakeholders. Its goals are to reduce anti-social behaviour, reduce alcohol related harm and violence, increasing the responsible provision of alcohol and enhancing community engagement and cooperation. The Commissioner acknowledges the respondent has consulted with the Fremantle Liquor Accord and will actively participate in the scheme.
- The Commissioner does not support the application however if it was to proceed the Commissioner requests that there be restrictions imposed on the licence. Amongst the proposed conditions, significantly, there should be low strength beer available, shooter style drinks should be prohibited, jugs of liquor prohibited and there be no sale of cheap liquor. Further, people wearing outlaw motorcycle gang clothing should not be admitted and there should be a closed circuit television system operating at all opening times.

Determination

- 12 In determining this section 25 review the Commission is required to comply with the following provisions of the Act:
 - By section 16(1)(b)(ii) the Commission may make its determination on the balance of probabilities.
 - Section 25 (2c) requires the Commission to have regard only to material that was before the Director when making the decision. In this regard the Director has provided a list of that material in his decision no. A221391.
- 13 The Commission is bound by the principle established by Martin CJ in *Hancock v Executive Director Public Health [2008] WASC 224 [52, 53]* in that conducting a review under section 25 of the Act it is not constrained by a finding of error by the Director but is to undertake a full review of the materials before the Director and make its own determination based on that review.
- 14 Pursuant to section 38(2) of the Act the onus is on the respondent to satisfy the Commission that the application is in the public interest. Section 38(4) of the Act sets out the inclusive matters the licensing authority may have regard to in determining

whether granting an application is in the public interest. The concept of public interest has been thoroughly litigated and the Commission takes notice of and applies the following principles from the various cases:

- it is of wide import and not exclusively defined by the Act, it does not have any fixed meaning;
 - its proper meaning is taken from the subject matter and the legislative framework;
 - it imports a value judgment confined to the scope of the subject matter and the scope and purpose of the Act;
 - it is a balancing exercise between the private interests of the individual and the public good;
 - it is for the decision maker to determine what is relevant and what weight is given to relevant matters;
 - the Commission shall have regard to the objects of the Act;
 - it directs attention to that conclusion on determination which best serves the advancement of the interest or welfare of the public;
 - the Commission is required to consider the application based on the positive and negative social, economic and health impacts on the community.
- 15 By operation of section 33(1) of the Act the Commission has 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]* :
- “s. 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 or make those objects the exclusive considerations nor the sole determinants of the public interest.”*
- 16 Section 74(1) of the Act provides the grounds for objection and section 73(10) requires that the burden of establishing the validity of any objection lies on the objector.
- 17 Section 37(3) of the Act provides that a licence shall not be granted where the Commission is satisfied that an undue degree of offence, annoyance, disturbance or inconvenience to residents in the vicinity is likely to occur.

18 In the view of the Commission, the public interest assessment is a balancing exercise between the private interests of the individual and the public good. It also involves an assessment of the harm or ill-health caused to people due to the use of liquor. In carrying out the balancing exercise the Commission has taken into consideration the following:

- Not all of the objections are relevant. Parking is primarily the responsibility of the local authority and it would appear by its various approvals to be satisfied on this issue. Parking would only become a public interest matter if it triggered an issue under sections 37(3) or 38(4). Similarly property values are not relevant to the “PIA”.
- None of the objectors have provided sufficient nexus between the reported anti-social behaviour and disturbances and the Corner Room. This is often difficult to establish but given the presence of other establishments in the area including the licensed premises, it would be unfair to put the blame on the Corner Room patrons without more evidence.
- The intention of Parliament by its 2006 amendments to the Act has been to introduce and promote small bar licences for the responsible consumption of liquor. In the first reading speech Minister McGowan observed (*Hansard, 20 September, 2006, page 6341*);

“The Bill creates a small bar licence. The small bar licence will be restricted to venues that accommodate no more than 120 persons, and they will be prohibited from selling packaged liquor. Small bars will operate the same trading hours as taverns, and restaurants will be provided with more flexibility to serve liquor without a meal. Restaurant licences will be able to apply for a permit to allow 100 per cent of the available seating capacity of the restaurant to be used for the consumption of liquor without a meal. The maximum permit hours will be the same as those for taverns. The reform does not mean that restaurants can trade as bars. The permits will be conditional so as to maintain the purpose of a restaurant as intended by the Act; that is the service of meals.”

- The City of Fremantle has fully supported the application through its various processes including its Town Planning Scheme.
- The respondent has made a genuine attempt to take notice of the objections and is aware of the issues that can arise through excessive consumption of alcohol.

Whilst the objectors do raise issues of concern to them these must be weighed and balanced against the overall public good of this proposed facility.

19 An examination of the submissions made by the Commissioner of Police particularly in respect of alcohol related harm and outlet density and its impact in the area requires careful consideration. Whilst the information provided is general in nature there has been some harm in the area that can be ascribed to alcohol use. In *Executive Director*

of Health v Lily Creek International Pty Ltd (2000) 22 WAR 510 at 515, Ipp J held that "it was necessary to undertake a weighing and balancing exercise with the various objects of the Act. While harm minimisation was a primary object it was significant that the object was to minimise harm or ill-health, not to prevent harm or ill-health absolutely. The word 'minimise' is consistent with the need to weigh and balance all of the relevant considerations."

20 The Commission notes that the subject application is for a grant of a small bar licence in a busy entertainment area. It is pertinent to observe the comments made by the Commission in *Russell Patterson v Dale Jeffrey Harris*, licensee of Guildford Indoor Sports (LC28/2010),

"The Commission accepts that the noise level at and around the time the majority of the participants leave the Centre due to voices and vehicles causes a disturbance but could not conclude it was undue. McHenry (1987) 4SR (WA) 31-58 is authority for the principle that quiet must be "unduly disturbed". This requires in its ordinary and natural meaning the interruption of a person's peace in the usual enjoyment of his property. The word must also be qualified by the nature of the neighbourhood; thus in a quiet neighbourhood disturbance might be undue which was not so in a more noisy neighbourhood. (If one resides in the vicinity of a hotel one must, however, expect some disturbance.)"

21 Section 5(1)(b) of the Act provides that a primary object of the Act is to minimise harm or ill-health caused to people due to the use of liquor. This matter has been raised by the applicants primarily in relation to their son and the smoke coming from the alfresco pavement area of the Corner Room aggravating his asthma. There is contention about the distance but there is possibly 15 metres separation from the alfresco area and the applicants' residence and it would appear there are precautions the applicants can take. In any event this objection no longer carries any significant relevance with the applicant moving out of the neighbourhood.

22 Ultimately, in weighing and balancing the various positive and negative aspects of this application, in particular the conditions imposed on the licence, the Commission is of the view that the grant of this application is in public interest.

23 Accordingly the Commission determines that the decision of the Director is affirmed and the application for review is dismissed.



JIM FREEMANTLE
CHAIRPERSON