

**Liquor Commission of Western Australia  
(Liquor Control Act 1988)**

**Applicant:** Alison Fraser and Jacob Slavin

**Respondent:** W1 Hospitality Pty Ltd  
*(represented by Tim Monaghan of Monaghan Lawyers)*

**Objectors:** Michael Sumich  
Alison MacGuire and Stuart Kay  
Vanessa Frzop  
Anthony Smithson and Lisa James  
Denise Sumich  
Izabela Blaszkiewicz and Karol Blaszkiewicz

**Commission:** Mr Eddie Watling (Deputy Chairman)  
Ms Emma Power (Member)  
Dr Eric Isaachsen (Member)

**Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of a decision by the delegate of the Director of Liquor Licensing to grant an application for a hotel licence.

**Premises:** Warders Hotel, 19-29 Henderson Street, Fremantle

**Date of Determination:  
(on papers)** 7 August 2018

**Determination** The application is dismissed and the decision of the delegate of the Director is affirmed.

**Authorities referred to in Determination:**

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *O'Sullivan v Farrer* [1989] HCA 61
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Busswater Pty Ltd v Director of Liquor Licensing* (LC17/2010)
- *Woolworths Ltd v Director of Liquor Licensing and Other* (LC43/2011)
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC16/2015)
- *Re McHenry* [1987] 4 SR (WA) 31
- *OSB Operations Pty Ltd v Jansen & Anor* [2006] WASCA 270

## **Background**

- 1 On 3 October 2017 W1 Hospitality Pty Ltd (“the respondent”) lodged an application pursuant to sections 41(4), 62 and 68 of *the Liquor Control Act 1988* (“the Act”) for the conditional grant of a hotel licence (“the Licence”) in respect to the premises to be known as Warders Hotel, 19-29 Henderson Street, Fremantle (“the Premises”).
- 2 The respondent complied with the statutory requirements prescribed by the Act and lodged a Public Interest Assessment (“PIA”) in support of the grant of the Licence. The application was advertised in accordance with instructions issued by the Licensing Authority.
- 3 A number of notices of objection to the application were lodged by the applicant and the objectors listed in this application.
- 4 The Commissioner of Police (“the Commissioner”) lodged a notice of intervention. Following consultation between the respondent and the Commissioner certain trading conditions were agreed to be attached to the licence.
- 5 The application was determined by the delegate of the Director of Liquor Licensing (“the Director”) with the Director approving the grant of a licence pursuant to certain conditions.
- 6 The reasons for such decision were published on 26 March 2018 (Decision A000247503).
- 7 Pursuant to section 25 of the Act, Alison Fraser and Jacob Slavin (“the applicant”) have applied for a review of the decision of the Director.

## **Submissions on behalf of the applicant**

- 8 In the original objection the applicant objected to the grant of the licence pursuant to section 74(1)(g)(i). However, in subsequent responsive submissions further objections pursuant to section 74(1)(a) and section 74(1)(j) and 74(1)(g)(ii) have been raised.
- 9 The applicant resides at 17 Henderson Street, Fremantle, being located in close proximity to the Premises as well as being immediately adjacent to the Fremantle Markets.
- 10 Specifically, the applicant has made the following arguments:
  - a. an entry point to the proposed Premises is only 4.55 metres from the property containing their residential premises and 8 metres from the back door;
  - b. many components of their residence are heritage listed and cannot be altered to reduce noise impact;

- c. the area is already subject to lots of congestion (especially during Fremantle Markets trading hours) and the grant of the licence will:
  - i. create further crowding;
  - ii. make access to their property more difficult; and
  - iii. create constant disturbance and inconvenience due to the trading hours.
- d. the respondent's primary intent is to sell liquor, not conduct a hotel business;
- e. the possible noise impacts during private or special events are likely to be excessive;
- f. there are already a large number of licenced premises offering a huge variety of drinking/dining/entertainment and function options within 500 metres of the Premises;
- g. the Premises would add to the crime, noise nuisance, and anti-social behaviour already present in the area;
- h. the laneway close to the applicant's residence will encourage intoxicated people to loiter and create noise, especially when exiting the Premises;
- i. the large patron capacity and lack of patron parking is likely to attract more pedestrian traffic in to the nearby carpark as well as create more litter, vandalism, drink walking and other pollution; and
- j. the positioning of the designated smoking area means it is likely that smokers will loiter in the laneway near the residence creating smoke and litter.

11 In its application for review, the applicant further argued:

- a. it is unlikely that the Premises provide any meaningful addition to hotel services or tourism due to its small size;
- b. the layout of the Premises means it will have no link with the historic building;
- c. the respondent has provided no evidence that tourists will regularly purchase liquor from the Premises;
- d. there are no really local (Fremantle) wines available;
- e. the applicant and the objectors were not included in any consultation process;
- f. the application should be for a restaurant licence only;
- g. noise emissions from the hotel/café/Apertivo bar portion of the Premises have not been assessed and the existing noise assessment does not take into account relevant changes to the interior design;

- h. deliveries may occur in Market Lane and create additional disturbances;
  - i. the existing residential use of the Warders Cottages is highly relevant;
  - j. the existing noise level in the area is already excessive and will be exacerbated by the Premises;
  - k. the survey undertaken by the respondent is flawed and of limited value; and
  - l. the witness letters of support should be given little weight.
- 12 Pursuant to the application for review the applicant reiterated some of its earlier arguments and also specifically objected to the Director's decision on the following basis:
- a. the Director made his decision on the basis of an incorrect opinion that the area the Premises is located in is an "entertainment precinct"; and
  - b. it is a fact that Henderson Street is often quiet and has been residential for over 160 years.
- 13 In addition, the applicant maintains that:
- a. the application for the licence and a number of surveys are fatally flawed due to an error of the address of the Premises; and
  - b. the respondent's submission regarding the review should be discounted as they were received after the end of the business day on the due date.

### **Submissions on behalf of the respondent**

- 14 In its PIA and original submissions, the respondent submits that the Licence is in the public interest and should be granted due to the following factors:
- a. the respondent is an experienced and responsible licensee;
  - b. the unique characteristics of the Premises and quality of the service will create a hospitality venue that is truly unique and of a world class standard;
  - c. the redevelopment of the Premises will conserve the heritage aspects of the site and facilitate significant heritage restoration;
  - d. the Premises will offer a premium service with a full range of facilities and services expected by contemporary consumers;
  - e. none of the current licensed venue in the locality is capable of providing the range and quality of liquor and related services as the Premises;
  - f. the Aperitivo Café/Bar and Garden Bar Restaurant will provide essential ancillary services to lodgers;

- g. packaged liquor will be sold only to hotel lodgers and will allow such tourists to take home local wines as a memory of their vacation;
- h. the Premises will be in a relatively low risk category in terms of safety and security;
- i. the locality is a “destination precinct” and one of the State’s key tourism precincts with the Premises being part of the unprecedented development, investment and renewal in the area;
- j. the grant of the Licence will enhance tourism by creating a tourist destination with special heritage character that offers attractive hospitality services;
- k. it is anticipated patrons will be comprised of a significant proportion of tourists and will also accommodate a broad range of ages as well as family groups;
- l. the grant of the Licence would be consistent with the broad strategies and aims of the City of Fremantle;
- m. the grant of the Licence will improve “liveability” in the area;
- n. the possible harm and ill health to the community will be mitigated by the location and design of the Premises and being a member of the Fremantle Liquor Accord and the Premises will not sell or supply liquor for consumption off the Premises;
- o. the intended patron profile is considered low risk;
- p. the venue will cater to the requirements of consumers for liquor and related services with regard to the proper development of the tourism industry by:
  - i. providing high quality premises and services and a safe, well controlled environment;
  - ii. incorporating heritage buildings located in a recognised and developing tourist precinct; and
  - iii. being consistent with tourism and heritage objectives of the State;
- q. the grant of the Licence will positively contribute to the amenity of the Locality;
- r. consumers (both locals and other visitors) have a requirement for the Premises, range of liquor and services proposed to be provided;
- s. the evidence provided supports a conclusion that, assessed against the existing level of harm, no significant level of harm will be likely to be caused by the grant of the Licence;
- t. the grant of the Licence is unlikely to cause annoyance, disturbance and inconvenience to persons in the Locality; and

- u. there are significant positive aspects to the development of the Premises should the Licence be granted.
- 15 In addition, the respondent maintains its evidence is persuasive and of a high standard and, further, that the applicant and objectors provide little or no relevant evidence to support their objections and assertions.

### **Submissions on behalf of the Objectors**

- 16 Seven (7) objections were received (from 11 individual objectors listed above) to the respondent's original application, on various grounds under the Act.
- 17 All the persons making an objection own or reside in the heritage cottages situated in close proximity to the Premises.
- 18 The objector's specific objections substantially reflect the applicant's arguments and are not further set out here.

### **Legal and Statutory Framework**

- 19 The Commission is not required to find error on the part of the Director, but rather undertakes a full review and makes a determination on the basis of the same materials as before the Director when the decision was made pursuant to section 25(2)(c) of the Act (*Hancock v Executive Director of Public Health* [2008] WASC 224 (54)).
- 20 On a review under section 25 of the Act, the Commission may:
- a. affirm, vary or quash the decision subject to the review; and
  - b. 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; and
  - c. give directions –
    - i. as to any question of law, reviewed; or
    - ii. to the Director, to which effect shall be given; and
  - d. make any incidental or ancillary order.
- 21 Section 16 of the Act prescribes that the Commission:
- a. may make its determinations on the balance of probabilities [sub section(1(b)(ii))]; and
  - b. is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the Licensing Authority adopts those rules, practices or procedures or the regulations make them apply [subsection (7)(a)]; and

- c. is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms [subsection (7)(b)].
- 22 In addition, the Director is obliged to comply with the requirements of procedural fairness when exercising the powers conferred by the Act (*Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356).
- 23 Section 38(2) of the Act requires an applicant to satisfy the Commission that the granting of an application is in the public interest. The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer* [1989] HCA 61).
- 24 The factual matters which the Commission is required to take into account in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act as set out in section 5(1) and 5(2) of the Act.
- 25 The factual matters which the Commission may take into account in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act.
- 26 The approach that the Commission must adopt in its determination of the relevance of harm and ill-health to an application is set out in a decision by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208. Based on that decision the Commission is required to:
  - a. make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
  - b. make findings about the likely degree of harm to result from the grant of the application;
  - c. assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
  - d. weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether it is in the public interest to grant the application.

### **Relevant Issues**

- 27 The Commission has undertaken a full review and now makes a determination on the basis of the same materials that were before the Director when the decision was made. This is the correct and established procedure as referred to in *Hancock (supra)*.
- 28 Therefore, relevant questions to be considered are whether:
  - a. the evidence provided by the respondent satisfies the Licensing Authority that the grant of the application is in the public interest; and



- b. the evidence provided by the applicant and objectors validly establishes an objection to the grant of the application.
- 29 Section 38(2) of the Act requires the respondent to satisfy the Licensing Authority that granting the application is in the public interest.
- 30 Section 73(10) of the Act also requires that any objector must make out the validity of their objections.
- 31 It is within the Commission's discretion to decide what weight to give to certain evidence.
- 32 The evidence provided by either party must be "relevant, reliable, and logically probative to assist the decision maker in assessing the probability of the existence of the facts asserted in each case" [*Busswater Pty Ltd v Director of Liquor Licensing* (LC17/2010)].
- 33 Whether evidence is relevant and probative depends not on the intrinsic qualities of the evidence but on what the evidence is said to prove (*Woolworths Ltd v Director of Liquor Licensing and Other* (LC43/2011)).
- 34 Mere assertions or opinions are not enough and must be supported by appropriate evidence (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others* (LC16/2015)).

#### **Address Error and time for service**

- 35 After review of the various documentation provided during the advertising process (including electronic versions) and the comments relating to the error as to the address provided by the applicant and the respondent, the Commission is satisfied that the original advertising undertaken by the respondent is satisfactory. This is on the basis that:
- a. except for the written address in the application Form 2 and the consumer surveys undertaken by LBMC, all references to the Premises and diagrams/plans of the same are accurate and correct;
  - b. all public notices and advertising templates refer to "19 Henderson Street" and it is generally understood by the public that a premises with multiple lot numbers may refer to itself by only one of those numbers;
  - c. all public notices were in approved form;
  - d. the error appears to be simply a mistake with no intention to mislead;
  - e. no other parties or objectors appear to have been confused by this error; and
  - f. this error was not raised in the applicant's original objections.

36 As to the issue raised regarding time of service, the relevant submissions by the respondent was served on the applicant by 8.17 pm on the day the same were due. The Commission does not consider that a delay of a mere 3 hours and 17 minutes has unduly prejudiced either party and, as such, all such submissions are accepted.

### **Public Interest**

37 The expression “the public interest” imports a discretionary value judgment, confined only by the scope and purposes of the statute *Carnegies Realty Pty Ltd (supra)*

38 In considering the public interest the Commission is obliged to take into account the public interest in:

a. catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and

b. facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

39 The applicant has provided substantial submissions that to permit the licence would be in the public interest due to the reasons summarised in paragraph 14 above.

40 The expert statement by Mr M Papadoulis of Icon Tourism, the support of the City of Fremantle and the letter of support provided by the Tourism Council of Western Australia (combined with the location and nature of the Premises) clearly indicate that tourism in the area would be positively contributed to by the grant of the Licence.

41 The various letters of support indicate significant approval and support from local persons and businesses and regular visitors to Fremantle for the development of the Premises and grant of the Licence. Further, these demonstrate a requirement by consumers for the grant of the Licence.

42 The respondent has also satisfied the City of Fremantle that the development is appropriate for the historic site and, further, the development will be in accordance with the Conservation Management Plan by the Heritage Council of Western Australia for the site.

43 Each of these factors support an assessment that, on the balance of probabilities, the grant of the Licence would aid the proper development of the liquor and tourism industries in the State.

44 The applicants and objectors make various arguments that any the grant of the Licence will not provide any meaningful addition to hotel services, tourism or cruise ships. However, neither the applicant nor the objectors have provided any evidence to support this contention other than assertions.

- 45 Balancing the evidence supplied by the respondent and the applicant/objectors, the Commission finds that the applicant has discharged its onus to show that the application would be in the public interest.

**Health and Impact on Amenity and Offence, Annoyance, Disturbance or Inconvenience Caused**

- 46 The indications as to the current degree of ill health, offence, annoyance, disturbance or inconvenience caused by the Premises is contained in the various statements provided by the respondent in its PIA and are also evidenced by the objector's personal statements as to their experiences.

- 47 It is accepted by the Commission that some "at risk groups" are currently present in the locality and that there is a certain level of existing alcohol related harm or ill health.

- 48 Using the test set out in *Carnegies Realty Pty Ltd (supra)* the Commission:

- a. finds that, the current level of offence, annoyance, disturbance or inconvenience (or "harm") caused is currently not "undue" when considered in all the relevant circumstances including:
  - i. that the Premises is situated in what is substantially a "destination" location; and
  - ii. the policies and initiatives of the City of Fremantle to deal with at risk persons and alcohol related ill health;
- b. finds that the likely degree of additional harm to result from the grant of the application is minimal taking into account:
  - i. the location and design of the Premises as well as the proposed method of operation and service of alcohol;
  - ii. the proposed patron profile of the Premises;
  - iii. the fact that development of the Premises is broadly consistent with the strategies and aims of the City of Fremantle; and
  - iv. the fact the applicant and objectors have not provided any persuasive evidence to the contrary;
- c. assesses the likely degree of harm to result from the grant of the Licence to be only slightly increased as compared against the existing degree of harm; and
- d. considers that the grant of the licence is in the public interest when weighing the likely degree of harm together with the other relevant factors.

- 49 Therefore, the primary remaining objection to be decided is whether the grant of the Licence is likely to cause undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity.
- 50 It is clear from case law that what is “undue” has to be determined and qualified according to the nature of the neighbourhood, so that what might constitute “undue” noise in one neighbourhood may not constitute undue noise in another (*Re McHenry [1987] 4 SR (WA) 31, Sharkey J.*)”
- 51 Further, any disturbance or harm must “be regarded by a reasonable person as “undue”, having regard for all the relevant circumstances and taking into account what might reasonably be expected from premises of the kind licensed” and not based on the “subjective sensibilities of its immediate neighbours” (*OSB Operations Pty Ltd v Jansen & Anor [2006] WASCA 27*).
- 52 Therefore, in relation to considering the possible loss of amenity or harm caused to the locality, the Commission must consider what a reasonable person deems is “undue” and must weigh the evidence before it.
- 53 In this case, the relevant factors considered are:
- a. the nature of the locality is mixed residential and commercial;
  - b. that the locality is established as an entertainment precinct with other existing venues located within close proximity of the Premises;
  - c. that the applicant and the objectors have all elected to reside in an area which is notoriously known for substantial activity (from tourists and local visitors) and, at least in some cases, would have had direct notice of the likelihood of such activity; and
  - d. the statements and evidence provided by the respondent balanced with the objections made by the applicant and the objectors.
- 54 In addition, the Commission is of the view that the voluntary commitments agreed to by the respondent as to the closure of the Market Street entrance to the Premises in certain circumstances, limitations of music volume and location of designated smoking areas is indicative of the licensee endeavouring to arrive at a balance between the interests of the business on the one hand and any possible undue offence, annoyance, disturbance and inconvenience to the neighbourhood (and particularly the applicants and objectors) on the other.
- 55 It is further noted that the Commissioner discontinued his intervention after having been satisfied that the conditions agreed to be attached to the licence, were appropriate to minimise the possible resulting public disorder or disturbance.
- 56 The applicant’s argument that the area is not an entertainment precinct is clearly flawed in nature. It is treated as such by both the Local and State Governments. The fact there are residences located within the area does not preclude this classification.

- 57 The applicant and the objectors have not presented convincing evidence that persuades the Commission to ignore the existing nature of the locality as a vibrant entertainment precinct or that reliably indicates that the nature of the patrons or activities operated in the Premises will unduly impact on the applicant, objectors or other persons residing within the locality.
- 58 The mere assertion of possible future concerns by the applicant and objectors are not enough to discharge the objectors' onus pursuant to the Act. All assertions must be supported by appropriate evidence (*Australian Leisure and Hospitality Group Pty Ltd (supra)*).
- 59 As such, after weighing the relevant factors and evidence, the Commission finds that, on the balance of probabilities, the grant of the Licence will not create undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity.
- 60 It is further noted that there have been arguments raised by the applicant and objectors that are not relevant to the issue of liquor licensing, such as zoning and town planning and possible alternative uses for the Premises. Such issues are simply not within the scope of the grounds for objection specified by the Act and cannot be considered by the Commission.
- 61 In addition, the arguments and opinions as to alternative types of liquor licence that the respondent should apply for are misconceived and not supported by any evidence.
- 62 Given the above conclusions based on the evidence and arguments provided, the Commission finds that the applicant and objectors have not (either separately or cumulatively) made out the validity of their objections as required under section 73(10) of the Act.

### **Final Determination**

- 63 The application is refused.
- 64 The decision of the Director and all conditions of the Licence are affirmed.



---

**EDDIE WATLING**  
**DEPUTY CHAIRMAN**