

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Penzance Pty Ltd
*(represented by Mr John Prior instructed by
Mr Peter Fraser of Dwyer Durack Lawyers)*

Intervenors: Director of Liquor Licensing

Executive Director of Public Health
*(both represented by Mr John Carroll of State
Solicitor's Office)*

Commission: Mr Eddie Watling (Acting Chairperson)
Mr Alex Zilkens (Member)
Dr Eric Isaachsen (Member)

Matter: Application for review of a decision by the
Director of Liquor Licensing pursuant to
section 25 of the *Liquor Control Act 1988*.

Premises: Beer Works Tavern
161 James Street
Northbridge

Date of Hearing: 3 September 2014

Date of Determination: 10 November 2014

Determination: The application for an extended trading permit
is conditionally granted for a period of five
years from the date of this determination
subject to the conditions imposed on permit
number 31723.

Authorities referred to in the determination:

- *Kordister Pty Ltd v Director of Liquor Licensing* [2012] VSCA 325
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258

Background

- 1 On 13 May 2013, Penzance Pty Ltd (“the applicant”) applied to the Director of Liquor Licensing (“the Director”) for an Extended Trading Permit (“ETP”) in respect of premises known as Beer Works Tavern at 161 James Street, Northbridge to permit trading on Friday and Saturday from 12 midnight until 2 am the following morning.
- 2 The premises have previously been subject to an ETP (31723) authorising trading on Friday and Saturday from 12 midnight until 2am. This ETP had been in effect from August 2008 until 12 September 2013, albeit that the venue has been closed since December 2008 for redevelopment.
- 3 The Executive Director of Public Health (“EDPH”) lodged a notice of intervention on 19 August 2013 pursuant to section 69(8a)(b) of the *Liquor Control Act 1988* (“the Act”).
- 4 On 30 May 2014, the Director refused the application (decision A223098) and on 27 June 2014 the applicant lodged an application for review of that decision with the Liquor Commission (“the Commission”) pursuant to section 25 of the Act.
- 5 On 14 July 2014, the Director intervened in the review proceedings pursuant to section 69(11) of the Act.
- 6 During August 2014 the applicant and both interveners each lodged their submissions and responsive submissions.
- 7 A hearing of the matter was convened on 3 September 2014.

Submissions on behalf of the applicant

- 8 The applicant made comprehensive submissions on the applicable law with a number of these referenced in the later section of the determination.
- 9 It was submitted that in effect the application is for the “renewal” of an existing ETP which was first granted to the applicant in December 2002 and which has previously been renewed on a number of occasions without interruption.
- 10 The grounds for review are that the director fell into error by:
 - i) failing to properly consider and identify the lack of connection between evidence of existing harm and ill-health in the locality and the liquor and related services contemplated by the application;
 - ii) failing to properly consider and identify the lack of a connection between general research and statistics relating to alcohol related harm and ill-health and the liquor and related circumstances contemplated by the

application;

- iii) failing to adequately consider the evidence of consumer requirement;
- iv) finding that in the absence of a “recent trading history he was unable to conclude that this application will not contribute to the prevailing issues of ... alcohol related violence and harm in the locality to an unacceptable degree”;
- v) failing to consider whether conditions attached to the licence and the ETP would satisfactorily mitigate against perceived harm (including the conditions expressly suggested by the applicant and the intervener).

11 Evidence on behalf of the applicant establishes that:

- a) the applicant has undertaken significant renovations and improvements to the tavern (estimated cost \$1.75m - \$2m);
- b) the applicant is an extremely experienced and responsible licensee;
- c) the applicant intends to operate the tavern with comprehensive management controls in place, adequate security and significant responsible service of alcohol practices and procedures.

12 It was submitted that there is significant public interest in the grant of the application as established by evidence including:

- a) 34 consumer surveys which were filed;
- b) 284 surveys conducted by Survey Master;
- c) 2 additional detailed witness statements from the intended demographic of patrons over the age of 25;
- d) 3 letters of support;
- e) comprehensive statement of William Oddy, a very experienced member of the liquor industry.

13 The population likely to patronise the premises during extended trading hours covers a broad range of ages (with no focus on young adults) and does not comprise any recognised ‘at risk’ group including young adults.

14 The applicant volunteered the imposition upon its licence such conditions being identical to those imposed on the existing ETP in relation to:

- a) seating and food availability;
- b) crowd controllers;

- c) video surveillance;
- d) from 1:00am until close of trade, restrictions on the volume and character of alcohol containing beverages;
- e) from 12:00 midnight, no sale or supply of beverages that would encourage rapid consumption of liquor;
- f) from 12:00 midnight no liquor is to be supplied mixed with energy drinks.

It was submitted that these conditions would mitigate against any increase in the levels of harm or ill health being experienced within the locality due to the consumption of liquor.

- 15 The applicant noted that mention had been made of the absence of "...any recent trading history" in the Director's reasons. It was submitted that there is no requirement under the Act for an applicant to submit evidence of recent trading history before making an application under the Act, and there is no written policy of the Director that an ETP can only be granted to a venue that has been trading for a period of time.
- 16 In the case of new licences where there is no possibility of an applicant submitting evidence of a trading history, the licensing authority does make conclusions regarding the likely future conduct of a licence based upon evidence such as the:
- a) experience and professionalism of the applicant;
 - b) intended manner of operation;
 - c) likely level of control based on evidence of intended management policies and procedures;
 - d) likely efficacy of RSA practices;
 - e) provision of security measures and engagement of licensed crowd control officers;
 - f) likely demographic of patrons attracted to the venue.
- 17 In the present case, the applicant has submitted significant evidence establishing its credentials as an experienced operator in the liquor industry and the premises enjoyed an ETP until 2:00am on the evenings in question from December 2002 until 2008.
- 18 Therefore, the applicant is not a 'new entrant' to the liquor industry, nor is there a lack of history with respect to the applicant trading at the present location until 2:00am on Friday and Saturday evenings.

- 19 It is submitted that more than adequate evidence was provided to the licensing authority of the proposed manner of trade such that it would be possible in the first instance to determine whether or not there was a risk of harm or ill health occurring in the event that that the present application was granted.
- 20 The applicant addressed the EDPH intervention through the adoption of the method of analysis outlined in the decision of the Victorian Supreme Court in the matter of *Kordister Pty Ltd v Director of Liquor Licensing and Anor [2012] VSCA 325* and the three categories of evidence referred to in that case:
- a) Specific incidents;
 - b) Locality evidence;
 - c) General evidence.
- 21 In relation to *specific incidents* there was no reliance on actual specific or causally linked incidents to the applicant's venue.
- 22 In relation to *locality evidence* it is not possible to determine from the statistics provided by the EDPH what percentage of alcohol related assaults are domestic and what percentage are non-domestic. Nor can it be determined whether or not those incidents deemed to be alcohol related, involved individuals who had been socialising on licensed premises or had obtained their alcohol from takeaway sources and consumed it elsewhere.
- 23 In addition, the wide definition of "alcohol related" adds to the difficulty of determining the extent to which alcohol related offences relate to consumption on licensed premises, nor is there disclosure of the characteristics of the offenders. In the absence of the latter information it is not possible to discern whether or not offenders were likely to patronise the applicant's premises.
- 24 It was submitted that data on drink-driving in the locality did not provide detail which would be applicable when determining the harm or ill-health that may be caused by a specific venue trading beyond 12:00 midnight within Northbridge.
- 25 In relation to the general evidence, the EDPH cited reports linking alcohol sales and ETPs; linking ETPs and the level of assaults; linking late night trading and rates of crime and violence; and linking the consumption of alcohol generally and the commission of crimes of violence.
- 26 In the view of the applicant none of these are recent studies and none have a demonstrated connection to the locality relevant to the present case, nor to the particular circumstances of this application. The premises under study, in several instances, traded until 3:00am and beyond; were not the subject of restrictive conditions designed to mitigate risk; and some WA studies pre-dated the 2006 amendments to the Act dealing with staff training and employment practices.

- 27 Due to these factors, the research relied upon by the EDPH is not applicable to the circumstances of the present application and should be afforded little weight.
- 28 The applicant has already proposed a number of conditions which would substantially mitigate any risk associated with issues raised by the interveners.
- 29 The applicant is seeking an additional 4 hours of trade spread over two evenings per week where the normal permitted hours of a tavern allow for 118 hours of trade per week.
- 30 In balancing the competing considerations, the application should be granted in the terms sought in the public interest.
- 31 If the Commission concludes that there is a risk of harm, the conditions proposed by the applicant adequately address and mitigate those risks.

Submissions on behalf of the Director of Liquor Licensing

- 32 The Director's original decision was supported by the evidence before him (the same evidence being that before the Commission by virtue of the provisions of section 25 of the Act). The Director's reasoning was sound and it is open to the Commission to adopt the same reasoning and reach the same conclusion as the Director.
- 33 There are existing levels of alcohol related harm and ill-health in Northbridge that are concerning and the re-introduction of up to 450 people will have an unknown impact. In the circumstance that the premises have not traded since 2008 the Director was not able to be satisfied that the grant of the ETP would not contribute to the existing alcohol related violence and harm in Northbridge to an unacceptable degree.
- 34 The EDPH provided evidence that
 - a) there were 463 assaults in the suburb of Northbridge for the period 1 June 2012 and 30 June 2013;
 - b) of those 463,290 (63%) overall were recorded as alcohol related;
 - c) 153 (33%) of the assaults occurred between 12.00midnight and 2.00am with 103 (67%) recorded as being alcohol related;
 - d) of these 103 alcohol related incidents, 63 were recorded as occurring on a Friday or Saturday night;
 - e) there are a significant number of drink driving offences being committed where the locality of the last drink was identified as Northbridge.

- 35 The Director also noted that crime and anti-social behaviour in Northbridge being at concerning levels is a fact that has been acknowledged by both the Director and the Commission in various decisions.
- 36 The applicant had submitted that the alcohol related harm and ill health were not at an unacceptable level and that the fact that the levels had been decreasing in the last few years meant that such levels were not at an unacceptable level. The Director submits that simply because the levels have decreased is not a basis for a conclusion that the current level is acceptable.
- 37 The Director submitted that what is acceptable or not requires an objective assessment of the seriousness of the given level of harm in conjunction with the Commission's assessment of whether that level is in line with, or exceeds community expectations. Based on the evidence it is open to find that Northbridge is an area experiencing a high level of alcohol related harm and ill health.
- 38 It was submitted that it was implicit in the Director's recitation of the evidence, read in conjunction with the findings that were expressly made, that the Director found that the application was likely to increase the level of alcohol related harm in Northbridge.
- 39 Although the Director expressed his conclusion in terms of the failure of the applicant to satisfy him that the grant of the application will not contribute to the existing levels of harm or ill-health due to the consumption of liquor, it is apparent from the context of the decision that this is simply infelicitous phrasing, rather than error.
- 40 The Director submits that it is appropriate to take into account the fact that the premises is not currently trading nor has it operated since 2008. The Commission has previously considered the existing manner of trade, operation and management of licensed premises to be relevant when determining whether to grant an ETP.
- 41 If the ETP were to be granted, the effect would be a reintroduction of approximately 450 people into Northbridge at times (of the day and week) when harm and ill-health are at their peak. This application differs from the usual renewal process where an applicant is already trading and patrons from their premises are already included in the data.
- 42 In the current application, the ETP is sought in an area where there are already concerning levels of alcohol related harm and ill health. In these circumstances it is presumed that an applicant will usually need to demonstrate that it is a well managed facility with procedures to reduce or mitigate the potential impact that the premises may have on existing levels of harm.
- 43 Whilst the applicant provided evidence and submissions relating to its previous management of the premises, and its management of other licensed facilities,

the Director found that these factors were insufficient to counterbalance the significant levels of harm and ill health that already exist.

Submissions on behalf of the Executive Director of Public Health

44 It was submitted that:

- i) there is already a significant level of alcohol related harm and ill health in Northbridge, particularly during the extended hours sought in the application;
- ii) there is a risk that the grant will increase the already high levels of alcohol related harm and ill-health in Northbridge;
- iii) there is a risk that the reintroduction of approximately 450 people into Northbridge will further increase the already high levels of alcohol related harm and ill-health in that locality. In those circumstances it would be appropriate for the applicant to first demonstrate a trading history in order for the licensing authority to better assess the possible impact of the ETP.

45 A body of statistical evidence concerning alcohol related assaults and drink driving offences was submitted in support of the propositions.

46 It was submitted that the applicant's criticism of the data provided by the EDPH was improperly conceived in its focus on whether or not levels of harm are on the decline. Attention should be drawn to what the current levels of harm are, and, whether the grant of the ETP will create an unacceptable risk of higher levels of such harm and ill-health.

47 It was submitted that academic research particularly work of Catalano Stockwell and Chikritzhs in relation to Western Australia that demonstrates:

- a) levels of wholesale alcohol purchases surged among hotels granted ETPs;
- b) there is a strong link between extended trading hours and alcohol-related harm.

48 Alcohol related assault data shows that there is a spike during the time that the applicant wishes to operate under its ETP.

49 The basis of the submission relying upon the evidence relating to drink-driving is that drink-driving and associated road trauma is a relevant harm and ill health consideration for the purposes of the Act. It is not broken down into days and times however the weight to be ascribed to the data is a matter for the Commission.

50 Attention was drawn to the petition aimed at demonstrating consumer

requirement for the ETP. It submitted that an inference can be drawn that a section of the petitioners were not partaking in the responsible consumption of alcohol at the time of signing the petition, and were likely already adversely affected by alcohol. If the petitioners were already exhibiting signs of irresponsible consumption of alcohol at 10.30 pm – 11.30 pm there is clearly a risk that increased consumption of alcohol from 12.00 am – 2.00am will increase the risk of alcohol related harm and ill health arising by virtue of the ETP.

- 51 In essence, it is submitted that in order to minimise alcohol related harm or ill health, it would be appropriate for the applicant to first demonstrate a trading history in order to better assess the possible impact of the ETP upon alcohol related harm and ill health in Northbridge.

Response on behalf of the applicant to the interveners' submissions

- 52 It was submitted that there is no basis for the proposition by the Director that when the Beer Works tavern reopens, up to 450 patrons will be “reintroduced” into Northbridge. Rather, in all likelihood, the vast majority, if not all, consumers who chose to patronise the applicant’s venue during the hours the subject of the present application, will be persons who habitually resort to Northbridge for their entertainment needs.
- 53 It was submitted that rather than a “reintroduction” of 450 patrons, it is more accurate to describe the proposed patronage at the applicant’s venue as a redistribution of patrons amongst licensed premises within Northbridge.
- 54 With regard to the Director’s reference to the lack of a recent trading history at the applicant’s venue, the applicant had an unblemished trading history between 2002 and 2008 when trading under the ETP which is the subject of the present “renewal” application.
- 55 The applicant, and in particular stakeholders of the applicant company, are very experienced licensees within Western Australia who have successfully managed numerous licensed premises within the locality.
- 56 With regard to the EDPH reference to the risk that extended trading hours may lead to increased alcohol-related harm and ill-health caused by drink driving, there is no evidence that would support a finding that persons who resort to Northbridge are currently “drink driving”. Therefore it is difficult to determine upon what basis an inference can be drawn that the grant of the present application “may lead to increased alcohol-related harm and ill-health caused by drink driving”.

Determination

- 57 Under section 25(2c) of the Act, when considering a review of the decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.

- 58 On a review under section 25 of the Act, the Commission may –
- a. *affirm, vary or quash the decision subject to the review;*
 - 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;*
 - 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.*
- 59 In conducting a review under section 25, the Commission is not constrained by a finding of error on part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials (refer *Hancock v Executive Director of Public Health [2008] WASC 224*).
- 60 Pursuant to section 38(2) of the Act, an application for the grant of a licence must satisfy the licensing authority that granting the application is in the public interest. 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.
- 61 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgement 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*).
- 62 The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142* where he said:

“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.

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.”

63 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities Ltd v Director of Liquor Licensing (1992) 7 WAR 241*). The primary objects of the Act are:

- a. *to regulate the sale, supply and consumption of liquor;*
- b. *to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and*
- c. *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.*

64 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".

65 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*).

66 By virtue of decision A223098 the Director refused the application for an ETP for the premises Beer Works in Northbridge.

67 In its public interest assessment and other submissions the applicant states that the premises have been closed since 2008 with a current plan to renovate to a high standard of design which would provide an environment aimed at attracting adults over the age of 25. The premises traded from 2002 – 2008 under an ETP which was extended to 2013 however the premises ceased trading in December 2008, albeit that the ETP remained in place until 12

September, 2013.

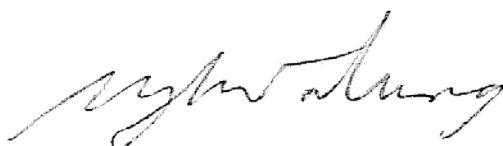
- 68 The harm and ill health data for Northbridge were analysed from the viewpoint of each party. It would be common ground that Northbridge experiences a level of harm and ill health related to alcohol which is of concern to the community and to the Commission. The degree to which current management strategies at venues, together with improved community and public education levels regarding alcohol consumption, are achieving the aim of reducing harm and ill health is debatable although the apparent trend towards reduction is encouraging.
- 69 It is not contested that in the Northbridge locality between 12.00 midnight and 2.00 am on Saturday and Sunday the levels of alcohol-related assaults by time of day are the highest recorded during the week. The applicant wishes to extend its normal hours of trade into these problematic times. It is contested that all these assaults can be attributed to licensed entertainment venues.
- 70 Submissions were received from all parties with respect to the potential impact of the maximum capacity of 450 patrons on the harm and ill health data in Northbridge. These ranged from propositions that the full capacity would be added to the current patron numbers in Northbridge between 12.00 midnight and 2.00am on two nights per week through to consideration that the outcome would be mainly re-distribution of current patrons of Northbridge.
- 71 It is common in entertainment precincts for there to be a flux in the popularity and number of premises operating as new ones open whilst others may close or undergo renovation and renewal. In the circumstances of this application the balance of probabilities is that the number of patrons in Northbridge is unlikely to be increased by a figure that is anywhere close to the 450 venue capacity on an ongoing basis.
- 72 The flux in popularity and number of premises will also influence the interpretation of harm and ill-health data. Premise specific data poses no difficulty with linking cause and effect whilst general data has limited application in evaluating whether or not an individual venue contributes to such harm data.
- 73 In the current application the absence of trading since December 2008 precludes assessment of the operation of the premises. It was submitted by the interveners that information relating to current trading was essential in assessing the application. The counter view was that the experience of the applicant coupled with the practices adopted at other premises currently operated by the applicant are available for scrutiny and that such information is relevant.
- 74 The applicant submits that continuation of the conditions on ETP number 31723 relating to premise setup, video surveillance, crowd controllers, service of liquor and a 30 minute lockout will mitigate the potential for harm.

- 75 In its evaluation of the application the Commission accepts that the premises will provide a late night entertainment venue which will benefit both the local population and tourists and meets the requirement of the objects of the Act set out at section 5(1)(c).
- 76 The extent to which the ETP sought might affect the degree of harm and ill-health due to alcohol in Northbridge is a necessary consideration. Whilst the data presented show that increased trading hours are associated with an increase in harm, the Commission is of the view that an increase in the venue trading hours as proposed in this ETP application, would not, in itself, contribute to a degree of harm and ill-health beyond that which currently exists in the locality.
- 77 The fact is that the venue has (subject to section 62(9) approval) a liquor licence to trade to 12 midnight on a Friday and Saturday night, therefore patrons attending the venue up until that time will already be in the Northbridge locality. Without the applied for ETP those patrons will be required to leave the premises at 12 midnight and it then becomes problematic as to how many will seek to migrate to other Northbridge venues or alternatively, will leave the locality. It would be expected that many would seek another venue option.
- 78 The migration factor has been a well-recognised contributor to anti-social behaviour, as patrons from different venues mingle in the street and in many instances, join queues for access to another venue.
- 79 Should the applicant be granted an ETP then there may be a more orderly dispersal of patrons from the venue over the 12 midnight to 2:00am period with a significant reduction in the need to migrate to other premises.
- 80 The Commission is of the view that this outcome is more preferable than having up to 450 patrons exiting the premises at midnight.
- 81 This then raises the question as to the lack of a recent trading history upon which an assessment can be made in relation to management capabilities and the existence of procedures being in place aimed at reducing or mitigating the potential impact that the premises will have on existing levels of alcohol related harm and ill-health within the locality.
- 82 In the normal course the Commission accepts that, whilst not provided for in the Act or the Director's policies, the granting of an ETP, where there is no trading history for the licensee, would generally not be in the public interest. However, on the basis of the circumstances of this application, where the applicant:
- a) is well experienced in operating licensed premises in the locality;
 - b) has operated for many years from the same venue under the same ETP authorisations and conditions now applied for (albeit that ETP 31723 has not been active from 2008 to present);

- c) proposes a manner of trade and the acceptance of conditions on the ETP that are considered by the Commission to be positive contributions to factors which can mitigate the potential harm and ill-health that may arise;

the Commission is of the view that in weighing the benefits against the likelihood of harm and ill health that the grant of the application may cause, the Commission finds that the public interest would be served by the grant of this application.

- 83 The decision of the Director refusing the application for the ETP is quashed and the application is conditionally granted for a period of five years from the date of this determination subject to the conditions imposed on permit number 31723.



EDDIE WATLING
ACTING CHAIRPERSON