

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Mr William Brooks
(assisted by Ms Rita Brooks, Director of The View on Hannans Motel)
- Respondents:** Mr Andrew Alcock and Ms Gail Alcock
- Commission:** Ms Helen Cogan (Presiding Member)
Dr Eric Isaachsen (Member)
Mr Alex Zilkens (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the delegate of the Director of Liquor Licensing to approve the grant of a restaurant licence for premises to be known as *Cecilia's on Hay*.
- Premises:** Cecilia's on Hay, situated at 179-181 Hay Street, Kalgoorlie.
- Date of Hearing:** 5 October 2015
- Date of Determination:** 19 November 2015
- Determination:** The application for review is refused.

Authorities referred to in the determination:

- *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
- *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing* [2010] WASC 345

Background

- 1 On 6 February 2015, Andrew Alcock and Gail Alcock (“the respondents”) lodged an application pursuant to sections 50 and 68 of the *Liquor Control Act 1988* (“the Act”), for the grant of a restaurant licence for premises to be known as “Cecilia’s on Hay” situated at 179-181 Hay Street, Kalgoorlie.
- 2 The restaurant complied with all statutory requirements and lodged the necessary and required documentation including a Public Interest Assessment (“PIA”).
- 3 The application was duly advertised in accordance with instructions issued by the Director of Liquor Licensing.
- 4 On 28 April 2015, a notice of objection was lodged by William Brooks (“the applicant”) who described himself as the Manager of the business known as “The View on Hannans”.
- 5 The delegate of the Director of Liquor Licensing (“the Director”) considered the application on the papers pursuant to sections 13 and 16 of the Act and determined to approve the application with the licence to be subject to conditions. The decision with reasons was published on 16 July 2015 (Decision A000057320).
- 6 On 31 July 2015, the applicant lodged an application pursuant to section 25 of the Act for review of the decision of the Director to approve the application and grant the restaurant licence.
- 7 A hearing before the Commission was held on 5 October 2015.

Grounds for review

- 8 The grounds for review stated by the applicant were:
 - (a) the Director failed to consider and take into account or alternatively attached insufficient weight to the impact on the amenity as submitted by the objector on 28 April 2015 e.g.
 - the at risk groups;
 - the location of the premises;

- the hours of operation;
 - the noise limitations have been insufficiently documented;
- (b) further, the application being objected to was incomplete and did not contain the necessary information required for the Director to be able to legally determine the application;
- (c) further, as a result of the application being incomplete, the objector has been denied procedural fairness in that it wasn't able to properly present its objection to the Director.
- 9 At the hearing on 5 October 2015, the applicant and the respondents made oral submissions and answered queries put by members of the Commission.

Submissions on behalf of the applicant

- 10 The applicant is seeking a review of the decision of the Director on the grounds set out in paragraph 8 above.
- 11 The applicant originally objected to the grant of the licence on the following grounds:
- (a) The applicant has failed to provide sufficient information to determine the impact of amenity within the locality. The Bega Aboriginal Health Centre is situated within 100 metres of 181 Hay Street.
- (b) The applicant has failed to provide the following details:
1. *The number of licensed outlets in the area as prescribed by the Department of Racing, Gaming & Liquor.*
 2. *The number of licensed premises to be used as a food outlet.*
 3. *The impact on the amenity as there are signs that prohibit children (at the front of 181 Hay Street).*
 4. *Which is the area to be used for children and patrons of the proposed licensed premises?*
 5. *The applicant has not addressed the Harm Minimisation.*
 6. *The applicant has not provided sufficient information that considers the potential impact on behaviour in public places around the location.*

7. *The PIA submitted by the applicant fails to acknowledge the number of at risk groups in the area.*
 8. *The PIA does not consider the impact and loss of amenity of the current business proposal to apply for a Restaurant Licence for 181 Hay Street. Guests at 181 Hay Street will impact the amenity of the Motel guests.*
 9. *It is not clear who the target clients will be at the Tapas Bar.*
 10. *The applicant does not demonstrate the positive aspects of their application including the economic and health impacts of the proposed Restaurant.*
 11. *The applicant has not provided sufficient information that the grant of the application is in the public interest.*
 12. *There is insufficient information provided in the PIA with regard to the type of food and beverage to be offered.*
- 12 At the same time as the notice of objection was lodged, the applicant lodged photographs and a newspaper article in relation to the application for the restaurant licence which documents concerned the former use of the premises (as a brothel) and nearby premises called “Wink” which operated as a massage parlour and following the hearing and with the Commission’s consent, the applicant lodged further photographs of the premises and their surrounds which relate more particularly to the car parking and signage issues.

Submissions on behalf of the respondents

- 13 The respondent’s PIA lodged on the Department of Racing, Gaming and Liquor Form 2A (as supplemented after it was lodged) contained details relating to:
- (a) the facilities and services to be provided by the proposed premises, i.e. restaurant serving alcohol;
 - (b) the proposed manner of trade i.e. serving evening meals and beverages;
 - (c) the client target base i.e. small groups and couples in the 30-60 age range;
 - (d) the particular theme or décor, i.e. Tapas meals;
 - (e) the reason why the grant of the licence would be in the public interest and how it would benefit the community – i.e. *“There are no venues that offer this type of food. We are offering a relaxed dining experience with good quality wines”;*

- (f) the House Management Policy, Harm Minimisation/Management Plan and Code of Conduct.

Determination

- 14 Section 25(2c) of the Act provides that when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 15 *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.*
- 16 In conducting a review under section 25, the Commission is not constrained by a finding of error on the 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*).
- 17 Section 38 of the Act provides that the onus is on the applicant for a licence to satisfy the licensing authority that the application is in the public interest and the following provisions of section 38 are particularly relevant:
 - (3) *for the purposes of subsection (2), the applicant must provide to the licensing authority –*
 - (a) *any prescribed document or information; and*
 - (b) *any other document or information reasonably required by the licensing authority for those purposes.*

- (4) *Without limiting subsection (2), the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include –*
- (a) *the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and*
 - (b) *the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and*
 - (c) *whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and*
 - (d) *any other prescribed matter.*
- 18 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.
- 19 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgment confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175 and *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241). The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 where he said:
- (i) *“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.*
 - (ii) *The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”*

- 20 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities Ltd supra*). The primary objects of the Act are:
- (a) to regulate the sale, supply and consumption of liquor; and
 - (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.
- 21 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”.*
- 22 The respondents seek to establish a restaurant in the ‘Tapas’ style offering a relaxed dining experience with good quality wine to meet the requirements of consumers in the 30-60 age range and the respondent has submitted that there are no other venues in Kalgoorlie offering this type of restaurant experience.
- 23 The respondents PIA and other documentation and submissions included letters of support from potential consumers and statements as to the lack of any negative impacts should the restaurant licence be granted.

- 24 The respondents have submitted probative evidence, including photographs, of the compliance with the requirements of the Inspector's Report on the premises.
- 25 The Commission notes that while the respondent's PIA was not as detailed as is perhaps usually the case in licence applications, generally licensed premises trading under a restaurant licence are considered to be 'low risk' premises, as the licensee of such premises is only authorised to sell and supply liquor for consumption on the licensed premises ancillary to a meal provided by the licensee and eaten there by customers. While that does not mean that the usual considerations do not apply, the material in support of such considerations does not necessarily have to be as extensive and comprehensive as may be the case in other classes of licence.
- 26 The Commission is of the view that the respondent has adequately dealt with the statutory matters required to be dealt with.
- 27 The Commission is satisfied on the basis of the evidence produced by the applicant that the applicant has not discharged the onus of establishing the validity of the applicant's objection, the only valid and relevant portions of which are the points made in relation to amenity of the area i.e. the Commission is not satisfied that, on the balance of probabilities and also as stated in the Director's decision, the grant of a restaurant licence for the premises would cause:
- (a) undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity of the proposed premises, would be likely to occur; or
 - (b) the amenity, quiet or good order of the locality of the proposed premises, would in some other manner be lessened.
- 28 The Commission considers that the applicant has provided no probative evidence that the applicant was not afforded procedural fairness in relation to the application for the grant of the licence.
- 29 The Commission is satisfied on the basis of the materials which were before the Director together with the materials submitted after the Director's decision was published and after the hearing (which materials the Commission considers constituted an 'expansion' of materials that were before the Director and may therefore be considered by the Commission – see Hall J in *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing* [2010] WASC 345 at paragraphs 34-44) that the respondent has

produced evidence sufficient to establish that the grant of the application for the restaurant licence is in the public interest and that any negative impacts of the application are sufficiently outweighed by the positive impacts.

30 The Commission is satisfied that the concerns which the applicant may have in relation to the operation of the premises will be met by the conditions imposed on the licence by the Director, by the conditions imposed by section 50(3) of the Act and by the facts that:

- the nearby premises formerly known as Wink Massage are no longer operating;
- the issues relating to parking for the premises do not pose a problem;
- the issues relating to signage on the premises have been or will be dealt with;
- the issues relating to noise do not pose a problem;
- the issues relating to 'at risk' groups do not pose a problem;
- the issues relating to the hours of operation do not pose a problem;
- the issues relating to the spa area (closed) and the fire door to the neighbouring premises (installed) have been dealt with.

31 In all the circumstances the Commission has determined that the application for review is refused and the decision of the Director is affirmed.



HELEN COGAN
PRESIDING MEMBER