

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Ms Joanna MacLeod and Mr Gareth Hancox
(represented by Ms Joanna MacLeod)

Intervener: The Commissioner of Police
(represented by Ms Leanne Atkins of WA Police)

Executive Director Public Health
(not represented at hearing)

Director of Liquor Licensing
(represented by Mr Peter Spragge of State Solicitor's Office)

Objectors: Fremantle Beverages Pty Ltd
Newport Fremantle Pty Ltd
(both represented by Mr Peter Fraser of Dwyer Durack)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling
Ms Helen Cogan

Date of Hearing: 22 July 2011

Date of Determination: 6 September 2011

Premises: Soho Bar and Kitchen
16 South Terrace, Fremantle

Matter: Application for review of decision A218158 of the
Director of Liquor Licensing pursuant to section 25
of the *Liquor Control Act 1988*

Determination: The Application is refused and the decision of the
Director of Liquor Licensing is affirmed

Authorities considered in the determination:

- *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241
- *Executive Director of Public Health v Lily Creek International & Ors* [2000] WASCA 258
- *O'Sullivan & Farmer* [1989] 168 CLR 210
- *McKinnorn & Secretary, Department of Treasure* [2005] FCAFC 142
- *Shallcross Investments Pty Ltd v Director of Liquor Licensing* (LC26/2010)
- *Busswater Pty Ltd v Director of Liquor Licensing* (LC17/2010)
- *Paul Kontinorinis & Maria Kontinorinis v Director of Liquor Licensing* (LC23/2010)
- *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing* (LC18/2004) & WASC 345 of 2010
- *High Moon Pty Ltd & City of Fremantle & Ors* [2004] WLLC 4
- *Director of Liquor Licensing & Kordister Pty Ltd* [2011] VSC 207
- *Scott Cove Pty Ltd Anor v Liquorland Australia Pty Ltd* [2004] SASC

Background:

- 1 On 4 October 2011 Ms Joanna MacLeod and Mr Gareth Hancox lodged an application for the grant of a tavern licence for a premises located at 16 South Terrace, Fremantle.
- 2 On 10 November 2010 a letter of support from Conexio Genomics was lodged.
- 3 Objections to the application were lodged by Fremantle Beverages Pty Ltd, licensee of Bar Orient, and Newport Fremantle Pty Ltd, licensee of Newport Hotel, to the grant of the licence. Notices of Intervention were also lodged by the Commissioner of Police and Executive Director of Public Health.
- 4 On 20 April 2011 the Director of Liquor Licensing in decision A218158 determined the matter and refused the application for the tavern licence.
- 5 On 17 May 2011 an application for review of the decision of the Director was lodged with the Commission pursuant to section 25 of the *Liquor Control Act 1988* ("the Act"). The Director of Liquor Licensing subsequently lodged a Notice of Intervention in respect of this application.
- 6 A hearing before the Commission was held on 22 July 2011.

Submissions on behalf of the Applicant

- 7 The Applicant does not wish to run a tavern in the traditional sense but more of a restaurant downstairs and cocktail bar upstairs.
- 8 The Executive Director of Public Health ("EDPH") stated that the likelihood of harm and ill health being caused by the licence being approved would be greatly reduced if the conditions contained in the section 40 certificate were imposed. The reasonable conclusion to be drawn from the EDPH intervention was that if these conditions were embraced the EDPH would be "happy for the licence to be granted".
- 9 The Applicant had made it clear that it fully accepted these conditions.
- 10 The crime reports relating to the Clink Nightclub situated in the same building as the Applicant are not relevant to the Applicant.
- 11 The fact the Council granted a change of use to accommodate the intended operation suggests it believes that the premises will be operated in the public interest.
- 12 The Director misunderstood the nature of the operation of the licensed premises and the application was not considered on its individual merits.
- 13 The conditions imposed by the City of Fremantle on the Planning Approval are an adequate mitigant to any harm or ill health that might be otherwise caused.

- 14 The application fits the vision of the City of Fremantle for the International Sailing Federation World Championships which is a major event bringing many tourists as well as competitors to Fremantle.

Submissions on behalf of the Commissioner of Police

- 15 The tavern licence if granted may increase the likelihood of harm and ill health to patrons and people using other licensed premises in the vicinity (known as the Fremantle Entertainment Precinct).
- 16 The Director has identified hotels and taverns as “at risk venues” in respect of causing harm (*Decision A191578 of Director of Liquor Licensing*).
- 17 The licensing authority of its own knowledge knows of the extent of alcohol related harm in the metropolitan area and may apply this knowledge without the need to call evidence.
(*Scott Cove Pty Ltd Anor v Liquorland Australia Pty Ltd [2004] SASC*)
- 18 Licensed premises by their nature give rise to issues of noise and revelry when groups of patrons leave late at night and anti social behaviour often results which management, however good, cannot control as it occurs off the licensed premises.
- 19 It is the consequences of the granting of a licence in a particular location rather than the proposed operation of the premises themselves that is the determining factor in assessing the likelihood of the amenity of an area being diminished.
(*Highmoon Pty Ltd v City of Fremantle & Ors [2004] WLLC4*)
- 20 CAD data indicates a high level of attendance by Police at this locality. The premises are located in the Fremantle Entertainment Precinct and in the immediate vicinity of a Nightclub which is regarded as problematic by Police.
- 21 Outlet density in the vicinity is high – seventeen (17) licensed premises. There is a high level of correlation between harm and outlet density.
- 22 There is no substantiation in the PIA that there is any requirement for the proposed licensed facility.
- 23 The application for a tavern licence approximately eight (8) months after being granted a 100% extended trading permit for the restaurant operation supports the notion that the applicant’s primary intention is to sell liquor.

Submissions on behalf of the Executive Director of Public Health

- 24 There is already a high density of outlets and granting this licence application would escalate the situation and add to the already high levels of alcohol related harm in Fremantle.
- 25 Imposing the conditions contained in the planning approval given by the City of Fremantle would be an important mitigant of potential harm.

Submissions on behalf of the Director of Liquor Licensing

- 26 Pursuant to section 38(2) of the Act, there is a positive obligation on an Applicant to satisfy the licensing authority that the granting of the application is in the public interest. To do so the Applicant must support its application with information sufficient to so satisfy the licensing authority and opinion, supposition and assertion are insufficient.
- 27 The Applicant must address the issues raised in section 38(4) of the Act and satisfy the objects of the Act as set out in Section 5.
- 28 No objective evidence was provided by the Applicant to support its application.

Submissions on behalf of the Objector

- 29 The objector's submission covered many of the issues raised by the interveners and it is not necessary or helpful to repeat them.
- 30 The objector raised in considerable detail the issue of the premises in which the applicant's business is accommodated being shared with the Clink Nightclub and the high level of incidents recorded in the Police CAD database relating to the Clink and the building accommodating the Applicant and The Clink.
- 31 There are a number of incidents in relation to patrons of other licensed premises, of which the objector's is one, moving on to the Clink.
- 32 The Fremantle entertainment precinct is a popular destination for persons who drink to the level of intoxication and who are then prone to violence.
- 33 The rate of alcohol related offending is high (and rising) in the Fremantle entertainment precinct.
- 34 Academic research concludes that there is a high level of correlation between outlet density and harm.

Determination

- 35 Pursuant to Section 38(2) of the Act, the applicant for the grant of a tavern licence must satisfy the licensing authority that granting the application is in the public interest.
- 36 Whilst Section 38(4) of the Act is directed to the potential negative impact of an application, these are not the only matters for consideration. In considering the public interest under Section 38, the licensing authority needs to consider both the positive and negative social, economic and health impacts that the grant of an application will have on a community (refer *Second Reading Speech, Parliamentary Debates, WA Parliament, vol 409, p 6342*).
- 37 Furthermore, pursuant to section 33(1), the licensing authority has an absolute

discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest; the discretion being confined only by the scope and purpose of the Act (refer *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7WAR 241).

- 38 When considering the public interest, the licensing authority is also bound by the objects of the Act as set out in section 5. In respect of this application, the objects set out in sections 5(1)(b) and (c) and 5(2)(a) are particularly relevant. Promoting the objects of the Act is necessary in determining the public interest (*Palace Securities supra*)
- 39 Where there is conflict between the various objects of the Act, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).
- 40 In determining the application
- (a) Section 25(2c) of the Act requires that the Commission may take into account only that material which was before the Director when making the decision;
 - (b) Section 25(4) sets out the actions open to the Commission.
- 41 In its consideration of what constitutes the public interest, the Commission is guided by the following precedents:
- (a) *Palace Securities* (supra)
 - (b) The expression “in the public interest” when used as the criteria for the exercise of a statutory discretion usually imparts a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation. (*O’Sullivan v Farmer* [1989] 168 CLR210).

In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC142, Tamberlin J stated:

“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.”

- 42 Section 38(2) is clear in its imposition of an affirmative or positive obligation to demonstrate to the licensing authority that granting a licence application is in the public interest. It is insufficient to demonstrate that the grant of the licence is not contrary to the public interest.
- 43 The Applicant argues that it has provided a sufficient level of evidence to support its application however the Commission finds that there was in fact little, if any, substantiation of a requirement by a section of the public for the facility.
- 44 Whilst the Commission found in *Shallcross Investments Pty Ltd v Director of Liquor Licensing (LC26/2010)* that “it would be helpful to Applicants if the Director’s policy in respect of the PIA could perhaps highlight more clearly the requirement for Applicants to adequately demonstrate the positive aspects of their application and provide evidence of their claims”, this does not imply, nor should it be inferred that the policy guidance in respect of PIA submissions does not require proper supporting evidence of contentions made in a PIA.
- 45 There is now a consistent and carefully enunciated position of the Commission confirming the requirement for sound (wherever possible, objective) evidence supporting assertions made in a PIA and further, confirming that mere conjecture, supposition and assumptions were not enough.

(Refer: *Busswater Pty Ltd v Director of Liquor Licensing (LC17/2010)*,
Paul Kontinorinis and Maria Kontinorinis v Director of Liquor Licensing (LC23/2010))

- 46 In addressing the issue of harm, ill health and loss of amenity which might be caused by granting this licence application, the Applicant relied on:
- (1) The contention that the Director misunderstood the nature of the operation of the licensed premises and more particularly, did not consider the Application on its individual merits but was unduly swayed by the premises being in the same building as the Clink Nightclub.
 - (2) The City of Fremantle granted a change of use.
 - (3) The conditions imposed by the City of Fremantle in granting the change of use satisfied the issues raised by the second intervener (Executive Director of Public Health) and it could be thus reasonably concluded that the EPHD would be “happy for the licence to be granted”.
- 47 Taking each of these in turn it is important to look beyond the individual licensed premises and whether they are well managed.
- (a) Greaves J found in *Highmoon Pty Ltd v City of Fremantle and others [2004] WLLC4* that it is the consequences of the granting of the licence in a particular location rather than the proposed operation of the premises

themselves that is the determining factor in assessing the likelihood of the amenity of an area being diminished.

- (b) In *Director of Liquor Licensing v Kordister Pty Ltd [2011] VSC207* Bell J stated “the question to be asked always is whether the licensing decision will contribute to minimising harm.... even though the particular premises may not be to blame for misuse or abuse of alcohol which has occurred or will be likely.” This case was determined under the Victorian Act however the relevant legislative provisions are similar to those in the *Liquor Control Act 1988* in WA.
- 48 In granting the change of use, the City of Fremantle was making a planning decision. That the premises have the appropriate planning permission from the relevant Local Government Authority is only relevant in the licensing decision to the extent that it is a condition precedent to establishing the licensed premises at a particular location. In *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing LC18/2004* the Commission formed a view that while zoning permitted tavern use there are other considerations which must be taken into account.
- 49 The Commission went on to affirm the Director’s decision to refuse the licence notwithstanding all planning approvals were in place.
- 50 On appeal Hall J further affirmed this position in *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing [2010] WASC345* in stating “the Commission accepted that the appellant had obtained all relevant planning approvals and took this into account in support of the application. However, it was then necessary for the Commission to go on to consider whether granting the application was in the public interest. In this regard the considerations in Section 38(4) were matters that may well have been considered by the planning authority but that does not obviate the need for the licensing authority to consider those matters itself.”
- 51 The second intervener (EDPH) stated that if the licensing application was granted then the conditions imposed by the City of Fremantle would be a significant mitigant to the harm and ill health which might be caused by granting the licence. This is not the same thing as “being happy with grant of the licence”.
- 52 Both the first and second interveners expressed concern that:
 - (a) there would be a high risk of harm and loss of amenity and
 - (b) the Fremantle Entertainment Precinct where these premises are situated, is an area of high outlet density and attendant alcohol related harm.
- 53 Ipp J in *Executive Director of Public Health v Lily Creek International Pty Ltd* held that likelihood of alcohol related harm was a matter of prediction but it was not necessary to establish that harm or ill health would occur on the balance of probabilities.... It was necessary to take into account even the possibility that

harm and ill health may occur. He went further in stating that potential of harm and ill health would be a powerful public interest consideration.

- 54 The Commission acknowledges that the application fits the vision of the City of Fremantle in respect to furthering the tourist experience of the forthcoming International Sailing Federation World Championships. Whilst this was more in the nature of a statement by the Applicant than a well supported submission, the Commission accepts that it is difficult to get strong evidence to lend that support. The Commission accepts that the Applicant's contention in this regard is congruent with section 5(1)(c) of the Act and should be accorded some weight.
- 55 The Commission is of the view that objections lodged by a competitor should be assessed with some caution as they may be regarded as lacking objectivity. Much of the evidence submitted by the objector covered matters raised by the Interveners and was well supported by evidence hence the Commission accorded the objector's submission some weight.
- 56 On weighing up the evidence led by the interveners and objectors, the Commission formed the view that on balance the potential for harm in these circumstances was significant and imposition of the conditions imposed by the City of Fremantle were insufficient to adequately mitigate this potential for harm.
- 57 Consequently in weighing and balancing the evidence before it, being the material before the Director in making the decision as it is required to do pursuant to section 25 of the Act, the Commission is of the view that the potential for further harm in a location where the level of alcohol related harm and loss of amenity were already high outweighed the considerations of section 5(1)(c) of the Act. Therefore, the Application fails and the decision of the Director stands.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', with a stylized flourish at the end.

JIM FREEMANTLE
CHAIRPERSON