**LC 05/2019**

**Liquor Commission of Western Australia**

**(*Liquor Control Act 1988*)**

**Applicant:** Kapinkoff Nominees Pty Ltd  
*(represented by Mr Mario Sequeira, Hospitality Total Services (Aus) Pty Ltd )*

**Respondent:** Director of Liquor Licencing   
 *(not an intervener in these proceedings)*

**Commission:** Mr Paul Shanahan (Presiding Member)

Ms Sarah Oliver) (Member)

Dr Eric Isaachsen (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 not to approve, in full, an application to vary a condition of the applicant’s Tavern Restricted Licence Number 6380149287.

**Premises:** "The Squire’s Fortune", Shop 6, Rendezvous Grand Hotel,148 The Esplanade, Scarborough

**Date of Hearing:** 4 February 2019

**Date of Determination:** 6 March 2019

**Determination:** The decision of the delegate of the Director of Liquor Licensing is quashed.

The application to cancel a trading condition of the tavern restricted licence held by Kapinkoff Nominees Pty Ltd in relation to the premises situated at Shop 6, Rendezvous Grand Hotel, 148 The Esplanade, Scarborough, is also refused.

**Authorities referred to in the determination:**

* *Hancock -v- Executive Director of Public Health* [2008] WASC 224
* *Australian Leisure and Hospitality Group Pty Ltd -v- Commissioner of Police and Others* (LC 01/2017)
* *Woolworths Ltd -v- Director of Liquor Licensing* [2013] WASCA 227

**Background**

1. On 19 August 2014, the Director of Liquor Licensing (the **Director**) conditionally granted a tavern restricted licence to Kapinkoff Nominees Pty Ltd (the **Applicant**) for premises to be known as 'The Squire’s Fortune' and situated at Shop 6, Rendezvous Grand Hotel, 148 The Esplanade, Scarborough.
2. The tavern restricted licence was subject to trading conditions, which relevantly included:
   * + "*All live entertainment (acoustic only – non-amplified) or music is to be background in nature only sufficient to enable normal conversation to occur.*
     + *All amplified music is to be played through the in-house system. No subwoofers are to be fitted to the sound system and there are to be no outdoor speakers.*
     + *External doors and windows including bi-fold doors to the premises are to be closed after 10 p.m*."
3. The grant of the conditional tavern restricted licence was confirmed, and the licence was issued on 8 January 2015 for the Applicant to commence to conduct the business under the licence.
4. On 18 March 2015, the Applicant lodged an application pursuant to section 64 of the *Liquor Control Act 1988* (the **Act**) to vary the trading conditions referred to in paragraph 2 above to:
   * + "*All live entertainment or music is to be played through the in-house system and is to be background in nature, at a level sufficient to enable normal conversation to occur.*" (the **First 18/03/15 Condition**); and
     + "*Outdoor speakers are permitted to be used within the alfresco area prior to 10 p.m.*" (the **Second 18/03/15 Condition**)
5. In support of that application, the Applicant provided the Director with a noise assessment report prepared by EcoAcoustics and dated 17 February 2015. The Director granted that application on 14 October 2015, and the trading conditions were amended accordingly.
6. The Applicant lodged an application on 7 August 2018, pursuant to pursuant to sections 63, 64 and 68 of the Act, to cancel the First 18/03/15 Condition of its licence (the **Application**).
7. The Director has decided that the Application is subject to the provisions of section 38(2) of the Act.
8. The Application was advertised in accordance with instructions issued by the Director.
9. No objections to the Application or interventions have been lodged.
10. The Applicant lodged a Public Interest Assessment (**PIA**) and written submissions in support of the Application. The Applicant's written submissions included a submission that:
    * + "*It wishes to cancel the restrictive entertainment condition so as to be able to provide a diverse range of entertainment at the premises.*
      + *The cancellation of the restrictive condition will enable it to provide music and entertainment in keeping with other licensed venues in the locality as they are permitted to provide entertainment (including live music) at their licensed tavern premises. Premises include The Sandbar Scarborough Beach, El Grotto, The Local Shack, Look Out Pop Up Bar and Ocean bar One*".
11. On 26 October 2018, the Application was determined on the papers by a Delegate of the Director (the **Delegate**) in accordance with section 15 of the Act (the **Delegate's determination**). The Delegate determined that the trading conditions should be varied by replacing the First 18/03/15 Condition above with the following five conditions:
    * + "*Live entertainment may be conducted inside the premises in compliance with the Environmental Protection Noise Regulations 1997*";
      + "*All doors (including bi-fold) must be closed after 10 p.m. whenever live music is played inside the premises. However, doors may be opened to allow persons to enter or exit the premises*";
      + "*Other than live music, all other music played in the premises must be maintained at a background level that allows normal conversation to occur*";
      + "*Music played through speakers set up in the alfresco area must be maintained at a background level that allows normal conversation to occur*"; and
      + "*Live acoustic music (no amplification) is permitted to be played in the alfresco area*",

(collectively, the **Five 26/10/18 Conditions**).

1. On 1 November 2018, the applicant applied for a review of the Delegate's determination (the **Review Application**).
2. On 4 February 2019, the Commission conducted a review hearing in accordance with the Review Application.
3. The Applicant disagrees with the Delegate's determination to replace the First 18/03/15 Condition with the Five 26/10/18 Conditions.

**The issue of procedural fairness**

1. The Applicant made a number of submissions to the effect that it had been denied procedural fairness, including a submission that the Delegate had erred by failing to provide the Applicant with a reasonable opportunity to present its case in relation to the Five 26/10/18 Conditions before making his determination. That submission is expressed in the Applicant's written submissions of 21 January 2019 (the **Applicant's submissions**) as follows:

"*2.8 As previously outlined in this submission, some of the conditions imposed by the* [(Delegate's determination)] *have the effect of negating the condition sought to be removed by the Applicant in the public interest, and impose even more stringent conditions, without the Applicant having the opportunity to "show cause to the licensing authority why the condition should not be imposed, varied or cancelled." as required by 64(2a)* [(of the Act)].   
***…***

*2.10. The fact that the Applicant was not permitted the opportunity to ‘show cause’ is also not in keeping with Section 16(7) of the Act.*

*2.11. This is strongly highlighted in* **[**the Commission's decision in the matter of *Mr Walter Lenz -v- Director of Liquor Licensing* on 11 September 2012 (LC 35/2012), a copy of which was Attachment 3 to the Applicant's submissions**]***, where the licensing authority granted a Tavern Restricted Licence to an Applicant who had applied for a Tavern (Unrestricted) Licence.*

*2.12. As stated in LC 35-2012: "any intention to impose a restriction prohibiting sale of packaged liquor should have been advised to the applicant.*

*31 This approach is consistent with the provisions of section 64(2a) of the Act which states: “If the licensing authority proposes to impose, vary or cancel a condition under this section, the licensing authority may, by notice in writing, require the Applicant to show cause to the licensing authority why the condition should not be imposed, varied or cancelled.""*

1. Section 64(2a) of the Act states that:

"*If the licensing authority* *proposes to impose, vary or cancel a condition under this section, the licensing authority may, by notice in writing, require the Applicant to show cause to the licensing authority why the condition should not be imposed, varied or cancelled.*" (emphasis added).

1. The word 'may' in section 64(2a) of the Act indicates that the Delegate is not required to issue a notice in writing requiring the Applicant to show cause.
2. Notwithstanding the use of the word 'may' in section 64(2a) of the Act, the Commission:
   * 1. understands that the Applicant submits that the Delegate failed to show procedural fairness to the Applicant by proceeding to make a determination imposing the Five 26/10/18 Conditions without allowing the Applicant any opportunity to make submissions in relation to those trading conditions;
     2. agrees with that submission; and
     3. accordingly, finds that the Delegate's determination should be quashed in accordance with section 24(4)(a) of the Act.
3. As the Commission has decided that the Delegate's determination should be quashed for those reasons, it is unnecessary for the Commission to consider whether there are any other flaws in the Delegate's decision to impose the Five 26/10/18 Conditions.

**The remaining issue**

1. As the Delegate’s decision has been quashed, it remains for the Commission under section 25(b) of the Act to consider the merit of the Application to cancel the First 18/03/15 Condition, without imposing any new trading condition(s).

**The nature of the Application**

1. The Applicant has submitted that the purpose of the Application is "*to permit the provision of a diverse range of entertainment at the premises in the public interest*" **[**see paragraph 14 of the Applicant's 'Public Interest Assessment submissions' (**PIA**)**]**. The Applicant contends that the First 18/03/15 Condition prevents it from offering that "*diverse range of entertainment*". The Applicant has also made submissions as to the nature of that "*diverse range of entertainment*", including (but not limited to) the following matters:
   * 1. "*Depending on the time of day, the entertainment will reflect the contemporary needs of the patronage at that time*" (paragraph 31 of the PIA).
     2. The entertainment offered during early evening hours "*will include popular, upbeat artists and favourites from the 70’, 80’s, 90’s and 2000’s*" (paragraph 32 of the PIA).
     3. "*At times, the* [Applicant wishes] *to provide live music and/or a DJ, always ensuring that the music in question is relevant to the time/service period and to cater to the contemporary requirements of local, interstate and international visitors to Scarborough*" and the Applicant "*does not intend to play intense ‘heavy metal’ at the premises*" (paragraphs 35 & 36 of the PIA).
     4. "*The sound system at Squire’s Fortune will be operated by Venue Management only (i.e. Applicant, Approved Managers and Floor Supervisors), who will set volumes appropriate to service times*" (paragraph 38 of the PIA).
2. The nature of the First 18/03/15 Condition and the Applicant's submissions indicate that, if the Application is granted, then the Applicant intends to play music at the licensed premises:
   * 1. at volumes which are in excess of 'background' music and which will not allow 'normal conversation to occur'; and/or
     2. through amplifier and speaker systems that are independent from 'the in-house system', and which may be significantly more powerful than 'the in-house system'.
3. Cancelling the First 18/03/15 Condition would also mean that the only remaining restrictions on noise levels at the licensed premises would be the Second 18/03/15 Condition and the *Environmental Protection (Noise) Regulations 1997* (WA) (the **Noise Regs**) which operate as a prescribed standard under the *Environmental Protection Act 1986* (WA).
4. The Applicant has accepted that it is subject to the Noise Regs regardless of the trading conditions apply under its liquor licence. However, the Applicant would have no reason to seek cancellation of the First 18/03/15 Condition unless that trading condition placed a greater restriction on the volume of music which can be played at the licensed premises than the Noise Regs.

**The Applicant's submissions in support of the removal of the First 18/03/15 Condition**

1. The Applicant has made a number of submissions in support of its Application for the removal of the First 18/03/15 Condition, including that:
   * 1. The Commission should infer from:
        1. the fact that the operator of The Rendezvous Grand Hotel was advised of the Application but has not lodged an objection to that Application (i.e. an objection to the proposed removal of the First 18/03/15 Condition);
        2. the Applicant's contention that the General Manager of The Rendezvous Grand Hotel, Mr Matthew Richardson, told the Applicant's Operations Manager, Mr Adam Kapinkoff, that:

"[H]*e* [(Mr Richardson)] *had no noise concerns from the Squire's Fortune operations and although he supports what The Squire's Fortune has and continues to positively contribute in the area, the hotel* [does] *not provide letters of support for these types of applications*"

and that:

"*He* [(Mr Richardson)] *would be more than happy to speak with someone from the licensing authority or the police should it be required*";

And

* + - 1. the residents of that hotel are the group most likely to be affected by the grant of the Application,

that granting the Application would cause little or no damage to the public interest.

* + 1. The WA Police Liquor Enforcement Unit (**LEU**), WA Health Chief Health Officer (**CHO**), City of Stirling and local residents have not objected to the Application or sought to intervene.
    2. The Applicant is an experienced operator who has traded at the premises since 2014, in a safe and responsible manner, and the City of Stirling has also confirmed that it has not received any noise complaints relating to the premises.
    3. The First 18/03/15 Condition imposes an unnecessary and onerous 'compliance burden' on the Applicant.
    4. A report prepared for Tourism Western Australia, titled 'Tourism WA: Perth Entertainment Precincts', (the **P.E.P. Report**) states that the Scarborough Beach precinct is the least popular of nine 'entertainment precincts' that are referred to in that report. The P.E.P. Report also states 26% of the people who responded to a survey question as to why they did not visit the Scarborough Beach precinct said that they did not do so because they perceived there were "*No suitable venues*" in the precinct. This shows that there is a need for a contemporary, entertainment amenity in the redeveloped Scarborough Beach precinct. The First 18/03/15 Condition is preventing the Applicant from offering such an amenity.
    5. The Applicant wishes to cancel the restrictive entertainment condition so as to be able to provide a "diverse range of entertainment" at the premises.
    6. The cancellation of the restrictive condition will enable the Applicant to provide entertainment in keeping with other licensed venues which trade in the same locality and which are permitted to provide entertainment, including live music. The Applicant has identified those other licensed venues as 'The Sandbar Scarborough Beach', 'El Grotto', 'The Local Shack', 'Look Out Pop Up Bar' and 'Ocean Bar One' (see paragraphs 23 to 27 of the PIA).

**Legal and statutory framework**

***The basis of the Commission's review***

1. On a review under section 25 of the Act, the Commission may -
   * 1. affirm, vary or quash the decision subject to the review; and
     2. 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
     3. give directions –
        1. as to any question of law, reviewed; or
        2. to the Director, to which effect shall be given; and
        3. make any incidental or ancillary order.
2. 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).
3. Section 16 of the Act prescribes that the Commission:
   * 1. may make its determinations on the balance of probabilities [section 16(1)(b)(ii)];
     2. 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 [section 16(7)(a)]; and
     3. is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; [section 16(7)(b)].
4. The failure to refer to any specific evidence in written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd -v- Commissioner of Police and Others* (LC 01/2017)).

***The public interest***

1. As the Director has decided that the Application is subject to the provisions of section 38(2) of the Act (see paragraph 7 above), the Application cannot be granted unless the Applicant satisfies the Commission that it is in the public interest to do so.
2. In *Woolworths Ltd -v- Director of Liquor Licensing* [2013] WASCA 227, His Honour Buss JA set out the statutory framework for a determination of an application in which an applicant had to satisfy the Commission that the granting of an application was in the public interest in the following terms:
   * 1. by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;
     2. the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;
     3. the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those relevant to the objects of the Act, as set out in section 5(2) of the Act;
     4. the factual matters which the Commission is entitled to 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;
     5. section 5(2) is mandatory whereas section 38(4) is permissive; and
     6. on the proper construction of the Act (in particular, sections.5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
        1. 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
        2. facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.
3. By section 38(4) of the Act, the Commission may have regard to the following matters in determining whether granting an application is in the public interest:

"*(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) whether the amenity, quiet or good order of the locality in which the licensed premises or proposed licensed premises are, or are to be, situated might in some manner be lessened; 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*

*(ca) any effect the granting of the application might have in relation to tourism, or community or cultural matters; and*

*(d) any other prescribed matter*."

1. No matters have been prescribed under section 38(4)(e) of the Act.

**Determination**

***Nature of the Application***

1. It can reasonably be inferred from the matters in paragraphs 22, 23 and 24 above that there will be a substantial increase in the volume of noise emanating from the licensed premises at different times of the week if the First 18/03/15 Condition is cancelled.

***Consideration of the primary objects of the Act in section 5(1)***

1. Section 5(1) of the Act states that the primary objects of this 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 for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State*."

1. The First 18/03/15 Condition places restrictions on the operation of the licensed premises that have the effect of limiting the volume of noise emanating from that venue. The First 18/03/15 Condition is not directed to the matters referred to in section 5(1)(a) and 5(1)(b) of the Act.
2. However, the First 18/03/15 Condition is directed to the matters referred to in section 5(1)(c) of the Act, as:
   * 1. the First 18/03/15 Condition sets "*requirements*" for the provision of entertainment services at the licensed premises;
     2. those services are "*related*" to the consumption of liquor, as they services are provided in order to attract patrons to the licensed premises to consume liquor;
     3. the First 18/03/15 Condition caters for "*the proper development of the liquor industry, the tourism industry and other hospitality industries in the State*":
        1. by effectively limiting the noise emanating from the licensed premises, being noise which may detract from the amenity of the Scarborough Beach precinct; and
        2. as that precinct is an attraction for the "*the tourism industry*" and is the location of other enterprises in the "*hospitality industries*", being industries which may be adversely affected by excessive noise emanating from the licensed premises.
3. The fact that the First 18/03/15 Condition is directed to the matters referred to in section 5(1)(c) of the Act does not mean the public interest favours retaining the First 18/03/15 Condition and denying the Application. The Commission must assess whether the public interest favours granting or denying the Application in light of all the mandatory statutory considerations and the relevant facts, and the Commission may also chose to consider discretionary statutory considerations.

***Consideration of the secondary objects of the Act in section 5(2)***

1. Section 5(2) of the Act states that the secondary objects of the Act are:

"*(a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and*

*[(b), (c) deleted]*

*(d) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and*

*(e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act; and*

*(f) to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community*".

1. The First 18/03/15 Condition concerns the objects in section 5(2)(a) of the Act. The Applicant contends that the First 18/03/15 Condition is contrary to those objects because that condition:
   * 1. effectively restricts the volume at which "*live original music*" can be played at the venue;
     2. prevents the Applicant from playing music which (the Applicant would contend) better reflects "*the diversity of the requirements of consumers in the State*", including those consumers who 'require' louder music; and
     3. thereby limits "*the use and development of* [the Applicant's] *licensed facilities*".
2. The secondary objects in section 5(2) of the Act do not mean the public interest favours cancelling the First 18/03/15 Condition and granting the Application. As already noted (see paragraph 38 above), the Commission must assess whether the public interest more broadly.

***Consideration of the public interest factors listed in section 38(4) of the Act***

1. The First 18/03/15 Condition is not applicable to the consideration listed in section 38(4)(a) of the Act.
2. The First 18/03/15 Condition directly addresses the considerations listed in sections 38(4)(b), 38(4)(c) and 38(4)(ca) of the Act. However, that does not mean the public interest favours retaining the First 18/03/15 Condition and denying the Application. As already noted (see paragraph 38 above), the Commission must assess the public interest more broadly.

***The Applicant's case***

1. The Applicant contends that the PIA and its submissions (see paragraphs 21 and 25 above) show that the balance of the public interest favours cancelling the First 18/03/15 Condition (without imposing any new trading conditions) and granting the Application. However:
   * 1. As to the inference that the Applicant seeks to draw from the fact that the operator of The Rendezvous Grand Hotel has not lodged an objection to the Application (see paragraph 25(a) above):
        1. It is for the Commission, rather than the operator of The Rendezvous Grand Hotel, to determine the effect which granting the Application is likely to have on the public interest.
        2. The residents of the hotel are only one of the groups of people who may be affected by the proposed removal of the First 18/03/15 Condition. While they are within the hotel, the residents of the hotel are protected from noise emanating from the Applicant's premises by the structure of the hotel building.
        3. People who visit the Scarborough Beach precinct, who are unprotected by the structure of the hotel building and who pass near the outside of the Applicant's premises, will be exposed to any additional noise which will emanate from the Applicant's premises if the First 18/03/15 Condition is removed.
     2. More particularly, in relation to the undated letter or statement referred to in paragraph 25(a)(ii) above:
        1. The letter or statement asserts that the operator of The Rendezvous Grand Hotel "*supports* [what the Applicant] *has* [done] *and continues to positively contribute in the area*". The letter or statement does not say that the operator of The Rendezvous Grand Hotel supports the Application.
        2. The assertions made in the letter or statement are no more than bare assertions by Mr Adam Kapinkoff, and are not to be given any greater weight merely because they are made in the form of a letter or unsworn statement.
        3. The assertion that "*the General Manager of the Rendezvous Hotel Scarborough* [has said he] … *would be more than happy to speak with someone from the licensing authority*" does not add any evidential weight to the other assertions in that letter or statement. The Applicant bears the onus of satisfying "*the licensing authority that granting the application is in the public interest*" (see section 38(2) of the Act and paragraph 30 above). The Applicant is also responsible for providing evidence as to that public interest. The licensing authority has no responsibility for investigating the truth of the Applicant's assertions.
     3. As to the inference which the Applicant seeks to draw from the fact that the LEU, CHO, City of Stirling and local residents have not objected to the Application or sought to intervene (see paragraph 25(b) above):
        1. It is for the Commission, rather than for any other body, person or group, to determine the effect which granting the Application is likely to have on the public interest.
        2. The Commission cannot assume that the LEU, the CHO or any other body will rigorously assess the likely impact which every application that they become aware of will have on the public interest.
     4. As to the Applicant's 'track record' as a safe and responsible manager, and as to the lack of any noise complaints (see paragraph 25(c) above):
        1. Those matters merely demonstrate that the current noise-related trading conditions are working well.
        2. It is not reasonable to infer that the absence of noise complaints indicates that the First 18/03/15 Condition is too restrictive.
        3. No inference can logically be drawn as to the noise levels that are likely emanate from the licensed premises if the First 18/03/15 Condition is cancelled based on the current absence of noise complaints.
     5. As to the Applicant's assertion that the First 18/03/15 Condition imposes an unnecessary and onerous 'compliance burden' (see paragraph 25(d) above):
        1. Any 'compliance burden' which the Applicant bears in ensuring compliance with the First 18/03/15 Condition is not unreasonable or disproportionate to the potential harm to the public interest in the event there was no restriction on the noise emanating from the premises other than the Noise Regs and the Second 18/03/15 Condition.
        2. It is reasonable to infer that the Noise Regs are less restrictive than the First 18/03/15 Condition (see paragraph 24 above). Accordingly, if the Applicant was no longer required to comply with the (more restrictive) First 18/03/15 Condition, then the Applicant would be required to monitor compliance with the (less restrictive) Noise Regs. Conversely, if the Applicant continued to be bound by the First 18/03/15 Condition, then the Applicant should not be required to monitor compliance with the Noise Regs. This means that there is an administrative task in relation to either, compliance with the First 18/03/15 Condition, or, compliance with the Noise Regs..
        3. In very broad terms, monitoring the compliance of the licensed premises with the Noise Regs would require:
           1. measuring the noise levels at the boundary of those premises (i.e. immediately outside those premises) in decibels at different times of the day:  
              ● in accordance with the procedures described in Part 3 of the Noise Regs;   
              ● using the equipment specified in Schedule 4 of the Noise Regs; and  
              ● taking account the tonality, impulsiveness and modulation of that noise;

and then

* + - * 1. comparing those measured noise levels with the levels that are permissible for those premises at those times under the Noise Regs, as determined in accordance with the reasonably complex requirements of the Noise Regs.
      1. Ensuring compliance with the First 18/03/15 Condition is comparatively easy and straight forward when compared to ensuring compliance with the Noise Regs.
      2. It is not clear that cancelling the First 18/03/15 Condition would reduce the Applicant's 'compliance burden',. Indeed, it appears more likely to increase it.
    1. The evidential weight that is to be given to the P.E.P. Report, and particularly the 26% of people surveyed who indicated that they chose not to visit the Scarborough Beach precinct because they perceived there were "*No suitable venues*", is qualified by the facts that:
       1. The 26% of people who gave that answer to that survey may be unaware of the entertainment venues in the redeveloped Scarborough Beach precinct. In other words, those responses may be evidence of perception and marketing issues, rather than evidence of any actual failure to service a public demand.
       2. There is no evidence as to what that 26% of people regard as a "*suitable*" venue. There is no evidence to show that the First 18/03/15 Condition is preventing the Applicant from offering an amenity that would satisfy the desires of any appreciable part of that 26% of people.
       3. There is also no evidence that any part of the 26%of people would be appreciably more likely to travel to the Scarborough Beach precinct if the Application was granted.
    2. As to the Applicant's submissions that it requires the cancellation of the First 18/03/15 Condition so that it can provide a "*diverse range of entertainment*" at the premises (see paragraph 25(f) above) and that cancellation of that trading condition would allow it to provide music and entertainment in keeping with other licensed venues which trade in the same locality and which are permitted to provide entertainment (see paragraph 25(g) above):
       1. The First 18/03/15 Condition does not prevent the Applicant from providing music and entertainment at its licensed premises. Indeed, that trading condition expressly permits the "*live entertainment or music*" to be played at those premises. However, that trading condition relevantly requires that music and entertainment to be "*played through the in-house* system" (rather than through a separate 'sound system') and to be played at a volume level that is "*background in nature* [and] *sufficient to enable normal conversation to occur.*"
       2. Paragraph 23 of the PIA asserts that cancellation of the First 18/03/15 Condition is necessary to ensure the licences premises are permitted to provide the same music and entertainment as "*other licensed venues … in the locality… including (but not limited to):  
          ● The Sandbar Scarborough Beach;   
          ● El Grotto,   
          ● The Local Shack,   
          ● Look Out Pop Up Bar, and  
          ● Ocean Bar One*"

The Applicant has provided the Commission with copies of the Tavern Restricted Licences for each of those venues and for 'The Esplanade Bar' at 1 Manning Street, Scarborough. On balance, the First 18/03/15 Condition is more or less typical of the noise restrictions included in the trading conditions of each of the above named premises.

* + 1. The Applicant's assertion that cancellation of the First 18/03/15 Condition would allow it to provide music and entertainment in keeping with other licensed venues which trade in the same locality is also logically at odds with the Applicant's assertion that there are currently no suitable venues in the precinct to attract the 26% of people referred to in the survey in the P.E.P. Report.

1. The Applicant has not provided an acoustic report on the effect which cancelling the First 18/03/15 Condition is likely to have on noise levels emanating from the licensed premises, as experienced in the areas adjacent to the licensed premises. Nor has the Applicant provided sufficient further details of:
   * 1. the 'sound systems' through which the "*diverse range of entertainment*" may be delivered at the licensed premises; and
     2. the manner in which those 'sound systems' will be operated (i.e. the Applicant has only provided the general assurance referred to in 21(d) above),

so to allow the Commission to make any proper assessment of:

* + 1. the likely increase in the noise that will emanate from the licensed premises at different times of the week; or
    2. the way in which that increased noise will impact on the public interest, including (but not limited to):
       1. the extent to which it may lessen "*the amenity, quiet or good order of the locality in which the licensed premises*" is situated (see section 38(4)(b) of the Act);
       2. the "*offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises*" (see section 38(4)(c) of the Act);
       3. the "*effect the granting of the application might have in relation to tourism, or community or cultural matters*" (see section 38(4)(ca) of the Act),

if the Application is granted.

1. The Applicant's failure to provide the Commission with the information and evidence required to make a proper assessment of the matters referred to in paragraphs 45(c) and (d) above, means the Commission cannot be satisfied that it would be in the public interest to cancel the First 18/03/15 Condition without imposing any new trading conditions.
2. The Applicant's failure to provide evidence that would allow the Commission so to make the assessment referred to in paragraph 46 above would, by itself, be sufficient for the Commission to decide to deny the Application, even without considering any of the other matters set forth in paragraph 44 above, or elsewhere in this determination.

**Final determination**

1. In the circumstances referred to in paragraph 45, the Commission is not satisfied that the Applicant has discharged the onus it bears under section 38(2) of the Act to show that the cancellation of the First 18/03/15 Condition would be in the public interest. Accordingly, the Application is denied.



\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_   
**PAUL SHANAHAN**

**PRESIDING MEMBER**