

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)
- Interveners:** Commissioner of Police

Director of Liquor Licensing
(both represented by Ms Jessica Berry of State Solicitor's Office)
- Commission:** Mr Michael Egan (Presiding Member)
Ms Mara Barone (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.
- Premises:** "The Squire's Fortune", Rendezvous Grand Hotel,
148 The Esplanade, Scarborough
- Date of Hearing:** 16 March 2017
- Date of Determination:** 11 May 2017
- Determination:** The application for review is dismissed and the decision of the delegate of the Director of Liquor Licensing is affirmed.

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
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208

Background

- 1 Kapinkoff Nominees Pty Ltd (“the applicant”) has applied, pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”), for a review of the decision of the delegate of the Director of Liquor Licensing (“the Director”) in which the Director varied the condition relating to the employment of crowd controllers attached to the applicant’s tavern restricted licence (“crowd controller condition”).
- 2 The applicant is seeking to vary the number of hours it is required to employ crowd controllers at its premises, known and trading as “The Squire’s Fortune” at shop 6, Rendezvous Grand Hotel, 148 The Esplanade, Scarborough WA (“the licensed premises”).
- 3 The applicant lodged its application to vary the condition on 21 June 2016.
- 4 The Commissioner of Police (“the Police”) lodged a notice of intervention on 4 August 2016.
- 5 The Director determined, pursuant to section 38(1)(c) of the Act, that section 38 (2) of the Act is to apply to the application, as a consequence of which the applicant is required to demonstrate that the grant of the application is in the public interest.
- 6 The Director waived the requirement for a full public interest assessment, accepting the submissions lodged with the application.
- 7 Closing submissions were received from the applicant and the Police in accordance with the timeframe stipulated by the Director.
- 8 The Director determined to vary the crowd controller condition, but not to the extent sought by the applicant, and published his reasons for his decision on 28 October 2016 (reference number: A206533).
- 9 The applicant applied for a review of the decision of the Director on 15 November 2016.
- 10 The Director lodged a notice of intervention pursuant to section 69(11) of the Act in respect of these review proceedings on 1 December 2016.
- 11 The Commission conducted a review hearing on 16 March 2017.

Submissions on behalf of the applicant

- 12 The applicant is seeking to vary the commencement time for crowd controllers on Friday and Saturday nights from 5pm to 7pm, and the finishing time on Sunday nights from half an hour after the close of trade to 9pm.

- 13 The applicant contends that sales data submitted with the application for trading at the licensed premises over four weekends (Friday, Saturday and Sunday) between July 2015 and April 2016 demonstrates the busy trading periods at the licensed premises and supports the variation in the crowd controllers' start and finish times sought in the application.
- 14 More specifically, the applicant contends that the peak trading periods on weekends is between 7pm and 9pm on Friday and Saturday, and 5pm and 7pm on Sunday, and that crowd controllers are not required until the commencement of the busy period on Fridays and Saturdays nor after 9pm on Sundays.
- 15 In further support of the application, the applicant highlights a number of factors relating to the operation of the licensed premises, including:
 - a) the demonstrated exemplary and safe manner of trade by an experienced and reputable licensee, without any infringements issued over the past two years;
 - b) the dedication of a large proportion of the licensed premises to tables and chairs, and the level of food sales which constitutes around 36% of the total sales revenue, higher than the average of 25% for a "typical tavern";
 - c) the level of sales of craft beer (which represents 36.66% of all sales and over half of all alcohol sales) and the matching of food with beer "demonstrating the alcohol beverage of choice being consumed with the least negative impact on patrons and the locality"; and
 - d) the harm minimisation practices in place, such as the open plan venue which facilitates the monitoring of patrons throughout the venue as well as extensive CCTV coverage.
- 16 The applicant also contends that "the patrons are predominantly mature aged professionals given the quality fit out, product and price point of the venue" and that the "economic cost of engaging external crowd controllers (between 5pm and 7pm on Friday and Saturday and after 9pm on Sunday) is adding no tangible benefit to the public interest....".
- 17 In addition, accompanying the application is a statement from the Managing Director of the security firm providing crowd controller services to the licensed premises, in which the Managing Director expresses the view that, in his experience:
 - a) crowd controllers are not required from 5pm to 7pm on Friday and Saturday night nor after 9pm on a Sunday; and

- b) the venue attracts well mannered individuals who do not cause any violent or disruptive behaviour.
- 18 In response to the Police references in its intervention to the failure of the applicant to notify the police of a patron's removal (on 3 June 2016) and the failure to record the time of four incidents in the premises' Incident Register (out of 66 Incident Reports identified by the police over the period 1 January 2015 to 28 July 2016), the applicant maintains that the eight Incident Reports which necessitated notifying the police is not excessive and that the actions of the Approved Manager combined with the fact that Incident Reports have been generated represent cogent evidence that venue management is committed to upholding the requirements of the Act.
- 19 Further, in response to the Police, the applicant submits:
- a) new licences issued in the Scarborough Beach precinct have a significant focus on food and are significantly different to the high risk venues of the past;
 - b) the crime statistics presented by the Police in its intervention comparing alcohol and non-alcohol related offences for calendar years 2014 and 2015, while showing an increase in the number of offences:
 - i) do not account for the increase in patrons in the precinct or any increase in population;
 - ii) do not reflect the source of alcohol contributing to the offences nor if the alcohol was consumed at the applicant's premises; and
 - iii) reveal the proportion of alcohol related offences relative to the total number offences (approximately 10%) has not changed.

Submissions on behalf of the Police

- 20 The Police have intervened on the following grounds:
- a) on the question of whether, if a particular application was granted, public disorder or disturbance would likely result (section 69(6)(c)(ii) of the Act); and
 - b) any other matter relevant to the public interest (69(6)(c)(iv) of the Act).
- 21 In contrast to the applicant, the Police contend the sales data relating to trading over the four weekends selected by the applicant does not support a later deployment of crowd controllers on Friday and Saturday nights as "sales increase significantly on Friday and Saturday in particular from 5pm, peaking in most instances at 7pm".

- 22 The Police submit the busiest period is already underway prior to the proposed start time of 5pm on Fridays and Saturdays.
- 23 In the view of the Police, the proposal to adjust the starting times for crowd controllers on Friday and Saturday nights would allow for an “influx” of patrons entering the premises not being checked and assessed for drunkenness, dress code or personal identification by persons trained specifically in this field.
- 24 The Police acknowledge that Sunday trade appears to drop significantly after 8pm, but question how the number of patrons has been calculated.
- 25 Further, while 36% of total sales represent food sales, the Police note with some reservation that the total amount of liquor sold accounts for over 60% of total sales (with beer alone accounting for 36% of total sales).
- 26 Although the Police also acknowledge there have been no infringement notices issued, the Police intervention details the failure by the licensee to have the requisite number of crowd controllers on duty on 27 May 2016 and states that when questioned by police at the venue, neither the Approved Manager nor the crowd controllers were aware of the condition in relation to the ratio of crowd controllers to patrons, as a result of which the Police issued a caution to the licensee.
- 27 In addition, the Police have reported that of the sample of 66 Incident Reports obtained from the licensed premises for the period 1 January 2016 to 28 July 2016, one report relating to the removal of a patron was not reported to police and a further four reports had not recorded the time of the incident, as required under the Act.
- 28 The Police provided crime statistics for calendar years 2014 and 2015 highlighting an increase in the number of alcohol related offences from 88 to 115 and the number of non-alcohol related offences from 946 to 1061 for the locality.
- 29 The Police submit that the locality is becoming “heavily weighted with high risk venues” and points to a concern for community safety should the starting and finishing times for crowd controllers be adjusted.

Further submissions on behalf of the applicant

- 30 In support of the application to review the Director’s decision, the applicant has submitted:
 - a) the Incident Reports obtained by police indicate the predominant reason for patrons being removed was intoxication and/or nearing intoxication, and only a very small percentage of Incident Reports relate to incidents that occurred between 5pm and 7pm on Friday and Saturday and after

9pm on a Sunday (in fact, there was no breakdown or analysis of the type and nature of the 66 Incident Reports obtained by police or of Incident Reports over the two year period of trading by The Squire's Fortune submitted with the application or before the Director);

- b) neither the Police nor the Executive Director of Public Health has objected to the application;
- c) the evidence provided in the Police intervention does not support the contention the variation of starting and finishing times of crowd controllers would have a negative impact in the form of increased harm or ill-health in the locality;
- d) there is no evidence to suggest there would be an influx of patrons who have not been assessed for drunkenness and it is not usual or regular to experience such an influx;
- e) it is a notorious fact that the Director has determined other tavern restricted licence applications in the precinct and imposed less onerous and more flexible conditions relating to crowd controllers compared to the applicant's premises giving rise to a "serious inconsistency" and a "distinct lack of procedural fairness";
- f) by reference to the conditions applying to other tavern restricted licences in the locality, the applicant is requesting the Commission to "fairly review and apply equity and good conscience in the determination of the review as per section 16(7)(b) of the Act"; and
- g) having satisfied both the primary and secondary objects of section 5 of the Act, the application should be granted as all the relevant facts demonstrate the variation will permit the premises to continue to operate in the public interest with similar conditions relating to crowd controllers to those of other tavern restricted licensed premises in the precinct.

Submissions on behalf of the Director

- 31 It is submitted on behalf of the Director that the decision of the Director to vary the condition relating to crowd controllers so that crowd controllers are required only from 6pm on Fridays not 5pm, but otherwise to refuse the variations sought by the applicant was a balanced and correct decision, particularly having regard to the important role crowd controllers play in minimising the risk of alcohol related problems at, or in the vicinity of, licensed premises.
- 32 In response to the applicant's characterisation of the existing condition and the condition as amended by the Director as unfair and inconsistent given the conditions relating to crowd controllers at other licensed premises in the locality, it is submitted:

- a) the reliance on conditions which apply to other establishments is an attempt to put before the Commission material that was not before the Director; and
 - b) in any event, the evidence upon which those decisions were made is not before the Commission, nor is it possible to determine whether there are factually sufficient circumstances in any of the cases to make a comparison legitimate or worthwhile.
- 33 Furthermore, it is submitted that the contention that the applicant has been denied procedural fairness is misconceived.

Further submissions on behalf of the Police

- 34 The Police further submit that:
- a) the reliance of the applicant on the sales data, which in the opinion of the Police shows an increase in sales from 5pm on Fridays and Saturdays, in support of a variation of the start time to 7pm fails to appreciate the integral role of crowd controllers in monitoring patrons entering the premises;
 - b) the failure to comply with the crowd controller condition on 27 May 2016, the fact the Approved Manager and crowd controllers were not aware of the condition and the fact there are other omissions in some Incident Reports indicates the applicant does not fully appreciate or comply with the terms and conditions of the licence;
 - c) incidents do occur at the premises, including after 9pm on a Sunday, which are of such a nature that the presence of crowd controllers would be beneficial; and
 - d) the likelihood of an increase in patrons entering the premises without being properly assessed and the evidence of alcohol related crime in the locality supports a finding that reducing the number of hours during which crowd controllers are on duty is not in the public interest.

Determination

- 35 Under section 25(2c) of the Act, 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.
- 36 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.*

37 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 (*Hancock v Executive Director of Public Health*, [2008] WASC 224).

38 As the Director has determined that section 38(2) of the Act is to apply to this application, the applicant must satisfy the Commission that granting the application is in the public interest.

39 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.

40 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).

41 The Commission also 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.

- 42 Advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (*Palace Securities Ltd supra*).
- 43 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.*
- 44 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 music, reflecting the diversity of the requirements of consumers in the State; and*
 - b) *deleted*
 - 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.*
- 45 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 considered by 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”.

46 The applicant has sought a variation to the condition attached to its licence governing the employment, and starting and finishing times, of crowd controllers.

47 Section 64(1a) of the Act provides:

(1a) The licensing authority may impose, vary or cancel a condition under subsection (1) —

(a) of its own motion; or

(b) on the application of the licensee; or

(c) at the written request of the parties to a liquor accord.

48 The existing condition states:

Crowd controllers, licensed under the Security and Related Activities (Control) Act 1996 are to be employed at a ratio of two (2) crowd controllers for the first one hundred (100) patrons and one (1) crowd controller for each additional one hundred (100) patrons or part thereof on Friday and Saturday nights from 5.00 pm until half an hour after the close of trade, and on Sunday nights from 4.00 pm until half an hour after the close of trade. Approved Managers licensed under the Security and Related Activities (Control) Act 1996 make up no more than 50% of the required crowd controllers.

("the existing condition")

49 The Director, having considered the application and the evidence presented by the applicant and the Police, determined to vary the condition by amending the starting time for crowd controllers on Friday night from 5pm to 6pm. As amended the condition states:

Crowd controllers, licensed under the Security and Related Activities (Control) Act 1996 are to be employed at a ratio of two (2) crowd controllers for the first one hundred (100) patrons and one (1) crowd controller for each additional one hundred (100) patrons or part thereof on Fridays from 6.00 pm until half an hour after the close of trade; Saturdays (sic) nights from 5.00 pm until half an hour after the close of trade; and Sundays from 4.00 pm until half an hour after the close of trade.

("the amended condition")

50 Although not stated in the Director's decision, the Commission has assumed the provision relating to Approved Managers making up to 50% of the required crowd controllers has not changed.

51 The principal evidence presented by the applicant in support of the application is sales data for trading at the applicant's premises over four weekends selected by the applicant.

- 52 The sales data evidence is in the form of daily “Timesales Summary” tables showing for each hour of trade on each of the days comprising the four weekends selected by the applicant, among other things: “Total Sales” (representing the dollar value of sales of food and beverages combined), “Total Costs”, “Profit”, “Customers” and “Average sales”.
- 53 The applicant contends by reference to the sales data that “due to the timing of the busy periods demonstrated by the sales data collected from ‘The Squires Fortune’, crowd controllers are not required at the premises until 7pm on Friday and Saturdays and after 9pm on Sundays”.
- 54 Without explanation, it is not readily apparent from the sales data tables exactly which period the hourly sales data relate to or what the term “Customers” means. This is of some significance in understanding whether:
- a) the hourly dollar sales figure (shown as a dollar amount at, for example, 7pm) represents sales before or, as became apparent at the Commission hearing, after the various times depicted in the tables; and
 - b) the number of “Customers” represents a headcount for the premises, or, again as became apparent at the Commission hearing, the number of sales per customer at the various times set out in the tables.
- 55 It, therefore, became apparent at the Commission hearing that there is no evidence of the number of patrons frequenting the premises at any time on the days for which the sales data has been presented, or at all.
- 56 In the view of the Commission, the sales data, considered in isolation, does not support a reduction in the utilisation of crowd controllers.
- 57 Apart from the statement in the PIA that patrons are “predominantly mature aged professionals” there is no direct evidence of the profile of customers frequenting the licensed premises; further, if the reference to this demographic group is intended to suggest the patrons at the licensed premises have a propensity to drink responsibly, or at least more responsibly than any other particular group of people, there is no evidence to support this contention.
- 58 Moreover, the applicant has not produced any evidence to support the contention that the level of craft beer sold demonstrates the alcoholic beverage of choice being consumed has the “least negative impact on patrons and the locality”.
- 59 The applicant appears not to be questioning the need for, and supports the continued use of, crowd controllers during the hours specified in the existing condition except for the variations sought in the application.
- 60 When asked at the Commission hearing why the commencement time for crowd controllers should be varied to 7pm on Saturday and not on Sunday

when the sales data reflects not markedly dissimilar sales for both Saturday and Sunday between 5pm and 6pm, and 6pm and 7pm, it was suggested that it is a notorious fact that the drinking culture is different on each of these days.

- 61 Although the level of trade at the premises would appear to taper off significantly after 8pm on a Sunday, the Commission notes that the sales data is limited to trade over four weekends only and there was no evidence before the Director that there is not, or will not be, occasions when a higher level of patronage and trade will extend beyond 9pm or 10pm on a Sunday.
- 62 It is also apparent to the Commission from the incident leading to the issue of a caution by the police to the applicant on 27 May 2016 that the Approved Managers at the premises are not licensed under the Security and Related Activities (Control) Act 1996, and do not perform the role of crowd controller.
- 63 As a consequence, if the crowd controller condition were varied to only require crowd controllers to be employed until 9pm on a Sunday, no person licensed under that Act and experienced in dealing with criminal or unacceptable behaviour would be on duty if an incident arose after 9pm.
- 64 The applicant has presented a statement from the Managing Director of the security firm providing crowd controller services in support of the application.
- 65 However, the basis or foundation of this statement is not apparent apart from the reference by the author to his experience in supplying security services to the applicant, and certainly there is no direct evidence of the basis upon which the author concludes that the venue attracts “well mannered individuals that (sic) do not cause any violence or disruptive behaviour”.
- 66 Although the applicant has suggested that the 66 Incident Reports examined by police support the contention that venue management are diligent in meeting their statutory responsibilities and that the venue experiences a low level of unacceptable behaviour, there is very little evidence, other than the incidents notified to police as required under the Act, of the type and nature of the behaviour that has given rise to the Incident Reports or that has been experienced over the two year period during which The Squires Fortune has been trading.
- 67 The Commission has read and heard a good deal from the applicant on what it has variously claimed has been a denial of procedural fairness, and inequitable and unfair treatment.
- 68 The claim is based on the contention the crowd controller condition applying to the applicant’s licence is different to the conditions applying to other licences in the locality.
- 69 In the Commission’s view, these submissions, which appear not to have been made to the Director, are misconceived.

- 70 In its application, the applicant did not seek to identify factual matters or refer to characteristics of other venues or their modes of operation or their licence conditions to support the variation the applicant is seeking. This was not the basis of the application.
- 71 While the Commission accepts and strongly supports the principle of equity and fairness, and the importance of consistency in the decision making of the licensing authority, each type of premises and operation is unique and each application is determined on its particular circumstances and the evidence presented.
- 72 The applicant may disagree with the weight given to various matters of evidence by the Director and the outcome of the application, but it is quite another matter to claim a denial of procedural fairness or that the Director has acted in bad faith or unfairly.
- 73 The Commission does not accept these submissions made by the applicant.
- 74 The evidence and submissions presented to the Commission to establish that the grant of the application would be in the public interest having regard to the scope, and the primary and secondary objects of the Act are of limited value.
- 75 Maintaining public confidence in the liquor industry is paramount and hence the need for adequate controls over the sale and consumption of liquor (section 5(2)(d) of the Act).
- 76 The contention of the applicant at the Commission hearing that patrons may somehow be unsettled by, or apprehensive about, the presence of crowd controllers between 5pm and 7pm when patrons are typically frequenting the premises for food as well as alcohol, such as an evening meal, is not supported by any evidence and is not accepted.
- 77 Although the Commission acknowledges the commercial benefit to the applicant associated with the proposal, and although the commercial interests of an applicant and the public interest are not mutually exclusive, the Commission is not satisfied the applicant has demonstrated the variation to the crowd controller condition, as sought, would not diminish the level of control over the behaviour of patrons or the monitoring of patrons entering the licensed premises of the applicant.
- 78 Furthermore, in the Commission's view, the applicant has not demonstrated to the requisite degree that the public interest matters set out in section 38(4) of the Act would not be negatively impacted if the application were granted.
- 79 Having regard to the approach outlined by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*, the Commission is not persuaded that the level of harm and unacceptable behaviour inherent in the current operation at the licensed premises would not be exacerbated, or that

there is a public benefit that would outweigh any potential risk of an increase in harm and unacceptable behaviour, if the application is granted.

- 80 Accordingly, the Commission is not satisfied that the applicant has discharged its onus and established that the grant of the application is in the public interest.
- 81 The Commission accepts that the trade between 5pm and 6pm on Friday would appear to be less than either a Saturday or Sunday and although the Commission is strongly of the view that the applicant has not made out a case for a reduction in the start and finishing times for crowd controllers to the extent sought in the application, the Commission is prepared to uphold the decision of the Director in respect of the starting time for crowd controllers on Fridays.
- 82 Accordingly, the application to review the decision of the Director is dismissed and the decision of the Director confirmed.

A handwritten signature in black ink, appearing to read 'M. Egan', is written over a horizontal line.

MICHAEL EGAN
PRESIDING MEMBER