

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

Applicant: 140 Williams Perth Pty Ltd
(represented by Mr John Prior, instructed by Mr Jarrod Ryan and Ms Alyce Cassetta of Rockwell Olivier Lawyers)

Objector: Wentworth Plaza Hotel Corporation Pty Ltd
(not a participant in the review proceedings)

Interveners: Commissioner of Police
(represented by Mr Cheyne Beetham of State Solicitor's Office)

Executive Director of Public Health
(not a participant in the review proceedings)

Commission: Mr Jim Freemantle (Chairperson)
Mr Seamus Rafferty (Deputy Chairperson)
Ms Belinda Lonsdale (Member)

Premises: The Aviary, 140 William Street, Perth

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.

Date of Hearing: 29 May 2013

Date of Determination: 30 May 2013

Date of Reasons of Determination: 11 February 2014

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health* [2008] WASCA 224
- *Kapinoff Nominees Pty Ltd v Director of Liquor Licensing* [2010] WASCA 345
- *Executive Director of Public Health v Lily Creek International Pty Ltd* (2000) 22 WAR 510
- *Executive Director of Public Health v Highmoon Pty Ltd and ORs* [2002] WASCA 77

Determination

- 1 The applicant in this matter is the holder of a restricted tavern licence for the premises at Shop 1/40, 140 William Street Perth and trades under the name "The Aviary". The licence was granted to the applicant on 23 March 2011 and the premises have traded since November 2011.
- 2 On 20 May 2012, the applicant applied to the Director of Liquor Licensing (the "Director") pursuant to section 60(4) (g) of the *Liquor Control Act 1988* ("the Act") for the grant of an extended trading permit (ETP).
- 3 On 23 January 2013, in decision A217512 the Delegate of the Director of Liquor Licensing ("the Director") granted the application for an ETP but declined to grant the applicant the full range of conditions sought. The ETP permitted trading for the following extended hours:
 - On Fridays and Saturdays from 12am midnight to 1am the following morning in the Rooftop Bar;
 - Friday and Saturday evenings from 12am midnight to 2am the following morning in the Lounge and Birdcage bars; and
 - Sunday evenings from 10pm to 11pm across the entire venue.

A number of restricted trading conditions on the ETP were also imposed.

- 4 In this application for review, approval is sought for the Aviary to trade for the following hours:
 - From 12am to 2am the following morning on Thursdays, Fridays and Saturdays; and
 - 10pm to 12am on Sundays.

The Legislative Framework

- 5 The decision whether to grant the application must be considered having regard to the relevant legislative framework, and the objects of the Act set out in section 5, being primarily to:
 - i. regulate the sale, supply and consumption of liquor; and
 - ii. minimise harm or ill health caused to people, or any group of people, due to the use of liquor; and
 - iii. 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.

- 6 Section 33 of the Act provides that the Liquor Commission (“the Commission”) has absolute discretion to grant or refuse an application under this Act for public interest considerations, having regard to the merits of the application.
- 7 In deciding whether or not an application is in the public interest, the Commission must have regard to the factors set out in section 38 (4) of the Act which provides:
- (a) (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 —*
- i. the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and*
 - ii. the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and*
 - iii. 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*
 - iv. any other prescribed matter.*

The Main Points of Contention

- 8 At the hearing of the application, counsel for the applicant outlined the main points of contention, namely:
- that the applicant sought to have the trading hours extended to 2am from Thursday to Saturday and from 10pm – 12am on Sundays.
 - that the restrictions on entertainment in the rooftop bar, be removed.

Applications for Review – General Principles

- 9 The Commission must conduct an application for review under section 25(1) of the Act by conducting its own review of the material before the Director at first instance (refer *Hancock v Executive Director of Public Health* [2008] WASCA 224 AT [53] to [54] per Martin CJ).
- 10 The Commission may have regard only to the material that was before the Director when making the decision (refer *Kapinoff Nominees Pty Ltd v Director of Liquor Licensing* [2010] WASCA 345 per Hall J at [34] – [36]).

- 11 The Commission has had regard to the original material filed in support of the original application in so far as it is referred to in the decision of the Director on 23 January 2013.
- 12 The applicant's original application had contained a significant amount of material in the form of; inter alia, a Public Interest Assessment, a Consumer Requirement Questionnaire and an Acoustic Expert's Report.
- 13 The factual basis of the application (which was not seriously in dispute) are set out in paragraph 24 of the applicant's submissions and it is convenient to reproduce those submissions here:
1. *The Applicant's facility in the Perth Central Business District ("CBD") is unique, in particular for the following reasons:*
 - *it provides the largest rooftop bar facility in Western Australia;*
 - *the facility provides a wide variety of services, including a substantial food service and a variety of live entertainment;*
 - *the premises do not operate as a nightclub type environment and are consistent with the tavern licence as a pub style venue;*
 - *the premises, since it has opened for trade, has been well patronized and tends to attract an older demographic of patrons, in particular those above the age of 25 years; and*
 - *a variety of function packages are available at the premises.*
 2. *The existing patrons of the premises would support the extended trading hours sought, in particular for the following reasons:*
 - *the unique nature of the premises;*
 - *patrons will not be required to move to other licensed premises to use licensed facilities during the extended trading hours sought by the Applicant;*
 - *the accessibility of the premises to significant public transport facilities;*
 - *there is a limited number of licensed premises in the Perth CBD that provide late night pub style trading for the older demographic who do not want to attend a venue aimed at the 18 to 25 year old market.;*
 - *the Applicant or its employees have not breached the conditions of its liquor licence nor committed any offences under the Act;*

- *at the existing closing hours on the Thursday to Sunday nights, the premises are well patronized;*
- *there is a general desire of a number of entities and authorities identified in the material provided by the Applicant to the director to reinvigorate the CBD to make it a better destination for the public, city workers and tourists;*
- *the current operation of the premises does not contribute significantly to the harm or ill health caused to people or any group of people in the CBD, or the suburb of Perth, due to the use of liquor;*
- *the Directors of the applicant are experienced in the provision of liquor licensing services and venues in Western Australia and Victoria;*
- *the premises have a significant clientele from the corporate and tourist sector.*

Objection to the Application

- 14 The Wentworth Plaza Hotel, whose premises are located directly opposite the Aviary lodged an objection to the application for review.
- 15 Relevantly, on 9 November 2012, the Director in decision number A221189 granted the Wentworth Plaza Hotel an ETP to allow extended trading hours in part of the licensed premises on Fridays and Saturdays from 12.00 midnight to 2.00am the following morning.
- 16 The extent of Wentworth's objection to this application was limited to noise emanating from the rooftop bar only.
- 17 Wentworth did not seek to be heard at the hearing of the application and in the Commissions' view, Wentworth has not produced any evidence capable of being considered by the Commission on the question of whether the application for review should be granted.

Interventions by the Commissioner of Police and the Executive Director of Public Health

- 18 A notice of intervention under section 69 of the Act was lodged by the Commissioner of Police ("first intervener") and the Executive Director of Public Health ("second intervener").

19 The EDPH intervened to make representations regarding the high risk aspects of increased availability and use of liquor associated with the application for this tavern licence.

20 On 5 March 2013, the Commissioner intervened in the review proceedings pursuant to section 69(6) (c) of the Act.

The first intervener's Submissions

- i. The first intervener submits that extending the trading hours of the premises would involve an increase in alcohol-related harm or ill-health inconsistent with the primary object of the Act as outlined in section 5(1)(b).
- ii. It was submitted that data reveals a high level of public disorder and alcohol related harm in the suburb of Perth and that there are already a number of late night venues for the public to frequent. The first intervener referred to the fact that between June 2011 and May 2012 there were 547 alcohol related offences reported and statistics which suggested that approximately 64% of police attendances were on Thursdays to Saturdays. It was submitted that the number of incidents began to rise at approximately 9pm and continues at a high level until 2am.
- iii. The first intervener submits that:
 - the statistics in the Report are consistent with the peak periods of popular licensed premises in Perth and the hours requested as part of the applicant's proposed extended trading permit;
 - the fact that the applicant's premises are situated directly above the Perth Underground Train station, being a hub for intoxicated persons, will result in more intoxicated persons being released into the hub;
 - that it is questionable whether having another late night venue in an area already populated with late night venues is "consistent with the proper development of the liquor industry".

21 These are undoubtedly all relevant considerations. However, these factors must be weighed against the other objects of the Act, which might be promoted by the conditions imposed on a licence. Although, the minimization of harm or ill-health is paramount, it is only one factor to be considered (refer *Executive Director of Public Health v Lily Creek International Pty Ltd* (2000) 22 WAR 510 (Lily Creek No 1) at [50] and *Executive Director of Public Health v Highmoon Pty Ltd and ORs* [2002] WASCA 77 per Wheeler J at [11] – [12]).

Determination

22 The Commission acknowledges that there are significant levels of alcohol-related harm in the Perth and Northbridge localities. However, there are a number of venues,

particularly in the Northbridge area, which have later closing times, and in our view the evidence in this case does not establish that having these premises open for a further one-hour each night would result in a substantial increase in alcohol-related harm.

23 The Commission accepts that the Aviary contains a number of important points of distinction substantially for the reasons outlined by the applicant in its submissions. Having regard to the fact that the Aviary is more akin to a pub-style venue in which the focus is not just on the provision of alcohol and the fact that it is located in the CBD, the Commission is persuaded that the application ought to be granted.

24 Having considered the competing objects of section 5 of the Act, the Commission is of the view that it is appropriate to grant the application to the following extent:

- Trading be permitted on 12.00am midnight to 2.00am the following morning on Thursday nights.
- Trading be permitted 12.00am midnight to 2.00am the following morning on Friday nights.
- 12.00am midnight to 2am the following morning on Saturday nights; and
- 10.00 pm to 12.00am midnight on Sunday nights.
- That no live music be permitted after 1am in the outside area.
- The permit will otherwise be subject to the conditions imposed by the Delegate of the Director of Liquor Licensing dated 23 January 2013.

A handwritten signature in black ink, consisting of a stylized first name and a last name, positioned above a horizontal line.

JIM FREEMANTLE
CHAIRPERSON