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88 Paragraphs

HANCOCK v EXECUTIVE DIRECTOR OF PUBLIC HEALTH - BC200809126

Supreme Court of Western Australia
Martin CJ

GDA 2 of 2008

5 September 2008

Hancock v Executive Director of Public Health [2008] WASC 224

ADMINISTRATIVE LAW -- Decision of Liquor Commission of Western Australia -- Liquor Control Act 1988 (WA) -- Procedural fairness -- Obligation to provide reasons -- Content of reasons -- Turns on own facts.

(WA) **Liquor** Control Act 1988

(WA) **Liquor** Licensing Act 1988

(WA) Workers' Compensation and Rehabilitation Act 1981

Attorney General of New South Wales v Kennedy Miller Television (1998) 43 NSWLR 729; *Campbelltown City Council v Vegan* [2006] NSWCA 284 ; (2006) 67 NSWLR 372; *Carlson v King* (1947) 64 WN (NSW) 65; *Collector of Customs v Pozzolanic* (1993) 43 FCR 280; *Edwards v Giudice* [1999] FCA 1836 ; [1999] FCR 561; *Garrett v Nicholson* [1999] WASCA 32 ; (1999) 21 WAR 226; *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356; *Kioa v West* (1985) 159 CLR 550; *Laveson Pty Ltd v Smith & Anor* [2003] WASCA 286; *Lloyd v Faraone* [1989] WAR 154; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; *Mount Lawley Pty Ltd v WAPC* [2004] WASCA 149 ; (2004) 29 WAR 273; *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447; Pallot & Ors v Harrison (Unreported at 950261, 12 May 1995); *Pettitt v Dunkley* [1971] 1 NSWLR 376; *Public Services Board of NSW v Osmond* (1986) 159 CLR 656; *R v Gaming Board for Great Britain; Ex parte Benaim & Khaida* [1970] 2 QB 417; *Re Bannan; Ex parte Suleski* [2001] WASCA 289; *Re Commercial Registrar of the Commercial Tribunal of Western Australia; Ex Parte Perron Investments Pty Ltd* [2003] WASC 198; *Re Croser; Ex Parte Rutherford* [2001] WASCA 422 at 2001) 25 WAR 170; *Soulemezis v Dudley Holdings Pty Ltd* (1987) 10 NSWLR 247, referred

Martin CJ.

Introduction

[1] This appeal from the Liquor Commission of Western Australia (the Commission) was heard on 5 September 2008. After hearing argument I made orders allowing the appeal, quashing the decision of the Commission, ordering that instead of that decision there should be a decision quashing the decision of the Delegate of the Director of Liquor Licensing (the Director), together with a further order directing the Director or his Delegate to reconsider the appellant's application according to law, and, if practicable, by the Office of the Director of Liquor Licensing being differently constituted. At the time of making those orders, I indicated that reasons for my decision would be published in due course. These are those reasons.

The proceedings before the Director

[2] On 18 December 2006 the appellant, Mr David Hancock, applied for the grant of a Hotel Restricted Licence pursuant to s 41(1)(b) of the Liquor Licensing Act 1988 (WA), together with an Extended Trading Permit (ETP) permitting the premises to trade from midnight until 2.00 am the following morning on each of Friday night and Saturday night. The application related to premises to be known as 'Hotel Bambu' situated in Aberdeen Street, Northbridge.

[3] The application was advertised and objections were lodged.

[4] The Liquor Licensing Act was substantially amended by legislation passed during 2006 (Liquor and Gaming Legislation Amendment Act 2006 (WA)), and became the Liquor Control Act 1988 (WA) (the Act) on 7 May 2007. As the application had not been determined by that date, pursuant to the transitional provisions in the Act, the application was to be determined pursuant to the provisions of the Act as amended (sch 1A of s 5(3) of the Act).

[5] The appellant lodged written submissions in support of his application during June and July of 2007. Objectors lodged various materials during 2007.

[6] The decision of a Delegate of the Director was published on 6 September 2007. The Delegate indicated in those reasons that she had determined that the application would be decided on the basis of the written materials lodged, and without a hearing, pursuant to the powers conferred upon the Director in s 13 and s 16 of the Act.

[7] The Delegate described the premises the subject of the application as a backpacker hostel, having 12 rooms used as short term accommodation for up to 75 people with ancillary services such as kitchens, a bar room and ablution facilities. The Delegate further noted that the premises are situated directly opposite premises licensed as a tavern, and immediately adjacent to premises licensed as a special facility. She further noted that the area surrounding the premises is colloquially known as the 'Northbridge entertainment precinct' and is home to a range of nightclubs, hotels, taverns and restaurants.

[8] The Delegate made reference to the objections which had been lodged and the broad grounds of objection. She noted that one of the grounds of objection was related to the standard of the premises. In relation to that contention, the Delegate stated:

> [T]he assessment of the Department's own Inspector is such that the standard of the premises is less than would normally be expected by the licensing authority for a hotel restricted licence ... In this regard, the Inspector noted in his report date 12 January 2007 that *'the general standard of the premises is only fair and is not what is expected of a hotel restricted licence'*. (original emphasis)

[9] The Delegate also observed:

> Mr Hancock has held occasional licences in the past and was refused the most recent occasional licence in 2006 on the basis that previous licensed events had not been conducted in accordance with the licence conditions. For example, the applicant was required to have licensed crowd controllers on duty, which he didn't; and the event was approved as a private function not open to the public and that, according to the police, was also not the case.
>
> Mr Hancock has also previously engaged in promotions of his backpacker's hostel which were of concern. For example, the police submit that in 2006 his internet site advertised the premises as *'serving the most inexpensive drinks of any bar in central Northbridge'*, and *'keenly priced cocktails and our range of inexpensive beers'*.
>
> As at 30 August 2007 on the www.hostez.com site, Hotel Bambu advises -- *'The front lounge bar boasts plasma tvs and a complete DJ set-up, pool tables and lounges. While we are waiting for our bar license, guests can bring their own drinks in and consume on site at no charge'*.
>
> Mr Hancock has continued to host evenings at the premises where entertainment and alcohol are available. According to the police, the applicant currently trades as a BYO facility and I understand that the police have had cause to visit the premises on numerous occasions over the last 12 months as a consequence of problems in and around the venue.
>
> Further, the police confirm that the applicant provides DJ entertainment regularly and attracts general Northbridge punters as though it were already licensed premises.
>
> To assess this perception, I have visited the vicinity of the premises on a number of occasions and have formed the view that, without the benefit of knowledge to the contrary, any reasonable person would assume this premises is licensed already.
>
> Because of these issues, I believe the licensing authority has cause to be concerned about this applicant's general regard for the Liquor Control Act. The proper development of the industry and providing controls over persons involved in the disposal of liquor

are both objects of the Act. Further, the regulation of the sale, supply and consumption of liquor is a primary object. (original emphasis)

[10] It is common ground that none of the material set out in the reasons of the Delegate, and which I have cited above, was made known to Mr Hancock before it appeared in the decision of the Delegate. Mr Hancock was therefore deprived of any opportunity to put any submissions before the Delegate with respect to the conclusions which she drew. In particular, Mr Hancock was not provided with a copy of the report of the departmental inspector and was not given notice of: the allegations made with respect to his alleged non-compliance with previous conditions imposed on the grant of licences, on reliance being placed on the way his premises was promoted, or the view formed by the Delegate in the course of her inspections of 'the vicinity of the premises on a number of occasions'.

[11] The Delegate went on to conclude that Mr Hancock had not satisfied her that the grant of the licence was in the public interest. She further expressed the view that the grant of the licence sought would result in: the potential for harm or ill health to be caused to people due to the use of liquor at the licensed premises; a negative impact on the amenity of the locality in which the proposed licensed premises is situated; and offence, annoyance, disturbance or inconvenience which would affect people who reside or work in the vicinity of the licensed premises.

[12] In summary, the Delegate concluded that Mr Hancock had not discharged the onus of satisfying her that the granting of the application was in the public interest, on each of the three grounds specified in s 38(4) of the Act.

The proceedings before the Commission

[13] By letter dated 2 October 2007, Mr Hancock exercised the right conferred by s 25(1) of the Act to seek review of the Delegate's decision by the Commission. The grounds upon which that review was sought were later particularised in a letter from Mr Hancock's solicitor dated 30 November 2007. Mr Hancock's application for review was heard by the Commission on 31 January 2008. Section 25(2c) of the Act provides that when exercising its power of review the Commission is to only have regard to the material that was before the Director at the time of making the decision. Therefore, any attempt by any party to the proceedings before the Commission to introduce further material was refused by the Commission.

[14] The Commission published its reasons for decision on 14 February 2008. After setting out formalities such as the parties, their representatives, the dates of hearing and so on, under the heading 'Reasons' the Commission stated:

> The application is based on four main grounds.
>
> 1. Denial of **natural justice** and/or procedural fairness in that no opportunity was given to respond to
>   a) A departmental inspection report alluding to the state of the premises.
>   b) Advertisements appearing on an internet site
>   c) Verbal submissions from the Police
>   d) Observations of the Director
>
> In respect of points 1. a), b) and c) the Commission put some weight on the argument of denial of **natural justice**, however whether there was or was not a degree of denial of **natural justice**, the Commission's determination did not turn on any of these 3 points. (The Commission is aware the file on which the inspector's report is lodged, was available to the applicant).
>
> In respect of point d) the Director is entitled to form certain views based on visits to the applicant's venue (not denied by the Applicant).
>
> The Commission did not accept that there was any material denial of **natural justice** in these views not being given to the Applicant for comment.
>
> In any event the Commission's decision did not turn on point d).

[15] The second ground of review related to the Delegate's finding that the applicant's venue was a BYO facility. It is unnecessary to set out the reasons given by the Commission in respect of that ground. The remaining grounds relied upon were dealt with by the Commission in the following terms:

> 3 & 4. The findings set out below were not supported by evidence or the evidence was insufficient.
>   a) Further harm or ill health would be caused.
>   b) Amenity of the area would be adversely affected.

In respect of harm or ill health, the Commission put some weight on the applicant's submission that the granting of a licence would enable greater control over the consumption of liquor.

However, the Commission accepts the Director's contention that grant of the licence is not in the public interest on the grounds of potential increase in harm or ill health because:

(i) the published and readily available search of Chikritzhs, Stockwell and others clearly demonstrates the relationship between outlet density and increased harm and ill health; and

(ii) the venue houses and attracts one of the generally accepted 'at risk' groups in respect of alcohol consumption (18-28 years of age).

The Commission did not accept the applicant's submission that backpackers and their friends were not a high 'at risk' group.

The Commission holds that the Director put appropriate weight on the submission by the Executive Director of Public Health.

The Commission accepts the Applicant's submission that the premises are in the Northbridge Entertainment Precinct and in determining matters such as noise and disturbance this fact should be accorded appropriate weight particularly in respect of affected residential areas should there be any. The Commission notes that there were no objections from residents.

On balance, the Commission accepts the Director's contention that there is the potential for negative impact on the amenity of the area.

Furthermore, research conducted in the East Sydney Policing area and published by NSW Government demonstrates a clear correlation between outlet density and incidence of crime and anti social behaviour.

5. The Director erred in finding the applicant had not satisfied the provisions of Section 38(2).

The Commission found that the Director had not erred in her finding that the applicants had not satisfied the requirements of Section 38(2).

The Commission held that the reasons given in her determination were sufficient to justify the conclusion she reached even if the Commission had fully upheld the first ground of appeal.

In the Commission's view its findings in relation to harm or ill health and loss of amenity set out earlier confirms that the requirements of Section 38(2) had not been met by the Applicants.

[16] Under the heading 'Other issues and observations' the Commission made the following observations amongst others:

3. The submission of the Police was generally accepted by the Commission however the Commission did accept the Applicant's submission that many of the behavioural issues were a result of patrons of surrounding premises causing problems.

...

5. The Commission was not convinced that the control of the ingress and egress to the premises is adequate.

[17] The Commission concluded its reasons with the following:

Costs

Costs associated with the Application are set at $2,000 and are to be met by the Applicant.

The grounds of appeal

[18] The notice of appeal lodged by Mr Hancock identified 10 grounds of appeal. Because of the consensus which emerged during the hearing of the appeal to the effect that the appeal must be upheld, all represented parties agreed that it was only necessary for the court to consider and provide reasons in respect of four of those grounds, being:

The Liquor Commission of Western Australia erred in law by:

1. Failing to provide adequate reasons for its decision.
2. Finding that the decision at first instance could be affirmed in circumstances where the Applicant was denied natural justice by the failure to disclose evidence relied upon to ground findings in relation to the manner in which the premises were managed and the Applicant's compliance with provision of the Act.

> 3. Finding that the provisions of Section 21(1) of the Act empowered the Liquor Commission to award costs to the Liquor Commission.
>
> ...
>
> 10. Failed [sic] to consider the restrictive nature of the licence sought by the Applicant pursuant to Section 41(1)(b) of the Act.

[19] This is the first appeal to this court from a decision of the Commission. I was advised that the decision under appeal was only the second decision of the Commission in relation to s 25 of the Act (there have now been five decisions). It was common ground that, in the other decisions of the Commission in relation to s 25 of the Act published since the decision the subject of this appeal, the reasons provided by the Commission are similar in form to the reasons provided in this case.

[20] My fundamental reason for quashing the decision of the Commission could be quite shortly expressed, however, the parties contended, and I accept, that it is desirable for the court to elaborate upon the issues raised by the four grounds pressed, for the purpose of providing guidance to the Commission, the Director (and his Delegates), and the industry as to the proper construction and effect of the Act as amended.

The Act

[21] Because all the grounds which are pressed rely upon the construction of the Act, it is desirable to commence with a review of the relevant provisions of the Act following its substantial amendment in 2006.

[22] Since those amendments, the licensing authority constituted by the Act is made up of the Director and the Commission. By s 5 of the Act, the licensing authority is required to have regard to the primary and secondary objects of the Act as specified in that section, which include the regulation of the sale, supply and consumption of liquor and the minimisation of harm or ill health caused to people, or any group of people, due to the use of liquor.

[23] The Commission is created by div 2 of pt 2 of the Act (s 8 of the Act). Section 9I of the Act provides that a decision of the Commission is to be given in writing and authenticated in accordance with the rules of the Commission. The section further provides that the Commission is to give a copy of a decision to each party to the proceedings. There is no express provision in the Act dealing with the content of the written decision, and in particular, no provision of the Act expressly requiring the Commission to give reasons for its decision.

[24] Section 13 of the Act provides that the Director is responsible for the administration of the Act other than those aspects of administration relating to the Commission, and that the Director is to determine applications and matters under the Act that are not subject to the jurisdiction of the Commission. The section further provides that the Director may determine any application or matter without conducting a hearing.

[25] Section 16 contains a number of provisions relating to proceedings before the 'licensing authority' (defined in s 3 of the Act). They include provisions to the effect that the licensing authority, however constituted, is to act without undue formality and may obtain information as to any question that arises for decision in such manner as it thinks fit, and make its determination on the balance of probabilities. The Act also provides that the licensing authority:

> [M]ay consider and dismiss or determine applications, and receive submissions and representations in relation to any application before it, as it thinks fit [s 16(1)(d)].

[26] This section further provides that the licensing authority is to determine its own procedure, and is not bound by the rules of evidence or any practices or procedures applicable to courts, except to the extent that the licensing authority adopts those rules, practices or procedures. The section also provides that the licensing authority is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms, and as speedily and with as little formality and technicality as is practicable (s 16(7)). Section 16(11) provides:

> Subject to subsections (8) and (9) and section 30, the licensing authority shall ensure that each party to a proceeding before it is given a reasonable opportunity to present its case and, in particular, to inspect any documents to which the licensing authority proposes to have regard in making a determination in the proceedings and to make submissions in relation to those documents.

[27] Sections 16(8) and s 16(9) are concerned with the extent to which proceedings are to be conducted in public, and the suppression of publication of evidence or documents received by the licensing authority. Section 30 is concerned with information classified as confidential by the Commissioner of Police. None of the information received by the licensing authority in this case was classified in that way.

[28] Section 17 of the Act makes provision for the representation of parties to proceedings before the licensing authority. Section 18 confers powers upon the licensing authority to summons any person to attend before it for the purpose of giving evidence, and to require the production of records. Section 20 of the Act creates the offence of contempt of the licensing authority, which is to be dealt with as if it were a contempt of the District Court.

[29] Section 21 of the Act deals with costs, it provides:

> (1) Subject to this Act, the costs of and incidental to all proceedings to be determined by the Commission, including any adjournment, shall be in the discretion of the Commission, and the Commission has power to determine by whom, in what manner and to what extent costs are to be paid.
> (2) The costs may be recovered in any manner in which costs payable in respect of proceedings of the District Court may be recovered.
>
> [(3) repealed]
> (4) Costs and expenses, to be payable by or to a party to the proceedings, may be awarded by the Commission in respect of an objection whether the application to which the objection relates is granted, refused or withdrawn, except that costs shall not be awarded in relation to an objection made under s 73(1) by a person authorised to intervene under s 69(6), (7), (8) or (11).
> (5) Where, in the opinion of the Commission, a person has --
> (a) brought proceedings; or
> (b) exercised a right, or attempted to exercise a purported right, to object to an application,
>
> frivolously or vexatiously, the Commission may award costs against that person.
> (6) The Director does not have power to award costs.

[30] Section 25 of the Act provides that, subject to some exceptions not presently relevant, a person who is a party to proceedings before the Director and who is dissatisfied with the decision made by the Director may apply to the Commission for a review of that decision. The section further provides that when carrying out such a review, the Commission is to be constituted by three members if the decision of the Director relates to an application for the grant or removal of a licence. Section 25(2c) provides that when conducting a review, the Commission is to have regard only to the material that was before the Director when making the decision. Section 25(2d) provides that when conducting a review of a decision involving a question of law, the Commission is to be constituted by, or is to include, a member who is a legal practitioner.

[31] On a review, the Commission may affirm, vary or quash the decision subject to the review, make a decision that should (in the opinion of the Commission) have been made in the first instance, and give directions as to any question of law reviewed or to the Director (s 25(4)).

[32] Section 27 of the Act provides that the Commission may state a case on a question of law to the Supreme Court. Section 28 provides that a party to proceedings before the Commission who is dissatisfied with a decision of the Commission may appeal. In the case of a decision of the Commission constituted by three members, the appeal lies to the Supreme Court on a question of law. In the case of an appeal against the decision of the Commission constituted by one member, the appeal lies to the Commission constituted by three members, including a member who is a legal practitioner. The powers of the Supreme Court on appeal include the power to:

> (a) affirm, vary or quash the decision appealed against; or
> (b) make any decision that the Commission could have made instead of the decision appealed against; or
> (c) send the decision back to the Commission for reconsideration in accordance with any directions or recommendations that the Court considers appropriate,

together with the power to make any ancillary or incidental orders the court considers appropriate (s 28(5)). Those powers were exercised in the determination of this appeal.

[33] Section 33 of the Act provides that the licensing authority has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers to be in the public interest.

The section further provides that an application may be refused even if the applicant meets all the requirements of the Act, or may be granted, even if a valid ground of objection is made out.

[34] Section 38(2) provides that an applicant for the grant of a licence must satisfy the licensing authority that granting the application is in the public interest. Section 38(4) provides that without limiting the matters to which the licensing authority may have regard in determining whether granting an application is in the public interest, the authority may consider:

(a) the harm or ill health that might be caused to people, or any group of people, due to the use of liquor; and
(b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and
(c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises ...

[35] Section 41 of the Act makes provision for the grant of hotel licences. Section 41(1)(b) provides that:

(b) where a hotel licence is subject to a condition --
(i) prohibiting the sale of packaged liquor to persons other than lodgers; and
(ii) restricting other sales to liquor sold for consumption on the licensed premises,

it shall be referred to as a hotel restricted licence.

The application made by Mr Hancock was for a hotel licence subject to conditions of this kind.

[36] Section 60 of the Act provides for the grant of ETPs.

[37] Division 6 of pt 3 of the Act makes provision for the grant of applications subject to conditions. Division 7 of the same part sets out the procedures to be followed when application is made for the grant of a licence, and includes provisions relating to the lodgment of objections on grounds which include that the grant of the application would not be in the public interest, and other more specific grounds corresponding to the matters set out in s 38(4) of the Act.

Ground 2: procedural fairness

[38] The argument of all parties to this appeal proceeded upon the assumption that both the Director (and his or her Delegate) and the Commission are obliged to comply with the requirements of procedural fairness. There has been debate in some of the cases on the question of >the extent to which an obligation to comply with rules of procedural fairness is to be implied in the case of an application for a licence (which can be regarded as a privilege) (see for example *R v Gaming Board for Great Britain; Ex parte Benaim & Khaida* [1970] 2 QB 417), but more recent authority establishes that procedural fairness will be required where the legitimate expectations of a person are affected by the relevant decision (see *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J). These general principles relating to the implication of an obligation to comply with the rules of procedural fairness have been established by the cases, however, in the end, the application of those principles comes down to the proper construction of the statutory power under consideration.

[39] In *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356, the Full Court unanimously held that the Director was obliged to comply with the requirements of procedural fairness when exercising the powers conferred by the Liquor Licensing Act in respect of liquor licensing. I am bound by that decision, but in any event see no reason to question its correctness. Further, the issue is put beyond doubt by s 16(11) of the Act which I have set out above. That provision requires both the Director and the Commission to ensure that each party to a proceeding is given a reasonable opportunity to present its case.

[40] It is clear that Mr Hancock was denied that opportunity by the course taken by the Delegate. The Delegate took into account a number of significant matters without any prior notice to Mr Hancock. Mr Hancock had no opportunity to make submissions to her in relation to those matters. There cannot be any doubt that she failed to provide Mr Hancock with procedural fairness, and failed to comply with s 16(11) of the Act.

[41] The reasons given by the Commission suggest that it may have considered the fact that certain documents were on a file held by the licensing authority to which an applicant had a right of access was sufficient to comply with the requirements of procedural fairness and the obligations specifically imposed by s 16(11) of the Act. If that proposition is to be inferred from the Commission's reasons, it must be resolutely rejected.

[42] Procedural fairness requires that a decision maker contemplating making a finding adverse to a party whose interests are likely to be affected by the decision, put that party on notice of that prospect on terms which provide the party with a reasonable opportunity to make submissions in response. Consequently, procedural fairness does not require the party against whom such a finding might be made to conduct their own inquiries or investigations, or form speculative views as to the subjects upon which adverse findings might be made, or the materials that might be relied upon to make adverse findings. Sometimes the nature of the proceedings themselves will be sufficient to provide adequate notice of the prospect of an adverse finding. So, the exchange of submissions by interested parties, or the pursuit of a line of questioning in cross-examination may, in appropriate circumstances, put a party on notice as to the risk of an adverse finding. However, it cannot be contended that the mere fact that there is a document on a file in the possession of the licensing authority, to which an applicant might have access upon request, is a sufficient basis for concluding that procedural fairness was provided, or that an applicant was given a reasonable opportunity to present its case in opposition to an adverse finding based upon that document.

[43] In those cases in which the Director or his or her Delegate exercise the power to make decisions under the Act without convening a hearing, it is essential that the procedures adopted ensure compliance with the requirements of procedural fairness and the specific provisions of s 16(11) of the Act. So, in any case in which the Director or his or her Delegate propose to make a finding adverse to any party to the proceedings before the licensing authority, it is essential that the relevant party be made aware of the prospect of such a finding, and of the evidence or other materials to be relied upon for the purposes of such a finding, and be given adequate opportunity to present evidence or other materials and submissions to the licensing authority in opposition to that prospective finding.

[44] The Delegate of the Director did not follow that course in this case. It is not at all clear from the reasons given by the Commission what view the Commission took in relation to these matters. With respect to the first three aspects of the denial of procedural fairness specified in its reasons, the Commission 'put some weight on the argument of denial of **natural justice**', but then referred to the fact that the licensing authority's file was available for inspection by the applicant. In relation to the fourth aspect identified by the Commission in its reasons -- that is, the fact that the views formed by the Delegate upon her site visits had not been communicated to Mr Hancock, with the result that he had been denied the opportunity of putting any submissions in relation to those views -- the Commission concluded that this did not amount to a denial of procedural fairness. The Commission was wrong to do so. The fact that the Delegate of the Director was entitled to form views based upon a site visit was not denied by Mr Hancock's representative in the hearing before the Commission. However, that is quite a different issue to the question of whether, having formed those views, the Delegate was obliged to put them to Mr Hancock in order that he could make submissions addressing them. Procedural fairness required that he be given that opportunity, as did the express provisions of s 16(11) of the Act. The Director and his or her Delegates should be under no doubt that the procedural fairness obligations to which I have referred above apply with as much force to tentative views which they form as a result of site inspections, as they do to views formed on the basis of other evidence or materials.

[45] Because the Commission is unable to receive any material other than that which was before the Director at the time of making the decision, if the Director has denied procedural fairness, it will not ordinarily be possible for that denial to be cured in proceedings before the Commission -- at least where the cure requires the provision of an opportunity to present evidentiary material. It follows that, in such a case, the only way in which the Commission could uphold the decision of the Director would be if it decided to entirely exclude from consideration the matters upon which the Director relied, and in respect of which procedural fairness was denied. This course could only be followed if the matters to which the Director had regard were irrelevant to the issue under review. The reasons given by the Commission do not state with any clarity the extent to which it took into consideration the matters in respect of which procedural fairness had been denied. The Commission's reasons state that its decision 'did not turn on' the first three matters (inspection report, allegations of non-compliance and reliance on how the premises was promoted), but that is a very different thing to saying that they were entirely excluded from consideration. No comment was made in relation to the views of the Delegate after visiting the site. Because the reasons of the Commission leave open the distinct prospect that those matters were taken into consideration, it follows that the Commission has denied Mr Hancock procedural fairness and the right to present his case specifically conferred by s 16(11).

[46] For these reasons, I concluded that the proceedings before both the Delegate and the Commission had fundamentally miscarried. At no point in those proceedings was Mr Hancock given a reasonable opportunity to present his case. In such circumstances, the only course open was to make orders which would result in the recommencement of the process before the licensing authority. Those orders were made. Because of the approach taken by the Delegate of the Director, and the firmness of the views she expressed in her reasons, it is appropriate that the office of the Director be

differently constituted for the reconsideration of Mr Hancock's application, if practicable, so as to avoid a perception of pre-judgment of the issues.

[47] For these reasons, ground 2 was upheld.

Ground 1: the Commission's reasons

[48] Issue was joined on the question of whether the Commission was obliged to give reasons for its decision. Although this appeal can be disposed of on other grounds, out of deference to the argument and because of its possible application to the future workings of the Commission, it is appropriate that I express my views in relation to it.

[49] As I have observed, although the Act requires the Commission to make its determinations in writing, and to serve those determinations on the parties, the Act does not specify whether or not the Commission is obliged to give reasons for its determinations.

[50] Before reviewing the cases dealing with the extent to which an obligation to state reasons will be implied notwithstanding the absence of an express statutory obligation, it is appropriate to set out the views I have formed in relation to the character of the functions performed by the Commission -- at least in cases such as this -- when it is undertaking a review of a decision made by the Director.

[51] It is clear that the functions of the Commission when undertaking such a review are properly characterised as administrative, rather than judicial. The amendments which created the Commission abolished the Licensing Court which had, prior to those amendments, undertaken many of the functions now performed by the Commission. It is reasonable to infer from the abolition of the Licensing Court, and from the structure, constitution and functions of the Commission, that it was the intention of the Parliament that those functions be performed by an administrative body, rather than by a judicial body.

[52] Moving then from the general characterisation of the functions undertaken by the Commission when reviewing a decision of the Director, attention needs to be directed to a more specific characterisation of those functions. In the course of argument it was suggested that, because the Commission was unable to receive any material other than that which was before the Director at the time of the decision, it is proper to characterise the Commission's function as being a function of appeal in the strict sense, rather than by way of rehearing.

[53] I do not accept that proposition. There is nothing in the nature of an appeal by way of rehearing which necessitates the grant of a power to receive further evidence. As a matter of logic and practice, a rehearing can be conducted on the basis of the evidence or other materials before the original decision maker. On the other hand, an appeal in the strict sense would mean that the power of the Commission to quash or amend the original decision would be conditioned upon the establishment of error on the part of the original decision maker. There is nothing in the Act in general, or in s 25 in particular, which would support the proposition that the Parliament intended that the Commission would have such a restricted function. On the contrary, the fact that the Parliament has shifted the performance of the function from a court to that of an administrative tribunal, capable of being constituted by people with particular expertise and experience in the issues that arise for determination, strongly suggests that the Parliament intended that the Commission undertake a review of the decisions of the Director on their merits, as and by way of a rehearing. The fact that the Parliament has restricted the materials available to the Commission for the purposes of such a rehearing to those which were before the Director, can be explained by a desire to avoid a situation in which parties to proceedings before the Director 'keep their powder dry' and save their evidence and arguments for presentation to the Commission on review.

[54] Accordingly, I approach the question of whether the Commission is obliged to give reasons for its determinations on the basis that, when it is conducting a review of a decision made by the Director, it is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the materials before the Director, and to make its own determination on the basis of those materials. In a case in which the Director has conducted a hearing, the Commission will no doubt give appropriate weight to the forensic benefits derived by the Director from having seen and heard witnesses give evidence. However, this is not such a case.

[55] For reasons which will appear, it is also of significance to note that a person dissatisfied with a decision of the Commission constituted by three members is given a right of appeal to this court on a question of law.

[56] The extent to which an administrative decision maker might be subject to an implied obligation to state reasons has been the subject of some judicial controversy. The decisions are not entirely consistent. An appropriate starting point is

the decision of the High Court in *Public Services Board of NSW v Osmond* (1986) 159 CLR 656. In that case, Gibbs CJ (with whom Wilson, Brennan, Deane and Dawson JJ agreed) observed:

> There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons. (662)

[57] However, in *Osmond*, after agreeing with Gibbs CJ, that there was no general rule requiring reasons for administrative decisions to be given, Deane J went on to observe:

> On the other hand, it is trite law that the common law rules of natural justice or procedural fair play are neither standardised nor immutable. The procedural consequences of their application depend upon the particular statutory framework within which they apply and upon the exigencies of the particular case. Their content may vary with changes in contemporary practice and standards. That being so, the statutory developments referred to in the judgments of Kirby P and Priestley JA in the Court of Appeal in the present case are conducive to an environment within which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision maker should be under a duty to give reasons or to accept that special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision maker provide reasons for a decision to a person whose property, rights or legitimate expectations are adversely affected by it. Where such circumstances exist, statutory provisions conferring the relevant decision making power should, in the absence of a clear intent to the contrary, be construed so as to impose upon the decision maker an implied statutory duty to provide such reasons. As has been said however, the circumstances in which natural justice or procedural fair play requires that an administrative decision maker give reasons for his decision are special, that is to say, exceptional. (676)

[58] In *Re Commercial Registrar of the Commercial Tribunal of Western Australia;* ; *Ex Parte Perron Investments Pty Ltd* [2003] WASC 198, Wheeler J rejected an argument to the effect that there were 'special circumstances' pertaining to the administrative decision there under consideration which imported an obligation to provide reasons. Her Honour concluded that there must be something more than the fact that it would not be unduly onerous to provide reasons to import the obligation:

> Rather, something must be found either in the statutory scheme or in the nature of the decision or in some other circumstance particular to the case, to suggest that the case is so out of the ordinary that the general rule in relation to the provision of reasons does not apply. ([23])

[59] In *Edwards v Giudice* [1999] FCA 1836 ; [1999] FCR 561, Moore J suggested that a strongly contested case in which a final order of significant consequence may be made might be a sufficient circumstance to imply an obligation to provide reasons [44]. However, with respect, that observation appears to go somewhat further than the observations made in other cases. Further, the conclusion in that case, to the effect that there was an obligation to give reasons, is more readily justified by the existence of a right of appeal in the statutory scheme which was under consideration.

[60] In the case of judicial decisions, it is well established that an obligation to provide reasons is to be implied where there is a right of appeal to a superior court -- see *Carlson v King* (1947) 64 WN (NSW) 65 at 66; *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 381 and 387; *Soulemezis v Dudley Holdings Pty Ltd* (1987) 10 NSWLR 247 at 270; *Lloyd v Faraone* [1989] WAR 154 at 163-164. In *Laveson Pty Ltd v Smith & Anor* [2003] WASCA 286, Miller J relied upon this line of authority to conclude that the Licensing Court (which performed many of the functions now performed by the Commission prior to the 2006 amendments) was subject to an obligation to articulate proper reasons [7].

[61] However, in *Campbelltown City Council v Vegan* [2006] NSWCA 284 ; (2006) 67 NSWLR 372, Basten JA considered that it remained important to differentiate between functions properly characterised as judicial, and functions properly characterised as administrative, for the purposes of determining whether there was an implied obligation to give reasons, notwithstanding the existence of a right of appeal. In the view of Basten JA, the efficacy of subsequent legal processes was not a sound basis for determining whether or not reasons were required. As his Honour observed, the existence of a full right of appeal, by way of rehearing, might mitigate strongly against the implication of a right to reasons -- referring to the observations of Priestley JA on that subject in *Osmond* in the Court of Appeal, *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 485. In the view of Basten JA, a most important consideration in the assessment of whether reasons are required was the characterisation of the function being performed. If that function was properly characterised as judicial, there is good reason to import an obligation to give reasons. As I have observed, I would not characterise the functions of the Commission in that way.

[62] However, there are other decisions which suggest that, even in the case of administrative functions, the existence of a right of appeal may provide a cogent basis for implying an obligation to state reasons. That view finds support in the decision of Handley JA in *Vegan* and by the court in *Attorney General of New South Wales v Kennedy Miller Television* (1998) 43 NSWLR 729. The latter case concerned decisions of costs assessors who had taken over the functions of assessing legal costs previously undertaken by court officers. Those functions were characterised by the court as being administrative in nature (although Handley JA expressed doubts on that subject, at 739). Notwithstanding that characterisation, Priestley JA, with whom the other members of the court agreed, observed that:

> [U]nless the costs assessors are to be obliged to give reasons for their determinations, the appeal provisions are likely to be, although not completely useless, so close to it as to negate the clear intent that in regard to questions of law at any rate a party dissatisfied with the costs assessor's decision should have a real and not largely illusory right of appeal. (735)

[63] With the greatest respect for the views expressed by Basten JA, in my opinion, the same approach should be taken to the construction of the Act in this case -- at least in circumstances in which there is a right of appeal to this court on a question of law. If the Commission was not obliged to give reasons for its determinations, that right of appeal would be illusory. I can see no reason why the Act should be construed in a way which would attribute to the Parliament an intention that a right of appeal specifically conferred could be rendered nugatory by a failure to provide reasons. That view is reinforced by the consideration that an obligation to provide reasons is consistent with the nature of the function being undertaken -- that is the review by way of rehearing of an earlier decision. The interests of the parties, the original decision maker, the industry and the public are all served by the provision of reasons by the Commission for its decisions. The provision of reasons will enable informed decisions to be made as to the likely outcome of future applications, facilitate the development of policy and foster consistency. It is unlikely that these obvious advantages would have been overlooked by the legislature, and more likely that their attainment would have been assured.

[64] Accordingly, for these reasons, at least when there is a right of appeal to this court from a decision of the Commission, the Commission is obliged to give reasons for that decision.

The content of the reasons required

[65] In the context of judicial tribunals, the formulation of the requisite content of a statement of reasons commonly cited is that provided by Jordan CJ in *Carlson v King* at 66:

> It has long been established that it is the duty of a court of first instance, from which an appeal lies to a higher court, to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision.

[66] This formulation has been cited with approval by Moffitt P in *Pettitt v Dunkley* at 387, by Malcolm CJ in *Lloyd v Faraone* at 163 and by Miller J in *Laveson Pty Ltd v Smith* at [6].

[67] In *Pallot & Ors v Harrison* (Unreported, WASC, Library No 950261, 12 May 1995), Owen J observed that while the specific content of the reasons required must, of course, depend upon the circumstances of the particular case, the reasons must show both the parties and an appeal court why a decision was made in a particular way. Owen J also emphasised that unless it is apparent on the face of the reasons why the decision maker arrived at their conclusion, the entire process can be called into question. This approach was adopted by the Full Court in *Garrett v Nicholson* [1999] WASCA 32 ; (1999) 21 WAR 226 [31].

[68] In *Mount Lawley Pty Ltd v WAPC* [2004] WASCA 149 ; (2004) 29 WAR 273, the court emphasised that the obligation to state reasons served more purposes than merely enlivening a right of appeal. As the court observed ([26]), the obligation to provide reasons is likely to produce a more soundly based rational judgment. The court elaborated upon the requisite content of a statement of reasons, at least in a curial context, and upon the consequences of inadequacy of reasons, in the following passages:

> 27. Where there is a right of appeal, the reasons must be sufficient to give effect to that right. The basis for the decision must be apparent, as otherwise the losing party cannot know whether there has been a mistake of law or of fact. Just what that will involve depends upon the nature of the case. Some cases turn upon a simple contest of

> credibility between two witnesses. Others involve detailed and complex factual and legal issues requiring close reasoning and analysis.
>
> 28. Reasons need not be lengthy and elaborate: *Re Powter;* ; *Ex parte Powter* (1945) 46 SR (NSW) 1 at 5; *Beale*, at 443; nor do they need to refer to all the evidence led in the proceedings: *Mifsud v Campbell* (1991) 21 NSWLR 725 at 728. However, relevant evidence should be referred to (albeit not necessarily in detail) and, where there is conflicting evidence of significance to the outcome, both sets of evidence should be referred to. Where one set of significant evidence is preferred over another, the trial Judge should set out findings sufficient to explain why: *Beale*, at 443. Similarly, where a dispute involves a form of 'intellectual exchange, with reasons and analysis advanced on either side', the Judge 'must enter into the issues canvassed before him and explain why he or she prefers one case over the other': *Flannery*, at 382.
>
> 29. Inadequacy of reasons does not necessarily amount to an appealable error. An appeal court will only intervene when no reasons have been given in circumstances in which they were required, or when the inadequacy is such as to give rise to a miscarriage of justice: *Beale*, at 444. Nor does an appealable error arising from inadequate reasons necessarily result in a new trial. The appeal court is entitled to consider the matter and, if it can do so (where, for example, only one conclusion is reasonably open on the available evidence), it may itself decide the matter: *Beale*, at 444

[69] Although these requirements were enunciated in the context of the performance of a judicial function, at least where there is a right of appeal, I can see no reason why they should not also be applied to an administrative function, such as that performed by the Commission. What that means, in practical terms, is that while the Commission is not obliged to refer in detail to the entirety of the evidence it received, where there is a conflict in evidence which is significant to the outcome, it is necessary for the Commission to refer to the conflicting evidence and to explain why one set of evidence is preferred over another. Similarly, where there is a conflict in submissions which is significant to the outcome, it is necessary for the Commission to set out the differing positions advanced by the parties and the reasons why it prefers one position over another.

[70] However, while the basic requirements that must be served by a statement of reasons may not depend upon the classification of the function being performed, as either administrative or judicial, the assessment of the manner in which those requirements must be met will be affected by the nature and expertise of the decision maker. So, where the statute vests the power of decision in a tribunal which does not necessarily comprise legally qualified persons, the approach properly taken to an assessment of the reasons provided by such a decision maker is appropriately described by Kirby J in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259:

> 1. The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law.
> 2. This admonition has particular application to the review of decisions which, by law, are committed to lay decision-makers, ie tribunals, administrators and others. This is not to condone double standards between the reasons and decisions of legally qualified persons and others. It is simply to recognise the fact that where, by law, a decision is to be made by a person with a different, non-legal expertise, or no special expertise, a different mode of expression of the decision may follow. It must be taken to have been contemplated by the law maker (291).

[71] In the present context, as I have noted, the question of whether or not the Commission will include a person with legal qualifications depends upon the particular function being performed by the Commission.

[72] The approach enunciated by Kirby J in *Wu Shan Liang* was endorsed in *Re Croser;* ; *Ex Parte Rutherford* [2001] WASCA 422 ; (2001) 25 WAR 170. In that case, Murray J observed:

> At the very least, one would expect a sufficient discussion of relevant matters to enable the parties to understand the basis upon which the determination has been made. Viewed in that light, the giving of reasons may be seen to be a task of explanation which need not be onerous and need not be performed in formal language of a kind which may be employed by lawyers. The adequacy of the reasons may be tested by asking whether the party upon whom the determination may have an adverse impact in the context of the statutory scheme, may understand why the determination was not more favourable and so that that party may know that the panel has performed its statutory function. [9]

[73] That case concerned a challenge to a determination made by a Medical Assessment Panel constituted under the Workers' Compensation and Rehabilitation Act 1981 (WA). Olsson AUJ (with whom Steytler J agreed), referred with approval to the observations of Kennedy J in *Re Bannan;* ; *Ex parte Suleski* [2001] WASCA 289 at [12] and [14]:

12. Section 145E(3) of the Act requires the Panel to give its determination and reasons in writing to the Director. The requirements for reasons have been discussed in a number of decisions of this Court. Thus, in *Re A Medical Assessment Panel; Ex parte Hays* unreported; FCt SCt of WA; Library No 980575; 5 October 1998, Wheeler J, with whom the other members of the Court agreed, said at 6-7 of her reasons:

> So far as the 'reasons' of the panel are concerned, it is fair in my view, to characterise the mere listing of matters allegedly considered by the panel as a complete failure to provide reasons. The essence of reasons for decision is that they disclose the reasoning processes of the Tribunal. Fulfilment of the obligation to give reasons ensures that a person whose interests may be adversely affected by a decision understands why the decision has been made, and allows a party dissatisfied with a decision to determine whether there has been a reviewable error: see *Re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 478; *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507; *Telescourt v Commonwealth* (1991) 29 FCR 227.
>
> As has been said on many occasions, no standard of perfection is required in preparation of the reasons, and they are to be considered fairly and not combed through 'with a fine appellate toothcomb to find error': *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291; *Bisley Investment Corp Ltd v Australian Broadcasting Tribunal* (1982) 59 FLR 132 at 157. At a minimum, however, it seems to me that in a case of this kind the panel must not merely list the materials upon which it relied, without any hint as to what portions of those materials is considered particularly relevant or the way in which it reconciled any portions of those materials which might have been in conflict. It should at least have set out what it considered to be the material facts which emerged from the materials to which it referred, and its process of reasoning from those material facts to its conclusion. Although each case must be considered individually, having regard to the purpose of the obligation to provide reasons, it is generally sensible for a fact finding body of this kind to make a particular reference to material which would appear to be inconsistent with the conclusion which it reached (such as the EMG and nerve conduction study in this case) and to explain why such material was considered not to be relevant, or to be outweighed by other considerations.

See also *Re A Medical Assessment Panel; Ex parte Rusich* [2001] WASCA 111.

...

14. It is important that the applicant should be able to understand, from the reasons for decision, why he has had his claim dismissed. He should be told in clear and unambiguous language why he has lost. What is required, at the least, in the Panel's reasons is that they give the medical reasons in sufficient detail to show that the questions referred to it have been properly considered according to law, and that the answers furnished are founded upon an appropriate application of the members' medical knowledge and experience -- cf *Masters v McCubbery* [1996] 1 VR 635, per Callaway JA at 661. Measured by these standards, the report was inadequate and a reviewable error has been established.

Olsson AUJ went on (at [72]).

> I would merely wish to add to what fell from Kennedy J that it needs to be borne in mind that Medical Assessment Panels are constituted of medical practitioners who have a large number of cases coming before them. It is not to be expected that they will produce the closely reasoned decision of a lawyer. What *is* required is the writing of a determination which, on a fair construction of it, does convey the basis of the decision arrived at, with sufficient particularity to satisfy the above dicta. [original emphasis]

[74] So, in the case of an administrative decision maker:

> The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error. (*Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287, cited with approval in *Wu Shan Liang*, 272)

The reasons of the Commission

[75] Adopting the approach required by the cases to which I have referred, in my respectful submission, the reasons given by the Commission for its decision fell manifestly short of the content required to enable the parties and this court to comprehend the process of evaluation undertaken by the Commission and the reasons for its decision.

[76] Dealing firstly with the portion of the Commission's reasons relating to procedural fairness, as I have observed, it is not at all clear from the reasons given by the Commission:

(a) whether it upheld the contention that Mr Hancock had been denied **natural justice** (procedural fairness) in respect of the first three aspects identified by the Commission; or
(b) whether the Commission had excluded from consideration the matters in respect of which Mr Hancock asserted he had been denied procedural fairness.

Mr Hancock and the other parties to the proceedings before the Commission were entitled to know the position at which the Commission had arrived on both those issues, as is this court when an appeal is brought.

[77] In relation to the observations made by the Commission adjacent the numbers '3 and 4' and which I have set out above at [15], there are, I think, a number of fundamental difficulties with the reasons provided by the Commission.

[78] First, it is not at all clear from those reasons whether the Commission has formed its own view of the issues before the Director or whether it has approached the matter on the basis that error on the part of the Director must be established. That uncertainty arises from the Commission's reference, on two occasions, to the Commission accepting 'the Director's contention', and from its observation that 'the Director put appropriate weight' on a particular submission. In relation to the issue of harm or ill health, it is of great significance to that issue that the application was for a 'hotel restricted licence' to be granted on conditions that alcohol not be permitted to be sold for consumption off the licensed premises, and that alcohol only be sold to those who are lodgers at the backpackers' hostel (see further: Ground 10: hotel restricted licence). As the Director noted, those lodgers had the opportunity to acquire alcohol from licensed premises directly across the road and next door. No reference is made to these important restrictions on the licence sought by Mr Hancock in the reasons of the Commission. Further, the reasons given by the Commission refer to a relationship between outlet density and increased harm and ill health, including the incidence of crime and anti social behaviour. However, what is omitted from the Commission's reasons, is any elucidation of how that general proposition was applied to the particular circumstances of this case, in which, by definition, the patrons of the licensed premises would be in the vicinity (because they were lodgers), and had ready access to alcohol in licensed premises immediately adjacent to, and opposite the premises for which the licence was sought.

[79] In relation to the propositions advanced by the Executive Director of Public Health, the only observation made by the Commission was 'that the Director put appropriate weight' on that submission. With respect, that observation tells one nothing of the view formed by the Commission in relation to the propositions advanced in that submission, or of the Commission's reasons for its view.

[80] On the subject of amenity of the area, the Commission records its acceptance of submissions made by Mr Hancock on that subject, and notes that there were no objections to Mr Hancock's application from residents. However, the Commission apparently nevertheless concludes that the grant of the licence would have an adverse effect upon the amenity of the area. The only reason given by the Commission for that view was the proposition that it 'accepts the Director's contention that there is the potential for negative impact on the amenity of the area'. With respect, that is the expression of a conclusion, and not the elucidation of a process of reasoning.

[81] Further, in relation to those parts of the Commission's 'other issues and observations' which I have set out above (at [16]), in the item numbered 3, the Commission does no more than record submissions which it accepted. Again, that is the announcement of a conclusion, not the elucidation of a process of reasoning. The same observation applies to the item numbered 5, as no reason is provided for the Commission's view that the control of the ingress and egress to the premises was not adequate. Further, the expression of that view in terms that the Commission 'was not convinced' suggests that the Commission has applied a higher standard of proof than is necessary or appropriate.

[82] In relation to costs, it is not at all clear from the Commission's reasons to whom the costs are to be paid, why they are to be paid, or how they have been assessed.

[83] Accordingly, notwithstanding the latitude properly given to the assessment of reasons provided by an administrative body such as the Commission, the reasons given in this case fall well short of the requirements to be implied into the Act. Therefore, ground 1 should be upheld. This is another reason why I concluded that the decision of the Commission had to be set aside.

Ground 3: costs

[84] As I have observed, the purpose or effect of the costs order made by the Commission is not at all clear. The failure to refer to the objectors, or to allocate the costs it ordered Mr Hancock to pay to any particular objector, or apportion those costs as between the objectors, rather suggests that the Commission may have intended that Mr Hancock make a contribution to the Commission's own costs. If that is the proper interpretation of the order made by the Commission, such order plainly exceeded the Commission's powers under the Act.

[85] In my view, it is clear that when, in s 21 of the Act, reference is made to 'costs', that word means the costs of the parties to proceedings before the Commission, and does not include the Commission's own costs. Otherwise s 21 of the Act would give the Commission an unlimited power to charge parties to proceedings before it whatever it liked for the provision of its services. It seems to me to be most unlikely that this was the intention of the legislature. If it had been the intention of the legislature to raise fees from parties to proceedings before the Commission, one would expect to see a specific provision in the Act to that effect, together with a power to make regulations establishing a scale of the fees to be charged.

[86] The policies to be adopted by the Commission in respect of the exercise of the power to order one party to pay the costs of another is a matter for the Commission. However, in the formulation of that policy, the Commission would no doubt have regard to s 21(5) which expressly provides that costs may be awarded against a party where proceedings have been brought frivolously or vexatiously. The Commission might well conclude that the terms of that subsection provide a legislative guide to the circumstances in which the legislature contemplated that the Commission would award costs against a party. Such an approach would be consistent with the characterisation of the functions of the Commission as administrative, rather than judicial. When the Commission is considering exercising its power to award costs, procedural fairness must be provided. That means that any party who might be affected by the order must be put on notice of the prospect of such an order being made and given the opportunity to put submissions on the question of whether an order should be made, and if so, the amount or method to be employed to assess the amount. Further, adequate reasons would have to be given for any determination made by the Commission on the subject of costs.

[87] For these reasons, ground 3 of Mr Hancock's appeal must also be allowed.

Ground 10: hotel restricted licence

[88] As I have observed, in the context of the issues that arose for determination by the Commission, the fact that Mr Hancock was applying for a 'hotel restricted licence', which, if granted, would not authorise the sale of alcohol for consumption off the premises, or to persons who were not lodgers at the premises, was a matter of considerable significance. In the reasons given by the Commission, no reference whatever is made to that fact. The Commission's failure to refer to a matter of such significance fairly gives rise to an inference that it was not a matter taken into account by the Commission. The nature of the licence sought and the conditions to which the licence would be subject are obviously matters of the utmost importance to the Commission's determination, and matters which, on the proper construction of the Act, must be taken into account by the Commission. It follows that ground 10 must also be upheld and would, of itself, have provided a sufficient reason for setting aside the Commission's decision.

Order

Appeal allowed

No appearance for the second respondent.

Counsel for the appellant: *Mr J B Prior*

Counsel for the first and third respondents: *Mr C S Bydder*

Solicitors for the appellant: *Ilberys Lawyers*

Solicitors for the first and third respondents: *State Solicitor for Western Australia*