

Liquor Commission of Western Australia

(Liquor Control Act 1988)

Applicant: Garrett Hotels 2010 Pty Ltd and
Primary Securities Pty Ltd
*(represented by Mr John Prior and Mr Tim Monaghan of
Dwyer Durack)*

Objectors in attendance: Mr Dougal McLay and Ms Gail McLay
Mr Peter Goff on behalf of Lisa Patricia Engelbrecht
Mr John Willoughby Sadlier

Objectors: Mr Phillipa Sarah Bant
Mr Jim Bennett
Ms Isobel Herbert
Ms Patricia Carmichael
Ms Dorothy Lynette Sadlier
Mr David Miller

Commission: Mr Alex Zilkens(Presiding Member)
Dr Eric Isaachsen (Member)
Ms Emma Power (Member)

Matter: Application pursuant to section 25 of the *Liquor Control
Act 1988* for a review of a decision by the delegate of the
Director of Liquor Licensing to refuse an application to
vary a condition of licence in relation to premises known
as the "Beach Club".

Premises: Beach Club, Cottesloe Beach Hotel, 104 Marine Parade,
Cottesloe

Date of Hearing: 29 November 2017

Date of Determination: 15 February 2018

Determination

The application for review is granted and the Existing Condition is varied as follows:

“Liquor may not be sold or consumed in that part of the premises known as the Beach Club after 11pm on Sundays, Mondays and Tuesdays unless the Beach Club is being used as a private function, arrangements for which have been made prior to that day.”

All other conditions of the licence remain in force.

Authorities referred to in Determination:

- *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*
- *Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356*
- *Hancock v Executive Director of Public Health [2008] WASC 224*
- *O'Sullivan v Farrer [1989] HCA 61*
- *Northbridge Enterprises Pty Ltd v Commissioner of Police [2014] WASC 135*
- *Busswater Pty Ltd v Director of Liquor Licensing (LC 17 of 2010)*
- *Re McHenry [1987] 4 SR (WA) 31*
- *Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207*
- *OSB Operations Pty Ltd v Jansen & Anor [2006] WASCA 270*
- *Woolworths Ltd v Director of Liquor Licensing and Other LC43/2011*
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others (LC 01/2017)*

Background

- 1 The licence of the area of the Premises known as the “Beach Club” (formerly known as the Beer Garden) of the Cottesloe Beach Hotel has a condition imposed which restricts liquor being sold or consumed in the Beach Club after 10pm on any night (“the Existing Condition”).
- 2 By an application lodged on 15 August 2016 made pursuant to section 64 of *the Liquor Control Act 1988* (“the Act”), the licensee applied to vary the Existing Condition of the licence to the following:
 - “Liquor may not be sold or consumed in that part of the premises known as the Beach Club after 11pm on Sundays, Mondays and Tuesdays unless the Beach Club is being used as a private function, arrangements for which have been made prior to that day.”
 - (“the Proposed Condition”).
- 3 The Proposed Condition would permit the Beach Club to trade the following hours:
 - a on Sundays to Tuesdays, to 11pm; and
 - b on Wednesdays to Saturdays, to 12 midnight.
- 4 The applicant complied with the statutory requirements prescribed by the Act and lodged documentation in support of the application for variation of the condition including a Public Interest Assessment Submission (“PIA”). The application was advertised in accordance with instructions issued by the licensing authority.
- 5 A number of notices of objection to the application were lodged by the objectors listed in this application.
- 6 The application was determined by the delegate of the Director of Liquor Licensing (“the Director”) with the Director approving the variation of the Existing Condition as follows:
 - “Liquor may not be sold or consumed in that part of the premises known as the Beach Club (beer garden) after:
 - (a) 10 p.m. on Sundays (generally) to Wednesdays; and
 - (b) 11 p.m. on Thursdays to Saturdays and on Sundays preceding a public holiday, unless the Beach Club is being used for a private function, arrangements for which have been made prior to that day.”
 - (“the Appealed Condition”).
- 7 The reasons for such decision were published 6 July 2017 (Decision A000211208).
- 8 Pursuant to section 25 of the Act, Garrett Hotels 2010 Pty Ltd and Primary Securities Pty Ltd (“the applicant”) have applied for a review of the decision of the Director.
- 9 A hearing before the Commission was held on 29 November 2017.

Additional Background

- 10 It is helpful and relevant in this case to refer to some general additional background regarding the operation and history of the Beach Club.
- 11 Prior to 2010 the Beach Club (then known as the Beer Garden) traded at a greater capacity and in a manner causing significant local disturbance and excessive noise which led to the Existing Condition to be imposed.
- 12 In mid 2010, the applicant purchased the Premises with the Existing Condition in place. The applicant closed the Beach Club and undertook significant improvements and renovations to the same.
- 13 The Beach Club re-opened in December 2012 and the applicant maintains the prior problems of the beer garden no longer exist due to the detailed reasons set out in the applicant's PIA.
- 14 In 2013, a section 117 complaint was made by various local residents (including some of the current objectors) ("the 2013 section 117 Complaint"). During the mediation of the 2013 section 117 complaint, certain acoustic attenuation works were agreed to and undertaken by the applicant.
- 15 The 2013 section 117 Complaint was dismissed by the Director (Decision A225105) and, on appeal, by the Commission (Decision LC 14/2015).

Submissions on behalf of the applicant

- 16 In its PIA and original submissions, the applicant submits that the Proposed Condition is in the public interest and should be granted due to the following factors:
 - a the nature of the service and style of operation at the Beach Club:
 - i is consistent with contemporary consumer requirements;
 - ii has undertaken a "culture shift" since 2012 including a focus on food, reduced patron numbers and no live music being played and change in patron entry policies and demographic;
 - iii has been significantly improved since the change of ownership and re-opening in 2012 and no longer demonstrates the same patron behaviour problems (including excessive alcohol consumption, antisocial and inappropriate behaviour);
 - b the Beach Club premises has undergone substantial renovations and improvements, including acoustic attenuation works and noise management practices;
 - c there is no intention to change the current style of service and operation;

- d Cottesloe Beach is an iconic beach and is a significant tourist attraction which attracts a large number of tourists;
- e regular and consistent feedback from patrons support the Proposed Condition and note that the Existing Condition does not suit their leisure needs and consumer requirements;
- f the statements from 6 persons provided with the PIA and the additional statements of a further 16 persons who live or work in the vicinity clearly indicate that:
 - i the Beach Club has greatly and positively changed for the better since its reopening in 2012;
 - ii those persons do not currently suffer from offence, annoyance, disturbance or inconvenience due to the operation of the Beach Club; and
 - iii those persons would find the amenity of the area enhanced if they could attend the Beach Club later than the trading times permitted by the Existing Condition;
- g the results of the consumer survey of 250 persons (150 being Beach Club patrons and 100 being general members of the public) support the Proposed Condition;
- h the dismissal of the 2013 section 117 Complaint indicates that the grant of the application would not cause offence, annoyance, disturbance or inconvenience to the residents, business owners or persons passing through the locality;
- i the implementation of the Proposed Condition would be in the public interest and improve local amenity by:
 - i providing an additional facility for licenced dining and beverage services for residents and tourists;
 - ii make the area more attractive to consumers, contributing towards economic growth;
- j the statement by Mr Manny Papadoulis as a tourism expert supports the fact there is significant consumer requirement for the increased trading hours of the Proposed Condition and shows that their implementation would have a positive impact on, and would contribute to the further development of, the tourism industry in Western Australia;
- k the statement by Mr Antonio Dichiera, CEO of the applicant, shows that the applicant is an experienced operator committed to responsible service of alcohol;
- l no interveners objected to the application.

- 17 In addition, the applicant maintains its evidence is persuasive and of a high standard and, further, that the objectors provide little or no relevant evidence to support their objections and assertions.
- 18 The applicant has appealed the Director's decision on essentially two grounds being:
- a the decision of the Director lacked procedural fairness on the basis that the Director did not give the applicant adequate notice that a decision may be made on more restrictive terms than the Proposed Condition; and
 - b the decision of the Director was not based upon conclusions reached in a rational manner based upon the evidence provided and the Director was misdirected in taking what was described as a "measured approach".
- 19 Further, it is contended by the applicant that the evidence supports that the circumstances that led to the Existing Condition being imposed have changed and that such condition is no longer appropriate.

Submissions on behalf of the Objectors

- 20 8 objections were received (from 11 individual objectors) to the applicant's original application on various grounds under the Act as well as including some objections that are not relevant to the decision made by the Director and the Commission.
- 21 Mr D Miller has objected under each available ground permitted under the Act. Specifically, he mentions noise, disruption, damage, litter, parking blockage, public urination. He also refers to his previous objection.
- 22 Ms P S Bant is the owner of a residence in close proximity to the Beach Club and objects on the grounds set out in section 74(1)(g)(i) on the Act. She contends that the noise produced would be a disturbance to the quiet neighbourhood and excessive at closing time.
- 23 Mr J and Ms IM Bennett do not specify any particular ground of objection but refer to the depreciation of land values and the prior 2013 section 117 Complaint.
- 24 Ms I Herbert objects on the grounds in sections 74(1)(a), 74(1)(b), 74(1)(g)(i) and 74(1)(j). Specifically the objection refers to the following issues:
- a the quiet amenity of Marine Parade would be jeopardised;
 - b the drinking culture lending itself to violence and antisocial behaviour;
 - c the noise from the Beer Garden is already intrusive during the current trading hours;
 - d the nearby residents will be inconvenienced and the family beach will suffer.
- 25 Ms L P Engelbrecht objects on the grounds in sections 74(1)(a), 74(1)(b), 74(1)(g)(i) and 74(1)(ii). The objection raises the matter of other hotels being in close proximity and the staggering of closing times of licensed premises in the area. The current and potential

disruption to residents from queuing, noise and antisocial behaviour is also referenced. Ms Engelbrecht also argues that the Beach Club is not a suitable venue for the area with its large patron capacity and that the other areas of the Premises adequately provide for extended hours use by patrons.

- 26 Ms P Carmichael objects on all permissible grounds. The objections raised are:
- a the impacts on the local area of antisocial behaviours, noise, disruptions to local residents, vandalism, police call outs, traffic movement and parking;
 - b the costs to the community and State for policing, hospitalisation and family violence; and
 - c health concerns that further hours will promote excessive drinking.
- 27 Mr J W Sadleir and Ms D L Sadleir object on the grounds permitted in sections 74(1)(a) and 74(1)(g)(ii) of the Act. The Sadleir's provided initial submissions, further submissions with evidence and copies of a variety of emails to the local authority and police. The Sadleirs live near the Premises and also own a rental property nearby. The Sadleirs assert that the area is more residential in nature than commercial. Further concerns raised are:
- a lack of suitable parking for patrons;
 - b lack of a suitable buffer between the Beach Club and residential areas;
 - c the extended trading hours will attract a more boisterous type of patron and encourage further drinking and inebriation;
 - d noise by patrons, arriving and departing will increase with vehicles leaving later in the night and create further disturbances to residents;
 - e that the nuisance and interruption from the Beach Club has not allowed the properties in Warnham Road to be developed and makes the properties less attractive to renters;
 - f the circumstances giving rise to prior noise complaints regarding the Beach Club will continue;
 - g that the Beach Club creates noise levels in excess of those permitted by the Environmental Protection Noise Regulations 1997 and therefore the amenity of the residents in John Street and Warnham Road is decreased;
 - h the design of and improvements to the Beach Club are not enough to minimise the noise created; and
 - i the Council did not object as an intervener only due to pressure put on Councillors by the applicant and Council should have followed the recommendation of its staff to lodge an intervention.

28 Mr D McLay and Ms G McLay object on all permissible grounds. Generally, the McLays submit that the neighbourhood would not gain any public interest benefit and the amenity of the neighbourhood would be decreased by noise and unruly behaviours and the general attractiveness of the area would be decreased. Specific concerns raised were:

- a the applicant was inaccurate in many aspects of its PIA and application and that the evidence provided by it does not support its application;
- b the type of patrons of the Beach Club are unlikely to want or need later trading hours which are, in any event, available in other parts of the Premises;
- c the statements collected by the applicant are not representative of the locals of the area but of a small minority;
- d the longer hours would place more vulnerable persons at risk and increase crime in the area;
- e the Beach Club is not a unique or iconic venue so does not need additional hours;
- f the increase of trading hours threatens a return of the problems of the prior beer garden and complaints will increase;

29 Two submissions relating to the section 25 application were provided by the objectors being JW and DL Sadlier and D McLay who objected to the decision by the Director on various grounds summarised as follows:

- a the previous determinations of the liquor authorities should not be taken into account as they are not in the nature of legal precedent;
- b the Director's decision and generally the liquor authority decisions do not reflect community expectations and norms;
- c the Director should have given more weight to the acoustic measurements recorded for and referred to in the 2013 section 117 Complaint;
- d the Director should have given more weight to the objectors' evidence and statements;
- e the applicant has not provided sufficient evidence that the change of the Existing Condition will not cause undue offence, annoyance disturbance of inconvenience or be in the public interest;
- f the statements provided by the applicant do not comprise a sufficient sample of the local population and are not representative;
- g the decision of the Director was incorrect and not based upon the evidence provided which was ignored or misinterpreted; and

- h the decision of the Director was not procedurally fair on the basis that the Director did not give the objectors adequate notice that an adverse decision may be made.

Legal and Statutory Framework

- 30 The Commission is not required to find error on the part of the Director, but rather undertakes a full review and makes a determination on the basis of the same materials as before the Director when the decision was made (*Hancock v Executive Director of Public Health [2008] WASC 224*).
- 31 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.*
- 32 When considering a review of a decision made by the Director, the Commission is required to have regard to only the material that was before the Director at first instance (section 25(2c) of the Act).
- 33 Section 16 of the Act prescribes that the Commission:
- a may make its determinations on the balance of probabilities [sub section(1)]; and
 - b is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply [subsection (7)(a)]; and
 - c is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; [subsection (7)(b)];”
- 34 In addition, the Director is obliged to comply with the requirements of procedural fairness when exercising the powers conferred by the Act (*Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356*).
- 35 Section 38(2) of the Act requires an applicant to satisfy the Commission that the granting of an application is in the public interest. The expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan v Farrer [1989] HCA 61*).

- 36 The factual matters which the Commission is required to take into account in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act as set out in section 5(2) of the Act.
- 37 The factual matters which the Commission may take into account in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act.
- 38 The decision by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208* sets out the Commission’s function in reviewing a decision of the Director pursuant to section 25 of the Act as follows:
- a make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - b make findings about the likely degree of harm to result from the grant of the application;
 - c assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - d weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether it is in the public interest to grant the application.
- 39 The Director and Commission also:
- a must take into account those matters relevant to the objects of the Act; and
 - b may take into account the matters set out in s. 38(4) of the Act.

Procedural Fairness

- 40 The issue of procedural fairness must first be considered. The Applicant refers to the cases of *Hancock v Executive Director of Public Health [2008] WASC 224* (“Hancock”) and *Northbridge Enterprises Pty Ltd v Commissioner of Police [2014] WASC 135* (“Northbridge Enterprises”).
- 41 Each of these cases involved very different facts and circumstances to the current application.
- 42 In Hancock procedural fairness was denied due to the decision maker reaching a decision based upon matters and evidence without bringing such matters to the attention of the applicant or allowing the applicant make submissions regarding the same. That circumstance is not the case in this application.
- 43 In Hancock Martin CJ at 42 also noted that “Sometimes the nature of the proceedings themselves will be sufficient to provide adequate notice of the prospect of an adverse finding”.

- 44 In the Northbridge Enterprises case the issue of procedural fairness arose from various matters, but substantially from the fact the applicant had been directed towards addressing certain aspects of the case as being relevant, but not the fact that the conditions on the current extended trading permit may have been varied.
- 45 Edelman J at 84 noted the relevant question as being "...would a reasonable person in the position of the aggrieved party have anticipated the possibility of an adverse decision on that issue?".
- 46 In the current matter the applicant:
- a is requesting an existing restrictive condition on the Beach Club be varied; and
 - b has suggested a variation to such condition that comprised trading hours less than both:
 - i those ordinarily allowable to a licensed premises of that type under the Act; and
 - ii the hours normally traded by the remainder of the licensed premises.
- 47 As such, the applicant would have been able to reasonably anticipate that an adverse decision may be made due to the following reasons:
- a Firstly, the applicant itself requested the reduced trading hours. By such election the applicant indicated:
 - i it was aware there would be community opposition of some type to the full trading hours being implemented; and
 - ii that it was prepared to accept trading hours less than those permitted by the Act.
 - b Secondly, taking into account the history of the Beach Club's operation, the number of objections received and the possible impacts on surrounding neighbours, the Director may reasonably find that more restrictive trading hours than the applicant's suggested trading hours were suitable.
- 48 Given the above, the Commission does not find that procedural fairness was denied to the applicant as the nature of the proceedings themselves suggested that an adverse finding was possible and that the applicant ought to have reasonably anticipated that alternative trading hours may be nominated by the Director given the nature of its application.
- 49 In relation to the objectors' arguments as to a lack of procedural fairness, due to the nature of the application and proceedings, the objectors could reasonably have anticipated that an adverse decision may be made either by granting the whole or part of the trading hours sought by the applicant.

Relevant Issues

- 50 The Commission has undertaken a full review and now makes a determination on the basis of the same materials as before the Director when the decision was made. This is the correct and established procedure as referred to in Hancock decision.
- 51 For the purposes of clarification to the parties, and particularly the objectors:
- a any previous objection, submission or evidence made by a particular objector on a prior matter dealing the Premises are not before the Commission; and
 - b the 2013 section 117 Complaint is not being reassessed here. The submissions and evidence presented with that complaint are not before the Commission.
- 52 The above items cannot be considered by the Commission. However, the published decisions previously made by the Director and the Commission are relevant and highly persuasive.
- 53 Further, there have been arguments raised by the objectors that are not relevant to the issue of liquor licensing. Issues as to land values, possible development opportunities and the Local Council's decision making processes are simply not within the scope of the grounds for objection specified by the Act and cannot be considered by the Commission.
- 54 Therefore, relevant questions to be considered are whether:
- a the evidence provided by the applicant satisfies the licencing authority that the grant of the application is in the public interest; and
 - b the evidence provided by the objectors validly establishes an objection to the grant of the application.
- 55 Section 38(2) of the Act requires the applicant to satisfy the Licensing Authority that granting the application is in the public interest.
- 56 Section 73(10) of the Act also requires that any objector must make out the validity of their objections.
- 57 It is within the Commission's discretion to decide what weight to give to certain evidence.
- 58 The evidence provided by either party must be "relevant, reliable, and logically probative to assist the decision maker in assessing the probability of the existence of the facts asserted in each case" (*Busswater Pty Ltd v Director of Liquor Licensing LC 17 of 2010*).
- 59 Whether evidence is relevant and probative depends not on the intrinsic qualities of the evidence but on what the evidence is said to prove (*Woolworths Ltd v Director of Liquor Licensing and Other LC43/2011*).
- 60 The failure to refer to any specific evidence in written reasons does not mean that the evidence has not been considered (*Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police and Others LC 01/2017*).

Public Interest

- 61 The expression “the public interest” imports a discretionary value judgment, confined only by the scope and purposes of the statute *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*.
- 62 In considering the public interest the Commission is obliged to take into account the public interest in:
- a catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and
 - b facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.
- 63 The applicant has provided substantial submissions that to permit the Proposed Condition would be in the public interest due to:
- a the general expectations of patrons and tourists;
 - b the unique nature of the Beach Club; and
 - c the tourism status of Cottesloe Beach,
- and that any harm is minimised due to:
- d the experience of the licensee;
 - e the character of the neighbourhood;
 - f the patron profile;
 - g the operation and fit-out of the Beach Club;
 - h the maximum number of patrons permitted; and
 - i the fact that no live music is played in the Beach Club.
- 64 Specifically, the applicant has provided several consumer statements stating that they feel an increase of trading hours would better suit their leisure needs. Further, the results of the survey undertaken by LBMC Consulting predominately support this view.
- 65 Although the assertion by the applicant that “no other venue in the locality does, or is capable of providing a similar mix of liquor and related services” is taken with a degree of scepticism, it appears that the extended trading hours would cater to a good proportion of the public and reflect the requirements of both existing and potential consumers.
- 66 The evidence from Mr G Davies and expert statement by Mr M Papadoulis, as well as the proximity of Cottesloe Beach, supports that, at least to some degree, tourism in the area would also be contributed to by the extended trading hours.

- 67 The applicant has also provided persuasive evidence as to current operation of the Premises, including the type of patron, the focus on meals and type of service provided. It is reasonable to extrapolate that these circumstances will continue for the additional trading hours sought.
- 68 Each of these factors support the assessment that the grant of the Proposed Condition would aid the proper development of the liquor industry in the State.
- 69 In addition, the Commission is of the view that the applicant applying for the Proposed Condition (rather than the full trading times usually permissible under the Act) is indicative of the licensee endeavouring to arrive at a balance between the interests of the business on the one hand and the amenity of the neighbourhood on the other.
- 70 Balancing these factors with the objectors' statements and experiences the Commission finds that the applicant has discharged its onus to show that the application would be in the public interest.

Health, Impact on Amenity and Offence, Annoyance, Disturbance or Inconvenience Caused

- 71 All evidence as to the current degree of ill health, offence, annoyance, disturbance or inconvenience caused by the Premises is contained in the various statements provided by the applicant in its PIA and by the objector's personal statements.
- 72 The Commission will not restate the various contents of all of the statements and objections here, but has carefully read the same taking particular account of the proximity and position of the maker of the statement or objection to the Beach Club.
- 73 The Commission is satisfied that the locality currently has very low levels of alcohol related harm or ill health.
- 74 The aspects of the amenity of the locality that the objections are based on are, in fact, substantially concerned with the issue of offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity.
- 75 It therefore appears the primary objection to be decided is whether the grant of the Proposed Condition is likely to cause undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity.
- 76 The results of the 2013 section 117 Complaint show that the Premises was previously found not to be causing an undue degree of offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity when operating up to 10pm. This was found despite the acoustic reports showing that the *Environmental (Noise Regulations) 1997* were at times exceeded.
- 77 Neither the applicant nor the objectors have put forward any new or more recent acoustic report that evidences any change in the noise generated from the Premises since the acoustic report provided in May 2013. It is noted that such report is several years old.
- 78 As correctly set out by the Director, it is clear from case law that:

- a what is “undue” has to be determined and qualified according to the nature of the neighbourhood, so that what might constitute “undue” noise in one neighbourhood may not constitute undue noise in another (*Re McHenry [1987] 4 SR (WA) 31, Sharkey J*); and
- b “any resident who lives nearby to a hotel must expect a certain amount of necessary or usual noise from people arriving at, or more likely departing from the premises. From time to time one or more of the patrons might be expected to be noisier than the others – calling out, even yelling and screaming may occur. In extreme cases a fight or two. These are, in my experience, the types of disorder and inconvenience that might be realistically expected by nearby residents” (*Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207*).

79 Further, any disturbance or harm must “be regarded by a reasonable person as “undue”, having regard for all the relevant circumstances and taking into account what might reasonably be expected from premises of the kind licensed” and not based on the “subjective sensibilities of its immediate neighbours” (*OSB Operations Pty Ltd v Jansen & Anor [2006] WASCA 27*).

80 Therefore in relation to considering the possible loss of amenity or harm caused to the locality, the Commission must consider what reasonable a person deems is “undue” and must weigh the evidence before it using the test set out in *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208*. In applying that test the Commission:

- a finds that, especially taking into account the result of the 2013 section 117 Complaint, the current level of offence, annoyance, disturbance or inconvenience (or “harm”) caused is currently not “undue” when considered in all the relevant circumstances including:
 - i the nature of the locality being mixed residential and commercial;
 - ii the Beach Club being a relatively high impact venue;
 - iii the statements and evidence provided by the applicant; and
 - iv the objections made by the objectors;
- b finds that the likely degree of additional harm to result from the grant of the application is minimal. There is no evidence presented that reliably indicates that the nature of the patrons or activities of the Beach Club will change or that any existing harm will necessarily increase due to an increase in trading hours;
- c assesses the likely degree of harm to result from the grant of the application to be only slightly increased as compared against the existing degree of harm. The amount and type of harm is likely to stay constant, however, may occur later in the evening which has a possible higher impact on the locality.

- 81 There is no evidence presented that indicates the Beach Club will return to the type of operation that initially caused the Existing Condition to be imposed.
- 82 Further, the Proposed Condition introduces trading hours on Sundays, Mondays and Tuesdays that are less than those usually available to a licensed premises of this type under the Act. No evidence is presented that an incremental introduction of additional trading hours would:
- a lessen the impact of the Beach Club on the amenity of the locality; and
 - b finds the likely degree of harm or loss of amenity not to be “undue” when considered in all the circumstances and determines the grant the application to be in the public interest.
- 83 It is also relevant that the Existing Condition was imposed due to the operation of the Beer Garden by prior owners and the evidence presented indicates that the circumstances giving rise to the Existing Condition have largely ceased.
- 84 Given the above conclusions based on the evidence provided, the Commission finds that the objectors have not made out the validity of their objections as required under s 73(10) of the Act.

Final Determination

- 85 The Decision of the Director is quashed, the application granted and the Existing Condition is varied as follows:

“Liquor may not be sold or consumed in that part of the premises known as the Beach Club after 11pm on Sundays, Mondays and Tuesdays unless the Beach Club is being used as a private function, arrangements for which have been made prior to that day.”

- 86 All other conditions of the licence remain in force.



**ALEX ZILKENS
PRESIDING MEMBER**