

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Owen Keith Hutchinson
*(represented by Mr Dan Mossenson and
Mr Alec Weston of Lavan Legal)*

Intervener: Commissioner of Police
*(represented by Mr Joshua Berson and
Ms Hailey Richardson of State Solicitor's
Office)*

Commission: Mr Jim Freemantle (Chairperson)
Ms Helen Cogan (Member)
Mr Eddie Watling (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.

Date of hearing: 27 February 2014

Date of Determination: 12 March 2014

Determination: The application is refused.

Authorities referred to in the determination:

- *Director of Liquor Licensing v Vladmir Hardi* [LC 03/2011]
- *Director of Liquor Licensing v Saran Singh Bajaj* [LC 06/2011]
- *Commissioner of Police v Sean Spence* [LC 37/2012]
- *Technotron Investments Pty Ltd v Bussell Motor Hotel Pty Ltd and others* (unreported LL Ct of WA; No 97/97; April 1998)
- *Director of Liquor Licensing decision A24742 (Hinkley)*.
- *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing* [2010] WASC 345
- *Travelli v Johnson* (unreported, SCt of WA; Library No 960693; 25 November 1996)

Background

1. On 7 August 2013, pursuant to section 84 of the *Liquor Control Act 1988* (“the Act”), an application was lodged by Collaboration Investments Pty Ltd for the transfer of a restaurant licence in respect of a licensed premises known as “The Crowded House” and situated at 25 Douro Road, South Fremantle. Collaboration Investments Pty Ltd proposing to hold the licence as trustee for the unit holders of the Public & Co Unit Trust and who are:
 - Arjun Bhardwaj – 45 units; and
 - Owen Keith Hutchinson – 10 units.
2. On 29 August 2013, pursuant to section 69 of the Act, a Notice of Intervention was lodged by the Commissioner of Police (“the Commissioner”) for the purpose of making representations on the grounds that Mr Hutchinson, by virtue of the convictions recorded against him, is not a fit and proper person to hold or gain benefit from a licensed premises.
3. On 12 September 2013, the Department of Racing Gaming and Liquor (“the Department”) wrote to Mr Hutchinson to inform him of the provisions of section 33(6) of the Act and enclosed a copy of the Notice of Intervention. Mr Hutchinson was also afforded the opportunity to provide a written submission (by 4 October 2013) in response to the Notice of Intervention and to demonstrate why he should be deemed fit and proper to occupy a position of authority in a body corporate that holds a licence.
4. On September 17 2013, Mr Hutchinson wrote to the Director of Liquor Licensing (“the Director”) stating that he had been convicted of selling illegal substances in 2006 (at the age of 21) and had received a suspended sentence of 2 years. Mr Hutchinson outlined his successful business and community activities since that time and enclosed certificates for Responsible Service of Alcohol and Managing Licensed Premises 1, training that had been completed on 14 February, 2013.
5. On 30 October 2013, the Director’s Delegate in the Decision numbered A223463 (“the Decision”) determined that, in view of the seriousness of the drug convictions and two traffic convictions in 2012, Mr Hutchinson was not a fit and proper person for the purposes of the Act.
6. On 29 November 2013, an application for review of the Director’s decision was lodged on behalf of Mr Hutchinson (“the applicant”) on the following grounds:
 - (1) The decision maker incorrectly concluded at paragraphs 15, 28 and 29 of the decision that the applicant’s letter dated 17 September 2013 was in response to the letter the licensing authority purportedly sent to the applicant on 12 September 2013.

- (2) The applicant was denied procedural fairness. The applicant did not receive the letter sent by the licensing authority dated 12 September 2013 advising him of the requirement to provide submissions in respect of his fitness and propriety to be involved with licensed premises until after decision A223463 had been made and published.
 - (3) The decision maker failed to take into account relevant decisions of the licensing authority in assessing whether the applicant was a fit and proper person to be directly or indirectly interested in the application or in the business, or the profits or proceeds of the business to be carried on under the licence.
7. On 13 February 2014 and 20 February 2014 submissions and responsive submissions were lodged by the Commissioner and the applicant.
 8. A hearing before the Liquor Commission (“the Commission”) was conducted on 27 February 2014.

Submissions on behalf of the Applicant

9. It was submitted that there were two main issues to be addressed:
 - Is the applicant a fit and proper person for the position he holds in relation to the business and premises the subject of the application for a transfer of the relevant licence?
 - Was the applicant given a fair go - i.e. was there a denial of natural justice?
10. Regarding the applicant being a fit and proper person under the Act, it was submitted that he is in fact at the bottom rung of involvement in the proposed liquor licence as, with 10 units, he is only a minor unit holder in the Public Company & Unit Trust; the other unit holder, Mr Arjun Bhardwaj, holding 45 units.
11. Accordingly, the applicant will have no power, authority or management role and as such does not fit the reference in the Department’s letter of 12 September, 2013 that “ ...the licensing authority must be satisfied that a person who occupies a position of authority is fit and proper”.
12. The applicant does not fit any of the descriptions of a person occupying a position of authority as set out in section 3(4) of the Act which states:

For the purposes of this Act, a person occupies a position of authority in a body corporate if that person –

- (a) *is a director of a body corporate; or*
- (b) *exercises or exerts, or is in a position to exercise or exert, control or substantial influence over the body corporate in the conduct of its affairs; or*
- (c) *manages, or is to manage, the business of the body corporate to be conducted under a licence; or*
- (d) *occupies a position, in relation to the body corporate, prescribed as a position of authority,*

or, where that body corporate is a proprietary company, if that person is a shareholder in that proprietary company.

13. Accordingly, section 37(1)(b)(i) of the Act which states:

.....
if the applicant, or one of the applicants, is a body corporate or a public body-

that each person who occupies a position of authority in the body corporate is a fit and proper person to occupy that position in a body corporate that is a licensee of the premises to which the application relates;....

does not apply.

14. It is acknowledged that the applicant was convicted of drug related criminal offences to which he pleaded guilty in 2007. For those offences he received a 2 year suspended sentence. There has been no re-offending since that time with the 10 year period to have those convictions removed under the *Spent Convictions Act 1988* only 3 years away.

15. It was submitted that the 2 traffic offences in late 2012 were unrelated to licensed premises and there are a number of cases that demonstrate that such offences do not represent sufficient grounds to render the applicant not a fit and proper person under the Act. The following cases were cited:

- a. *Director of Liquor Licensing v Vladmir Hardi* [LC 03/2011];
- b. *Director of Liquor Licensing v Saran Singh Bajaj* [LC 06/2011];
- c. *Commissioner of Police v Sean Spence* [LC 37/2012];
- d. *Technotron Investments Pty Ltd v Bussell Motor Hotel Pty Ltd and others* (unreported LL Ct of WA; No 97/97; April 1998); and
- e. Decision A24742 of the Director of Liquor Licensing (Hinkley).

16. It was submitted that clearly these authorities support a finding that the applicant should be considered a fit and proper person to hold a position of authority in relation to licensed premises.

17. With regard to the reference in the Director's Decision to the case *Travelli v Johnson* (unreported, SCt of WA; Library No. 960693; 25 November 1996), the principles of the passages cited were not properly applied to the

circumstances of the applicant. Had they been properly applied, the decision maker should have concluded that:

- the convictions did not happen in the course of the applicant conducting business as a licensee or in relation to licensed premises;
- the offences were not offences of dishonesty such as fraud, perverting the course of justice or misleading and deceptive conduct;
- the offences did not occur when the applicant was the holder of a licence under the Act; and
- although the offences were of a serious nature, the fact that the applicant has not committed similar offence/s, it could not be said that he has displayed a consistent disregard for the law. Indeed, the decision maker did not make such a finding in this instance.

18. With regard to the applicant being denied procedural fairness, this arises from the fact that he did not receive the letter advising him of the opportunity to provide submissions in respect of his fitness and propriety to be involved with licensed premises, until after the decision had been issued.

19. The postal address used by the Department was incorrect and related to premises that the applicant had vacated some 4 years earlier and as a result, the correspondence was not received giving him no opportunity to respond and submit the information to demonstrate that he is a fit and proper person under the Act.

20. The fact that the applicant did write to the Department on 17 September 2013, was not a response to the Department's letter and was an initiative of his own, following advice from his business partner that he had become aware that there were some queries in respect to the applicant's suitability to be involved in licensed premises. The Department incorrectly assumed that this letter was in response to its letter of 12 September 2012. It is clear that the applicant did not receive this letter based on the following:

- i. the applicant does not refer to the letter or the intervention in his letter dated 17 September 2013;
- ii. the applicant advised the licensing authority when he was informed of the decision that he had not received the letter dated 12 September 2013 or a copy of the intervention and requested a copy of both documents to be sent to him by email immediately;
- iii. the applicant's statutory declaration made on 13 February 2014 and filed in the proceedings.

21. As the licensing authority did not seek an LLD/5 Personal Particulars form

from the applicant, it was not armed with all of the usual or normal relevant personal information. Had the licensing authority followed its own procedure and requested an LLD/5 form be completed by the applicant, the licensing authority would have been aware of his current address.

22. Had the applicant received the letter he would have provided positive character references which, had they been received and processed by the licensing authority, would not have led to the conclusion in paragraph 29 of the decision that:

“In respect of Mr Hutchinson’s submissions, while I acknowledge them and his achievements appear commendable, no supporting information such as testimonials or letters attesting to his character, reputation and standing within the community were submitted.”

23. It was submitted that the Commission is entitled to have regard to the character references provided subsequent to the Decision as they can be considered an “expansion” on material that had been put before the Director in the applicant’s letter of 17 September, 2013 –(refer *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing [2010] WASC 345*).

24. In conclusion it was submitted that:

- i. The applicant did not receive the letter requesting a response from the applicant and enclosing a copy of the intervention and consequently the matter was decided without a response to these two documents.
- ii. On the basis of the *Travelli v Johnson* (unreported, SC of WA; Library No 960693; 25 November 1996) decision and other relevant cases referred to in these submissions, no adverse finding should have been made against the applicant. On any reasonable comparison with other cases of a similar nature, the applicant should have been found a fit and proper person.
- iii. The Commission should readily find the applicant a fit and proper person to hold a position of authority in licensed premises pursuant to section 33(6) of the Act.
- iv. If the Commission refuses to accept the further material which expanded on the material before the Director, the matter should be remitted to the Director with directions allowing the applicant to respond to the letter and intervention and present relevant evidence in response.

Submissions on behalf of the Commissioner of Police

25. It was submitted that the applicant had not been denied procedural fairness

as the address to which the Department's letter of 12 September 2013, was forwarded to is the same address identified as the applicant's current address on the original application requesting the transfer of a licence, dated 7 August 2013, and in the Unit Trust Deed dated 18 July 2013, which was executed by the applicant on 23 July 2013.

26. It is not open for the applicant to assert that he was denied procedural fairness when the licensing authority has been provided with an address on a number of documents, including recent documents the applicant signed, which he now complains is incorrect.
27. The assertion that the licensing authority did not follow its own procedures because it did not seek an LLD/5 Personal Particulars form from the applicant is not correct as the applicant was not a director or shareholder in respect of the application lodged by Collaboration Investments Pty Ltd on 7 August 2013. Therefore he was not required to fill in a Personal Particulars or LLD/5 form.
28. It is unknown why the applicant provided an address in the Unit Trust Deed and application documents that is purportedly a residence that he has not lived in for over four years, however, it is incumbent on the applicant to ensure that the details provided as part of the application were correct and up to date.
29. It was therefore submitted that the applicant has not been denied procedural fairness.
30. The applicant citing *Kapinkoff* (supra) has contended that the new material submitted subsequent to the decision is merely an "expansion" of the letter put before the Director by the applicant dated 17 September 2013 and as such should be considered by the Commission. It was submitted that this is in fact new material and is in breach of section 25(2c) of the Act for three reasons:
 31. First the new material is of a completely different character to that provided at first instance in front of the Director in that they are not self-serving statements made by the applicant attesting to his own purportedly good character, but testaments of the applicant's character by third persons;
 32. Second, the argument posed by the applicant that this material is merely an expansion because it touches upon the same "themes" as was first contended by the applicant himself in his letter dated 17 September 2013, is fundamentally flawed. By that analogy, any new material that touches upon the applicant's character could be included as part of the proceedings before the Commission. The primary issue in these proceedings is the applicant's character. To allow any new evidence that touches upon the applicant's character, just because the Applicant himself addressed it in the original proceedings, renders section 25(2c) of the Act inoperative.

33. Consequently, for the purposes of undertaking a review of the Decision, the Commission cannot take into account the new references that have been included in the applicant's submissions.
34. With regard to whether the applicant is a fit and proper person under the Act, it was submitted that the applicant's prior criminal and traffic record renders him other than a fit and proper person for two, cumulative, reasons:
- f. the applicant's prior criminal history relates primarily to convictions of drug possession and supply, which of itself renders him other than a fit and proper person; and
 - g. the applicant's recent traffic convictions are evidence of the applicant's deliberate disregard for and defiance of the law.
35. Given the Act's emphasis on regulation and its intention to prevent undesirable persons from participating in the liquor business, it is appropriate for the Commission to reach the conclusion that a person who has actively participated in the sale and supply of narcotics is not someone who is fit and proper to be involved in the sale or disposal of liquor in Western Australia, albeit indirectly through a Unit Trust.
36. Given the tightly regulated nature of the liquor industry, it is open to the Commission to find that a person who has committed such offences is not a fit and proper person for the purposes of the Act on the basis of the nature of the offences committed, or their character and reputation.
37. It was submitted that the applicant's traffic convictions, particularly the December 2012 conviction for driving without authorisation, suggests a wilful disregard for and defiance of the law. The December 2012 conviction was direct disobedience of an order of a court suspending his driver's licence.
38. Therefore, given the applicant's more recent traffic convictions and his previous involvement in serious drug offences, it is appropriate for the Commission, as it was for the delegate of the Director, to conclude that he was not someone fit and proper to be involved or interested in the sale or disposal of liquor in Western Australia.
39. With regard to the cases cited by the applicant to demonstrate that such offences do not represent sufficient grounds to render the applicant not a fit and proper person under the Act, it was submitted that the circumstances of this case can be distinguished from each of them. In particular, with regard to *Travelli* (supra):
- i. the seriousness of the applicant's drug offences cannot be diminished, while he only received an 18 months suspended imprisonment order, the applicant was subject to a maximum

penalty under the *Misuse of drugs Act 1981* of \$100,000 and 25 years imprisonment;

- ii while the offences did not occur while the applicant was the holder of a licence under the Act, one of the offences did occur outside a licensed premises; and
- iii the offences committed by the applicant were for the sale of the drug ecstasy, otherwise known as a “party drug” and often taken by patrons of licensed premises or large events.

40. In conclusion it was submitted:

- that the applicant was not denied procedural fairness by the licensing authority;
- the Commission must not have regard to the additional material filed by the applicant that was not before the delegate of the Director; and
- on the material before the delegate of the Director, it cannot be said that the applicant is a fit and proper person for the purposes of the Act.

Determination

41. Under section 25(2c) of the Act, when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.

42. 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.*

43. By operation of section 33(6) of the Act:

Where the licensing authority is to determine whether an applicant is a fit and proper person to hold a licence or whether approval should be given to a person seeking to occupy a position of authority in a body corporate that

holds a licence, or to approve a natural person as an approved unrestricted manager, an approved restricted manager or a trustee –

- h. the creditworthiness of that person; and*
- (aa) the character and reputation of that person; and*
- i. the number and nature of any convictions of that person for offences in any jurisdiction; and*
- (c) the conduct of that person in respect to other businesses or to matters to which this Act relates; and*
- (d) any report submitted, or intervention made, under section 69,*

are relevant and amongst the matters to which consideration may be given.

44. A preliminary matter considered by the Commission was the question of whether the Commission could consider a statutory declaration made on 13 February 2014 by Mr Hutchinson together with eleven (11) character references, being material submitted subsequent to the decision. The applicant contended that this material was not new material, but an expansion on material that had been put before the Director, and cited the decision in *Kapinkoff* (supra).
45. The Commission is of the view that the statutory declaration can be considered as it provides an elaboration on the communication processes between the applicant and the Department. Those processes are the basis of the claim that the applicant has been denied procedural fairness.
46. The eleven character references forwarded with the statutory declaration do, however, represent new material of a substantive nature that was not before the delegate of the Director and therefore in accordance with section 25 (2c) of the Act cannot be considered by the Commission.
47. In considering grounds 1 and 2 of the application, the Commission has evaluated the process by which the transfer application lodged by Collaboration Investments Pty Ltd on 7 August 2013 was administered and the related correspondence dealt with.
48. Whilst the Department's letter of 12 September 2013 and the applicant's letter of 17 September 2013 to the Department may have been two separate initiatives, the timing was such that it is not unreasonable to conclude that the applicant's letter was in fact a direct response to the Department's letter. Although there is no direct reference to matters raised in the Department's correspondence, nor to the intervention notice, the applicant's letter contained sufficient relevant material to be considered a responsive submission.
49. The fact that the Department addressed its correspondence in accordance with the address provided in the original application and the Unit trust

documentation would provide no indication that the mail had not been received. This is evidenced in the wording of the Director's decision at paragraphs 15, 28 and 29.

50. The fact remains that it is the responsibility of applicants to ensure that details provided as part of an application are correct and up to date.
51. The Commission accepts that there was no procedural requirement for the Department to request the applicant to fill in a Personal Particulars LLD/5 form.
52. The conclusion reached by the delegate of the Director that the Department's letter of 12 September 2013 had reached the applicant and that the applicant's letter of 17 September 2013 was a responsive submission is considered by the Commission not to be unreasonable.
53. The Commission therefore finds that grounds 1 and 2 have not been made out.
54. Ground 3 relates to the assessment of whether the applicant is a fit and proper person to be directly or indirectly interested in the application or in the business, or the profits or proceeds of the business, to be carried on under the licence.
55. Much has been made by the applicant as to the level of his involvement should the application for transfer be approved, particularly as to whether the applicant could, or should, be regarded as a person in a position of authority as detailed in section 3(4) of the Act (refer paragraph 12).
56. The applicant takes the position that as a minor unit holder in the Public Company & Unit Trust, he would be far removed from the operations of the licence and as such has no power or management role and therefore cannot be regarded as occupying a position of authority. Therefore section 37(1)(b) of the Act (refer paragraph 13) does not apply.
57. The Commission does not accept this view as it is clear from section 37(1)(d) of the Act which states that each person directly or indirectly interested in the application or in the business, or the profits or proceeds of the business, to be carried on under the licence or permit has to be a fit and proper person to be so interested. Accordingly, having regard to applicant's clear interest in the profits or proceeds of the business, there is no room for consideration of a minimal level of involvement in the business.
58. Consequently the Commission finds that ground 3 is not made out.
59. Furthermore, with regard to the status of the applicant as a fit and proper person under the Act, the Commission has closely considered the circumstances and timing of the criminal and traffic convictions.

60. The criminal convictions relate to activities on 10 separate occasions throughout May 2006 involving the possession, supply and selling of illicit drugs. The applicant contends that the sentence of 18 months imprisonment (suspended for 2 years) was a “wake up call” which has enabled him to re-direct his life as a successful businessman and as a positive contributor to the community.
61. The Commission acknowledges the personal development that the applicant has achieved since the time of his criminal convictions. However, the crimes were of a very serious nature, and in the normal course, the situation would need careful analysis of all the relevant facts before assessing whether sufficient time has elapsed to enable consideration of the applicant as a fit and proper person under the Act.
62. Each case turns on its own facts and whilst the applicant cites LC 03/2011 (Hardi), LC 06/2011(Bajaj) and LC 37/2012 (Spence) in that the Commission has in the past assessed applicants with some history of drug offences of one kind or another as fit and proper, the facts and circumstances were different in each application
63. However, more recent circumstances, particularly the second of the two traffic offences, incurred in December 2012 (the first in September 2012), add another dimension to such consideration and does indicate a blatant disregard for authority, irresponsible decision making and an inability to act with honesty and integrity, as contended by the Commissioner. To that extent then these offences are highly relevant in assessing whether the applicant is a fit and proper person within the meaning of the Act
64. No attempt has been made by the applicant to address the circumstances associated with either traffic offence and it remains for the Commission to conclude that the offences are consistent with the assessment given in paragraph 33 above. The application is refused.



JIM FREEMANTLE
CHAIRPERSON