LC 06/2020

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

Applicant:	Sand Volley Australia Pty Ltd *(represented by Ms Philippa Honey of Francis Burt Chambers and Mr Alec Weston of Lavan)*
Intervener:	Director of Liquor Licensing *(represented by Mr John Carroll and Ms Emily O'Keeffe of State Solicitor's Office)*
Objectors:	Colin Beckett Rex Growden and Judith Growden Kenneth Ilett and Helen Ilett Paul Morgan Robert MacPherson Judith Drummond
Commission:	Mr Seamus Rafferty (Chairperson) Ms Elanor Rowe (Member) Mr Paul Shanahan (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 for a grant of special facility licence
Premises:	Sand Sports Australia, 34 Verdun Street, Nedlands
Date of Hearing:	5 September 2019
Date of Determination:	23 March 2020
Determination	The application is granted

Authorities referred to in Determination:

- *Sand Volley Australia Pty Ltd -v- Director of Liquor Licensing* [2019] WASC 209
- *Hancock -v- Executive Director of Public Health* [2008] WASC 224
- *Woolworths Ltd -v- Director of Liquor Licensing* [2013] WASCA 227
- *O'Sullivan -v- Farrer* [1989] HCA 61; (1989) 168 CLR 210
- *Carnegies Realty Pty Ltd -v- Department of Liquor Licensing* [2015] WASC 208
- *Liquorland (Australia) Pty Ltd -v- Executive Director Public Health* [2013] WASC 51
- *Australian Leisure and Hospitality Group Pty Ltd -v-Commissioner of Police* [2017] WASC 88
- *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247
- *Harold Thomas James Blakeley -v- Director of Liquor Licensing* [LC 44/2010]

Background

1. This matter concerns an application by Sand Volley Australia Pty Ltd (the “applicant") for the grant of a special facility licence ("SFL") pursuant to sections 46 and 68 of the *Liquor Control Act 1988* ("the Act") for premises located at 34 Verdun Street, Nedlands (the “Premises").

2. At all relevant times, the applicant operated a sports facility known as 'Sand Sports Australia' at the Premises. Two main sporting activities are conducted at that facility, being sand-based volleyball (also known as beach volleyball) and sand-based netball. Those activities are available to registered teams at that facility during the regular season for each sport. That facility also has capacity to cater to outside groups for private, social and corporate events.

3. In 1996, the applicant entered into a sub-lease with the Hollywood Subiaco Bowling Club ("HSBC") and the City of Nedlands. From that time, players and spectators at the Premises could purchase liquor under HSBC's licence (club licence no. 6040005207).

4. In November 2011, the licensing authority determined the applicant was not able to be sufficiently controlled by HSBC and the area covered by HSBC's club licence was reduced to exclude the Premises.

5. On 7 August 2017, the applicant lodged an application for a SFL for the Premises. The applicant sought the SFL for the prescribed purpose of a 'sports arena' in accordance with regulation 9A(11) of the *Liquor Control Regulations 1989* (the "Regulations").

6. The Premises is approximately 2,421 square metres. The applicant seeks a licence for approximately 185 square metres of that area (the "Proposed Licensed Area"), of which 125 square metres will be accessible to patrons. The maximum number of patrons who may be accommodated within the Proposed Licensed Area is 80 people at any one time.

7. The applicant complied with the statutory requirements prescribed by the Act and lodged documentation in support of the application including a Public Interest Assessment ("PIA") submission. The application was advertised in accordance with instructions issued by the licensing authority.

8. The applicant initially sought the SFL from 6:00 am to 12:00 midnight on Monday to Sunday, with trading on Christmas Day, Good Friday and Anzac Day.

9. On 31 August 2017, the applicant gave notice amending the proposed trading hours to:

    (a) on Monday to Thursday from 10.00 am to 10.30 pm;

    (b) on Friday and Saturday from 10.00 am to 11.00 pm;

    (c) on Sunday from 10.00 am to 10.30 pm; and

    (d) trading on Christmas Day, Good Friday and Anzac Day.

10. In support of the application, the applicant submitted that (among other things) it provides players and spectators with sand-based sports and recreation premises, and it aims to provide a limited range of food and beverages (including liquor) as an ancillary service to players and spectators playing or viewing sports or attending events at the Premises. The applicant also submitted that the licence would provide an amenity that was previously

available when players and spectators at the Premises could purchase liquor under HSBC's licence. The applicant also submitted that it aims to attract local residents, workers and visitors to the Premises by providing an outdoor sport amenity[1].

11. Six notices of objection to the application were lodged (from eight individual objectors) on various grounds. The objectors were local residents living in close proximity to the venue.

12. On 2 February 2018, the application for the SFL was refused by a delegate of the Director of Liquor Licensing (the "Delegate") and reasons for that decision were published (Decision A000243122). In summary, the Delegate found the Premises were not suitable for the purpose of a 'sports arena' SFL. In light of that finding, the Delegate then also determined that it was not necessary to:

    (a) decide whether the applicant had discharged its obligation under section 38(2) of the Act to satisfy the licensing authority that granting the application was in the public interest; or

    (b) assess the validity of the objections.

13. On 8 February 2018, the applicant applied for a review of the decision of the Delegate pursuant to section 25(1) of the Act and with such decision to be made by the Liquor Commission of Western Australia (the "Commission") on the papers. When reviewing a decision made by the Delegate, the Commission may only have regard to the material which was before the Delegate when the decision was made by the Delegate[2]. The Commission is not required to find error on the part of the Delegate, but is to undertake a full review and make a fresh determination on the basis of that materials[3].

14. In support of its application for review of the decision of the Delegate, the applicant asserted that a 'sports arena' SFL was the most appropriate licence for the Premises as playing sand-based netball and beach volleyball was the primary focus of the business at the Premises. The applicant also submitted that the SFL was in the public interest and should be granted as:

    (a) the proposed SFL is consistent with consumer requirements as evidenced by a number of consumer surveys;

    (b) the proposed SFL will provide an amenity, including functions, that were previously available pursuant to the licence held by HSBC;

    (c) the proposed SFL will help to attract local players, corporate clients, local residents, workers and visitors to the Premises;

    (d) the applicant provides a sought after amenity not readily available in other localities in Western Australia;

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[1] Decision of the Director of Liquor Licensing, Decision A000243122 (2 February 2018) [10], [12].
[2] *Liquor Control Act* s 25(1).
[3] *Liquor Control Act* s 25(2c).

(e) the proposed SFL will facilitate the growth of the hospitality, liquor and tourism industries by providing high standard licensed premises that caters to the contemporary requirements of consumers of liquor and related services;

(f) the applicant is an experienced licensed sporting venue operator committed to upholding high compliance and regulatory standards;

(g) the harm minimisation strategies to be put in place, the nature of the proposed functions and the demographic of customers will deter the rapid consumption of alcohol, overconsumption and intoxication, and do not encourage parties to remain on site for extended periods of time;

(h) no eighteenth or twenty first birthday parties will be permitted;

(i) no liquor will be able to be purchased for consumption off the Premises;

(j) the locality of the Premises (the "Locality") has a high Socio-Economic Index for Areas score, which shows the Locality is a relatively socio-economically advantaged area with a lower risk of alcohol related harm;

(k) there will be minimal or no direct negative impact on the Locality as a result of approving the application;

(l) some of the objectors were aware of, and had consented to, any additional noise levels and light spill from the Premises because a notification was lodged on the certificate of titles of the properties of those objectors pursuant to section 70A of the *Transfer of Land Act 1893*, being the Notification J733200;

(m) when liquor was previously served from the Premises pursuant HSBC's club licence, there were no infringements or complaints relating to liquor consumption, antisocial behaviour, noise, vandalism or any other offence;

(n) the applicant has met with the objectors and has addressed issues and concerns regarding noise and parking;

(o) despite any assertions of the objectors, no evidence has been provided that demonstrates the proposed Premises has contravened any local or State laws or regulations; and

(p) no intervenors objected to the application.

15. On 6 June 2018, three members of the Commission (none of whom are making this current decision) refused the application. The reasons for the Commission's decision on that occasion have been published as LC 15/2018. In summary, the Commission found that[4]:

(a) an SFL for a 'sports arena' could only be granted for a premises that was a 'sports arena' for the purposes of the Act and its regulations, and the sports facility at which the Premises was to be located was not a 'sports arena' for those purposes; and

[4] Decision of the Commission, LC 15/2018, 6 June 2018 [63]

(b) the PIA submission did not demonstrate to a satisfactory degree that the granting of the application was in the public interest (i.e. the applicant failed to discharge the onus required by section 38(2) of the Act).

16. The applicant then lodged an appeal to the Supreme Court of WA against the Commission's decision on the basis that (the applicant contended) the decision was an error of law.

17. On 15 November 2018, the applicant lodged an amended notice of appeal that narrowed the grounds of appeal to two assertions, being that the Commission erred in law by:

(a) misconstruing the meaning of 'sports arena' in regulation 9A(11) of the Regulations ("Ground 1"); and

(b) finding that the applicant had not demonstrated to a satisfactory degree that the grant of the licence was in the public interest as that finding was:

- to constructively fail to exercise its functions in accordance with section 38(2) of the Act;
- alternatively, so unreasonable as to be outside the scope of the Commission's powers under the Act,

in circumstances where the Commission had:

(i) failed to consider all of the primary and secondary objects set out in sections 5(1) and 5(2) of the Act, as it was bound to do;

(ii) gave disproportionate weight to the primary object in paragraph 5(1)(c) of Act, being "*to cater for the requirements of consumers for liquor and relates services, with regard to…the proper development of the tourism industry and other hospitality industries in the State*";

(iii) failed to undertake a weighing and balancing exercise of the various objects of the Act with a view to achieving the best possible outcome; and

(iv) made factual findings in support of the applicant's PIA and identified no negative aspects in opposition to that PIA ("Ground 3").

18. No objector to the proceedings before the Commission sought to take part in the appeal.

19. On 10 December 2018, the applicant's appeal was heard by Her Honour, Acting Justice Strk. At that time, the applicant sought orders that the Commission's decision of 6 June 2018 be set aside and this matter be remitted to the Commission, differently constituted, to be determined in accordance with law. At that time, it was common ground that the applicant would need to succeed on both Ground 1 and Ground 3 in order for the Court to make those orders.

20. On 19 June 2019, Her Honour delivered her decision[5] (the 19/06/19 Decision) granting the orders sought by the applicant. The Commission directs the readers of this decision to the full

[5] Reported as; *Sand Volley Australia Pty Ltd -v- Director of Liquor Licensing* [2019] WASC 209.

text of Her Honour's written reasons, which is reported at [2019] WASC 209. For current purposes, it is sufficient to note that Her Honour found that:

(a) As to Ground 1:

> "*[38] The Liquor Control Regulations reg. 9A prescribes the fifteen purposes for which a special facility licence may be granted, which includes the following purpose:*
>
> ***Sports arena***
>
> *(11) A special facility licence may be granted for the purpose of allowing the sale of liquor at a sports arena (being premises primarily used for playing and viewing sport) to persons playing or wing sports, or attending any other event, at the arena.*
> ***....***
>
> *[78] Interpreting the words in parenthesis as providing a statutory definition of the term 'sports arena' is consistent with the regulatory purpose, as it accords a simple, clear and unambiguous meaning.*
>
> *[79] The Commission determined that the facilities do permit individuals to play sport as well as watch players at the premises from a limited physical area which provides a restricted view.* [6] *However, the Commission fell into error by making an assumption about what it perceived to be the desired operation of the regulation. Further, in weighing in the balance the standard of the facilities available at the premises*[7]*, it confused the task of construing the regulation with making an assessment as to the suitability and standard of the premises under the Liquor Control Act s 37(1)(f)(i).*
>
> *[80] The Commission misconstrued the meaning of 'sports arena' in reg. 9A(11) and therefore erred in law.*
> ***....***
>
> *[85]* ***...*** *Had the Commission properly construed reg 9A(11), the outcome of the Commission's determination on whether the premises were a 'sports arena' may not have been different. On the other hand, it may have*."

(b) As to Ground 3:

> *"[99] Taking into account the submissions made on behalf of the parties, I do not consider that the reasons reveal that the Commission gave proper, genuine and realistic consideration to the matters relevant to the s 5(1)(a)* [of the Act]. *Had the Commission done so, the outcome of the Commission's determination as to whether* [the applicant] *had demonstrated to a satisfactory degree that the grant of the licence was*

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[6] Footnote 42 in Her Honour's judgment, which says: "*Decision of the Commission, LC 15/2018, 6 June 2018 [30].*"
[7] Footnote 43 in Her Honour's judgment, which says: "*Decision of the Commission, LC 15/2018, 6 June 2018 [34] - [35].*"

in the public interest may have been different.

....

[104] Taking into account the submissions made on behalf of the parties, I do not consider that the reasons reveal that the Commission gave proper, genuine and realistic consideration to the matters relevant to s 5(1)(c) [of the Act]*.*

....

[108] Again, a proper consideration of the s 5(1)(c) object may not have led to a different result for [the applicant]*, but on the other hand, it may have.*

....

[110] For the reasons set out above, I find that the Commission did not consider all mandatory objects which arose on the evidence. It follows that the Commission did not (as without considering all relevant objects, it could not) undertake a weighing exercise of the various objects of the Act with a view to achieving the best possible outcome.

....

[116] It is not necessary to further opine on [the applicant's contentions in relation to the submission referred to in paragraph 17(b)(iv) above[8]]*. For the reasons given, I have concluded that the Commission did not consider all mandatory objects which arose on the evidence. Accordingly, the Commission was not in a position to undertake a weighing exercise of the various objects of the Liquor Control Act (grounded on a full suite of factual findings) with a view to achieving the best possible outcome.*

....

[121] ***...*** [The applicant] *has established that despite evidence being before the Commission relevant to certain mandatory objects of the Liquor Control Act, the Commission failed to consider those objects in its assessment of public interest. In so doing, I find that the Commission has not exercised its decision-making power within the bounds of legal reasonableness, amounting to a jurisdictional error."*

21. On 4 July 2019, the applicants' solicitors wrote to the Executive Officer of the Commission requesting that this matter be relisted for hearing before the Commission in accordance with Her Honour's decision. Pursuant to that request, the Commission relisted this matter for hearing on 5 September 2019.

22. The applicant filed 'Applicant’s Submissions' with the Commission on 22 August 2019. The Director of Liquor Licensing (the "intervenor") filed 'Intervenor's Outline of Primary Submissions' on the same date. The applicant filed 'Applicant’s Closing Submissions' on 29 August 2019. The intervenor filed 'Intervenor's Responsive Submissions' on the same date.

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[8] This refers to the applicant's contention that the Commission made factual findings in support of the applicant's PIA and identified no negative aspects in opposition to that PIA.

The Hearing on 5 September 2019 and this Decision

23. This matter was heard by the Commission for the second time on 5 September 2019. As noted above, none of the Commission members sitting at that hearing had sat at the Commission's earlier hearing of this matter on 6 June 2018.

24. As with the decision made at that earlier hearing, the Commission:

    (a) may only have regard to the evidential material which was before the Delegate on 2 February 2018 (see paragraphs 12 and 13 above); and

    (b) is not required to find error on the part of the Delegate, but must undertake a full review and make a fresh determination,

    in reaching this decision. However, in reaching this decision, the Commission has also taken account of:

    (c) the submissions made at that earlier hearing;

    (d) the reasons for the 19/06/19 Decision (see paragraphs 17 to 20 above); and

    (e) the submissions made by the parties in these proceedings, including the verbal submissions made at the hearing on 5 September 2019.

The Legal and Statutory Framework

25. The findings made by the Commission on 6 June 2018 (see paragraph 15) as to the relevant legal and statutory framework are correct and are repeated in paragraphs 26 to 32 below.

26. As already noted (see paragraphs 24(a) and (b) above), 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).

27. 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.

28. 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).

29. Section 16 of the Act prescribes that the Commission:

    (a) may make its determinations on the balance of probabilities [subsection (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)].

30. Section 46 of the Act provides that the licensing authority shall not grant a SFL:

    (a) except for a prescribed purpose as set out in regulation 9A of the Regulations;

    (b) just because an approval, consent or exemption required under another written law in respect of a particular licence type, cannot be obtained; or

    (c) if granting or varying a licence of another class, or imposing, varying or cancelling a condition, on a licence of another class, or issuing an extended trading permit in respect of another class of licence, would achieve the purposes for which the special facility licence is sought.

31. In *Woolworths Ltd -v- Director of Liquor Licensing* [2013] WASCA 227 ("*Woolworths*"), His Honour Buss JA set out the statutory framework for a determination of this nature:

    (a) by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;

    (b) the expression 'in the public interest', when used in a statute, imports a discretionary value judgment (*O'Sullivan -v- Farrer* [1989] HCA 61; (1989) 168 CLR 210);

    (c) the factual matters the Commission is bound 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;

    (d) the factual matters which the Commission is entitled to 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;

    (e) section 5(2) is mandatory whereas section 38(4) is permissive; and

    (f) on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:

        (i) 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

        (ii) facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

32. Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:

(a) the grant of the application would not be in the public interest; or

(b) the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor; or

(c) that if the application were granted:

(i) undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or

(ii) the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened; or

(d) that the grant of the application would otherwise be contrary to the Act.

The Applicant's Submissions

33. The applicant's submissions at the hearing on 5 September 2019 were in accordance with the submissions it made in support of its application for review of the decision of the Delegate (see paragraph 14 above). The applicant's further submissions (including its oral submissions, written primary submissions and written closing submissions) can be summarised as follows:

The applicant submits the premises are a 'sports arena'

(a) The words in parenthesis in regulation 9A(11) of the Regulations[9] provide a statutory definition of the term 'sports arena' for the purposes of the Regulations, so that term means "*premises primarily used for the playing and viewing of sport*" for those purposes. Accordingly, in determining whether the Premises are a sports arena for those purposes, the Commission must simply determine whether, on the evidence before it, the Premises are primarily used for the playing and viewing of sports.

(b) The Commission had previously found that the sports facilities at the Premises permit individuals to play sport and to watch players at the Premises from a limited physical area which provides a restricted view. Based on that finding, the Commission also found that the Premises are a 'sports arena' for the purposes of the Regulations.

(c) The evidence before the Commission supports that finding. In that regard, the PIA:

(i) states that the applicant provides players and spectators with a sand-based sports and recreation premises;

[9] Regulation 9A(11) of the Regulations states: "*A special facility licence may be granted for the purpose of allowing the sale of liquor at a sports arena (being premises used primarily for the playing and viewing of sports) to persons playing or viewing sports, or attending any other event, at the arena*".

(ii) states the applicant provides two main sporting activities at the Premises, being sand based volleyball (i.e. beach volleyball) and netball;

(iii) states that the applicant submits that the provision of those sporting activities is the primary focus of the business at the Premises;

(iv) states the Premises is home to WA's largest social beach volleyball and netball competition, with over 250 teams playing each week; and

(v) includes images that demonstrate the Premises are primarily used for the playing and viewing of sports, being figure 1, figure 2 and figure 3.

(d) The Premises are primarily used for the playing and viewing of sport. Indeed, the Premises serve no other purpose.

The applicant submits that the grant of the SFL is in the public interest

(e) In accordance with section 38(2) of the Act, the applicant must satisfy the Commission that granting the application is in the public interest. Although the Commission has a discretion in finding whether or not that is the case, the Commission is bound to take into account the primary and secondary objects of the Act (set out in section 5(1) of the Act) when making that finding.

(f) To the extent of any inconsistency between the primary and secondary objects under the Act, the primary objects take precedence.

(g) The factual matters that the Commission is entitled to (but not bound to) take into account in determining whether it is satisfied the grant of the SFL is in the public interest are set out in section 38(4) of the Act.

(h) In considering whether the application is in the public interest, the Commission must undertake a weighing and balancing exercise of the various objects of the Act with a view to achieving the best possible outcome.

(i) The absolute discretion referred to in section 33(1) of the Act is subject to the Act and, hence, subject to the requirements referred to in paragraphs (e) to (h) above.

Assessment of the relevant objects of the Act

(j) Section 46(6) of the Act provides that:

(i) If the Director so approves, section 37(5) or section 38, or both of those provisions, or parts of either of those provisions, do not apply in respect of a special facility licence of a type prescribed.

(ii) Pursuant to regulation 9C(g), a sports arena licence is a type of special facility licence that may not be required to satisfy the public interest test.

(iii) In any event, as set out below, the primary and secondary objects in section 5(1) and (2) of the Act are achieved by the grant of the SFL. The public interest test in section 38(2) of the Act is satisfied.

Primary object	*section 5(1)(a) — to regulate the sale, supply and consumption of liquor;*
Secondary object	*section 5(2)(d) — to provide adequate controls*

(k) The grant of the licence will ensure that the sale, supply and consumption of liquor is regulated by virtue of the fact that the Premises are capable of operating as an unlicensed "BYO" venue. As an unlicensed venue, the Premises are not subject to the requirements and controls of the Act. Therefore, by granting the licence, the licensing authority will ensure that the venue is subject to the requirements and controls of the Act. Accordingly, the primary objects in section 5(1)(a) and 5(2)(d) would be achieved by the grant of the SFL.

Primary object	*section 5(1)(b) — to minimise harm or ill-health caused to people*

(l) In *Carnegies Realty Pty Ltd -v- Department of Liquor Licensing* [2015] WASC 208 ("*Carnegies*"), His Honour Justice Allanson of the Supreme Court found that the licensing authority should assess harm and ill-health considerations by:

(i) making findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;

(ii) making findings about the likely degree of harm to result from the grant of the application;

(iii) assessing the likely degree of harm to result from the grant of the application against the existing harm; and

(iv) weighing the likely degree of harm, so assessed, together with any other relevant factors to determine whether the applicant has satisfied the licensing authority that it is in the public interest to grant the application (see *Carnegies* at [42] - [43]).

(m) In *Liquorland (Australia) Pty Ltd -v- Executive Director Public Health* [2013] WASC 51 ("*Liquorland*"), His Honour Justice Edelman of the Supreme Court (as he then was) stated that: "[The licensing authority must also] *consider the baseline level of risk and, in that context, the effect of an increase in risk from the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated. Similarly, it is relevant that there are existing 'at risk' persons who might be further affected*".

(n) In *Carnegies* (at [46]), His Honour Justice Allanson also stated that: "*It is not sufficient to simply reason that, where there is already a high level of harm in the particular area, even a small increment in potential or actual harm may be determinative, without making specific findings on the evidence about the level of alcohol related harm which is likely to result from the grant of the particular application. Those finding (sic) about the effect of the particular application must be the basis on which the [licensing authority] evaluates what is in the public interest*" (emphasis added).

(o) In reaching those 'specific findings on the evidence about the level of alcohol related harm which is likely to result from the grant', the licensing authority "*must act upon materials which have rational probative force*" **(**see: *Australian Leisure and Hospitality Group Pty Ltd -v-Commissioner of Police* [2017] WASC 88 ("*Australian Leisure*") per Banks-Smith J at [19], and *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247 at [256] to [257]**)**.

(p) The application incorporates harm minimising features, including the matters referred to in paragraphs 14(f),(h),(i),(j) and (n) (above) and the fact that:

(i) the Premises are relatively small with a capacity of only 80 people; and

(ii) the consumption of liquor will be ancillary to playing and viewing sport;

(q) No concerns were raised by the Liquor Enforcement Unit in response to the application, and the Commissioner of Police has not elected to intervene or object to the application. The crime statistics provided by the applicant establish that the crime rates in the Locality are significantly lower than the WA average. Accordingly, the Commission should hold no concerns about the level of alcohol-related crime occurring in the Locality.

(r) Similarly, the Chief Health Officer has not elected to intervene or object to the application. The Locality of the Premises experiences a significantly lower rate of alcohol-related hospitalisations than the WA average. Accordingly, the Commission should hold no concerns about the level of alcohol-related crime occurring in the Locality.

(s) Based on the available evidence, it is open for the Commission to find that the application is low risk and the Locality has a low risk of alcohol-related harm. Further, in assessing the application in accordance with the principles referred to in paragraph (l) above, it is open for the Commission to find that:

(i) the existing level of alcohol-related harm in the relevant area is very low;

(ii) the likelihood of harm resulting from granting the application is very low;

(iii) accordingly, there is also a low likelihood of additional alcohol-related harm (in comparison with the existing level of alcohol-related harm) resulting from granting the application; and

(iv) the 'weighing exercise' described in paragraph (l)(iv) above should satisfy the Commission that granting the application is in the public interest.

Primary object	*section 5(1)(c) — to cater to the requirements of consumers of liquor and related services with regard to the proper development of (relevantly) the liquor industry;*
Secondary object	*section 5(2)(a) — to facilitate the use and development of licence facilities, reflecting the diversity of the requirements of consumers in the State*

(t) The fact that liquor has previously been served at the Premises demonstrates that there is a consumer requirement for liquor at the sporting-venue. Additionally, every person responding to the applicant's survey of the people who play and view sport at the Premises: (a) supported the application; (b) agreed that the ability to consume liquor would add to the amenity of the Premises; and (c) said they would appreciate the opportunity to purchase liquor when visiting the Premises.

(u) It was appropriate for the applicant to survey only those people as those people are best placed to determine whether the provision of liquor is a service that would be of benefit at the Premises. The evidence from that survey is uncontroverted and undisputed.

(v) The following matters also demonstrate that granting the SFL would satisfy the objects in sections 5(1)(c) and 5(2)(a) of the Act:

(i) beach volleyball and netball (being the activities offered at the Premises) are relatively new to Western Australia;

(ii) the Premises provide a sought after activity not readily available in other localities in Western Australia;

(iii) the Premises positively contribute to the social, sporting and recreational aspects of the locality and will further assist in increasing the diversity and amenity available within the locality; and

(iv) currently 90 teams compete in sand volleyball and netball at the Premises, with the numbers of players and spectators growing.

Secondary object	*section 5(2)(e) — to provide a flexible system with as little formality as may be practicable, for the administration of the Act*

(w) Section 16(7)(b) of the Act also requires the Commission "*to act according to equity, good conscious and the substantial merits of the case without regard to technicalities and legal forms*". The application is simple and straightforward, and it may be assessed with little formality because of the matters referred to in paragraphs 14(m) and 33(p) above and as this is not a 'complex' application for a high-risk licence category.

Permissive consideration	*section 38(4)(a) --- the harm or ill-health that might be caused to people or any group of people due to the use of liquor*

(x) This issue has been comprehensively addressed in the submissions above.

Permissive consideration *section 38(4)(b) --- the impact on the amenity of the Locality*

Permissive consideration *section 38(4)(c) --- whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the Premises*

(y) The Premises are already in operation as an unlicensed sporting facility and patrons are capable of bringing their own liquor to consume at the Premises if they so wish. Those matters, together with:

(i) the lack of any complaints when the Premises were using HSBC's club licence (see paragraph 14(m) above);

(ii) the fact no complaints have been received by the local government authority in relation to the operations at the Premises;

(iii) the limited nature of the liquor service proposed and the low number of patrons who will be served (see paragraph (p)(i) above); and

(iv) the fact that some of the residences near to the Premises have notifications placed on the certificates of titles as to the operations that occur at the Premises.

show that granting the SFL is unlikely to have a negative effect on the amenity of the Locality or on the people who reside or work in the vicinity of the Premises. Indeed, the applicant submits that there are no negative considerations to be taken into account with respect to this application.

Objections

(z) No interventions were received in relation to the application.

(aa) Although a number of objections were filed by residents living close to the Premises, none of those objectors has established the validity of their objection, as required by section 73(10) of the Act. In that regard:

(i) The objectors have not provided any independent evidence to establish the validity of their objections.

(ii) The Commission should be guided by the following passage from the decision in *Harold Thomas James Blakeley -v- Director of Liquor Licensing* [LC 44/2010] at [47], and it is open for the Commission to make a similar finding in this case:

> "*Whilst residents are always fearful of having licensed premises operating within the vicinity of their homes, it is not enough to rely on the general proposition that the consumption of alcohol inevitably brings with it undue offence, annoyance and disturbance to persons who reside in the vicinity. Many licensed premises operate in harmony with the local community. Also, the objector(s) submitted that they already experience an unacceptable level of disorderly conduct by passers-by who have consumed alcohol, however no evidence was provided to support this claim. The Commission finds that the objector(s) have failed to establish their grounds of objection*". (emphasis added)

(iii) The matters referred to in paragraph (y)(iv) above are also relevant.

(iv) A number of the objections appear to use a pro forma submission in support of their objection.

(bb) Even if the Commission should find that the objectors have established the validity of their objections, then the Commission should still grant the application on the basis that it remains in the public interest.

Closing submissions

Submission that the Premises are a "sports arena"

(cc) The intervenor's submission that the Premises are not a 'sports arena' for the purposes of the Regulations because they may not be suitable for viewing sports, and more particularly because there is "*no permanent or fixed seating*"[10], should be rejected as the Act does not require any seating to be provided at a sports arena.

(dd) The approach advocated by the intervenor to the issue of whether the Premises are a 'sports arena' is inconsistent with the approach taken by the licensing authority in similar, or analogous, earlier decisions.

(ee) If the Commission determines that the Premises are not a 'sports arena' for the purposes of the Act, and that it cannot grant the SFL sought by the applicant for that reason, then the Commission can still grant a licence of another class[11].

Submission that the Premises are suitable

(ff) When considering whether the Premises are of a sufficient standard and suitable for the proper conduct of the business to be carried on there[12], the Commission should consider the customary requirements of the applicant's patrons (in accordance with section 33(7)(b) of the Act). Those people are beach volleyball players, sand-based netball players, and their friends and family who come to watch them play. These people do not require an easy or organised view of the entire playing area from appropriate seating, special function facilities or more than basic toilet facilities[13]. Indeed, what has been referred to as a 'can bar' is suitable for the nature of the applicant's business.

(gg) The matters in paragraph (ff) above are evident from the fact that patrons currently consume alcohol at the Premises that they bring to the Premises themselves (i.e. 'BYO', as noted in paragraph (k) above) as well as alcohol that is served to them at the Premises pursuant to a 'small functions' exemption. It is also evident from the fact that a Premises Inspector provided a report to the Director which did not find that the Premises were unsuitable[14]. Further, the Commission is not permitted to reconsider a

[10] Intervenor's submissions at [60]
[11] Liquor Control Act 1988 (WA) s46B(1)(a)
[12] Intervenor's submission at [67]
[13] As previously found by the Commission in the decision of the Commission dated 6 June 2018 at [35] and referred to in the intervenor's submissions at [65]
[14] LCID Doc 4

finding of fact made by the Director as to the adequacy or suitability of any premises, accommodation or services to be provided under a licence[15].

Submission regarding consumer requirements and the evidence in support of the Application

(hh) The intervenor's submission that the applicant's surveys are of limited probative value[16] (see paragraph 34(x) below) should be rejected because the people who actually use the sports facilities are best placed to make an assessment of their own requirements based on their own experience and observations. Indeed, those surveys have a very high probative value.

Submission that the Commission should adopt an approach promoting flexibility and diversity

(ii) The Commission should be guided by Her Honour, Justice Banks-Smith's decision in *Australian Leisure*, and particularly by:

(i) Her Honour's reliance on the second reading speech of the Act; and

(ii) Her Honour's finding that that speech supports the view that decision makers should take an approach that reflects greater flexibility and diversity and an increased regard to consumer interests and choices.

(jj) The intervenor's submissions should be rejected to the extent they support a rigid and uniform approach to determining the application, which contrary to the intention of the Act.

The intervenor's submissions

34. The intervenor's submissions at the hearing on 5 September 2019 were in accordance with the 'Intervenor's Outline of Primary Submissions' (of 22 August 2019) and the 'Intervenor's Responsive Submissions' (of 29 August 2019), and can be summarised as follows:

Onus to demonstrate the applicants' business is for the prescribed purpose

(a) The onus is on the applicant to demonstrate that the business for which the SFL is sought meets the prescribed purpose of allowing the sale of liquor at a sports arena (being premises primarily used for playing and viewing sport) to persons playing or viewing sports, or attending any other event, at the arena. he words in parenthesis in regulation 9A(11) (i.e. "*being premises primarily used for playing and viewing sport*") provide a statutory definition of the term 'sports arena' which is consistent with the ordinary meaning of that term[17]. The word 'primarily' in those parenthesis also limits the ordinary meaning of 'sports arena', so that it is not sufficient for those purposes for premises to be used once, or on occasion, as a sports arena[18].

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[15] *Liquor Control Act 1988* (WA) s25(3)(b)

[16] The intervenor submits that the outcome of surveys is dependent upon the type of questions asked (see *Liquorland* at [15]), that the survey was only given to patrons of the Premises, and that the questions asked in this case (which only required the surveyed patrons to 'tick a box') led to the result.

[17] See the 19/06/19 Decision (reported as: *Sand Volley Australia Pty Ltd –v- Director of Liquor Licensing* [2019] WASC 209), per Acting Justice Strk at (53), (66) and (71)

[18] See the 19/06/19 Decision at (63) and (66).

(b) The intervenor submits that the applicant relies on bare assertions that the primary focus of the business is to provide "*players and spectators*" with sand-based sports, and those assertions do not establish that the Premises are primarily used for viewing sport, as well as playing sport. The intervenor submits that the images of the Premises provided by the applicant at best show small groups of people sitting on lawn areas adjacent to the court, but those people appear to be facing away from the court rather than spectating. Accordingly, it is open to the Commission to conclude that the Premises are not primarily used for playing and viewing sport.

Requirements of section 37(1)(e) and (f)

(c) If the business which the applicant operates at the Premises meets the prescribed purpose of regulation 9A(11), then the applicant must still also satisfy the Commission that:

(i) the Premises are of a sufficient standard and suitable for the proper conduct of the business to be carried on there[19] and that all approvals, consents or exemptions required under applicable planning laws permit the use of Premises for the sale of liquor have been obtained[20] (see section 37(1)(f) of the Act); or

(ii) that any of the requirements listed in (i) above are not appropriate and that the liquor will not be sold or consumed in a place or on premises unsuitable for the purpose (see section 37(1)(e)(ii)).

(d) In determining whether it is satisfied that the Premises are of a sufficient standard and suitable for the proper conduct of the business to be carried on there (see (c)(i) above), the Commission must not confuse that task with its assessment of the requirements of regulation 9A(11) of the Regulations (see [79] of the 19/06/19 Decision, referred to in paragraphs 19 and 20 above) and must consider the matters set out in section 33(7), including the customary requirements of those persons from whom the applicant would ordinarily be expected to derive trade.

(e) However, in determining whether the Premises meets the requirements described in (c)(i) and (c)(ii) above, the Commission should consider:

(i) that the SFL is sought for the prescribed purpose of a 'sports arena';

(ii) the customary requirements of those persons from whom the applicant would ordinarily be expected to derive trade;

[19] See section 37(1)(f)(i) of the Act.
[20] See section 37(2)(a) of the Act, as applied by section 37(1)(f)(ii). Section 37(2)(b) does not apply as there is no suggestion the applicant intends to carry out building works. Section 37(1)(f)(iii) does not apply as there is no evidence of any matters being referred to in any certificate required to be produced under sections 39 or 40.

(iii) the matters noted in the Report of Premises Inspector Roger Longhurst dated 24 August 2017 (the "Premises Report")[21] and by the Delegate[22];

(iv) any requirements made known, or reasons appearing, in a certificate under sections 39 or 40 of the Act; and

(v) any report submitted, or intervention made, under section 69 of the Act (see section 33(7) of the Act).

(f) The Commission cannot be satisfied of the matters listed in (c)(i) and (c)(ii) above given the findings in its earlier decision of 6 June 2018[23]. In reaching that conclusion, the Commission should consider (in relation to (e)(i) above) that:

(i) Although the facilities described and shown in photographs provided by the applicant permit people to play sport, they only allow people at the Premises to view that sport from a limited physical area that provides a restricted view.

(ii) Although the available evidence shows that the Premises are primarily used for playing sport, that evidence does not show that the Premises are primarily used for viewing sport. In fact, the available evidence only shows the Premises are used for viewing sport on occasion. Accordingly, the Commission can conclude that the Premises are not primarily used for both playing and viewing sport.

Requirements of section 37(3)

(g) The Commission must not grant the Application if it is satisfied that an undue degree of offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity of the Premises would be likely to occur (see section 37(3)(a) of the Act). In that regard, the Commission should consider the complaints about amenity issues raised in the objections made by nearby residents (including as to light and noise[24] and as to parking[25]), and that:

(i) the same complaints were raised by several residents (notwithstanding the absence of noise complaints to the City of Nedlands and the City's provision of the section 40 certificate); and

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[21] Matters noted in the Premises Report relevantly included that:
(a) the business to be carried on at the Premises includes supplying liquor to players and spectators at sand volleyball and netball matches and events for up to 80 persons;
(b) the patron area is about 125m^2 and located outside (although matches will be cancelled if it rains); and
(c) the Inspector was satisfied that the toilet facilities were suitable, however required a glass washing machine and additional signage to be installed.

[22] The Delegate was of the view that the proposed licensed area of the Premises is no more than a "can bar" with restricted viewing (see paragraph [62] of the Decision of the Delegate dated 2 February 2018).

[23] See the Commission's Decision of 6 June 2018 at [35], where the Commission found the Premises will not provide an easy or organised view to the entire playing area from appropriate seating, the bathroom facilities are inadequate for what the public may generally expect and no special function facilities exist, which together indicate the Premises would not ordinarily be classified as an "arena" type venue.

[24] Most of the objectors complaint that currently, noise such as yelling and music emanates from the outdoor Premises until late in the evening, that patrons are noisy when leaving the Premises and that the noise and lights of cars causes disturbance seven days a week. Most of the objectors also assert that the introduction of alcohol would exacerbate that light and noise problem.

[25] Most objectors also assert that current parking issues and infringement of parking rules would be exacerbated if greater numbers of people attended the Premises.

(ii) those complaints were made notwithstanding the applicant's attempts to engage with the residents and address their concerns[26]; and

(iii) the complaints made in those objections are quite inconsistent with the applicant's contention that some significance should be attached to the lack of any complaints when the Premises were using HSBC's club licence and the lack of complaints received by the local government authority (see paragraphs 33(y)(i) and (ii) above).

Overriding discretion

(h) The Commission may refuse the application even if the applicant meets all the requirements of the Act (see section 33(2) of the Act).

Objections

(i) If an objector makes an objection in pursuant to section 73 of the Act on any of the grounds listed in section 74 of the Act, then the burden of establishing the validity of the objection lies on the objector, and an application may be granted even if a valid ground of objection is made out (see sections 73(10) and 33(2)(b) of the Act).

The public interest

The law in relation to determining the public interest generally

(j) Pursuant to section 33(1) of the Act, even if the applicant meets all requirements of the Act, the Commission still has an absolute discretion to refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest. Pursuant to section 38(2) of the Act, the applicant has a positive obligation to satisfy the Commission that granting the Application is in the public interest. Accordingly, the applicant must adduce sufficient evidence to enable the Commission to satisfy itself that the Application is in the public interest[27]. The Commission has previously observed it is not sufficient for an applicant merely to express opinions and make assertions about the perceived benefits of their application[28].

(k) The intervenor contends that the applicant's submission in paragraph 33(j)(i) above is misconceived as the Director has not determined that sections 37(5) and 38 do not apply to the SFL sought by the applicant.

(l) The manner in which the Commission is required to assess whether the applicant has shown that the application is in the public interest is summarised by His Honour, Justice Allanson, in *Carnegies* at [22].

(m) The expression 'in the public interest', as used in the Act, imports a discretionary value judgment[29]. The Commission must also take into account factual matters relevant to the objects of the Act[30], and must have regard to both the primary objects (in section 5(1))

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[26] A Representative of the Applicant met with the residents to address their concerns on 13 September 2017. The Applicant then repositioned the direction and height of the speakers to reduce noise levels at the objector Paul Morgan's property (see the Applicant's letter to the residents dated 27 September 2017 and the Applicants' Further Submissions responding to objection of Paul Morgan dated 9 November 2017 at paragraphs [8] to [11]).

[27] See *William Street Bird –v- Director of Liquor Licensing* LC 07/2010 [3 8]

[28] See *John Thomas Blakeley –v- Director of Liquor Licensing* LC 44/2010 [39].

[29] See *Woolworths* at [46]-[55] per Buss JA, with whom Martin CJ and Murphy J agreed.

[30] See *Woolworths* at [49] and [52].

and the secondary objects of the Act (in section 5(2) of the Act). If, when considering the public interest, a tension arises between the primary object of 'minimising harm or ill-health' and any other objects of the Act contained in section 5, then the Commission must undertake a weighing and balancing exercise.

(n) The Commission is also entitled to (but is not bound to) take into account the additional factors set out in section 38(4) of the Act as it was at the time the application was lodged. However, the scope of the considerations relevant to the public interest in section 38 is not defined solely by sections 5 and 38(4) of the Act.

The applicant bears the onus on the issue of the public interest

(o) Since the application was lodged on 7 August 2017 and determined by the Delegate on 2 February 2018, the *Liquor Control Amendment Act 2018* (WA) introduced amendments to the Act. In particular, amendments to sections 5 and 38 of the Act commenced on 18 August 2018 and 3 October 2018. However, the Commission should apply the relevant provisions of the Act as they were when the Application was lodged. That means the applicant bears the onus of satisfying the Commission that the grant of the application is in the public interest, pursuant to section 38(2) of the Act as it then was.

Public interest–- Primary objects in sections 5(1)

(p) In the 19/06/19 Decision, Acting Justice Strk held that the Commission's reasons did not reveal that the Commission gave proper, genuine and realistic consideration to the objects of the Act in sections 5(1)(a)[31] or (c)[32] of the Act and noted that the introduction of a different offering in terms of consumer choice and diversity is an important matter for evaluation.

(q) The applicant may contend the Application addresses the primary object in section 5(1)(a) of the Act by increased regulation of the sale, supply and consumption of liquor at the Premises. However, the applicant is already subject to strict requirements when operating under the 'small functions' exemption, while operating the Premises as 'regulated premises' under the Act, as an occupier of the Premises and pursuant to the duties of care which the applicant owes to patrons on the Premises. Accordingly, the Commission could infer that the Application does not address the primary object in section 5(1)(a).

(r) The Commission can also reasonably infer that the grant of the Application would result in increased consumption of liquor at the Premises (due to the ready availability of liquor), and the Commission should balance the benefit derived from any "*greater regulation*" that results from granting the Application against the negative public interest considerations resulting from the increased consumption of alcohol.

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[31] See paragraph [99] of the 19/06/19 Decision. Section 5(1)(a) of the Act states that it is a primary object of the Act "*to regulate the sale, supply and consumption of liquor*".

[32] See paragraphs [104]-(107] of the 19/06/19 Decision. Section 5(1)(c) of the Act states it is a primary object of the Act "*to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State*".

Public interest – Primary object in section 5(1)(b) and consideration in section 38(4)

(s) The object of minimising "*harm or ill-health that might be caused to people, or any group of people, due to the use of liquor*" is a primary object of the Act (see section 5(1)(b)), and the italicized words are also a matter for the Commission to consider when assessing the public interest (see section 38(4)(a) of the Act).

(t) Following the approach described in *Carnegies*[33], the Commission should weigh the likely degree of harm against other relevant factors to determine whether the applicant has satisfied the Commission that it is in the public interest to grant the application.

(u) Although the Premises are located in an area of relative socio-economic advantage, and although the existing level of alcohol-related harm and ill-health in that area is lower than other parts of the State, granting the Application (and thereby increasing the availability of alcohol at the Premises) is likely to result in at least some alcohol-related harm and ill health. This is evident from the objections[34], from the public interest statement[35] and from the applicant's own submissions[36]. Any finding that there is a risk of harm and ill health must be weighed in determining whether granting the Application is in the public interest – even if that risk is quite low.

(v) The fact the Commissioner of Police and Executive Director of Public Health have not opposed the Application Commission does not mean there is no risk of alcohol-related harm (see the applicant's submissions at paragraphs 33(q) and (r) above).

Public interest–- Primary objects in section 5(1)(c)

(w) As noted in paragraph 34(p) above, Acting Justice Strk held that the Commission's reasons did not reveal that the Commission gave proper, genuine and realistic consideration to the objects of the Act in section 5(1)(c)[37]. It is apparent from the 2006 amendments to the Act that section 5(1)(c) was intended to involve consideration of the "*positive and negative social, economic and health impacts on the community*"[38]. The potential and opportunity for proper development of the industry (including change) is not to be ignored[39].

(x) The Commission has previously expressed reservations about the weight which the applicant has given to 42 sample consumer surveys to suggest that there is consumer

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[33] See paragraph 33(l) above, and paragraphs [42]-[43] of the decision in *Carnegies*.

[34] The intervenor asserts that the risk of alcohol related harm is increased when patrons consume alcohol into the evening after their match has finished. In that regard, see the objections of Rex and Judith Growden received 14 September 2007, Ken and Helen Ilett received 19 September 2017, Paul Morgan received 20 September 2017, and Robert MacPherson received 21 September 2017. The objections note there has been noise late into the evening, which suggests that patrons remain at the Premises for long periods to socialise after their matches.

[35] The intervenor asserts the risk of alcohol related harm is also increased when patrons consume alcohol after round robin competitions at corporate events (see Public Interest Submissions at paragraphs [5. 23]-[5. 24]). The Applicant accepts there may be a "*minimal . . . direct negative impact*" as a result of approving the Application (see Public Interest Submissions at paragraph [9. 12]).

[36] The Applicant relies on consumer surveys to show that patrons are eager to consume alcohol at the premises.

[37] See paragraphs [104]-(107] of the 19/06/19 Decision. Section 5(1)(c) of the Act states it is a primary object of the Act "*to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State*".

[38] See Western Australia, Parliamentary Debates, Legislative Assembly, 20 September 2006, at 6341-6342

[39] See *Australian Leisure* at [67]-[68].

support and demand for the liquor licence[40]. The intervenor submits that these surveys are of limited probative value.

(y) The intervenor also submits that regard must be directed to "*the proper development of the liquor industry, the tourism industry and other hospitality industries in the State*" (emphasis added), and that there is no evidence that the grant of the Application would support such 'proper' development.

(z) The intervenor also submits that the applicant's submissions at paragraphs 33(t), (u) and (v) above must be rejected as the applicant has not demonstrated any potential for the grant of the Application to cater for the proper development of the liquor, tourism or other hospitality industries. The applicant's submissions (wrongly) consider only the development of the liquor industry. However, there is simply no evidence to show that granting the Application would assist in the proper development of all of "*liquor industry, tourism industry and other hospitality industries in the state*", as required by the primary object in section 5(1)(c) of the Act. Indeed, if the applicant's submission were accepted, then it could be said that any grant of a licence to a local sporting venue or organisation would satisfy the requirements of section 5(1)(c).

Secondary objects in section 5(2)

(aa) To the extent the objects in section 5(2)(a) and (d)[41] arise for consideration, the Director refers to the submissions summarised in (i) to (p), (x) and (y) above.

(bb) The intervenor says that applicant's characterisation of the Application as "*simple and straightforward*" in nature (see paragraph 33(w) above) is irrelevant to the object in s 5(2)(e). That object does not excuse the applicant from compliance with the usual statutory requirements, including sections 37 and 38(2) of the Act.

Section 38(4) of the Act - Factors to be considered when assessing public interest

(cc) The intervenor asserts the term 'amenity' should be given a broad interpretation in section 38(4)(b)[42] and submits that the objections demonstrate that the amenity of the Premises will be adversely affected if the Application is granted[43].

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[40] See: Public Interest Submissions [7. 6]; Consumer Surveys for the Grant of a Special Facility Licence (Sports Arena) Application to the Department of Racing, Gaming and Liquor, WA (various dates); *Liquorland* at [51]; and *Upper Reach Pty Ltd –v- Director of Liquor Licensing* LC 29/2014 [61]-[62] citing *Woolworths*.

[41] Section 5(2) of the Act relevantly states: "*In carrying out its functions under this Act, the licensing authority shall have regard to the primary objects of this Act and also to the following secondary objects —*

(a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and ***...***

(d) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor. …"

[42] Section 38(4) relevantly states that "*in determining whether granting an application is in the public interest* [the Commission may have regard to:] *… (b) whether the amenity, quiet or good order of the locality in which the licensed premises or proposed licensed premises are, or are to be, situated might in some manner be lessened* **…**".

[43] In paragraphs 24 to 27 of the intervenor's responsive submissions, the intervenor asserts that the Commission should reject the applicant's claim that there are no negative amenity considerations to be taken into account as:

(a) granting the Application would enable patrons to purchase alcohol on site on demand until late into the evening;
(b) it is reasonable to infer that the increased availability of alcohol will result in increased consumption on the Premises compared to current consumption of alcohol on an ad hoc "BYO" basis or at small functions; and
(c) granting the Application is more likely to exacerbate (rather than alleviate) the current level of disturbance

The objectors' objections

(dd) In response to the applicant's submission at paragraph 33(aa)(iv) above (i.e. the assertion that the objections were made on a 'pro forma' basis), the intervenor submits that the objections refer to specific complaints about past activities at the Premises (not merely general propositions), that those concerns are corroborated by several objectors, and that the objections (while similar) are differently worded (i.e. they are not 'proforma').

The objectors' land titles

(ee) In response to the applicant's submission at paragraph 33(y)(iv)33(aa)(iv) above (i.e. the assertion that residences near the Premises have notifications placed on the certificates of titles as to the operations that occur at the Premises), the intervenor submits that the objectors have a right of objection and their concerns are relevant to the determination of the Application by virtue of sections 73 and 74 of the Act in any event.

Conclusion

(ff) In relation to the public interest, the intervenor submits that the Commission:

(i) should weigh the limited evidence of consumer benefit (noting the lack of evidence that the licence would support the proper development of the liquor, tourism or other hospitality industries) and any increased regulation of the supply of liquor against the potential alcohol-related harm and impact on the locality; and

(ii) can conclude that the applicant has not discharged its onus to establish that the grant of the Application would be in the public interest.

(gg) In conclusion, the intervenor also submits that it is open to the Commission to affirm the decision of the Delegate.

The Objectors

35. As previously noted (see paragraph 11 above), eight individual objectors lodged six notices of objection to the application on various grounds. The objectors were local residents living in close proximity to the venue. However, the objectors did not lodge any submissions and did not appear at the hearing on 5 September 2019.

Common Ground

36. At the hearing before the Commission on 5 September 2019, it was common ground that the two main issues remaining in dispute between the parties are:

(a) firstly, whether the Premises were a 'sports arena' for the purposes of regulation 9A(11) of the Regulations (the "First Issue");

(b) secondly, if the answer to that question is 'yes', then whether the applicant must satisfy the Commission that granting the SFL is in the public interest; and

(c) thirdly, if the answer to both those questions is 'yes', then whether it would be in the public interest to grant the SFL sought by the applicant (the "Last Issue").

37. The First Issue and the Last Issue broadly reflect the two grounds on which the applicant appealed to the Supreme Court (see paragraph 17 above). As to the second issue (see paragraph 36(b) above):

    (a) Both the applicant and the respondent accept that section 38(2) of the Act requires the applicant to satisfy the Commission that granting the application is in the public interest (see paragraphs 33(e) and 34(j) above).

    (b) The Commission accepts the intervenor's submission that the applicant bears the onus of satisfying the Commission that the grant of the application is in the public interest (see paragraph 34(o) above).

Determination of the First Issue

38. The First Issue is whether the Premises are a 'sports arena' for the purposes of regulation 9A(11) of the Regulations.

The applicant's submissions

39. As previously noted, the applicant submits that the PIA includes images that demonstrate the Premises are primarily used for the playing and viewing of sports (see paragraph 33(c)(v) above). However, none of those images show any people who clearly are primarily spectators, rather than people participating in those sports. Accordingly, those images do not show that the Premises are primarily used for viewing sports as well as playing sports. Accordingly, the images in the PIA provide no support for the applicant's submission that the Premises are a 'sports arena'.

40. As previously noted, the PIA asserts that over 250 teams play each week at the Premises (see paragraph 33(c)(iv) above and paragraph 16.d. of the 'Applicant's Submissions' dated 22 August 2019). However, the applicant also asserts that 90 teams currently compete in sand volleyball and netball at the Premises and that the number of players is growing (see paragraph 33(v)(iv) above and paragraph 52.d. of the 'Applicant's Submissions' dated 22 August 2019). The apparent inconsistency between those assertions casts doubt on the veracity of both of them, particularly as they are bare assertions that are unsupported by any real evidence. However, on balance and in the absence of any evidence to the contrary, the Commission accepts that there are currently 90 teams competing at the Premises on a daily basis as at 22 August 2019 (the date of the 'Applicant's Submissions').

41. As previously noted, the applicant asserts that the Commission should reject the intervenor's submission that the fact there is "*no permanent or fixed seating*"[44] means that the Premises are not a 'sports arena' for the purposes of the Regulations because the Act does not require any seating to be provided at a sports arena (see paragraph 33(cc) above). While it is certainly true that the Act does not require permanent or fixed seating, it is appropriate to look at the facilities that are available for people to view sport at the Premises when determining whether the Premises are used primarily for the purposes of viewing sport as well as for the purposes of playing sport.

42. As previously noted, the applicant asserts that the approach advocated by the intervenor to the issue of whether the Premises are a 'sports arena' is inconsistent with the approach taken

[44] Intervener's Submissions at [60]

by the licensing authority in similar, or analogous, earlier decisions (see paragraph 33(dd) above). However, the Commission notes that none of those earlier decisions are binding on the Commission in this instance.

43. As previously noted, the applicant asserts that if the Commission determined:

    (a) the Premises are not a 'sports arena' for the purposes of the Act; and

    (b) the Commission cannot grant the SFL sought for that reason,

    then the Commission can still grant a licence of another class (see paragraph 33(ee) above). However, at the hearing on 5 September 2019, the applicant accepted that no other class of licence is suitable for the Premises.

Conclusion

44. In reaching its decision in relation to the First Issue, the Commission has carefully considered the law (including the guidance of Her Honour, Acting Justice Strk in the 19/06/19 Decision), the evidence and all of the parties' submissions (including those described above). After considering those matters, the Commission concludes that the Premises is a 'sports arena' for the purposes of Regulation 9A(11) of the Regulations notwithstanding the other considerations. In that regard:

    (a) It is uncontroversial that the Premises is used to *some* extent for both playing sport and viewing sport. However, the issue of whether the viewing of sport is a primary purpose of the Premises is one of the two central matters in contention between the applicant and the intervenor.

    (b) Regulation 9A(11) clearly contemplates that premises may have more than one primary use. Particularly, it contemplates that the primary purpose of a single premises can be both the playing sport and the viewing of sport.

    (c) If premises are used for both that playing sport and viewing sport (as in this case), then it is reasonable to infer that (save in the most rare exceptional cases) the premises will be used somewhat more for one of those purposes than for the other. Accordingly, in order to ensure Regulation 9A(11) is construed in a manner which allows it to have some real practical application, the Commission accepts the fact that the Premises is used somewhat more for the playing of sport than for the viewing of sport does not mean that the playing of sport is the primary purpose and that the viewing of sport is a secondary purpose (in other words, that the viewing of sport is not a primary purpose).

    (d) The Commission infers a 'sports arena' SFL is not intended to be reserved only for those most exceptional cases where the relevant premises are used for both of those purposes to precisely the same extent.

    (e) By reason of those matters, if premises are used for both the playing and viewing of sport, and if the premises will be used somewhat more for one of those purposes than for the other, then:

        (i) that does not mean that both of those purposes (i.e. both playing sport and viewing sport) cannot both be primary purposes of the premises (in other words, those circumstances do not mean that one of those purposes is a primary purpose

and that the other purpose must be a 'secondary' purpose, rather than a primary purpose); and

(ii) that also does not mean that a 'sports arena' SFL cannot be granted with respect to those premises.

(f) Notwithstanding those matters, the Commission cannot grant a 'sports arena' SFL in circumstances where the premises are used for both that playing sport and viewing sport, and where one of those uses is purely incidental to the other.

(g) The Commission notes and accepts the applicants' submission that the Premises are only used for playing sport and viewing sport (in other words, the submission that those are the only two uses of the Premises), and that they are not used for any other purpose. However, it does not necessarily follow from accepting that submission that both of those purposes (i.e. both playing sport and viewing sport) must be the primary purposes of the Premises. In other words, if premises are used for only two purposes, then it is still entirely possible that one of those purposes will be the primary purpose and the other will be a secondary purpose, or even an incidental purpose.

(h) On balance, the Commission concludes that the Premises are 'primarily used for playing and viewing sport' for the purposes of Regulation 9A(11). The Commission reaches this conclusion notwithstanding the scarcity of evidence to establish that 'viewing sport' is one of the primary purposes of the Premises. Indeed, that conclusion rests largely on the fact that:

(i) the applicant has provided some evidence that 'viewing sport' is one of the primary purposes of the Premises in the PIA; and

(ii) the intervenor has provided no evidence to contradict the applicant's evidence in that regard.

(i) In reaching its conclusion that the Premises are 'primarily used for playing and viewing sport' for the purposes of Regulation 9A(11), the Commission also notes:

(i) sports arena SFLs have previously been granted for premises that operate as squash courts and which have only very limited and rudimentary facilities for spectators to view sport (see paragraphs 33(dd) and 42 above); and

(ii) although the Commission is not bound by decisions made by the Director or by its own previous decisions, it is desirable for the Commission to apply the Act and Regulations in a consistent fashion.

45. By reason of the above matters, and having regard to all the evidence and submissions, the Commission is also satisfied that:

(a) the SFL has been sought for a prescribed purpose (as required by section 46(1) of the Act);

(b) the applicant has demonstrated that the business for which the SFL is sought meets the prescribed purposes for which the SFL may be granted (as required by section 46(2b) of the Act); and

(c) there is no need to impose additional terms and conditions on the SFL in order to ensure that it is used only for the prescribed purpose for which it is granted (as required by section 46(3) of the Act).

Determination of the Last Issue

46. The Last Issue is whether it would be in the public interest to grant the SFL sought by the applicant.

The applicant's submissions

47. As previously noted, the applicant cites both section 5(2)(e) and section 16(7)(b) of the Act as support for its submission that the application meets the secondary objectives of the Act because (the applicant asserts) the application is simple and straight-forward and may be assessed with little formality (see paragraph 33(w) above). However, that reliance on section 16(7)(b) wrongly conflates:

(a) the aim of providing a flexible system for the administration of the Act (i.e. the object referred to in section 5(2)(e) of the Act); with

(b) the aim of conducting proceedings in accordance with principles of merit, equity and good conscience, and without unnecessary legal technicality (i.e. the principle referred to in section 16(7)(b) of the Act.

48. As previously noted, the applicant asserts that the SFL is unlikely to have a negative effect on the amenity of the Locality or on the people who reside or work in the vicinity of the Premises because, amongst other matters, no complaints have been received by the local government authority in relation to the operations at the Premises (see paragraph 33(y)(ii) above). However, in the earlier Commission proceedings, the applicant only asserted that no evidence was available to show that the Premises had contravened any laws or regulations (see paragraph 14(o) above), which is very different assertion. The Commission assumes that the applicant has been able to verify that no complaints were received by the local government authority and assumes that the applicant was able to verify that fact sometime between the earlier Commission proceedings and the hearing on 5 September 2019.

49. As previously noted, the applicant also asserts that the fact that some of the residences near to the Premises have notifications placed on the certificates of titles relating to the operations at the Premises shows that the application is not inconsistent with the permissive considerations specified in sections 38(4)(b) and (c) of the Act (see paragraph 33(y)(iv) above). The applicant also asserts that those notifications show that the objectors have not established the validity of their objection as required by section 73(10) of the Act[45] (see paragraph 33(aa)(iii) above). However, the fact that some residences near to the Premises may have notifications on the certificates of title in relation to the noise and light spill from sporting activities at the HSBC and the Premises has little or no relevance to:

(a) the impact which granting the SFL will have on amenity of the Locality (under section 38(4)(b) of the Act); or

[45] Section 73(10) of the Act says: "[t]*he burden of establishing the validity of any objection lies on the objector*".

(b) the effect which granting the SFL will have on people who reside or work in the vicinity of the Premises (under section 38(4)(c) of the Act).

50. There is also no logical connection between the notifications and the applicants' assertion that the objectors have failed to establish the validity of their objections.

51. The applicant also has not provided any evidence that any of the objectors (let alone all of them) had notifications on the certificates of title of their properties, and has not even made any clear assertion to that effect.

52. Further, even if the Commission assumed that all of the objectors had such notifications, then:

(a) the fact the owners of those residences may have been aware of those sporting activities when they purchased those properties does not mean they had any level of awareness in relation to the possible future grant of this SFL or any decreased amenity that might result from granting the SFL; and

(b) the fact the owners of those residences may have given some level of tacit agreement to sporting activities at the Premises does not mean they have given any agreement to the grant of the SFL or to any decreased amenity that may result from granting the SFL.

Conclusion

53. In reaching its decision in relation to the Last Issue, the Commission has carefully considered the law (including the guidance of Her Honour, Acting Justice Strk in the 19/06/19 Decision), the evidence and all of the parties' submissions (including those described above).

54. The Commission must take into account the objects of the Act in determining this application. The first of those considerations is the minimising of harm and ill-health caused to people, or any group of people, due to the use of liquor. In considering this issue, the demographics of the locality in which the licensed premises will operate are a significant consideration. An assessment must be made as to the existing levels of harm or ill-health and whether the granting of an application has the potential of increasing such levels to a degree that would be considered to be unacceptable. However, there is nothing in the totality of the evidence which suggests that there are levels of harm and ill-health within the Locality that are of such levels that the granting of the application would cause an increase of harm or ill-health to unacceptable levels that would result in a determination that the granting of the application was not in the public interest. Indeed, this is demonstrated by the facts that:

(a) between 1996 and November 2011, players and spectators at the Premises were able to purchase liquor under HSBC's licence (see paragraph 3 above); and

(b) since November 2011, players and spectators have consumed alcohol at the Premises which they have brought onto the Premises themselves (i.e. 'BYO', as noted in paragraph 33(k) and (gg) above).

55. In addition, the venue is 2,431 square metres and the area to be licensed is relatively small at 185 square metres (within which the patron area will comprise 125 square metres). Based on the evidence the Commission finds that the sale of alcohol (such as for post-match social activities) will be ancillary to the actual sports activities carried on and viewing of sports at the venue.

56. Given the nature of the objections raised in this application, the primary statutory considerations in respect to this application are the permissive considerations set out in sections 38(4)(b) and (c) of the Act[46]. By reason of the above matters, the Commission is satisfied that a decision to grant of the application would not be inconsistent with those considerations. The Commission is also satisfied that a decision to grant the application would cause little or no additional harm or ill-health to any people, or any group, due to the use of liquor (see section 38(4)(a)).

57. By reason of the above matters, the applicant has also discharged the onus of showing that the grant of the application is in the public interest (see paragraph 34(o) above).

Determination of other matters

58. After considering the requirements of the Act, all available evidence, all of the parties' submissions (as described above), the Commission is satisfied that:

    (a) A decision to grant the application is consistent with the other primary objects and the secondary objects of the Act (see sections 5(1) and (2) of the Act, respectively).

    (b) If the SFL sought by the application is not granted, then no other:

        (i) class of licence;

        (ii) variation of a licence, or variation of a licence condition, or

        (iii) cancellation of a licence, or cancellation of a licence condition,

        will achieve the purposes for which the applicant has sought the SFL (see section 46(2) of the Act and paragraphs 30(c) and 43 above).

Determination of the Application

59. By reason of the above matters, the application is granted.

60. The Commission is satisfied that its decision to grant the application, and thereby grant the requested SFL, has not been made only because of the matters referred to in paragraph 58(b) above (see section 46(1a) of the Act).

SEAMUS RAFFERTY
CHAIRPERSON

[46] The permissive considerations set out in sections 38(4)(b) and (c) of the Act, are whether:
"*(b) whether the amenity, quiet or good order of the locality in which the licensed premises or proposed licensed premises are, or are to be, situated might in some manner be lessened; 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; …"