



# Liquor Commission of Western Australia 2013/14 Annual Report



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### Availability in other formats

This publication can be made available in alternative formats such as compact disc, audiotape or Braille.

People who have a hearing or speech impairment may call the National Relay Service on 133 677 and quote telephone number (08) 9425 1888.

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## STATEMENT OF COMPLIANCE

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Hon. Terry Waldron, MLA  
Minister for Sport and Recreation; Racing and Gaming

In accordance with section 9K of the *Liquor Control Act 1988*, I am pleased to present, for your information and presentation to Parliament, the Annual Report on the activities of the Liquor Commission of Western Australia for the financial year ended 30 June 2014.

The Annual Report has been prepared in accordance with the provisions of section 9K(2) of the *Liquor Control Act 1988*.

Yours sincerely,



Jim Freemantle

CHAIRPERSON

3 September 2014

## OVERVIEW OF AGENCY

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### EXECUTIVE SUMMARY

It is my pleasure to present the Annual Report of the Liquor Commission of Western Australia for the year ended 30 June 2014.

During the year in review, 31 new applications were lodged with the Liquor Commission, 4 applications were referred back from the Supreme Court for determination and 12 applications were carried over from 2012/2013. As at 30 June 2014, the Commission had determined 21 applications, 7 applications were withdrawn and 19 applications were carried over to 2014/2015.

Over the reporting period, the Commission continued to receive a significant number of liquor licence applications for review under section 25 of the *Liquor Control Act 1988*. The majority of these related to applications for liquor store licences, some of which are discussed later in this report.

Of significance is the emergence of applications relating to large scale destination liquor stores in Western Australia. The Commission recently approved an application referred back by the Court of Appeals in the matter of Dan Murphy's Bicton, for a 1843 square metre liquor retail outlet.

Another application by Dan Murphy's for a liquor store licence in Edgewater referred by the Supreme Court on a question of law was still waiting to be determined by the Commission at the time of this report being published.

Although the Commission received two applications for costs during the reporting period, both referred to the same case which eventually saw a local government authority ordered to pay costs to the licensee of a local nightclub, more of which is discussed later in this report.

Naturally, the Commission continued to receive complaints for disciplinary proceedings pursuant to section 95 of the Act, as well as reviews of Barring Notices imposed by the Commissioner of Police.

As in previous years, the Commission has continued to adopt a "zero tolerance" approach to licensees who do not comply with their obligations under the terms of their licence, and the Act. This is particularly so in regards to managing anti-social behaviour in and around licensed premises, and the failure to comply with the principles of the responsible service of alcohol.

For example, the Commission recently cancelled a nightclub licence and also declared its approved manager and director not fit and proper in light of several disciplinary proceedings initiated against the licensee.

In keeping with the obligation and desire to conduct matters as efficiently as possible, the Commission recently conducted a meeting with a group of stakeholders who appear frequently before the Commission. As a result of the meeting, changes have been introduced in some of the procedures of the Commission to make them more streamlined and “customer friendly”.

I wish to take this opportunity to thank Commission members and staff for their invaluable contributions to the efficient operation of the Commission.

A handwritten signature in blue ink, appearing to read 'Jim Freemantle', with a stylized flourish at the end.

Jim Freemantle  
CHAIRMAN

## OPERATIONAL STRUCTURE

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### ENABLING LEGISLATION

The Liquor Commission (the Commission) is established under section 8 of the *Liquor Control Act 1988* to provide a flexible system to review the decisions of the Director of Liquor Licensing (the Director), with as little formality and technicality as practicable. The Commission came into effect on 7 May 2007, to replace the Liquor Licensing Court.

The *Liquor Commission Rules 2007* regulate the practice and procedure of the Commission and matters that are related and subject to the *Liquor Control Regulations 1989*, as to the costs and charges payable in relation to proceedings under the Act.

### RESPONSIBLE MINISTER

As at 30 June 2014, the Minister responsible for the Racing and Gaming Portfolio was the Honourable Terry Waldron MLA, Minister for Sport and Recreation; Racing and Gaming.

### THE RESPONSIBILITIES OF THE LIQUOR COMMISSION

The Commission's primary function is to adjudicate on matters brought before it through referral by the Director of Liquor Licensing, or by an application for a review of a decision made by the Director of Liquor Licensing. The latter is achieved by way of a rehearing and thus makes its own determinations based on the merits of each case. When considering an application for review, the Commission may have regard only to the material that was before the Director of Liquor Licensing when making the decision.

The Commission is responsible for:

- determining liquor licensing matters referred to it by the Director of Liquor Licensing;
- conducting reviews of certain decisions made by the Director, or by a single member of the Commission;
- determining complaints and disciplinary matters in accordance with section 95 of the *Liquor Control Act 1988*;
- awarding costs associated with matters before the Commission;
- reporting annually to the Minister for Racing and Gaming on the activities of the Commission; and
- reporting to the Minister for Racing and Gaming, when requested to do so, on the jurisdiction and functions of the Commission, including the provision of high-level policy advice relevant to liquor control matters.

The Commission can make the following decisions:

- affirm, vary or quash a decision subject to review;
- 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;
- give directions as to any questions of law that have been reviewed;
- give directions to the Director of Liquor Licensing, to which effect shall be given; and
- make any incidental or ancillary order.

Parties to any proceedings before the Liquor Commission have the right to appeal any decision to the Supreme Court of Western Australia on a question of law.

## **APPEALS WHICH MAY BE HEARD BY THE LIQUOR COMMISSION**

The Commission can determine the following matters under the Act:

### **SECTION 24**

The Director may refer the whole or part of any matter that is to be determined by the Director, or any question of law arising from such a matter, for hearing and determination by the Commission.

### **SECTION 25**

Application for review of the Director's decision can be lodged when:

- the decision relates to an application for the grant or removal of a licence;
- the decision is to make, vary or revoke a prohibition order under Part 5A of the Act; or
- the Chairperson so determines under section 9A(2) of the Act.

### **SECTION 28(4A)**

When there is an appeal against the decision of one Commission member, it is to be heard and determined by the Commission constituted by three other members, including a member who is a lawyer as defined in section 3 of the Act.

### **SECTION 95**

The Liquor Commission determines complaints and disciplinary matters in accordance with section 95 of the *Liquor Control Act 1988*. Complaints lodged to the Commission may be made by the Director of Liquor Licensing, the Commissioner of Police or a local government authority.



The Commission will determine the validity of the complaint and impose disciplinary measures if grounds exist for such a course of action.

Where a complaint is lodged for disciplinary action, one member of the Commission is to be a lawyer as defined in section 3 of the Act.

The following table shows the number of section 95 complaints that were handled by the Commission during 2013-14.

Complaints Outstanding as at 1 July 2013	5
Complaints lodged 1 July 2013 – 30 June 2014	5
Complaints resolved 1 July 2013 – 30 June 2014 (excluding withdrawal orders)	8
<b>Total Outstanding Complaints as on 1 July 2014</b>	<b>2</b>

## **SECTION 115(AD)**

An application for a review of a barring notice issued by the Commissioner of Police can be heard by a Commission constituted by one member.

## **MATTERS OUTSIDE THE JURISDICTION OF THE LIQUOR COMMISSION**

An application for review cannot be lodged against the following decisions of the Director of Liquor Licensing:

- Cancellation of a licence under section 93 of the Act, unless the application for the review is made on a question of law.
- An application for or the conduct of business under an extended trading permit (where the period is greater than three weeks and less than five years) or an occasional licence.
- The imposition, variation, or cancellation of a term or condition of an extended trading permit, or an occasional licence.
- The cancellation or suspension of the operation of an extended trading permit or an occasional licence.
- The assessment of a subsidy.
- Matters relating to the hearing of an objection.
- Finding of fact required to be made in order to dispose of the matter or application.
- A decision made in the course of, and for the purposes of, the administrative duties of the Director not directly related to the outcome of any application or matter before the licensing authority.

Furthermore, the Commission cannot reconsider any finding of fact by the Director of Liquor Licensing as to:

- the qualifications, reputation or character of a person, or the fitness or propriety of a person in relation to an application or licence;
- the adequacy or suitability of any premises, accommodation or services provided, or proposed to be provided under a licence; or
- in relation to a club licence, or an application for such a licence, or the existence of the club, unless the review is sought by the person who lodged the application in respect of which the decision was made; or by the person about whom the finding was made in relation to the qualifications, reputation or character of a person.

## **ADMINISTRATIVE STRUCTURE**

Section 9B of the *Liquor Control Act 1988* provides that the Liquor Commission consists of a Chairperson and other members as determined by the Minister for Racing and Gaming. At least one member of the Commission is required to be a lawyer as defined in section 3 of the Act.

Each member of the Commission is appointed by the Minister for a maximum period of five years. Members are eligible for reappointment.

The member or members who constitute the panel in relation to an application/appeal shall be selected by the Chairperson, who will give consideration to their knowledge or experience.

Executive support for the Liquor Commission is provided by the Department of Racing, Gaming and Liquor.

As of 30 June 2014, the Liquor Commission consisted of nine members, namely:

### **Jim Freemantle - Chairperson**

Mr Freemantle was the Chairperson of the committee appointed by the Government in 2004 to review the Liquor Licensing Act. He is a former Deputy Chairperson of Good Samaritan Industries, Deputy Chairman of Racing and Wagering WA, and Chairperson of the Racing and Wagering Western Australia Integrity Assurance Committee. Mr Freemantle is also a former Vice President of the Western Australian Chamber of Commerce and Industry, and a former Chairperson of the Swan River Trust. Mr Freemantle holds a Bachelor of Economics and a Masters of Administration from Monash University.

### **Seamus Rafferty - Deputy Chairperson**

Mr Rafferty graduated from Notre Dame University in 2001 with a Bachelor of Law degree. He is a former State Prosecutor with the Office of the Director of Public Prosecutions for Western Australia (2002 and 2009), where he was involved in the prosecution of serious crimes in the District and Supreme Courts on behalf of the State of Western Australia. Since 2009, he has been a sole practitioner, specialising in criminal law. Mr Rafferty is a committee member of the Criminal Lawyers' Association and was Secretary of that organisation between 2009 and 2011.

### **Edward Watling - Member**

Mr Watling is a founding partner and Executive Director of the firm Tourist Coordinates, a Perth-based company specialising in tourism strategic planning and development. He has more than 38 years experience in the tourism industry, combining both government and private sector service. In 1984, he was appointed the inaugural General Manager of the Western Australian Tourism Commission and held that position until 1987. Following that, Mr Watling took up a position within the Public Service Commission, where he undertook a range of agency reviews for the Government's Functional Review Committee, after which he served for seven years as a tourism consultant to the Minister for Tourism.

### **Helen Cogan - Member**

Ms Cogan is a former State Solicitor's Office lawyer where she held the position of Senior Assistant State Solicitor. She was employed with the State Solicitor's Office from 1993 until 2005. Ms Cogan worked for various private and public legal organisations within Australia and overseas prior to her employment with the State Solicitor's Office.

### **Eric Isaachsen - Member**

Dr Isaachsen has worked for more than 25 years in general practice covering a broad range of professional interests. He is a Senior Sessional Member of the State Administrative Tribunal, sitting on matters in the Vocational and Human Rights streams.

### **Evan Shackleton - Member**

Mr Shackleton graduated from the University of Western Australia in 1996 with a Bachelor of Law degree. After completing articulated clerkship with the Legal Aid Commission, he continued to work in all areas of criminal defence until he left the Commission in 2004 to commence practice as a sole practitioner in criminal defence.

Mr Shackleton is currently a committee member of the Magistrates Court Liaison Committee.

**Belinda Lonsdale - Member**

Ms Lonsdale graduated from the University of Western Australia with a Bachelor of Law in 1991 and a Masters of Business Administration in 1999. She was admitted to practice in 1993, and since 2003 has been a barrister at Albert Wolff Chambers practicing principally in the area of criminal law and disciplinary tribunals.

Ms Lonsdale was President of the Criminal Lawyers' Association in 2005 and 2006. She is currently a Commissioner for Legal Aid, having been appointed to that position in 2006 and is a member of both the Law Society and Bar Association councils.

**Michael Egan - Member**

Mr Egan graduated from the University of Tasmania in 1980 with a Bachelor of Law degree. He worked in a senior management role in the Western Australia Public Service from 1985 until 1997 in a regulatory capacity, and subsequently, prior to his retirement in 2013, in an executive management position in the private sector in the gaming, hospitality and entertainment industry.

**Alex Zilkens - Member**

Mr Zilkens graduated from University of Sydney in 1986 with a combined Arts/Law degree, and has worked as a lawyer in private practice since his admission in 1987. He has been the principal of Zilkens Lawyers since 1993, taking instructions in commercial legal work as well as commercial and general litigation. After 14 years as chairman of YHA WA, he stood down from that position to become the chairman of Hostelling International Australia (formerly known as YHA Australia), a position that he has held since then. On 4 August 2014 Mr Zilkens was elected as a Vice President of the International Youth Hostel Federation trading as Hostelling International, a registered charity under the Charities Act in England & Wales, United Kingdom representing 69 member associations (youth hostelling associations from different countries).

## **PERFORMANCE SUMMARY FOR 2013/2014**

The tables on pages 13 to 16 provide details of the number, nature and outcome of applications heard and determined before the Commission as at 30 June 2014.

Full determinations are available from the Liquor Commission's website at [www.liquorcommission.wa.gov.au](http://www.liquorcommission.wa.gov.au)

## **OUTSTANDING MATTERS AS AT 30 JUNE 2014**

As at 30 June, there were 11 matters that have been heard but not determined. These were:

- McKail's Investments Pty Ltd;
- Woolworths Ltd -Dan Murphy's Bicton;
- Woolworths Ltd-Dan Murphy's Joondalup;
- Mr Mitesh Desai and Mrs Shailee Desai;
- TCC Perth Airport Pty Ltd;
- Grill'd Pty Ltd (on papers);
- Upper Reach Pty Ltd(on papers);
- Springbok Foods Pty Ltd(on papers);
- Williams Hotel –section 95 complaint by WA Police;
- Pier Hotel- section 95 complaint lodged by WA Police; and
- Tocoan Pty Ltd- section 95 complaint by the Director of Liquor Licensing

Furthermore there were eight matters listed but not heard, which were:

- Ms Mary Anne Kenworthy;
- Entrepreneur West Pty Ltd;
- Carnegies Realty Pty Ltd;
- Mad Mex Fresh Mexican Grill Pty Ltd;
- Secret Harbour Golf Links;
- Mr Sunmin Yu;
- Liquorland Belmont and Mandurah Forum; and
- Penzance Pty Ltd

The following table shows the number of applications to the Commission that were carried over from the previous reporting period, and the number of applications lodged and heard during the current reporting period.

Applications Carried Over From 2012/13			
Case No.	Name	Section of Act	Outcome
L30/01/192	Tocoan Pty Ltd	95	Complaint withdrawn
L30/01/206	Woolworths Ltd-Woolworths Supermarket Mundaring	24	Application for a liquor store licence granted
L30/01/207	Liquorland(Australia) Pty Ltd- Liquorland Mundaring	24	Application for a liquor store licence granted
L30/01/221	Woolworths Ltd-Woolworths Supermarket Margaret River	24	Application for a liquor store licence granted
L30/01/222	Liquorland(Australia) Pty Ltd- Liquorland Margaret River	24	Application for a liquor store licence granted
L30/01/244	Northbridge Enterprises Pty Ltd	25	Application for ETP granted subject to variation of conditions imposed by the Director
L30/01/247	Ms Mary-Anne Kenworthy	25	Matter referred back from the Supreme Court
L30/01/248	Peter Craig Kennedy and Julie Elaine Kennedy	95	Monetary penalty of \$ 2,000 imposed; conditions imposed on licence
L30/01/253	B.A.H (Brookton) Pty Ltd	95	Monetary penalty of \$ 1,500 imposed; conditions imposed on licence
L30/01/254	Franco Cicchini	95	Withdrawn
L30/01/256	Sunseasons Pty Ltd and Ms Aneta Marlene Grace	95	Monetary penalty of \$ 1,500 imposed; conditions imposed on licence

L30/01/257	100 Mile Pty Ltd	95	Confidential direction orders issued
<b>Applications Lodged and Heard 2013/14</b>			
Case No.	Name	Section of Act	Outcome
L30/01/260	Bigaland Kromista Enterprises Pty Ltd	25	Withdrawn
L30/01/261	Delvis Pty Ltd, Rosie Deveson and others	25	Withdrawn
L30/01/262	Tybel Nominees Pty Ltd	25	Application dismissed
L30/01/266	Guy Peter Hodgson	95	Penalty of \$3,000 imposed Licensee to complete a course
L30/01/267	Woolworths Ltd-Woolworths Supermarket Manjimup	25	Application granted
L30/01/268	Tocoan Pty Ltd-WA Police complaint(referred back from Supreme Court)	95	Conditions imposed on the licence
L30/01/271	Barring Notice-JP	115AD	Barring notice conditions varied
L30/01/272	Glen James McCormick	25	Application dismissed
L30/01/273	Tocoan Pty Ltd and Kevin Robert Mann-WA Police complaint	95	Licence cancelled; Director and approved manager, K Mann declared not fit and proper
L30/01/274	Owen Keith Hutchinson	25	Application dismissed

L30/01/277	Rocky D'Costa and Debra D'Costa Premises: Cannington Supa IGA Liquor	25	Application dismissed
L30/01/280	Barring Notice-JAC	115AD	Withdrawn
L30/01/282	Marcia Day	25	Application dismissed
L30/01/283	Angela Joy Bracknell	25	Application dismissed
L30/01/286	Barring Notice- MST	115AD	Withdrawn
L30/01/287	Barring Notice- JMN	115AD	Withdrawn



## SIGNIFICANT APPEALS BEFORE THE COMMISSION

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The Commission continued to make a number of significant decisions during the reporting period. Below are some of the more high profile decisions made by the Commission.

### **Commission upholds Busselton liquor store decisions**

This decision deals with two applications for liquor stores in Busselton (IGA and Woolworths), which were originally granted by the Director of Liquor Licensing, and a review was subsequently sought by objectors to both applications.

The decision to hear the applications together by the Commission was based on the fact that both applications were for premises in reasonable proximity to each other and therefore pursuant to section 16(12) of the *Liquor Control Act 1988* the evidence relating to one application was evidence relating to the other.

After the Director granted the applications, lawyers acting on behalf of the objectors (to both decisions) lodged an application with the Liquor Commission for a review of the decision.

The first applicant's submissions and documentation before the Director were examined by the Commission and a fair summary of those submissions and documentation was contained in the written reasons of the delegate of the Director, some of which is set out below as follows:

*The applicant seeks to establish a small scale liquor store set within the IGA retail area of the Busselton Central Shopping Centre. The proposed liquor store will consist of approximately 120sqm of patron walk through display area and an adjoining cool room.*

*The applicant proposes to provide one stop shopping convenience to the public who use the shopping centre.*

*The applicant's Public Interest Assessment (PIA), lodged in support of the application, provided information on the proposed manner of trade, the style and layout of the premises, the demographics and socio-economic profile of the locality and the matters contained in section 38(4) of the Act.*

*In summary, it was submitted that this is an application for a small scale liquor store in a substantial, quality supermarket contained within a large and popular shopping centre in the fast growing town of Busselton.*

The submissions on behalf of the Executive Director Public Health were summarised by the delegate of the Director as follows:

*The Executive Director Public Health (EDPH) lodged a Notice of Intervention in respect of the IGA application for the purpose of making representations regarding trading conditions that are likely to minimise alcohol-related harm by ensuring that the sale of packaged liquor within the existing regional community supermarket is separated from general grocery items.*

*The EDPH was of the view that because the proposed licensed premises will be located within the grocery area of the IGA supermarket, there is an increased risk of exposure of children and young people to alcohol, positioning it as an ordinary commodity.*

Consequently, the EDPH recommended a number of conditions be imposed on the operation of the licence if the application is approved.

The second applicant sought a liquor store licence for premises to be known as Woolworths Supermarket Busselton located at 65 Kent Street, Busselton.

The second applicant's submissions and documentation before the Director were examined by the Commission and a fair summary was contained in the written reasons of the Director delegate, some of which is set out below as follows:

*A large, new Woolworths supermarket is being established as part of a new retail development constructed on land between Kent and Duchess Streets in Busselton. It is submitted that the supermarket, totalling over 4761 m<sup>2</sup>, will be one of the largest and modern Woolworths supermarkets in Australia.*

*This new supermarket will update and replace the existing Woolworths supermarket in Busselton and it will be considerably larger than the existing supermarket and provide a range of new services.*

*The applicant's Public Interest Assessment (PIA) lodged in support of the application provided information on the nature of the locality in which the premises is to be located, the demographics and social health profile of the area, and information on the existing packaged liquor outlets.*

The submissions of the Commissioner of Police were outlined by the Director as follows:

*The Commissioner of Police lodged a Notice of Intervention in respect of the Woolworths application to express concerns that the existing level of alcohol-related harm in Busselton may increase if another packaged liquor outlet is established in the area.*

*According to the Commissioner of Police, there were 992 reported crimes in Busselton between January 2011 and July 2012, of which 63 were alcohol related. In view of the existing number of liquor outlets in Busselton, the grant of a further liquor store licence may increase the consumption of alcohol in the area and result in an increase in*

*alcohol-related harm. If the application is approved, the Commissioner of Police recommends that appropriate conditions be imposed on the operation of the licence.*

The objections to the applications are made on the following grounds, namely that the granting of the applications:

- a) would not be in the public interest;
- b) would cause undue harm or ill-health to people, or any group of people due to the use of liquor;
- c) would cause undue offence, annoyance, disturbance or inconvenience to persons in or travelling to or from an existing or proposed place of public worship, hospital or school; (only relates to the second application)
- d) would impact on the amenity, quiet or good order of the locality in which the premises are situated;
- e) would be contrary to the Act.

In seeking a review of the Director's decision, the objectors lodged their grounds for that review under the following headings:

- Denial of procedural fairness
- The Objectors
- Lack of objective evidence
- Anti-needs test growth in Busselton
- Convenience
- Outlet density
- Harm and ill-health
- Intervention by the Executive Director Public Health
- Woolworths supermarkets
- Conclusion

In making its decision, the Commission determined it was satisfied that each of the applications for liquor store licences satisfied the public interest test articulated in section 38(2) of the Act and that the objections to each application were not made out.

The decision of the delegate of the Director granting the applications for liquor store licences made by both applicants was therefore affirmed.

### **Margaret River liquor store licence granted**

An application that was lodged by Woolworths for the conditional grant of a liquor store licence in Margaret River was referred to the Commission under section 24 of the *Liquor Control Act 1988*.

A total of 29 objections to the application were received.

The applicant sought to operate a relatively small liquor store of approximately 165m<sup>2</sup> forming part of a Woolworths supermarket at 49 Town View Terrace, Margaret River.

The applicant argued that Margaret River was an important regional town which has experienced significant growth in the past decade.

While the resident population of the region had grown to approximately 5800 and 1,570,900 visitor nights per year in 2011, the retail packaged liquor services and facilities had not changed since approximately 1997.

The applicant claimed that the three licensed venues authorised to sell packaged liquor were insufficient to provide adequately for the diverse packaged liquor requirements of the vast volume of consumers who live in or visit the Margaret River area.

The largest group of objectors consisted of licensee objectors and residents. The grounds cited for the objections were essentially that:

- a) The application was not in the public interest; and that
- b) The grant of the application would cause undue harm or ill health and the amenity would be lessened.

The evidence submitted on behalf of the objectors was extensive and largely related to the existence of the “Margaret River Brand” and how the brand would be damaged by granting the application.

The applicant claimed that the “real” objectors to the application were competitor licensees, and that all other objections (represented by a legal firm) relied on the same grounds of objection, relied on the same particulars and evidence to support the grounds of objection, and were repetitious of each other – and as such ought to be treated as a single objection.

Furthermore, the applicant said much of the material presented by the identical objectors had little substantive or factual evidence of any real or actual issues and much was misconceived, exaggerated and emotive.

In assessing the application, the Commission made it clear that the commonly held view of all parties was that Margaret River “included not only the township but the surrounding region which includes a large number of wineries offering cellar door sales, diverse food offerings and other tourist attractions”.

On this definition, the resident population is approximately 12,000 but there is a large transient population of tourists/holiday makers/visitors (some 1.5 million bed nights per annum and 750,000 day trippers per annum). Thus in any assessment of where the public interest lies, not only residents but the high volume of visitors must be taken into account as constituting ‘the public’, given the nature of the region as a major destination for tourists.

The Commission found that objectors provided little evidence that the grant of the application would lead to undue harm and ill health (actual or potential) but relied on the supposition that the applicant would supply cheap liquor which would result in increased harm and ill health.

The real focus of the class case was on the “brand” or image of Margaret River state-wide, nationally and internationally. This brand or image had been built up carefully over time and focused on a quality product and quality visitor experience. They argued that the establishment of a “national chain” outlet would seriously diminish if not destroy this carefully built branding.

The Commission accepted that Margaret River was a “special area” with a distinctive branding and quality image.

However, the Commission did not accept that the establishment of this relatively moderate sized outlet as an adjunct to a supermarket would damage the carefully cultivated image of the Margaret River Township and the Margaret River wine region.

In fact, there was little cogent evidence submitted to suggest that it would. The objectors’ case was predicated more on emotion than demonstrable outcomes.

Granting this licence would increase the packaged liquor floor space in Margaret River and self evidently outlet density but this did not in itself mean that the granting of the application would be contrary to the objects of the Act and/or not in the public interest.

One of the primary objects of the Act pursuant to section 5 is to minimise alcohol-related harm, while another is to cater for the requirements of consumers for liquor and related services.

Where there is conflict between the various objects of the Act, the licensing authority needs to weigh and balance those competing interests. It is relevant to note that Ipp J in *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258

observed that it is significant that the primary object in section 5(1)(b) is to “minimise” harm or ill-health, not to prevent it absolutely.

There was no compelling evidence before the Commission to indicate that the population in Margaret River suffered from unacceptable levels of existing alcohol related harm.

In assessing the application, the Commission held that granting the licence would be consistent with the objects of the Act and given the particular local, social, demographic and geographic circumstances of this application, on the balance of probabilities there was little likelihood that the granting of this licence located in a shopping centre, would result in any negative impact on the amenity of the area.

The Commission was satisfied that the applicant had discharged its onus under section 38(2) of the Act and that granting the application was in the public interest.

Accordingly, the application was granted.

*NB: A similar application to the above by Coles was granted on the same day as this decision was handed down.*

### **Commission quashes Manjimup liquor store decision**

An application by Woolworths for the review of a decision made by the Director of Liquor Licensing to refuse a liquor store licence in the country town of Manjimup was successful during the reporting period.

The review, which was made under section 25 of the *Liquor Control Act 1988* and was held on November 28, 2013, was for a 156m<sup>2</sup> retail floor space within a Woolworths Supermarket.

As part of its application, the applicant claimed that none of the existing liquor outlets in Manjimup had a close association with a major supermarket, and the proposed liquor store would provide the convenience of one-stop shopping for customers of the new supermarket and shopping centre.

It was submitted that a primary object of the Act was to minimise, not eliminate harm and the proper development of the liquor industry was also a key factor to be considered under the objects.

The applicant questioned a number of the statistics submitted by the objectors pointing out that in some cases they were not based on data specific to Manjimup.

In lodging the application for a review of the decision of the Director to refuse a conditional grant for a liquor store licence, fourteen grounds for the application were submitted.

The grounds generally being that the Director of Liquor Licensing erred in law and reached incorrect findings in respect to the material before him when making the decision.

The applicant submitted that:

- many of the conclusions reached by the Director were uncertain;
- there was no basis for any conclusion other than the level of alcohol related harm in the town was consistent with that tolerated within the community;
- there was no evidence that the granting of the application would increase this level; and
- the benefits of granting the application outweighed any detriment.

Considerable comment was submitted in relation to conclusions reached by the Director relating to harm and ill-health issues associated with the application. Those conclusions were reached on the basis of the materials relied upon by the objectors.

Regarding the position taken by the licensee objectors as to the presence of existing high levels of alcohol related harm and ill-health, this was both obviously self-serving and hypocritical.

The self-serving nature of the licensee objectors' claims also ought to be acknowledged when considering assertions that the premises will be adjacent to sensitive premises, by which reference is made to the offices of the Department for Child Protection. There is nothing in the material relied upon that provides evidence that the office is, in fact, used by anyone other than departmental staff.

Furthermore, data submitted by the objectors with respect to the effects of alcohol on the Manjimup community was closely analysed and was deemed inconclusive, general in nature, marginal in its findings and/or lacking a nexus between the grant of the proposed licence and the advent of alcohol related harm.

In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials.

In support of the application, the applicant provided a petition signed by approximately 400 people together with 30 questionnaires completed by community members.

The Commission considered the material submitted by the applicant, including the Public Interest Assessment, the Caporn Report and the MGA report and was satisfied that the granting of the application would be consistent with object 5(1)(c) of the Act, which is:

*to cater for the requirements of consumers of liquor and related services with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*

The primary case of the objectors was the potential harm and ill-health impacts that the granting of this licence would cause.

While the Commission was mindful of the possible vested commercial interests of the licensee objectors, these objections were dealt with on their merits and in association with those lodged by the incorporated groups and individuals.

The Commission found it difficult to accept that the statistical data referred to by the objectors, and presented in the report "Impact of Alcohol on the Population of Western Australia", could be specifically applied to demonstrate a nexus between higher alcohol-related hospitalisations and the number of packaged liquor outlets in the Manjimup locality.

The data referred to was collected from regional or statistical local areas and went beyond the defined locality of this application.

Manjimup had one commercial packaged liquor store to 3333 population, which would change to one packaged liquor store to 2500 population if this application was approved. This is not inconsistent with the outlet density of Bunbury and Busselton, yet the SRR data differs considerably.

However, the Commission was obliged to consider the likelihood of harm and ill-health being caused by the grant of the application and was well aware of the academic research and reports that address the issues of outlet density and alcohol related harm.

In doing so, the Commission was not persuaded that the locality of Manjimup would be subject to an unacceptable level of increase in alcohol related harm and ill-health as a consequence of the granting of this application.

The Commission found that the evidence submitted in support of the grant satisfied the public interest test.

The Commission also found that the benefit in increased competition, range of products and diversity of choice outweighed the potential harm that may result from the grant of the application.

The Commission also found that the objections to the application had not been made out.

Accordingly, the decision of the Director refusing the application for the conditional grant of a liquor store licence was quashed.



### **City ordered to pay nightclub costs**

In a first for the Commission, a local government authority was ordered to pay costs to a nightclub licensee during the reporting period.

The City of Rockingham had originally made complaints against Tocoan Pty Ltd, trading as Zelda's Nightclub, pursuant to sections 95 and 117 of the *Liquor Control Act 1988*.

On 28 February 2012, the day before the hearing of the section 117 complaint, the City filed an appeal against the decisions of the Commission on February 7, 20 and 23, precluding the City from adducing further evidence on the hearing of the sections 95 and 117 complaints.

The appeal and the substantive complaints, which were heard separately by the Commission, were dismissed on the basis that there was insufficient evidence in support of both matters.

Tocoan then made an application for costs in respect to the s95 hearing, the s117 hearing, and the interlocutory applications and appeal that required determinations prior to the hearing.

The Commission concluded that while the section 95 and 117 complaints could not be deemed lacking in merit to be deemed to be vexatious or hopeless, the interlocutory applications and appeal lodged on February 28, 2012 were vexatious in the sense that the applications were bound to fail on previous orders made by the Commission.

On 27 February 2013, Commissioner Seamus Rafferty (LC 27/2013), granted costs in favour of Tocoan Pty Ltd for interlocutory applications lodged by the City during the course of section 95 and 117 proceedings before the Commission, and a subsequent appeal instituted by the City on 28 February 2013, against the decisions of the Commission to disallow further evidence in the proceedings.

In granting the costs in favour of Tocoan Pty Ltd, Commissioner Rafferty observed that having regard to the various orders made by the Commission, the applications and the appeal were foredoomed to fail and that they were vexatious in the sense that there was no merit to the applications and that they were unarguable.

The City appealed this decision of a single Commissioner to full panel of three Commissioners. Tocoan Pty Ltd also lodged a counter appeal on the basis that the Commission erred in not awarding costs in the section 117 proceeding, those proceedings being properly characterised as "vexatious".

By way of written submissions, solicitors for Tocoan set out the manner in which this matter should proceed and a schedule of costs. Submissions on behalf of the City were also initially filed but, due to a change in legal representation, the City was granted leave to file supplementary submissions, which was done on February 17, 2014.

In determining the quantum of costs to be awarded, it was submitted that the Commission should apply the hourly rate for legal practitioners approved in the Legal Practitioners (District Court Appeals) (Contentious Business) Determination 2010. However, as the Liquor Commission is not a court, it was not considered appropriate for the Commission to adopt scales of rates allowable for legal costs in the District or Supreme Courts. Furthermore, there is no provision in the Liquor Control Act 1988, Liquor Control Regulations 1989 or Liquor Commission Rules 2007 as to the maximum allowable rate permitted for a senior practitioner.

Accordingly, the submissions of the City were adopted and used to determine the issue of quantum of costs by applying the Legal Practitioners (State Administrative Tribunal) Determination 2010.

The full panel in its decision (LC 44/2013) concluded that Commissioner Rafferty erred in that he ought to have found that the continuation of the section 117 proceedings following the section 95 hearing was vexatious and therefore made orders for the payment of costs by the City from the time following the section 95 hearing. Ultimately, the appeal by the City was dismissed and costs granted in favour of Tocoan Pty Ltd for the interlocutory applications, the appeal proceedings commenced on 28 February 2013, section 117 proceedings and the appeal to the full panel. In total, Tocoan Pty Ltd was awarded \$15,840 in costs.

### **Commission cancels nightclub licence**

In one of its last decisions of the reporting period, the Liquor Commission cancelled a nightclub licence (Tocoan Pty Ltd), and permanently disqualified the approved manager from being the holder of a position of authority in a body corporate that holds a licence and from being interested in or in the profits or proceeds of, a business carried on under a licence.

On November 22, the Commissioner of Police filed a complaint pursuant to section 95 of the *Liquor Control Act 1988* alleging there was cause for disciplinary action against Tocoan Pty Ltd, the licensee company of the premises known as Zelda's Nightclub and its approved manager.

At the March 12, 2014 hearing, Police set out a history of complaints laid against the respondents and a detailed summary of the various provisions of the Act applicable to this complaint.

The following four grounds were relied upon by the complainant in this matter:

1. The continuation of the licence is not in the public interest (s 95(4)(j));
2. The licence has not been exercised in the public interest (s 95(4)(j));
3. The safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee (s95(4)(k)); and

4. A person holding a position of authority in a body corporate that holds the licence, or who is interested in the business or the profits or proceeds of the business is not a fit and proper person to hold that position or to be so interested (s95(4)(h)).

In addition to evidence relating to serious assaults occurring at the premises, the material lodged by Police also included evidence relating to various reports of apparent criminal activities taking place at the licensed premises.

The complainant's supporting material also included data on police and ambulance attendances at the licensed premises.

Police provided the details of three specific incidents that occurred at the licensed premises in grounds 1, 2 and 3 of the complaint.

Firstly, an assault occurred inside the premises on June 22, 2013 where a patron had been consuming alcohol and was approached by two other males, resulting in an unprovoked assault. The victim in this case sustained a broken jaw and nose. It was submitted that both the offender and victim were drunk at the time.

Secondly, on November 23, 2012, an approved manager recorded in the Zelda's Incident Register an incident where a patron was caught selling drugs on the premises; the patron was removed and no attempt was made to contact the police.

Police submit this matter was significant and the approved manager neglected his duty by not contacting police.

Thirdly, on August 17, 2013 the security register reveals a patron dropped a bag of cannabis in front of crowd controllers when going outside the premises.

Action taken was to dispose of the cannabis in a rubbish bin and the males were not permitted re-entry. Police claim the actions of crowd controllers constituted an offence by taking possession of the drugs and disposing of them. Furthermore, no attempt was made to contact police or provide any CCTV or ID scanner details of the patron involved.

In addition to the three specific incidents, the complainant noted that the incident register revealed that on at least four separate occasions, patrons were removed for being found asleep either at the bar or in other areas at the venue, indicating high levels of drunkenness.

The Commission found there was a consistency in statistical evidence pointing to a high level of incidents in the immediate vicinity of, and inside the premises, including criminal acts, which sustained the view that violence and anti-social behaviour was occasioned by patrons of the premises.

A review of the incident register as well as security incident registers required to be maintained by staff and security found a discrepancy of 190 reports not being accurately transcribed during a 14-month period.

Police claimed *“The lack of sound management practices, the culture of uncooperative staff when being dealt with by police investigating offences, the permissive attitude of excessive alcohol consumption and offending on the licensed premises has been the catalyst for several previous complaints against this licensee pursuant to Section 95 of the Act. This level of unprofessionalism has extended to the detriment of patrons resorting to the licensed premises by way of anti-social behaviour and assaults over a sustained period of time. There is nothing from the recent incident registers to suggest any improvement in this regard.”*

The incident reports showed that the respondent, who was the approved manager of the premises, was personally involved in a significant number of the incidents as well as being aware of the overall incidents recorded, it is apparent that no strategies or practices to reduce harm were put in place to curb the assaults and anti-social behaviour at the venue by the licensee.

In response, the respondent claimed that various incident reports were incorrect and the incidents recorded could not be attributed to the respondents.

The respondent maintained the claim that anti-social behaviour is taking place in the vicinity of the premises where no other businesses are trading was wrong as late night food vending businesses were trading in Railway Terrace where the nightclub is located.

The respondent claimed that many of the reported incidents related to preventing intoxicated persons entering the premises.

In making its determination, the Commission found that the incidents referred to by Police were sufficient to prove grounds 1, 2 and 3 of the complaint.

It found that the respondent relied heavily on a technique of attacking and attempting to cast doubt on the veracity of specific police reports and thereafter attempted to convince the Commission that on the basis that those specific reports were inaccurate, all of the reports were either wrong, or irrelevant or misleading.

The Commission was not convinced about the doubts being raised in relation to the veracity of the evidence, primarily because the various data and reports were collated by different persons at different times thereby quashing any possibility of collusion to present false data.

There was sufficient evidence provided before the Commission to show that the respondent used “gimmicks” to lure patrons into consuming alcohol rapidly.

The Commission found that on the balance of probabilities, it could be concluded that the effect of a large number of ejections of intoxicated patrons and refusal of entry to intoxicated persons resorting to this premises would potentially give rise to alcohol related anti-social behaviour in the vicinity of this licensed premises.

A decrease in police call outs and offending generally during the period when the premises were not operating supported this conclusion.

The Commission observed that over the past four years the Director and the Commission had imposed various conditions on the licence to try and assist the licensee company in the management of the premises and the discharge of its duties under the Act.

As a deterrent, the Commission also had imposed fines, yet serious incidents continued to occur.

Given the observations made by the Commission in previous determinations, the Commission therefore had to decide whether it was in the public interest to allow the continuation of the licence.

The Commission determined it was not, and was satisfied that the weight of evidence in respect of the conduct of the respondents over a considerable period of time justified the determination at which it arrived.

### **Supreme Court finds wrong question considered**

On 30 August 2011, the Liquor Commission refused an application for the conditional grant of a liquor store licence for a Dan Murphy's store in Bicton. The application was refused due to a lack of evidence of consumer demand.

The Commission's decision to refuse the application was appealed to a single judge of the Supreme Court. In dismissing the appeal, the judge found that the Commission had engaged with the appellant's case on its merits, had found all the necessary facts and had rejected the appellant's case and submissions on their merits (refer *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384).

The decision of the primary judge was appealed to a full bench of the Supreme Court which, in allowing the appeal and referring the application back to the Commission for redetermination, observed that the Commission was in error in considering the wrong question namely whether the popularity of the Dan Murphy's business model elsewhere justified the grant of the application. The court found that the correct question was "whether having regard to all of the evidence, was it in the public interest to grant the application?" (refer *Woolworths Ltd v Director of Liquor Licensing* [2013] WASC 227).

The application was referred back to the Commission for reconsideration. A remittal hearing for this application was heard before the Commission on 14 March 2014. On 11 June 2014, the Commission granted the application.

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## **SIGNIFICANT ISSUES IMPACTING THE LIQUOR COMMISSION**

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### **TRENDS OR SPECIAL PROBLEMS THAT HAVE EMERGED**

#### **Applications for moderate sized liquor stores in shopping centres**

This year, the Commission considered several applications for moderately sized liquor stores in shopping centres, particularly in regional towns. There appears to be an increasing trend by Woolworths Ltd and Liquorland (Australia) Pty Ltd, both major operators in the liquor industry, to open moderately sized liquor stores in shopping centres to offer “one stop shopping experience” to the customers visiting the shopping centre.

Although each application is to be determined on its merits, in the absence of compelling evidence to indicate unacceptable levels of existing alcohol-related harm, the grant of applications for such stores has generally been regarded as being consistent with the objects of the Act and in the public interest. Notwithstanding that the grant of such applications represents an increase in the number of packaged liquor outlets in the relevant towns/ locality, that in itself should not render the grant of such applications as being contrary to the public interest nor should it be seen as being inconsistent with the objects of the Act.

### **FORECASTS OF THE COMMISSION’S WORKLOAD FOR 2014/15**

It is expected that although the workload of the Liquor Commission for 2014/15 will be similar to previous years, the complexity of the matters before the Commission will continue to increase, thereby placing pressure on the current resources of the Commission. It is noted that one of the recommendations of the independent review committee to the Minister in December 2013 was to establish a full-time position to assist the Commission with writing decisions ensuring these can be provided in a timely manner.

### **PROPOSALS FOR IMPROVING THE OPERATION OF THE COMMISSION**

As part of ongoing endeavours to streamline the Commission’s processes to make it more “customer-friendly” and robust, a meeting with external stakeholders was arranged in which strategies to address various issues were discussed. Those areas which were identified as requiring more attention are currently being reviewed.

## **OTHER LEGAL AND GOVERNMENT POLICY REQUIREMENTS**

### **ADVERTISING**

Section 175ZE of the *Electoral Act 1907* requires public agencies to report details of expenditure to organisation providing services in relation to advertising, market research, polling, direct mail and media advertising. The Commission did not incur expenditure of this nature in 2013/14.

### **OTHER GOVERNMENT POLICY REQUIREMENTS**

The Commission meets its requirements through arrangements with the Department of Racing, Gaming and Liquor. The Department's Annual Report contains information on how the Department meets the following requirements:

- Disability Access and Inclusion Plan Outcomes.
- Compliance with Public Sector Standards and Ethical Codes.
- Recordkeeping Plans.
- Substantive Equality.
- Occupational Safety, Health and Injury Management.