

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Commissioner of Police
(represented by Mr David Leigh of State Solicitor's Office)

Respondent: Northbridge Enterprises Pty Ltd
(represented by Mr John Prior, instructed by Mr Peter Fraser of Dwyer Durack Lawyers)

Objectors: 6 objectors listed at paragraph 2

Intervener: The Executive Director of Public Health
(relied on submissions before the Director of Liquor Licensing)

Commission: Mr Jim Freemantle (Chairperson)
Mr Seamus Rafferty (Deputy Chairperson)
Mr Eddie Watling (Member)

Premises: The Deen Hotel, 84 Aberdeen Street, Northbridge

Matter: Review pursuant to section 25 of the *Liquor Control Act 1988* of the decision of the Director of Liquor Licensing to grant an extended trading permit to the respondent.

Date of Hearing: 18 June 2013

Date of Determination: 23 September 2013

Determination:

The decision of the Director of Liquor Licensing No A221731 is upheld with the following variation to trading hours and lock out period conditions on the extended trading permit:

- 1) The permitted trading hours under the permit are Monday to Saturday inclusive: 12.00am to 1.00am in the whole of the premises.
- 2) A lockout commencing 45 minutes before closing time under the permit will be imposed.

All other conditions imposed by the Director on the permit remain unchanged.

Authorities referred to in the determination:

- *Equanimity Investments Pty Ltd v Commissioner of Police and Another* (LC38/2011)
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *O'Sullivan v Farrer* (1989) 168 CLR 210
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142
- *Fremantle Beverages Pty Ltd v Executive Director Public Health and Others* (LC15/2010)
- *Gull Liquor, Gingers' Roadhouse, Upper Swan* (1999) 20 SR (WA) 321
- *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207
- *Highmoon Pty Ltd v City of Fremantle and others* [2004] WLLC 4
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258
- *Australian Leisure and Hospitality Group Limited v Executive Director Public Health and Others* (LC 31/2010)

Introduction

- 1 On 11 May 2012, an application was lodged by Northbridge Enterprises Pty Ltd ("the applicant"), for the grant of an extended trading permit ("ETP"), pursuant to section 60(4)(g) of the *Liquor Control Act 1988* ("the Act"), in respect of premises situated at 84 Aberdeen Street, Northbridge and known as The Deen Hotel.
- 2 Notices of intervention were received under the provisions of section 69 of the Act from the Commissioner of Police ("the Police") and the Executive Director Public Health ("EDPH").
- 3 Objections were lodged by:
 - Ms Wing Yi Doris Chen
 - Mr Cannon Go
 - Mr Peter Ruocco
 - Mr Timothy Richard Leaver
 - Mr Joseph Anthony Chandler
 - City of Perth
- 4 In decision no. A221731 dated 5 March 2013, the Delegate of the Director of Liquor Licensing ("the Director") granted the application.
- 5 On 22 March 2013, the Police lodged an application for a review of the Director's decision with the Liquor Commission ("the Commission") pursuant to section 25 of the Act.
- 6 A hearing was conducted on 18 June 2013.

PROCEEDINGS BEFORE THE DIRECTOR

Submissions on behalf of Northbridge Enterprises Pty Ltd in support of its application for an extended trading permit

- 7 The applicant seeks the grant of an extended trading permit to authorise trading on:
 - Monday 12.00am and 2.00am the next morning in zones 1,2 and 4 of the premises
 - Wednesday 12.00am to 1.00am the next morning in the whole of the premises;
 - Thursday 12.00am to 2.00am the next morning in the whole of the premises;
 - Friday 12.00am to 2.00am the next morning in the whole of the premises; and
 - Saturday 12.00am to 2.00am the next morning in the whole of the premises.
- 8 The hours sought were identical to the hours enjoyed by the respondent since the ETP was first issued in 2007. However prior to 2007, between June 2000 and 2007, the applicant enjoyed a number of ETP's permitting extended trading on an ongoing basis.
- 9 Due to its location, the premises attracts a wide demographic from throughout the metropolitan area including young adults, residents of the CBD, visitors/tourists, hospitality employees working in or near Perth CBD and persons attracted to the

venue on specific evenings of the week when particular genres of music and entertainment are offered.

- 10 According to the applicant in its Public Interest Assessment (“PIA”), the enduring popularity of the premises establishes that the grant of a new permit is in the public interest. The premises run at near capacity most nights that the ETP is operated which is further affirmed in the Patterson Report which clearly evinces that patrons attend licensed premises in Northbridge later at night.
- 11 Peak patron attendance at the premises occurs between the hours of approximately 10.30-11.30pm most nights of the week, with most patrons arriving at the venue around 11.pm. It was the licensee’s experience that the patrons prefer to go out later in the evening and wish to stay out late.
- 12 As part of its supporting documentation the licensee notably submitted the following:
 - a) WA Police Report – *Total Offences and Alcohol Related Offences for Northbridge 2009-2012*;
 - b) a report by Bob Falconer, former West Australian Commissioner of Police entitled *Safer City – An Integrated Approach to Problem Solving*;
 - c) summary of police IMS reports;
 - d) reports by Patterson Market Research concerning demand for late night facilities and the characteristics of the patrons using such facilities;
 - e) a report by Herring Storer concerning noise attenuation at the venue;
 - f) statement by Director, Mr Ben Maher outlining the benefits of the venue, security and management practices including a number of supporting documents covering the licensee’s position on noise attenuation and steps taken to remedy the issue as well as general information on the venue and events staged;
 - g) a report from Mr Ryan Blackburne on venue security measures particularly Scanteck and its actual and potential impact on curbing anti social behaviour;
 - h) statements (9) from various individuals who work and worked as security personnel at the venue were lodged supporting the submission of Mr Blackburne and discussing the level of security and the adequacy of measures already in place.
- 13 In its PIA, the applicant also addressed the matters set out in section 38(4) of the Act and the primary objects of the Act in section 5(1). Voluminous quantities of questionnaires and online survey forms were lodged by the respondent, as well as nine witness statements as objective evidence of a consumer requirement for the extended trading hours sought. A further eight letters of support were also lodged.
- 14 As part of its harm minimisation strategy, the applicant has taken steps to attract a mixed demographic of patrons by holding themed nights and varying the music genre and entertainment.
- 15 It was submitted that the licence is operated under strict harm minimisation policies and security personnel are well trained in dealing with and minimising harm.

- 16 As part of its harm minimisation strategy, the licensee introduced updated scanners at a reasonable cost which have had a positive impact on patron behaviour inside the premises.
- 17 Acoustic attenuation has been partly undertaken in conjunction with City of Perth requirements. Whilst a further stage 2 of these works has been proposed, the progress of the works is highly reliant upon the venue being granted the continuation of the extended trading hours to generate an adequate revenue stream.
- 18 It was submitted that statistics in relation to alcohol related crime should be treated with caution as:
- the statistics only refer to offences and not convictions;
 - offences are described as alcohol related and not alcohol caused;
 - the locality services not only Northbridge and the suburbs of Perth but the greater metropolitan area with greater masses of people utilising venues in the locality other than suburbs in Perth.
- 19 Overall, it was submitted that there will be no negative health or social effects resulting from the grant of the application. Rather the granting of the application will improve the amenity of the area and will be in line with the vision of the relevant planning authorities in relation to the locality within which the premises is located.

Submissions by the Executive Director of Public Health

- 20 The intervention by the EDPH was consistent with his approach to alcohol related harm in other matters before the Commission over a period of time.
- 21 He submitted there is a strong correlation between extended hours and alcohol related harm.
- 22 The intervener supports the Commissioner of Police's position on the incidence of harm during the early hours of the morning.
- 23 The intervener submitted statistical evidence to support the assertion that there was an existing high level of alcohol related harm in the vicinity of the subject premises.

Submissions by the objectors

- 24 Five (5) residential objections were received, none of which did more than make assertions about noise and drunkenness in the vicinity and loss of amenity.
- 25 The City of Perth also objected but only to the extent of additional trading hours sought for Sunday until such time as the venue could adequately attenuate low frequency noise levels satisfactorily.

Submissions by the Commissioner of Police

- 26 The Police intervened in the application before the Director for the purpose of making representations as to the likely public disorder or disturbance that would result in the event that the application was granted or alternatively any ETP granted if it was not

subject to conditions.

- 27 The Police submitted that the PIA provided by the applicant did not sufficiently assess factors such as public demand, at risk groups and the potential for harm or ill health that would be caused by the grant of this application.
- 28 Further evidence was provided that there was a significant level of alcohol related harm occurring in Northbridge, and submitted that there was similarly a significant level of alcohol related harm occurring both within and in the immediate vicinity of the premises.

REVIEW HEARING BEFORE THE COMMISSION

Application for review by the Police

- 29 The application for review of the decision of the Director to grant the ETP was sought by the Police on the basis that having found that there was already an unacceptable level of harm occurring in Northbridge, that the premises contributed to that harm; and that the grant of the application would lead to an increase in the harm; it was not open to the Director to grant the application. The grant of the application therefore amounted to a jurisdictional error in that it demonstrated that the decision maker misunderstood the nature of his power to grant the permit.
- 30 It was submitted that the Director made his decision in error because he considered only whether the individual harm that would result from the granting of this licence would outweigh the individual benefits that would flow from the granting of this permit.

Submissions before the Commission by the Police

- 31 In weighing and balancing the positive and negative aspects of the ETP extension application, consideration must take place in the context of the already existing levels of alcohol related harm.
- 32 The primary object emphasised namely minimising the harm or ill health caused to people or any group of people due to the use of liquor is an important aspect of the public interest.
- 33 It is not a question of whether the level of harm resulting from, or contributed by the ETP at the premises, but rather whether the level of harm is acceptable given the high level of harm extant in the Northbridge precinct (which the decision maker had already stated was unacceptable).
- 34 The report by Senior Constable Magill dated 28 June 2012 outlines the existing level of harm in the locality. Whilst the Police generally adopt the submissions made in the Report, they do not assert that the application is not in the public interest.
- 35 The PIA submitted with the original application contains a number of general unsubstantiated public interest assertions vaguely, if at all, linked to the issue of an ETP for the subject premises. No evidence is provided to support any of these assumptions in the PIA.
- 36 Whilst the availability of licensed venues in Northbridge might be attractive to inner city demographic or a wide cross section of population, there is no evidence to suggest that those persons are particularly attracted to such venues trading between midnight

and 2:00am as opposed to trading within the permitted hours under the Act.

- 37 The licensee's attempt to support the application by claiming that it accords with the planning framework for the CBD is misconceived. Great caution should be exercised before concluding any positive benefits from the grant of this application and planning documentation for the Perth inner city.
- 38 Magill's report illustrates there is a significant level of alcohol related crime in Northbridge and the hours between midnight and 3:00am is by a substantial margin the period of highest incidence.
- 39 There is a significant level of crime occurring both within and immediately outside the premises which are primarily against the person such as assaults and assaults occasioning bodily harm. A very significant majority of the crimes both within and immediately outside the premises occur during the hours of trade under the ETP. In fact the number of offences within and immediately outside of the premises has increased between 1 June 2010 and 31 May 2012. The report shows that the premises is a source of crime and other alcohol related harm in the locality.
- 40 The submission by the licensee that any decline in offending rates is a result of the multi pronged harm minimisation techniques like choosing to use Scantek ID system should be rejected. On the contrary the decline is as a result of increased police initiatives in the locality.
- 41 The applicant submits that the argument that the incidence of offences is low relative to the size of the establishment should be rejected as all licensees are expected to maintain safe and effective control of the premises. It is apparent that the strategies adopted by the licensee have not been sufficient to prevent a persistent level of offences occurring in the vicinity of the premises.
- 42 In summary, it was submitted that the evidence before the licensing authority explicitly shows that there is currently a serious level of alcohol related harm occurring in Northbridge with a sizable level of alcohol related harm occurring within and outside the premises during the trading hours of the ETP. It was therefore not in the public interest to grant the application.

Submissions before the Commission by the licensee

- 43 It was submitted that the observations by the Director in relation to the alcohol related harm in Northbridge go no further than acknowledging that on previous occasions the licensing authority has found that Northbridge experienced an unacceptable level of alcohol related harm.
- 44 A finding in 2010 by the licensing authority that Northbridge was experiencing unacceptably high levels of alcohol related harm cannot be relied upon by the Police in 2013 to support their intervention.
- 45 A number of applications have been granted by the licensing authority within Northbridge since 2010. In fact it was noted by the Commission in its decision *Equanimity Investments Pty Ltd v Commissioner of Police and Another (LC38/2011)*, that "*the last statistics from the WA Police show that alcohol related offences in Northbridge are declining*" and this decline in offending has continued.
- 46 The fact that the City of Perth has not objected elucidates that the application for

renewal of the ETP is consistent with the planning objectives of Northbridge by the City of Perth.

- 47 Evidence before the licensing authority clearly demonstrated that young professionals and overseas migrants enjoy the services provided by the premises.
- 48 There is no evidence before the licensing authority that a large number of people frequent Northbridge in early evenings. Similarly, there is no evidence to support the submissions that people who are in Northbridge early in the evening are not likely to be still in Northbridge frequenting licensed premises at 1:00am or have left and gone home by the hours of midnight to 2:00am. In fact the only evidence before the Commission is that a significant portion of persons who socialise in Northbridge do not arrive until after 9:00pm.
- 49 Ultimately, the only meaningful comparison for determining the level of alcohol related harm in Northbridge, as an entertainment precinct, would be with another entertainment precinct of similar size or density.

Determination

- 50 This is an application for a review under section 25 of the Act by the Police of a decision by the Director to grant an extension of an existing ETP to the respondent in relation to the Deen Hotel in Aberdeen Street, Northbridge.
- 51 The applicant intervened in the initial application for extension of the ETP but did not object to the application. However, as a party to the proceedings before the Director, it is entitled to seek a review of the Director's decision under section 25 of the Act.
- 52 Pursuant to section 38(1)(b) and 38(2) of the Act, the applicant must satisfy the licensing authority that granting the application for an extension of the ETP is in the public interest.
- 53 Section 33(1) of the Act gives the licensing authority an absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest; the discretion being confined only by the scope and purpose of the Act (refer *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*). The scope of this discretion was recently considered by Heenan J in *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384 [32]*.

“Section 33(1) is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole. Section 5(2) is requiring the licensing authority to have regard to the primary and secondary objects of the Act which have already been mentioned, obliges the licensing authority to pay regard to those objects of any application but does not otherwise alter the scope and meaning of the public interest to make those objects the exclusive consideration nor the sole determinants of the public interest.”

- 54 Whilst section 38(4) of the Act is directed to the potential negative impact of an application, these are not the only matters for consideration. In considering the public interest under section 38, the licensing authority needs to consider both the positive and negative social, economic and health impacts that the grant of an application will have on a community (refer *Second Reading Speech, Parliamentary Debates, WA Parliament, vol 409, p 6342*).

- 55 Section 38(2) is clear in its imposition of an affirmative or positive obligation to demonstrate to the licensing authority that granting an application is in the public interest. It is insufficient to demonstrate simply that the grant of the licence is not contrary to the public interest
- 56 Where there is conflict between the various objects of the Act, the licensing authority needs to weigh and balance those competing interests.
- 57 In its consideration of what constitutes the public interest, the Commission is guided by the following precedents:
- a) *Palace Securities* (supra).
 - b) The expression “in the public interest” when used as the criteria for the exercise of a statutory discretion usually imparts a discretionary value judgement confined only the subject matter and the scope and purpose of the legislation. (*O’Sullivan v Farrer* (1989) 168 CLR 210).
 - c) In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142, Tamberlin J stated:

“The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”
- 58 The premises are located in an entertainment precinct and offer a varied matrix of entertainment styles attracting a wide mix of people during trading hours. The ongoing popularity of the venue along with the busy patronage during the ETP hours unequivocally demonstrates to the Commission, and is also accepted by the Police, that there is a consumer requirement for a venue of this kind.
- 59 The fact that the Commission has formed a view that this premises caters to consumer requirements needs to be now balanced against the existing levels of alcohol related harm in the area.
- 60 Ipp J in *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258, had observed that it is significant that the primary object in section 5(1)(b) is to “minimize” harm or ill-health, not to prevent harm or ill-health absolutely. The word “minimize” is consistent with the need to weigh and balance all relevant considerations.
- 61 The Commission therefore needs to consider the level of alcohol-related harm, due to the use of liquor, which is likely to result from the grant of the application and whether

the possibility of harm or ill-health is of such a serious nature to be sufficient for the licensing authority to impose stringent conditions on a permit or refuse the grant absolutely.

- 62 The Commission has previously acknowledged in its decisions that Northbridge experiences high levels of alcohol-related harm. This is clearly enunciated in *Fremantle Beverages Pty Ltd v Executive Director Public Health and Others (LC 15/2010)* at paragraphs 54 and 55 where it was stated –

“One final comment. Northbridge is Perth’s premier entertainment precinct, attracting large numbers of people from throughout the metropolitan area and tourists each day and more significantly, at night on weekends. There is a high density of licensed premises, catering for a variety of consumer demands, in a relatively small locality, which, when mixed with a large influx of patrons late at night leads to the inevitable increase in anti-social behaviour and alcohol-related problems. Arguably, Northbridge is no different to entertainment precincts in other capital cities in Australia and elsewhere in other developed countries. This is not to excuse or downplay the extent of alcohol-related harm that occurs in Northbridge, but to put it in some context.

Consequently, whilst the evidence indicates that alcohol is a major contributing factor to much of the harm data, there is nonetheless a range of complex social dynamics which interplay to create the problems in Northbridge. There is no simple solution to these problems and all agencies must work collaboratively to solve them. However, the Commission must balance the existing alcohol-related harm against providing for the demand by consumers for liquor and related services in this entertainment precinct.”

- 63 The extent of the problems in Northbridge has been acknowledged by the Commission in various decisions. However, as previously observed by the Commission such evidence does not in itself immediately lead to an outcome that the application should be refused. Each application must be considered on its merits (section 33(2)) and the licensing authority must weigh and balance all relevant considerations.
- 64 Further, although the premises may be well managed, the impact that the grant of the application may have in the context of the public interest consideration extends beyond what may be occurring just within the premises itself. The harm considerations contemplated by the Act are not restricted to consumers of alcohol at the premises, but includes harm caused to people other than the consumers of liquor (refer *Re Gull Liquor, Gingers’ Roadhouse, Upper Swan (1999) 20 SR (WA) 321*).
- 65 Greaves J found in *Highmoon Pty Ltd v City of Fremantle and others [2004] WLLC 4* that it is the consequences of the granting of the licence in a particular location rather than the proposed operation of the premises themselves that is the determining factor in assessing the likelihood of the amenity of an *area being diminished*. In *Director of Liquor Licensing v Kordister Pty Ltd [2011] VSC 207* Bell J stated *“the question to be asked always is whether the licensing decision will contribute to minimising harm.... even though the particular premises may not be to blame for misuse or abuse of alcohol which has occurred or will be likely.”* This case was determined under the Victorian Act however the relevant legislative provisions are similar to those in the *Liquor Control Act 1988* in WA.
- 66 The Commission did not give any real weight to the contention that the premises ETP was important to the extent that it provided for the entertainment needs of hospitality

staff ceasing work late in the evening. Similarly, whilst the evidence indicates that tourists frequent the venue, the Commission does not consider on the evidence before it that the venue fills any significant role in the promotion of tourism within the meaning of section 5(1)(c) of the Act.

- 67 Similarly, none of the residential objections met the requirements of section 74 of the Act and the Commission gave them little weight. The Commission noted that Mr Chandler's objection did make some attempt to elicit some supporting evidence but one of the difficulties he faced was establishing any nexus between the premises and the noise about which he complained.
- 68 The Commission is mindful of the City of Perth's objective to create a safe, relaxed and crime free atmosphere in the city centre and gives more weight to the Paterson's report's findings that even if all the Northbridge venues closed at midnight, most would find an alternative precinct; and rejects the opinion of Constable McGill, that patrons would change their socialising habits.
- 69 Whilst the Commission accepts that the reduced incidents of violence are a result of an increased police presence and various initiatives introduced to make Northbridge a safer place to visit; it also gives weight to the submission that as a result of section 64 conditions imposed by the Director of Liquor Licensing in 2011, additional harm minimisation measures are employed by the other licensed venues in Northbridge, and it is not unrealistic to expect that alcohol related harm will continue to decline.
- 70 The licensee has a history of taking initiatives to minimise alcohol related harm in and around premises including imposing an additional lockout time in conjunction with the Scantek ID scanning system, strict entry procedures, queue checks, provision of crowd controllers above legislative requirements and introduction of polycarbonate drink ware.
- 71 Various statements by the crowd controllers at the premises demonstrate that there is a zero tolerance to antisocial behaviour at the premises and aggressive or antisocial behaviours are banned and such bans are recorded utilising the Scantek system.
- 72 The Commission has exercised caution in accepting the submission by the Police that statistics derived from IMS Reports demonstrate alcohol related harm in and around the premises as when a detailed analysis is conducted, the reports are not sufficient to come to the conclusion that this premises is the location of a large number of offences.
- 73 Evidence before the Commission demonstrates that the licensee has been proactive in engaging with the Police and implementing harm minimisation strategies.
- 74 Ultimately, the Commission is of the view that Northbridge is a premier entertainment area of the City and there is substantial public interest in grant of this application to cater for the uncontroverted consumer requirement satisfied by this licensed premises.
- 75 On weighing up the evidence led by the parties, the Commission gave greater weight to the positive aspects of the application. However, the Commission is of the view that in order to mitigate any potential for unacceptable harm and loss of amenity, further conditions and some curtailment of hours is warranted.
- 76 In its determination *Australian Leisure and Hospitality Group Limited v Executive Director Public Health and Others (LC 31/2010)*, the Commission granted an ETP to the licensee of the Brass Monkey, a relatively large hotel situated in the vicinity of the

respondent's premises. The Commission has decided to set the closing time and lockout period such that the discharge of a large number of patrons simultaneously from large premises is, as far as possible, avoided thus mitigating the number of people on the streets in the area and relieving some of the pressure on transport for patrons in the early hours of the morning. The following conditions are therefore varied on the permit:

- 1) The permitted trading hours under the permit are Monday to Saturday inclusive: 12.00am to 1.00am in the whole of the premises.
- 2) A lockout commencing 45 minutes before closing time under the permit will be imposed.

All other conditions imposed by the Director on the permit remain unchanged.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

MR JIM FREEMANTLE
CHAIRPERSON