

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

- Applicant:** Carnegies Realty Pty Ltd
(represented by Mr John Prior, instructed by Mr Tim Monaghan of Dwyer Durack Lawyers)
- Interveners:** Director of Liquor Licensing (First)
Commissioner of Police (Second)
Executive Director of Public Health (Third)
(all represented by Mr Jesse Winton of State Solicitor's Office)
- Commission:** Mr Jim Freemantle(Chairperson)
Ms Helen Cogan (Member)
Mr Alex Zilkens (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* ("the Act") for a review of the decision of the delegate of the Director of Liquor Licensing to refuse an extended trading permit to trade on Wednesday and Thursday until 1am, Friday and Saturday until 2am and on Sunday until midnight.
- Premises:** The National Hotel, 98 High Street, Fremantle
- Date of Hearing:** 23 July 2014
- Date of Determination:** 17 October 2014
- Determination:** The application is dismissed and the decision of the delegate of the Director of Liquor Licensing is affirmed.

Authorities referred in this determination:

- *Hancock v Executive Director of Public Health [2008] WASC224*
- *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384*
- *Woolworths v Orebo Pty Ltd (LC 10/2014)*
- *Northbridge Enterprises Pty Ltd v Commissioner of Police [2014] WASC 135*
- *Kordister Pty Ltd v Director of Liquor Licensing [2012] VSCA325*
- *Executive Director of Public Health v Lily Creek International Pty Ltd & Anor [2001] WASC 410*
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd [2007] WACA 175*
- *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142*
- *Palace Securities Ltd v Director of Liquor Licensing (1992) 7WAR 241*
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WACA 258)*
- *Highmoon Pty Ltd v City of Fremantle and others [2004] WALLC 4*

Background

- 1 On 3 July 2013, the applicant applied to the Director of Liquor Licensing for an extended trading permit ("ETP") in respect of the premises at 98 High Street, Fremantle to permit trading on Wednesday and Thursday until 1am, Friday and Saturday until 2am and on Sunday until midnight.
- 2 On 29 August 2013 and 30 August 2013, the Commissioner of Police ("the Commissioner") and the Executive Director Public Health ("the EDPH") respectively intervened pursuant to section 69 of the Act.
- 3 On 28 March 2014, the delegate of the Director of Liquor Licensing refused the application (decision A224220) and on 14 April 2014 the applicant lodged an application for review with the Liquor Commission ("the Commission").
- 4 On 7 May 2014, the Director of Liquor Licensing intervened in the proceedings before the Commission pursuant to section 69(11) of the Act.
- 5 A hearing of the matter was held on 23 July 2014.

Applicant's Submissions

- 6 The applicant made the submissions that are set out below. The applicant's submissions on the applicable law are dealt with later in the determination.
- 7 The detailed Public Interest Assessment ("PIA") lodged with the application clearly establishes that the grant of the application sought is in public interest as:
 - a) there was significant consumer demand for the extended hours supported by 168 consumer surveys collected in such a way as to avoid bias and error together with 11 witness statements; and
 - b) the evidence establishes that the demand for the extended hours is widely spread and there is no over representation of young adults or any other 'at risk' groups.
- 8 Food will be served at all times, responsible service will be enforced and an adequate number of licensed crowd controllers will be engaged.
- 9 In his decision, the delegate of the Director of Liquor Licensing accepted that the grant of the application would satisfy the requirements of a section of the public, increase the vibrancy of the locality and attract visitors.
- 10 The evidence of the Commissioner is general in nature and does not establish a nexus between the premises and the increase in alleged alcohol related offences.
- 11 Police IMS data evidencing alcohol related offences is vague, subjective and uses an excessively wide definition of "alcohol related". Furthermore it lacks geographical or temporal relevance and is not accurate.
- 12 The CAD data is similarly flawed.
- 13 The Commission should take note of its own statement in *Woolworths v Orebo Pty Ltd* (LC 10/2014) where the Commission at para 63 found that the harm evidence in that case was "... *not specific to the locality but to a wider area of influence*" and expressed difficulty in accepting that such statistical data could "*be specifically applied to demonstrate a nexus between higher alcohol related hospitalisations and the number*

of packaged outlets in the locality”.

- 14 The EDPH evidence suffers much the same problem of generality and lack of specific nexus and applicability.
- 15 The applicant questions the use of state average as a benchmark in determining the alcohol related hospitalisation rates in Fremantle and submits it would be wrong to accept state average as relevant to an essentially local area.
- 16 There is little or no evidence establishing a causal link by establishing a nexus between the type of persons hospitalised and the type of person who might patronise the applicant’s premises.
- 17 There is no distinction in the statistical evidence so as to distinguish between hospitalisation caused by consumption in licensed premises and caused by consumption of packaged liquor elsewhere.
- 18 The EDPH evidence similarly fails to demonstrate a nexus between emergency department presentations and hours of trading of licensed premises and furthermore suffers from the same geographical problem referred to in paragraph 13 above.
- 19 Assault statistics indicate that given the number of people in the Fremantle entertainment precinct on weekends, the rate of assaults on Friday and Saturday night could be considered to be relatively low.
- 20 As in the case of other measures of harm cited by the EDPH, incidents of alcohol related assaults cannot be causally related to consumption on licensed premises in comparison with packaged liquor consumed elsewhere.
- 21 Any issue of drink driving will be heavily mitigated by the fact that the target patrons generally travel by taxi or “designated driver” when socializing in Fremantle.
- 22 The age profile of likely patrons is spread over age brackets from 20 to 50 plus but no overwhelming proportion is in the younger age bracket which the Director of Liquor Licensing alluded to as not mature in relation to liquor consumption.
- 23 The EDPH provides only weak generalised evidence that granting the licence would increase alcohol related harm in the locality.
- 24 The applicant has already proposed a number of conditions which would substantially mitigate any risk associated with issues raised by the interveners.
- 25 The applicant is seeking only an additional 8 hours over and above the normal permitted hours of 118 per week.
- 26 The ETP could be granted for a lesser period which together with the conditions proposed would reduce any perceived risk.
- 27 Proper weight should be given to the fact that Fremantle is a major hospitality and tourism precinct.

Submissions on behalf of the Director of Liquor Licensing (the first intervener)

- 28 The decision of the delegate of the first intervener was supported by the evidence before the Director (the same evidence as that before the Commission by virtue of the provisions of section 25 of the Act). The reasoning of the delegate of the first

intervener was sound and it is open to the Commission to adopt the same reasoning and reach the same conclusion as the delegate of the first intervener.

- 29 There is a high level of harm and ill health extant in Fremantle and the grant of the application is likely to result in an increase in the level of alcohol related harm. There is a strong public interest in minimizing this harm which outweighs other considerations in granting this application.
- 30 The evidence submitted by the EDPH and the Commissioner indicates a high level of harm and ill health in Fremantle.
- 31 The EDPH evidence states:
- a) alcohol related hospitalisations for residents of Fremantle are significantly above state averages;
 - b) the verified assault rate for Fremantle is dramatically higher than the State rate and 47% of assaults in Fremantle between January 2010 and July 2013 were alcohol related;
 - c) there are a significant number of drink driving offences committed in Fremantle and the vast majority of offenders had been drinking at licensed premises prior to committing the offence.
- 32 The Commissioner supplied evidence that 11.4% of offences committed in Fremantle between March 2012 to February 2013 were alcohol related and 42% of violent offences committed in Fremantle during the same period were alcohol related.
- 33 The delegate of the first intervener found that granting the application if granted was likely to increase the level of alcohol related harm.
- 34 The delegate of the first intervener accepted that alcohol related assaults were highest at the times and on the days when the applicant seeks to trade and there is research demonstrating that there is a link between on-premises late night trading, increased consumption and alcohol related harm.
- 35 In determining the public interest which is the issue to be determined, the Commission will be required to engage in weighing and balancing the evidence.
- 36 The applicant, in introducing the principle of a causal link, misstates the nature of the enquiry and onus of proof. The Act at sections 5(1)(b) and 38(4)(a) does not prescribe a requirement that the actual or prospective alcohol related harm be demonstrated to be the fault of, or attributable to specific premises before an application can be refused.
- 37 The applicant's approach to the EDPH evidence is essentially forensic in nature and analyses each piece of evidence in isolation whereas it is appropriate for the Commission to consider the evidence as a whole.

Submissions on behalf of the Commissioner of Police (second intervener)

- 38 There is already a significant level of alcohol related harm and ill health in Fremantle which appears to have dramatically increased since 2006 and the grant of the application will exacerbate the situation.
- 39 CAD and IMS data submitted in evidence show a clear correlation between police

intervention and trading of licensed premises late at night.

- 40 This evidence is supported by academic and other research demonstrating this correlation.
- 41 The second intervener also made submissions similar to those of the first intervener concerning the question of causal link and supported the contentions of the first intervener.

Submissions on behalf of the Executive Director of Public Health (third intervener)

- 42 The third intervener submitted that there is already a significant level of alcohol related harm and ill health in Fremantle occurring predominantly during the hours sought by the applicant. Granting the application will potentially increase alcohol related harm and ill health.
- 43 A body of statistical evidence based on hospitalisation rates and emergency department presentations was submitted in support of this proposition.
- 44 The third intervener quotes information supplied by the Co-Director of the Emergency Department of Fremantle Hospital which shows:
- a) at least 556 patients in the 2012/13 year had a primary diagnosis of alcohol intoxication;
 - b) it is clear many presentations for injuries, violent assaults, mental health problems and other physical ailments are alcohol caused;
 - c) due to the emphasis on clinical data collection rather than epidemiological information the impact of alcohol is under reported;
 - d) the most common hour of presentation for alcohol intoxication is between midnight and 1am (46% of presentations are between 8pm and 3am).
- 45 Alcohol related assault data shows that these assaults overwhelmingly occur between 9pm and 6am on Friday, Saturday and Sunday peaking between midnight and 3am on Saturday and Sunday mornings.
- 46 Drink driving offences record that 72% of offenders were consuming alcohol at licensed premises prior to committing the offence.
- 47 The third intervener submitted academic research, particularly the work of Catalano Stockwell and Chikritzhs ("*The impact of Later Trading Hours for Australian Public Houses (Hotels) on Levels of Violence*") in relation to Western Australia that demonstrates:
- a) levels of wholesale alcohol purchases surged among hotels which were granted ETP's
 - b) there is a consistent and robust relationship between alcohol related violence and outlet opening hours.
- 48 The third intervener also quoted research by Briscoe and Donnelly ("*Problematic Licensed Premises for Assault in Inner Sydney, Newcastle and Wollongong*") which showed that incidence of assaults was concentrated late at night and early mornings on weekends at licensed premises in inner Sydney.

- 49 This is consistent with other research showing a demonstrable link between extended trading hours and alcohol related harm (National Drug Law Enforcement Research Fund, *“Dealing with Alcohol-Related Harm and the Night Time Economy”*).

Determination

- 50 Under section 25(2c) of the Act, when considering a review of the decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 51 On a review under section 25 of the Act, the Commission may –
- I. affirm, vary or quash the decision subject to the review;
 - II. 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;
 - III. give directions –
 - i. as to any question of law, reviewed; or
 - ii. to the Director, to which effect shall be given; and
 - IV. make any incidental or ancillary order.
- 52 In conducting a review under section 25, the Commission is not constrained by a finding of error on 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 (refer *Hancock v Executive Director of Public Health [2008] WASC224*).
- 53 Pursuant to section 38(2) of the Act, an applicant for the grant of a licence must satisfy the licensing authority that granting the application is in the public interest.
- 54 To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
- 55 Determining whether the grant of an application is “in the public interest” requires the Commission to exercise a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd [2007] WACA 175* and *Palace Securities Pty Ltd v Director of Liquor Licensing (1192) 7 WAR 241*. The Commission notes the words of Tamberlin J in *McKinnon v Secretary, Department of Treasury [2005] FCAFC 142* where he said:

“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.”

- 56 Advancing the objects of the Act, as set out in section 5 of the Act is also relevant to the public interest considerations (refer *Palace Securities Ltd v Director of Liquor Licensing* (1992) 7WAR 241). The primary objects of the Act are:
- I. to regulate the sale, supply and consumption of liquor;
 - II. to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - III. 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.
- 57 Section 33(1) of the Act gives the Commission an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was recently considered by EM 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) in 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 on any application but does not otherwise confine the scope or meaning of the public interest to make those objects the exclusive consideration nor the sole determinants of the public interest".*
- 58 Each application must be considered on its merits and determined on the balance of probabilities. It is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258).
- 59 In determining whether it is in public interest to grant a licence, the Commission must consider all the evidence and decide if actual or potential harm (and any other negative impacts) outweighs the furthering of the other objects of the Act. In doing so, the Commission must also consider whether the proposed conditions or granting the lesser number of trading hours would sufficiently mitigate any potential harm.
- 60 In its PIA and other submissions, the applicant states that the premises have been renovated to a high standard and are designed to provide a sophisticated drinking environment. The premises have been closed for some time and the renovations and reopening provide a new beginning.
- 61 The applicant makes the case that the premises are designed to, and will, attract a mature crowd dissatisfied with the alternative night club style late night entertainment currently on offer in Fremantle. Quality boutique accommodation and food will be offered and the style of entertainment ... *"will not have the same characteristics and attractions that are commonly associated with antisocial or criminal behaviour"*.
- 62 The Commission accepts that the premises will provide an attractive late night entertainment venue attracting both local population and tourists and meets the requirement of the object of the Act set out in section 5 (1)(c).

- 63 The EDPH as the third intervener made extensive submissions concerning the level of alcohol related harm and ill health in the Fremantle area. This evidence included a breakdown of hospitalisations and presentations at the emergency department at Fremantle Hospital, the primary health care centre in the area, which specifically attributed alcohol as a major causal factor in both hospitalisation and emergency department presentations.
- 64 The applicant made a detailed submission questioning the specificity of the health data and criticising the generality of the information. In its responsive submission the third intervener submitted that the health data should be looked at as a whole and not dissected 'forensically'.
- 65 The applicant also submitted that there was no causal relationship identified between either the premises and harm or even between harm caused by alcohol consumed on licensed premises and consumption elsewhere of packaged liquor.
- 66 The Commission accepts that a direct causal relationship between the premises and harm or ill health has not been established however this, as the first intervener points out, is, whilst a relevant factor, not a necessary prerequisite in itself of assessing the impact of granting a licence.
- 67 The case law quoted by the applicant (*Northbridge Enterprises Pty Ltd v Commissioner of Police [2014] WASC 135*) does not in the opinion of the Commission support the contention that a direct causal relationship needs to be determined. The case related to specific conditions imposed on a licence being required to be directly related to the issues they were designed to address.
- 68 Similarly in *Woolworths V Orebo* cited earlier, the facts were quite different; that case related to a packaged liquor outlet in a country town. In any event the Commission accepts that the statistics used by the third intervener are directly relevant to the locality in which the applicant's premises operate.
- 69 Although the Commission accepts that some of the evidence presented by the third intervener was general, it is the Commission's view however that it is still relevant. In *Kordister Pty Ltd v Director of Liquor Licensing [2012] VSCA325* Bill J stated....:

... by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and admissible, for it may, depending on the circumstances, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the 'particular local, social, demographic and geographic circumstances' of the given case. Any other approach to the consideration of such evidence would defeat the statutory objects. (emphasis added).

Whilst this case was decided in a different jurisdiction, the point made is equally relevant under the *WA Liquor Control Act 1988*.

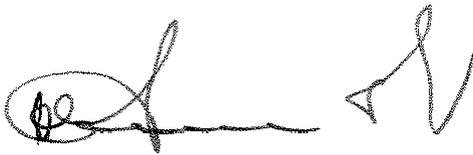
- 70 In *Executive Director of Public Health v Lily Creek International Pty Ltd & Anor [2001] WASC 410*, Wheeler J stated...

"The Act directs attention to the minimisation of alcohol related harm generally (Section 5(1)(b)). The relevant question for the Court, in that case, is the level of

alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application. This does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather it seems to me that must necessarily be assessed against any existing harm or ill health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be commonly accepted in the community, the distinction is probably not significant. However, where there is already a very high and serious level of alcohol related harm in the community, it may be that the Court would find a relatively small risk of increase in that level of harm to be unacceptable. In other words, it is not the 'risk' of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made."

- 71 The Commission accepts that there is already a high level of alcohol related harm in Fremantle. Wheeler J expresses the very specific view that given a high base level even a small increment in potential or actual harm may be determinative.
- 72 Given the premises have only recently reopened there is inevitably an element of speculation on what may or may not happen in the future particularly whether the applicant's belief that the premises will attract a mature and largely trouble free crowd will be realised.
- 73 The applicant has submitted that the following conditions imposed on the licence would sufficiently mitigate any incremental harm.
- a) lockout to apply 30 minutes prior to the expiry of extended trading on each of the relevant days;
 - b) a late night food menu to be available during all extended trading hours;
 - c) functions required to involve the service of food;
 - d) no promotions, advertising or incentives which encourage cheap or discounted drinks nor that would encourage the rapid or excessive consumption of alcohol;
 - e) refusal of Outlaw Motor Cycle Gang members (in the usual terms);
 - f) low and mid strength beers to be available;
 - g) shots, laybacks, test tubes or any other shooter style drinks prohibited during extended trading hours;
 - h) no sale of packaged liquor during extended trading hours;
 - i) no liquor to be served with energy drinks during extended trading hours;
 - j) CCTV condition (in the usual terms)
 - k) licensee to provide crowd control officers at a ratio of 2 for the first 100 patrons and 1 per 100 patrons thereafter from 8pm on any night that the hotel trades during extended trading hours; and
 - l) signage to be provided in all bar areas relating to relevant offence provisions under the Act.

- 74 The applicant has gone further in its submission to suggest that further mitigation might be to grant an ETP but further restrict the hours sought.
- 75 It is the Commission's view that the suggested conditions whilst potentially helpful would not sufficiently mitigate the risk of incremental harm given the high existing level of harm and ill health in Fremantle.
- 76 The applicant submitted that the Commission might grant an ETP for lesser hours than those originally sought; however the Commission finds that this together with the suggested conditions would not sufficiently mitigate the risk of an unacceptable increment in harm and ill health raised by the third intervener if further trading hours over and above the standard hours laid down in the Act were granted.
- 77 The Commission has weighed the various positive elements of this application against the likelihood of increased harm and ill health and is of the view that public interest is best served in the circumstances of this application by refusing it. It is also guided in this conclusion by the observation of Greaves J 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."*
- 78 Furthermore, in *Director of Liquor Licensing v Kordister Pty Ltd [2011] VCS 207* Bell J stated *"the question to be always asked 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."*
- 79 Accordingly the Commission determines that the decision of the delegate of the Director of Liquor Licensing is affirmed and the application for review is dismissed.



JIM FREEMANTLE
CHAIRPERSON