



Liquor Commission of Western Australia 2010/11 Annual Report

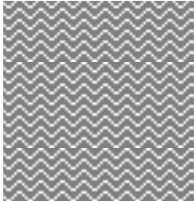


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The report is available in PDF format at www.liquorcommission.wa.gov.au

STATEMENT OF COMPLIANCE

Hon. Terry Waldron, MLA
Minister for 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 2011.

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

9 September 2011

OVERVIEW OF AGENCY

EXECUTIVE SUMMARY



It is with pleasure that I present the Annual Report of the Liquor Commission of Western Australia for the year ended 30 June 2011.

This report is designed to outline the Commission's activities and to satisfy its statutory reporting requirements. The Annual Report includes a synopsis of the Commission's activities.

The Commission carried over 12 applications from 2009/10 and received 37 new applications this year. Of these, 21 were heard and determined; three were heard but have yet to be determined; and 13 matters have been carried over to 2011/12.

There was a noticeable increase in applications by the Commissioner of Police for disciplinary action pursuant to section 95 of the *Liquor Control Act 1988* (the Act).

During the year in review, the *Liquor Commission Rules 2007* were amended to allow the lodgement of applications for the review of barring notices issued by the Commissioner of Police under section 115AD of the Act, as well as allowing for an increase in the fees and charges for lodging applications.

Furthermore, in reviewing a number of applications, it is apparent to the Commission that applicants rely heavily on the policies of the Director of Liquor Licensing in the preparation of their submissions and the Public Interest Assessment (PIA) submitted in support of their application. Consequently, the Commission is of the view that it would be helpful to applicants if the Director's policy in respect of the PIA could highlight the requirement for applicants to adequately demonstrate the positive aspects of their application and provide evidence to support their claims.

During the year, the Commission welcomed Dr Eric Isaachsen, who was appointed as a Commission member to replace Karen Lang.

I wish to take this opportunity to thank the other members of the Commission for their invaluable contribution to the efficient operation of the Commission. They have given willingly of their time and expertise in discharging their responsibilities and coping with a heavy workload.

Finally, on behalf of the Commission, I thank the Department of Racing, Gaming and Liquor, and in particular the Executive Officer of the Commission, for providing executive support services. It would be impossible for the Commission to conduct its activities efficiently and effectively without this invaluable support.

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

Jim Freemantle
CHAIRPERSON

OPERATIONAL STRUCTURE

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 2011, 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 making 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*.
- Making binding, high-level decisions in accordance with 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.
- 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 question of law that have been reviewed.
- Give directions to the Director of Liquor Licensing, to which effect shall be given.
- 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.

THE CONSTITUTION AND JURISDICTION OF THE LIQUOR COMMISSION

In accordance with section 9A of the *Liquor Control Act 1988*:

- The Commission is to be constituted by one member, except as otherwise stated in the Act, or determined by the Chairperson under subsection 9A(2) of the Act.
- The Chairperson may determine that, in respect of any particular matter or any matter of a particular kind, the Commission is to be constituted by three members.
- If the Commission is constituted by three members and they are divided on a question, the question is to be decided according to the opinion of the majority of members.

The Commission must be constituted by three members whilst determining the following matters under the Act:

SECTION 24

Matters that can be referred by the Director to the Commission:

- the matter or part of a matter relates to an application for the grant or removal of a licence;
- the matter or part of a matter relates to the making, variation or revocation of a prohibition order under Part 5A of the Act (any decision under Part 5A needs to be made in the public interest); or
- the Chairperson so determines under section 9A(2) of the Act.

SECTION 25

Application for review of the Director's decision 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

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.

SECTION 115(AD)

An application for a review of a barring notice issued by the Commissioner of Police can also 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 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.

As of 30 June 2011, the Liquor Commission consisted of the following members:

Mr 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 Chairman of Good Samaritan Industries and is Deputy Chairman of Racing and Wagering WA, Chairman of the Racing and Wagering Western Australia Integrity Assurance Committee and a Chair of the Swan River Trust. Mr Freemantle is also a former Vice President of the Western Australian Chamber of Commerce and Industry, and formerly held the position of Chief Executive of the Home Building Society. Mr Freemantle holds the qualifications of Bachelor of Economics and Master of Administration from Monash University.

Mr Edward Watling - Deputy Chairperson

Mr Watling is a founding partner and Executive Director of the firm Tourism Coordinates, a Perth-based company specialising in tourism strategic planning and development. Mr Watling 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 (WATC), resigning that office in 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. Mr Watling has served on several boards and committees, including the Indian Ocean Tourism Association, the Tourism Council Australia (WA), the Australian Tourism Research Institute, and the Perth Convention Bureau.

Ms Helen Cogan - Member

Ms Cogan is a lawyer retired from the State Solicitor's Office where she held the position of Senior Assistant State Solicitor. Ms Cogan is also a member of the Gaming and Wagering Commission of Western Australia. She was employed with the State Solicitor's Office over the period 1993 to 2005. Prior to her employment with the State Solicitor's Office, Ms Cogan worked for various private and public legal organisations within Australia and overseas.

Dr Eric Isaachsen, MB.BS, DRANZCOG, UWA - Member

Dr Isaachsen has worked for over 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. He has an ongoing interest and involvement in administration and governance at the secondary level of education.

Mr Greg Joyce - Member

Mr Greg Joyce was the former Director General of the Department of Housing and Works. He is currently Chairman of WorkCover WA. He has been on several Boards and Committees including Treasury Corporation Board and Chairman of the Justice Reform Implementation Committee. He has a law degree from the University of WA and is qualified to practice as a barrister and solicitor.

EXECUTIVE SUPPORT FOR THE LIQUOR COMMISSION

Executive support for the Liquor Commission is provided by the Department of Racing, Gaming and Liquor. The Executive Officer of the Commission is Ms Seema Saxena.

MAJOR ACHIEVEMENTS FOR 2010/11

The tables on pages 11 to 13 provide details of the number, nature and outcome of applications before the Commission as at 30 June 2011.

OUTSTANDING MATTERS AS AT 30 JUNE 2011

There were three matters that have been heard but not determined:

- Circuit Niteclub Pty Ltd t/a Up Nightclub
- Woolworths Ltd t/a Dan Murphy's Bicton
- Nick Martin - Barring Notice

Furthermore, there were 13 matters listed but not heard:

- Woolworths Ltd t/a Dan Murphy's South Fremantle
- Jun Chul Seo t/a Hi-Mart Vic Park
- Joanna Macleod and Gareth Hancox t/a Soho Bar and Kitchen
- The Waterfront Cafe and Restaurant Pty Ltd t/a Waterfront Cafe and Restaurant
- Equanimity Investments Pty Ltd t/a Emphyrean Function Centre
- Woolworths Ltd t/a Dan Murphy's Cockburn
- Repertoire Wines Pty Ltd t/a Cellar Door Repertoire
- Woolworths Ltd t/a Dan Murphy's Cannington
- Liquorland (Australia) Pty Ltd t/a First Choice Liquor Superstore, Maylands
- Woolworths Ltd t/a Dan Murphy's Canningvale
- Topsouth Holdings Pty Ltd t/a Champagne House
- Trent Gregory Norwood - Barring Notice
- Woolworths Ltd t/a Woolworths Liquor Warnbro

Full determinations are available at the Liquor Commission's website at www.liquorcommission.wa.gov.au

APPLICATIONS CARRIED OVER FROM 2009/10

Case No.	Name	Section of Act	Date Lodged	Hearing Date	Determination Date	Outcome
LC37/2010	Great Victoria Corporation <i>Premises: Sandringham Cellars</i>	21	4/02/2010	Directions hearing - 23/04/2010; Hearing - 23/08/2010	25/10/2010	Dismissed
LC27/2010	Troy Desmond Mercanti	30	9/02/2010	2/08/2010	24/08/2010	Prohibition application granted
LC31/2010	Australian Leisure and Hospitality Group Limited <i>Premises: The Brass Monkey</i>	24	18/02/2010	Directions Hearing - 14/05/2010; Hearing – 11/08/2010	2/09/2010	Application for ETP granted
LC23/2010	Paul George Kontorinis and Maria Kontorinis <i>Premises: Paul's Cellars</i>	25	12/03/2010	15/06/2010	5/07/2010	Decision of the Director affirmed, application refused.
LC26/2010	Shallcross Investments Pty Ltd <i>Premises: Malibu Wine Room</i>	25	1/04/2010	9/07/2010	29/07/2010	Decision of the Director affirmed, application refused
LC29/2010	Highmoon Pty Ltd and Yardoo Pty Ltd <i>Premises: Northbridge Brewing Company</i>	24	9/04/2010	29/07/2010	25/08/2010	Granted
LC28/2010	Russell Patterson <i>Premises: Guildford Indoor Sports</i>	25	23/04/2010	20/07/2010	25/08/2010	Decision of the Director upheld. Conditions varied.
LC30/2010	Leohag Holdings Pty Ltd T/A Kwinana Lodge Hotel	95	7/05/2010	10/08/2010	2/09/2010	Monetary Penalty of \$15,000 plus conditions imposed
LC33/2010	The Clink Nightclub	95	25/05/2010	1/09/2010	6/09/2010	Monetary penalty of \$7500 plus conditions imposed
LC18/2009	Carramar Family Pub	25	Supreme Court Appeal	28/7/2010	26/11/2010	Appeal dismissed
LC15/2010	Impact Bar-variation of condition	24		On Papers		Application Refused
LC32/2010	Element WA Pty Ltd <i>Premises: Naked Bottle Whitfords</i>	25	30/06/2010	19/08/2010	6/09/2010	Director's decision upheld

APPLICATIONS LODGED AND HEARD IN 2010/11

Case No.	Name	Section of Act	Date Lodged	Hearing Date	Determination Date	Outcome
LC40/2010	Zafiro Pty Ltd t/a Sapphire Bar	95	26/07/2010	13/10/2010	3/11/2010	Reprimanded
LC06/2011	Wavemark Enterprises P/L T/A Shape Bar	95	26/07/2010	27/01/2011	27/01/2011	Complaint Dismissed
	Paul's Cellars	28	Supreme Court Appeal	15/06/2010		Information not available
LC44/2010	Harold Thomas James Blakeley <i>Premises: Harry O's</i>	25	1/09/2010	9/11/2010	18/12/2010	Application Refused
LC12/2011	Lima Lima Pty Ltd <i>Premises: PK Fresh IGA Plus Liquor</i>	24	10/09/2010	23/02/2011	18/04/2011	Application approved
LC43/2010	The Clink	95	19/10/2010	14/12/2010	15/12/2010	Hearing of the complaint deferred pending the outcome of the proceedings in the Magistrate's Court.
LC02/2011	X-Wray Cafe	25	29/10/2010	06/01/2011	24/01/2011	Decision quashed and referred back to the Director
LC10/2011	Trinity Flame Pty Ltd <i>Premises: The Exchange Hotel</i>	25	29/10/2010	09/03/2011	8/04/2011	One condition varied, one amended.
LC03/2011	Mr Vladimir Hardi <i>Premises: Beaufort River Tavern</i>	95	12/11/2010	07/02/2011	8/02/2011	Complaint dismissed
LC14/2011	M.D Holdings Australia Pty Ltd; <i>Premises: Stirling Arms Hotel (Guildford)</i>	117	17/11/2010	15/03/2011	18/04/2011	Conditions imposed
LC13/2011	Woolworths Limited <i>Premises: Woolworths Liquor Wambo</i>	24	10/09/2010	01/03/2011	18/04/2011	Application approved
LC09/2011	Zelda's Nightclub - Question of Law	25	19/11/2010	18/02/2011	8/04/2011	Limited examination and cross examination of witnesses allowed

APPLICATIONS LODGED AND HEARD IN 2010/11 (CONTINUED)

Case No.	Name	Section of Act	Date Lodged	Hearing Date	Determination Date	Outcome
LC18/2011	Kununurra Hotel	95	3/12/2010	13/04/2011	9/05/2011	Monetary penalty of \$10,000 plus conditions imposed
LC11/2011	Equanimity Investments <i>Premises: Empyrean Function Centre</i>	24	24/12/2010	On Papers	12/04/2011	Application Refused
LC21/2011	100 Mile Pty Ltd <i>Premises: Williams Hotel</i>	95	14/01/2011	17/05/2011	24/06/2011	Monetary penalty of \$15,000 plus conditions imposed
LC20/2011	M.D Holdings Australia Pty Ltd; <i>Premises: Stirling Arms Hotel (Guildford)</i>	95	20/01/2011	30/03/2011	23/05/2011	Monetary penalty of \$10,000 plus conditions imposed
LC23/2011	Circuit Nightclub Pty Ltd <i>Premises: Up Nightclub</i>	95	23/02/2011	18/05/2011	24/06/2011	Monetary penalty of \$15,000 plus Mr Shane Van Styn disqualified for a period of 3 years
LC19/2011	Shane Gerald Van Styn – Barring Notice	115AD	4/03/2011	11/5/2011	17/05/2011	Barring notice quashed
LC24/2011	Bremerton Pty Ltd and Westlander Pty Ltd <i>Premises: De Bernales Tavern</i>	95	18/3/2011	18/05/2011	27/06/2011	Monetary penalty of \$10,000 plus conditions imposed
LC16/2011	Circuit Nightclub Pty Ltd <i>Premises: Up Nightclub</i>	25	15/04/2011	21/04/2011	21/04/2011	Director's Decision suspended until next hearing date.
LC22/2011	Bremerton Pty Ltd and Westlander Pty Ltd <i>Premises: De Bernales Tavern</i>	25	3/05/2011	25/05/2011	24/06/2011	Application Refused

SIGNIFICANT MATTERS BEFORE THE LIQUOR COMMISSION

The following pages contain a synopsis of significant decisions handed down by the Commission. All references to “the Act” in the following pages refer to the *Liquor Control Act 1988*, unless stated otherwise.

LC26/2010 – SHALLCROSS INVESTMENTS PTY LTD

Application for the conditional grant of a liquor store licence for premises to be known as Malibu Wine Room.

On 30 December 2009, an application was lodged by Shallcross Investments Pty Ltd for the conditional grant of a liquor store licence for premises to be known as the Malibu Wine Room and situated at the Malibu Shopping Centre, 110-116 Malibu Road, Safety Bay.

In decision A204614, dated 5 March 2010, the Director of Liquor Licensing refused the application.

On 1 April 2010, Shallcross Investments Pty Ltd lodged an application for a review of the Director’s decision, pursuant to section 25 of the Act.

By a notice dated 4 May 2010, the Director of Liquor Licensing intervened in the proceedings before the Commission, pursuant to section 69(11) of the Act.

A hearing before the Commission was conducted on 9 July 2010.

According to the Public Interest Assessment (PIA), the applicant sought to provide a new, independent liquor store in a convenient location with an emphasis on good service and quality products, including organic/bio-dynamic and local Peel Region wines.

The proposed liquor store would be located in the Malibu Shopping Centre. The Malibu Shopping Centre was a small complex that includes an IGA Supermarket, Malibu Fresh Essentials, a fish and chip takeaway, a florist, a Chinese restaurant, and a pharmacy. This site was specifically chosen for the proposed liquor store in order to complement the existing businesses, particularly Malibu Fresh Essentials. It was asserted that customers would find it convenient to be able to obtain liquor from the proposed liquor store. It was submitted that the grant of the application would be in the public interest.

The applicant’s PIA addressed the matters set out in section 38(4) of the Act, with data provided on the existing level of crime in the locality; the social profile of the locality; local population and demographics; and an analysis of tourism data. The applicant also

identified the existing liquor stores in the locality and provided information on the initiatives it would adopt to minimise alcohol-related harm in the area.

It was submitted by counsel for the Director of Liquor Licensing that the application was generally characterised by speculation and assertion, which was unsubstantiated by any evidence. The applicant did not provide any evidence that the application was directed towards satisfying the requirements of consumers for liquor and related services and therefore the applicant had failed to demonstrate that the objective in section 5(1)(c) of the Act had been met.

During the hearing, counsel for the applicant submitted that if the Commission was of the view that the applicant had not provided sufficient evidence to support its claims, it was open to Commission to quash the decision of the Director of Liquor Licensing and remit the application back to the Director so that the applicant is afforded an opportunity to provide further evidence.

The Commission did not grant this request because it would result in any party to proceedings before the Commission under section 25 of the Act, who had not fulfilled their obligations, seeking to have the matter remitted to the Director of Liquor Licensing so that they could be afforded another opportunity to prove their case.

Whilst the Commission was satisfied that, on the balance of probabilities and the evidence submitted, the grant of the application would not negatively impact on the local community, the Commission was of the view that the applicant had not sufficiently demonstrated the positive impacts that the grant of the application would have. The applicant had failed to demonstrate that the grant of the application was in the public interest.

On 29 July 2010, the Commission issued its determination to refuse the application.

In hearing this application, and other recent applications, it was apparent to the Commission that the applicant had relied heavily on the policies of the Director of Liquor Licensing in the preparation of their submissions and the Public Interest Assessment submitted in support of their application.

Consequently, the Commission was of the view that it would be helpful to applicants if the Director's policy in respect of the PIA could highlight more clearly the requirement for applicants to adequately demonstrate the positive aspects of their application and provide evidence to support their claims.

LC29/2010 - HIGHMOON PTY LTD AND YARDOO PTY LTD

Application for the conditional grant of a tavern licence pursuant to sections 41 and 62 of the Liquor Control Act 1988.

On 23 April 2009, an application was lodged by Highmoon Pty Ltd and Yardoo Pty Ltd for the conditional grant of a tavern licence for premises to be known as Northbridge Brewing Company and located at 44 Lake Street, Northbridge.

The application was advertised to the general public in accordance with instructions issued by the Director of Liquor Licensing. An objection to the application was lodged by Tindara Tarricone, licensee of the Lake Street Liquor Supply, pursuant to section 73(4) of the Act. The Executive Director Public Health (EDPH) lodged a Notice of Intervention pursuant to section 69(8a) of the Act.

On 9 April 2010, the Director of Liquor Licensing referred the application to the Commission for determination, pursuant to section 24 of the Act.

A hearing before the Commission was held on 29 July 2010.

According to the Public Interest Assessment (PIA), the application referred to a tavern licence for a multi-faceted facility which would include a micro brewery, café, restaurant and a function room catering for up to 70 people. The proposed premises would be set over three levels and would be adjacent to the Northbridge Piazza.

The premises would trade seven days a week, providing breakfast, lunch and dinner, as well as a dedicated function venue for the business community. The design of the premises would be visually attractive and provide a dynamic “interactive streetscape”, with the brewing equipment on display to passersby on Lake Street and an alfresco area fronting the Piazza.

It was submitted that the grant of the application was in the public interest because the application had the support of the City of Perth and Tourism WA, as well as public support, as evidenced by the witness petitions and witness petition summary, online survey and public interest witness questionnaires.

In her Notice of Objection, Mrs Tarricone stated that whilst she did not object to the sale of liquor for consumption on the premises, she objected to the sale of packaged liquor as this would affect her business. It was also submitted that it was in the public interest for the Commission to prohibit the sale of packaged liquor at the premises because this was consistent with the applicant’s representations about its proposed manner of operation.

The purpose of the intervention from the EDPH was to recommend that the application be refused because of the high risk aspects associated with the application, including the high outlet density of licensed premises in the locality of the proposed venue; the

high levels of violence and alcohol-related problems in the vicinity of the proposed premises, particularly during late night trading times; the association between late night trading, high outlet density of licensed premises and increased rates of alcohol-related harm; the existing levels of drink-driving in Northbridge; and the limited late night public transport options available at the proposed closing time of the premises. The EDPH provided data to highlight the existing problems in the locality.

The Commission was satisfied that the overall positive aspects of the applicant's proposal outweighed the potential negative impact on existing levels of harm in the area. However, the Commission acknowledged the risks associated with the operation of a large, new licensed outlet of this nature in a sensitive area and agreed that conditions should be imposed on the grant of the licence to mitigate these risks and ensure that the premises operated in the manner submitted by the applicant or by any other licensee in the future, should the licence be transferred.

The Commission was satisfied that the applicant had complied with all necessary statutory criteria, requirements and conditions precedent to the application being granted.

On 25 August 2010, the Commission issued its determination to conditionally grant the application.

LC31/2010 - AUSTRALIAN LEISURE AND HOSPITALITY GROUP LIMITED

Application for an extended trading permit pursuant to section 60(4)(g) of the Liquor Control Act 1988.

On 2 December 2009, an application was lodged by Australian Leisure and Hospitality Group Limited for the grant of an extended trading permit for premises known as The Brass Monkey and located at 209 William Street, Northbridge.

The applicant sought the grant of a permit for a period in excess of three weeks, to authorise trading on Wednesday and Thursday nights from 12 midnight to 1am and on Friday and Saturday nights from 12 midnight to 2am.

The application was advertised to the public in accordance with instructions issued by the Director of Liquor Licensing. The Executive Director Public Health (EDPH) lodged a Notice of Intervention pursuant to section 69(8a) of the Act, and Salmon Point Holdings Pty Ltd (licensee of the Rise Nightclub), lodged an objection to the application under section 73 of the Act.

On 18 February 2010, the Director of Liquor Licensing referred the application to the Commission for determination, pursuant to section 24 of the Act. The Director of Liquor Licensing also intervened in the application, pursuant to section 69(11) of the Act.

Prior to the hearing of the substantive application, the Director of Liquor Licensing wrote to the Commission on 30 April 2010 questioning whether the Commission was empowered to grant the application, given the failure of the applicant to comply with section 38(3)(b) of the Act, and submitted that such failure rendered *ultra vires* any purported grant of an extended trading permit.

On 14 May 2010, the Commission heard arguments on this preliminary issue, and determined that the Commission was empowered to hear and determine the substantive application.

The matter was heard by the Commission on 11 August 2010.

According to the applicant, The Brass Monkey had operated with post midnight trading under an extended trading permit for the past 15 years. The current permit was granted in 2006 for a period of three years, and the application was seeking to continue the way the premises had traded for many years.

The Public Interest Assessment addressed the matters set out in section 38(4) of the Act, and the applicant provided a range of supporting evidence, including various witness statements and a summary of a patron survey.

Finally, it was submitted that the grant of the application was in the public interest because The Brass Monkey was a well managed tavern with a sound history of compliance with the provisions of the Act and the licensing authority's policy requirements. The history of late night trading at the venue demonstrated that the applicant had evolved sound and proper host responsibility policies which minimised the potential for alcohol-related harm to occur.

In its written submission to the Commission, Salmon Point Holdings Pty Ltd objected to the grant of the application on the grounds that it would not be in the public interest. According to the objector, Northbridge experienced excessive alcohol-related harm, which was linked to extended trading hours. The objector stated that research evidence indicated that extended trading at hotels led to higher consumption of alcohol and increased levels of intoxication, with the inevitable consequence of a greater incidence of alcohol-related harm, including increased violence.

The purpose of the intervention from the EDPH was to bring to the Commission's attention a number of high risk public interest aspects associated with the application, including the high levels of violence and alcohol-related problems in the locality of the premises, particularly during late night trading times; the existing levels of drink driving in Northbridge; and the association between late night trading, licence type, and increased rates of alcohol-related harm such as violence, road trauma and related injury.

The EDPH also submitted that harm did not have to be occurring inside the venue itself for the consumption of alcohol at the premises to contribute to harm in the locality. Many

of the problems in the locality peaked during late night trading times and were particularly problematic at 2am, when many hotels/taverns with extended trading hours closed. The EDPH provided data highlighting the existing harm in the locality.

The Commission was satisfied that the public interest was best served by granting the application. In weighing and balancing the competing interests in this case, the Commission was satisfied that the positive aspects of the application outweighed the potential impact that the grant of the application may have on existing levels of harm in the area.

On 2 September 2010, the Commission issued its determination to grant the application for an extended trading permit, subject to a number of conditions imposed on the permit, including a 'lockout' condition whereby patrons were prohibited from entering or re-entering the premises after 12 midnight.

LC44/2010 - HAROLD THOMAS JAMES BLAKELY

Application for the conditional grant of a special facility licence for premises to be known as Harry O's.

On 17 March 2010, an application was lodged by Harold Thomas James Blakely for the conditional grant of a special facility licence for a premises to be known as Harry O's and located at 81 Mandurah Terrace, Mandurah.

The application was advertised to the public in accordance with instructions issued by the Director of Liquor Licensing. Notices of Intervention were lodged by the Commissioner of Police and the Executive Director Public Health (EDPH), while the City of Mandurah submitted comments in respect of the application. Objections to the application were lodged by Janette Robyn Lucas and the Atrium Hotel Mandurah; however, the Atrium Hotel Mandurah subsequently withdrew its objection.

In decision A210692, dated 9 August 2010, the Director of Liquor Licensing refused the grant of the application.

On 1 September 2010, the applicant lodged an application for a review of the Director's decision, pursuant to section 25 of the Act.

The Director of Liquor Licensing lodged a Notice of Intervention in respect of the review application, pursuant to section 69(11) of the Act.

A hearing before the Commission was held on 9 November 2010.

The applicant sought a special facility licence for the prescribed purposes of tourism and foodhall. According to the applicant's Public Interest Assessment (PIA) Harry O's would be predominantly a food orientated business providing bistro and market style services, catering for tourists, holiday makers and residents of Mandurah. Food

serveries would be placed in strategic locations in the venue for ease of access and choice by customers, although table service would be available when requested.

Liquor could be purchased for consumption on the premises with or without a meal and it was proposed to have limited package liquor sales featuring products from local or regional producers. The applicant also described the proposed business as being a piano bar type atmosphere which was family orientated with reasonable prices.

The Commissioner of Police intervened on the basis that if the application was granted or conditions not imposed on the licence, harm or ill-health may be caused to people or any group of people due to the use of liquor, and this would be contrary to the public interest. The Commissioner of Police sought to have various conditions imposed on the licence if the application was granted.

The purpose of the intervention from the EDPH was to make representations regarding the high risk aspects of the application and to recommend harm minimisation conditions be imposed on the licence should the application be granted. The EDPH outlined the risk aspects associated with the application, and recommended a number of conditions be imposed on the licence if granted.

Ms Janet Lucas, a local resident, lodged a Notice of Objection to the grant of the application. Accompanying Ms Lucas' objection was a petition signed by 58 other residents who opposed the application. The grounds of objection included increased road and pedestrian traffic; undue annoyance and disturbance to persons residing in the area; and lessening of the amenity, quiet and order of the locality in which the premises was situated. The objectors claimed that local residents already experienced unacceptable disorderly conduct by passers-by who had consumed alcohol. The behaviour of these persons caused fear and trepidation to the residents.

Although not formally intervening in the application under s 69(8) of the Act, the City of Mandurah advised that it did not support the sale of packaged liquor from the premises, and was concerned about the potential negative impact on local residents if an outside walkway leading to the carpark formed part of the licensed premises.

The Director of Liquor Licensing lodged a Notice of Intervention under s 69(11) of the Act in respect of the review application. It was submitted that the applicant had failed to discharge their onus under sections 46 and 38(2) of the Act. The Director submitted that the applicant's PIA was characterised by speculation and assertion and lacked supporting evidence.

The Commission found that the applicant had failed to satisfy the Commission that the grant of the licence was in the public interest as required under section 38(2) of the Act, nor had the applicant discharged its burden under section 46 of the Act.

In view of these findings, it was not necessary for the Commission to consider the objection from Ms Lucas and the signatories to the petition as they had provided limited

evidence to support their grounds of objection. Whilst residents were always fearful of having licensed premises operating within the vicinity of their homes, it was not enough to rely on the general proposition that the consumption of alcohol inevitably brought with it undue offence, annoyance and disturbance to persons who reside in the vicinity.

On 18 December 2010, the Commission issued its determination to refuse the application.

LC02/2011 - SUSAN LEAVER AND GREGORY LEAVER

Application for review of a decision of the Director of Liquor Licensing under Section 25 of the Liquor Control Act 1988.

The applicants, the licensees of premises known as Xwray Cafe, were authorised to sell liquor for consumption on the premises, whether or not ancillary to a meal, pursuant to Extended Trading Permit No. 31159 (the ETP).

On 30 July 2010, the Director of Liquor Licensing (the Director) advised the applicants that the ETP was no longer appropriate due to an alleged breach of conditions of the licence, and provided the applicants with an opportunity to provide submissions as to why the ETP should not be cancelled.

On 23 August 2010, the applicants provided submissions to the Director opposing the cancellation of the ETP, and requested further details of the alleged breaches of the ETP.

On 2 September 2010, the Director advised the applicants that it was in the public interest to condition the licence so that liquor could only be consumed by patrons while seated at a table or a fixed structure used as a table. On 28 September 2010, the applicants provided the Director with submissions opposing the imposition of the proposed conditions on the licence.

On 4 October 2010, the Director issued Decision A213133, imposing two additional conditions on the licence - liquor could only be consumed by patrons seated at a table, or a fixed structure used as a table; and the sale and supply of liquor to patrons was restricted to table service by staff of the licensees.

On 28 October 2010, the applicants sought a review of the Director's Decision, pursuant to section 25 of the Act, on the grounds that the imposed conditions were not in the public interest. On 9 November 2010, the Director intervened in the review application. The Commission heard the matter on 6 January 2011.

The applicants submitted that the proposed conditions were not necessary to avoid confusion or to maintain the amenity of the business, and the interference caused by the conditions was unwarranted and not in the public interest.

Counsel for the applicants objected to the use by the Commission of inspection reports because of an alleged breach of procedural fairness. The applicants had asked the Director for copies of these reports but they were not supplied. The Director had, in his correspondence to the applicants, summarised his concerns arising from inspection reports, and the applicants had paid a fine pursuant to an infringement notice for breach of the ETP that was issued as a consequence of an inspection on 31 October 2009. However, the reports were made available to the applicants prior to the hearing.

Counsel for the applicants also submitted that the applicants had not breached the conditions of the ETP, and that any alleged breach could be explained by the different types of customers present at the premises.

Counsel for the Director submitted that as the ETP and the licence were capable of operating at the same time to impose different conditions on the sale and consumption of alcohol by different classes of patrons, there was a potential for confusion about the circumstances under which patrons may be supplied alcohol. The applicants and their staff had no way of determining whether the ETP or the licence applied to any patron who had not ordered a meal, other than by asking that patron whether he or she intended to do so. The potential for confusion was obvious, and could in some cases lead to criminal liability. Such confusion could only be eliminated by the conditions imposed by the Decision, which maintained the ambience of the premises as a restaurant rather than a de facto small bar.

The Commission observed that when a restaurant licensee obtained an ETP for non-dining customers, the Act contemplated the coexistence of two types of customers - those who consumed alcohol ancillary to a meal; and those who consumed alcohol whilst being served and seated at a table. The responsibility for managing the types of customers resided with the licensee, whilst the responsibility for monitoring the types of customers lay with the Department. The Department needed to ensure that any evidence for any breach of conditions needed to be precise.

The Commission issued its determination on 24 January 2011, quashing the Decision of the Director of Liquor Licensing dated 4 October 2010, and referring the matter to the Director for redetermination.

LC09/2011 – TOCOAN PTY LTD

*Appeal against orders numbered 3 and 4 respectively made on 26 October 2010 by Commissioner Mr Eddie Watling (refers to LC38/2010)*¹.

Two individual complaints pursuant to section 95 of the Act were lodged by the Commissioner of Police and the City of Rockingham respectively against Tocoan Pty Ltd, the licensee of Zelda's Nightclub.

On 26 October 2010, a Directions Hearing in respect of the complaints was conducted by Commissioner Watling who subsequently issued orders.

Pursuant to section 28(1) of the Act, Tocoan Pty Ltd appealed against orders 3 and 4, which were:

3. *'No witnesses will be required to attend the hearing for the purpose of providing oral evidence or be subject to cross examination.'*
4. *'Mr Gavin Crocket representing the City of Rockingham shall provide to the Liquor Commission and Mr Ashley Wilson, solicitor representing the licensee, Zelda's Nightclub details of the survey respondents by close of business Friday, 5 November 2010. Mr Wilson is prohibited from disclosing this material to any third party including his client or any person associated with his client. Prior approval of the Liquor Commission is required for any disclosure of this information.'*

A hearing before the Commission in respect of the appeal was held on 18 February 2011.

Counsel for Tocoan Pty Ltd submitted that if the grounds of a complaint under section 95 of the Act were made out so that proper cause for disciplinary action existed, the Commission may exercise the disciplinary powers provided in section 96 of the Act, which were extensive and include taking no action at all; imposing a monetary penalty up to \$30,000; finding a person not fit and proper; or suspending or cancelling the operation of a licence.

Both the Commissioner of Police and the City of Rockingham relied upon evidence which alleged illegal and unlawful conduct by the licensee or the licensee's director. The licensee contended that some of the allegations were both inaccurate and untruthful.

The licensee submitted that the doctrine of natural justice, and the duty to act fairly and extend procedural fairness, dictated that the licensee's interest should not be adversely affected unless the licensee had the opportunity to challenge and test the evidence upon which the complaints were made.

¹ See *LC38/2010 Commissioner of Police v Tocoan Pty Ltd*, available on the Liquor Commission's website at www.liquorcommission.wa.gov.au

In respect of Order 4 of Commissioner Watling's orders, it was asserted that the effect of this order deprived the licensee of a reasonable opportunity to present its case, and in particular, to inspect any document to which the licensing authority had regard to in making a determination, as required under section 16(11) of the Act.

Counsel for the Commissioner of Police submitted that whilst section 16(11) required the Commission to ensure that parties had a reasonable opportunity to present its case, and section 18 permitted the summoning of witnesses, the Commission was not required by the Act to permit any party to cross examine a witness to the proceedings.

Counsel also submitted that the appeal appeared to be predicated on the notion that the right to cross-examine a witness was required to ensure procedural fairness in the determination of the complaint, whereas the general practice of the Commission was to receive written submissions followed by oral submissions from the respective parties at a hearing without the calling of witnesses to give evidence in person.

The main focus of the submissions from the City of Rockingham related to Order 4 of Commissioner Watling's orders. It was submitted that proceedings under section 95 of the Act were not quasi criminal, but disciplinary proceedings in which the Commission had broad powers to determine the procedure and manner in which it conducted those matters. By virtue of the orders issued by Commissioner Watling, the licensee had not been denied procedural fairness because all the information pertaining to the survey was within the possession of the licensee, through their solicitors.

The Commission accepted the licensee's submission that there was some dispute in the evidence relating to the complaints that had been lodged and sought disciplinary action against the licensee. The Commission was also cognisant of the fact that the applicants in the complaints under section 95 of the Act were seeking significant penalties to be imposed on the licensee and/or its officers and therefore potentially the outcome of the complaints may seriously impact on the interests of the licensee.

In this case, the Commission concluded that the licensee was entitled to cross-examine witnesses where a dispute arose as to the veracity of the evidence. However, this did not mean that the examination of witnesses would be without boundaries or unlimited in scope.

The Commission was not persuaded by the licensee's arguments that it would be denied a reasonable opportunity to present its case, or be denied procedural fairness, if the personal details of the survey respondents were not disclosed to it.

The Commission issued its determination on 8 April 2011; varying Order 3 of Commissioner Watling's orders to allow limited cross-examination of witnesses. The appeal against Order 4 of Commissioner Watling's orders was dismissed.

LC19/2011 – SHANE VAN STYN

Application seeking review of barring notice pursuant to section 115AD of the Liquor Control Act 1988.

On 24 February 2011, a delegate of the Commissioner of Police issued a Barring Notice pursuant to section 115AA(2) of the Act to prohibit Shane Gerald Van Styn from entering any licensed premises in Western Australia, except for liquor stores, for a period of six months.

The Barring Notice was issued following an incident that occurred on 15 February 2011 at the Camel Bar in Geraldton, where it was alleged that Mr Van Styn unlawfully assaulted a person.

On 4 March 2011, Mr Van Styn lodged a Notice of Appeal in respect of the Barring Notice, pursuant to section 115AD(3) of the Act.

The appeal was heard by the Commission on 11 May 2011.

Counsel for the Commissioner of Police submitted that there was nothing in the Act which required the Commissioner of Police to demonstrate multiple, serial, habitual or repetitious conduct in order to ground the making of a Barring Notice. A single incident was sufficient to establish the belief based on reasonable grounds required by section 115AA(2).

The victim alleged that Mr Van Styn punched him to the jaw, causing him to be knocked to the floor. The victim declined to make any formal complaint of assault. Although CCTV footage of the incident was unclear, the recording showed a forceful movement of Mr Van Styn's right arm towards the victim, causing the victim to stumble and fall.

It was submitted that the actions shown on the CCTV footage, taken with the statement of the victim confirming a punch to the jaw, amounted to violence on licensed premises which consequently justified the Barring Notice that was issued.

Mr Van Styn's counsel argued that Mr Van Styn was issued with a Barring Notice, prohibiting him from entering most licensed premises, following a single incident that occurred on 15 February 2011. Although it was alleged that Mr Van Styn punched the victim, Mr Van Styn asserted that he pushed the victim and was acting in self defence as a result of provocation by the victim, which was supported by the CCTV footage and witness statements submitted in support of Mr Van Styn.

The Commission could not determine whether the victim was punched as he alleged, or pushed as asserted by Mr Van Styn. However, the CCTV footage showed that the victim suffered no injuries because after stumbling backwards and falling to the ground, he immediately got to his feet and showed no sign of distress which he most likely would have if he had been punched by a man of Mr Van Styn's physical stature. This was supported by the Police Incident Report, which stated that the victim sustained no

injury. The Commission found that Mr Van Styn may have responded as a result of some provocation from the victim.

The evidence appeared to support Mr Van Styn's version of events. A number of character references submitted indicated that Mr Van Styn was not an angry, aggressive, or violent person.

Although not condoning Mr Van Styn's actions, the Commission was of the view that, based on the evidence submitted and the incident which led to the issuing of the Barring Notice, Mr Van Styn posed no risk to public safety. Consequently, the underlying public interest consideration upon which section 115AA of the Act was founded upon did not exist in this case. Overall, the Commission did not consider that the evidence supported the issuing of a Barring Notice in this instance.

On 17 May 2011, the Commission issued its determination to quash the decision of the Delegate of the Commissioner of Police to issue a Barring Notice to Mr Van Styn.

SIGNIFICANT ISSUES IMPACTING THE LIQUOR COMMISSION

CHANGES TO THE LIQUOR COMMISSION RULES

The *Liquor Commission Amendment Rules 2011* amended the *Liquor Commission Rules 2007* and came into operation on 22 June 2011. The following amendments were made:

- The definition of the term “proceedings” under Rule 3 was amended to allow the lodgement of applications for the review of barring notices issued by the Commissioner of Police under section 115AD *Liquor Control Act 1988*.
- ‘Rule 14 - Commission’s records, access to’ was deleted as the restricted access to the records of the Commission by the parties to a proceeding was deemed to be inconsistent with the provisions of section 16(11) of the *Liquor Control Act 1988*, which provides for each party to inspect any documents to which the licensing authority proposed to have regard in making a determination in the proceedings.
- The fees and charges for lodging applications with the Commission were increased to achieve greater cost recovery. The new charges are listed on the Commission’s website at www.liquorcommission.wa.gov.au

TRENDS OR SPECIAL PROBLEMS THAT HAVE EMERGED

There continues to be an increase in the number of applications received by the Commission. The Commissioner of Police is increasingly willing to lodge section 95 applications for disciplinary action against licensees.

There has also been an increasing reliance by the WA Police on the use of confidential police information (CPI) in proceedings before the Commission. Section 30 of the *Liquor Control Act 1988* provides that information classified as CPI cannot be published or disclosed to any person, including the defendant.

However, the matter of *Commissioner of Police v Mr Edward Horace Withnell [CIV1599 of 2010]* stated that some CPI material may be able to be disclosed to a defendant by way of a redacted version, while still maintaining the confidentiality of that information.

The Director of Liquor Licensing has referred several significant matters for the Commission to determine. These include several large liquor barn style applications such as Dan Murphy’s and Liquorland.

During the year in review, the Supreme Court heard an appeal by Kapinkoff Nominees Pty Ltd against the Commission's decision in the matter of *LC18/2009 - Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing*².

Kapinkoff Nominees argued that the Commission had erred in law in its determination to dismiss an application for the conditional grant of a Tavern Licence for the premises to be known as Carrammar Family Pub.

On 26 November 2010, the Supreme Court delivered its decision³, ruling in favour of the Commission and dismissing the appeal.

FORECASTS OF THE COMMISSION'S WORKLOAD FOR 2011/2012

It is expected that the workload of the Liquor Commission for 2011/12 will continue to increase, particularly in view of the rise in the number of disciplinary matters brought by the Commissioner of Police. Indications are that the Commission is adequately resourced to efficiently carry out its functions for the time being.

PROPOSALS FOR IMPROVING THE OPERATION OF THE COMMISSION

Other than for the continuing attention to improving and streamlining the process of handling applications for review, there are no proposals for improving the operations of the Commission.

² Available on the Commission's website at www.liquorcommission.wa.gov.au

³ See *Kapinkoff Nominees Pty Ltd v Director of Liquor Licensing* [WASC 345 / 2010], available on the Supreme Court of WA's website at <http://www.supremecourt.wa.gov.au/>

OTHER LEGAL AND GOVERNMENT POLICY REQUIREMENTS

ADVERTISING AND SPONSORSHIP

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 2010/11.

DISABILITY ACCESS AND INCLUSION PLAN OUTCOMES

The Commission meets its obligations for Disability Access and Inclusion Outcomes through arrangements with the Department of Racing, Gaming and Liquor. The Department of Racing, Gaming and Liquor's Annual Report contains information on how the Department has complied with the obligations imposed under section 29 of the *Disability Services Act 1993*.

COMPLIANCE WITH PUBLIC SECTOR STANDARDS AND ETHICAL CODES

The Commission does not employ staff, but has a net appropriation agreement with the Department of Racing, Gaming and Liquor relating to functions carried out on behalf of the Commission by staff of that Department. Accordingly, the Commission does not report on compliance with the Public Sector Standards. The Department of Racing, Gaming and Liquor's Annual Report contains relevant information.

RECORDKEEPING PLANS

Section 19 of the *State Records Act 2000* requires every Government agency to have a Recordkeeping Plan. The Recordkeeping Plan provides an accurate reflection of the recordkeeping program within the agency and must be complied with by the agency and its officers. The records of the Commission are maintained by the Department of Racing, Gaming and Liquor. The Department of Racing, Gaming and Liquor's Annual Report contains information on the Recordkeeping Plan.

SUBSTANTIVE EQUALITY

The Commission meets its obligations for the elimination of systemic racial discrimination from all policies and practices, in accordance with the Policy Framework for Substantive Equality, through arrangements with the Department of Racing, Gaming and Liquor. The Department of Racing, Gaming and Liquor's Annual Report contains information on how the Department has complied with the obligations imposed under the *Public Sector Commissioner's Circular 2009-23*

OCCUPATIONAL SAFETY, HEALTH AND INJURY MANAGEMENT

The Commission meets its obligations for occupational safety, health and injury management through arrangements with the Department of Racing, Gaming and Liquor. The Department of Racing, Gaming and Liquor's Annual Report contains information on how the Department has complied with the obligations imposed under the *Public Sector Commissioner's Circular 2009-11*.