

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Kununurra Liquor Pty Ltd
(represented by Mr John Prior, instructed by Mr Andreas von Altenstadt of AVA Legal)
- Intervener:** Executive Director of Public Health
(represented by Mr Tom Pontre of State Solicitor's Office)
- Objectors:** Commissioner of Police
(represented by Mr Tom Pontre of State Solicitor's Office)
- Kimberley Accommodation (East) Pty Ltd
(represented by Mr Peter Fraser of Dwyer Durack Lawyers)
- Dr Robert Phair
- Australian Broadcasting Corporation
- Commission:** Mr Seamus Rafferty (Chairperson)
Mr Michael Egan (Member)
Ms Helen Cogan (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988*, for a review of a decision by the delegate of the Director of Liquor Licensing to refuse an application for the conditional grant of a liquor store licence for premises to be known as *Liquor Barons Kununurra*.

Premises: Liquor Barons Kununurra, 116 Coolibah Drive,
Kununurra

Date of Hearing: 18 March 2016

Date of Determination: 3 May 2016

Determination: The application is refused and the decision of the Delegate of the Director of Liquor Licensing is affirmed.

Background

- 1 Pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”) Kununurra Liquor Pty Ltd (“the applicant”) applied for a review of the decision of the delegate of the Director of Liquor Licensing (“the Director”) to refuse the conditional grant of a liquor store licence for premises to be known as Liquor Barons Kununurra. The application was determined by the Director and reasons for the refusal of the application published on 15 December 2015.
- 2 The applicant lodged the application for the conditional grant of a liquor store licence on 14 April 2015. The application was accompanied by a Public Interest Assessment (“PIA”), and advertised as required by the Director on 21 May 2015.
- 3 Objections were filed pursuant to section 74 of the Act by the following parties, namely:
 - a) the Commissioner of Police (“the Police”);
 - b) the Australian Broadcasting Commission (“ABC”), which has premises in close proximity to the proposed premises;
 - c) Dr Robert Phair, the Procedural District Medical Officer (Anaesthetics) at the Kununurra District Hospital; and
 - d) Kimberley Accommodation (East) Pty Ltd, licensee of the Hotel Kununurra (“the licensee objector”).
- 4 The Executive Director of Public Health (“EDPH”) filed a notice of intervention pursuant to section 69 of the Act.

Application for review of Director’s decision

- 5 The application for a review of the Director’s decision was filed on 14 January 2016, and the hearing of the review before the Liquor Commission (“the Commission”) was conducted on 18 March 2016.
- 6 Although the applicant has lodged detailed grounds in support of the review, claiming error on the part of the Director, the Commission is not constrained by the need to find

error on the Director's part, but is required to undertake a full review of the materials before the Director at first instance and make its own determination on the basis of those materials.¹

Evidence and submissions from the applicant

- 7 The applicant's PIA outlined the nature and operation of the proposed premises and seeks to establish that the grant of the application is in the public interest, having regard to the primary and secondary objects of the Act prescribed by sections 5(1) and (2) of the Act.
- 8 The size of the proposed premises is approximately 174 square metres, with approximately 66 square metres of "browse area" comprising wine racking and 13 cool room doors for beer, craft beer, wine, champagne and rose. The proposed premises are located in a commercial precinct in the Kununurra town centre containing retail offices, a café and business offices, including real estate, IT services, art gallery and legal services centre.
- 9 The applicant submits that the proposed premises differ from the other two packaged liquor outlets in Kununurra, they being the bottle shops operated by the Hotel Kununurra and Gulliver's Tavern, by virtue of:
 - a) the independent ownership and operation of the proposed store, and the flexibility that it provides by enabling the applicant to tailor the range of liquor products to the requirements of the local community;
 - b) the browse style layout;
 - c) the proposed manner of trade which will focus on premium wines, boutique beer and spirits, and be directed towards attracting a segment of the market seeking quality and value;
 - d) the wine tasting and education, gourmet products, such as Margaret River cheeses and olive oils, and local pickles and jams;

1 *Hancock v Executive Director of Public Health* [2008] WASC 224

- e) the attention to be given to quality control, particularly temperature control to guarantee wines are not heat affected; and
 - f) the design of the store (in accordance with Crime Prevention through Environmental Design principles), and management and security systems to be effected to limit the risk of harm and adverse impact on the local amenity.
- 10 The applicant contends that there is a clear requirement of consumers for the proposed premises based on the following factors, namely:
- a) the closure of the Liquorland store in August 2014, which has “deprived the town of its only browse style liquor store”;
 - b) the recent population growth in Kununurra;
 - c) the importance of Kununurra as a tourist gateway to the North;
 - d) the limited range and choice of liquor products currently available to consumers locally.
- 11 The population of Kununurra, a component of which is transient in nature, is approximately 7,000, having increased at a rate of 2.5% per annum over the period 2001-2011. The applicant highlights publications of the local shire and the Kununurra Chamber of Commerce as evidence of the expected population growth in the town, and an ABC article suggesting that Lake Argyle could be the location for a future “second capital” sustaining a population of 150,000.
- 12 By reference to ABS Census data (2011), the applicant concludes that the locality is relatively advantaged, with high income and employment figures, and low mortgage stress figures. It is further contended that there is a growing Aboriginal middle class, a proposition supported by a report in the Sydney Morning Herald in 2012 that ‘the increase in Aboriginal participation in the booming mining sector has led to the emergence of an Aboriginal middle class’.
- 13 The services to be offered by the applicant ‘are aimed towards the development needs of the locality, including catering to the needs of the local and growing population,

particularly the burgeoning middle class...who are most likely to have modern tastes and preferences for good quality liquor products’.

- 14 In response to the licensee objector’s contention that the SEIFA Index reflects a significant level of disadvantage in the local government area, the applicant claims that the SEIFA scores do not take into account future trends, that certain areas in and around Kununurra have relatively high SEIFA rankings and that the proposal is for an ‘upmarket store that targets the middle class’.
- 15 The number of tourists visiting the Kimberley is also highlighted in the PIA. Approximately 112,330 people visited Kununurra in 2010/2011. The growth tourism market segments are expected to be travellers aged 60 years or older (grey nomads), socially active and community minded persons drawn to undiscovered destinations (dedicated discoverers) and business travellers.
- 16 It is submitted that the existing two drive through packaged liquor outlets ‘do not provide for this growing market and the market’s growing sophistication’ and ‘a quality browse style liquor store is needed with an appropriate range of premium liquor brands, and a service level to match tourist expectations’.
- 17 The PIA refers to the Drug and Alcohol Interagency Strategic Framework for WA 2011-2015 which seeks to prevent and reduce the adverse impacts of alcohol and other drugs in WA, and to the population groups identified in the framework who experience greater impacts from alcohol than others.
- 18 In respect to two of these priority groups, Aboriginal people and communities, and children and young people, the applicant submits that:
 - a) while Aboriginal and Torres Strait Island people are overrepresented in the population of Kununurra (25.8%) compared to the rest of WA (8.4%), in a regional context the figure is low (cf. 40% for the Kimberley region and 34.8% for the Shire of Wyndham East Kimberley); and
 - b) the proportion of persons aged between 20 and 24 years (7.3%), while higher than the rest of WA, is average in a regional context (7.2% for the Shire of Wyndham East Kimberley).

- 19 The applicant points to the consultation conducted with members of the local community, including many within the Aboriginal community, as objective evidence of support for the application in the local community.
- 20 In addition to talking to local residents and advertising the application, the applicant received 105 responses to 1000 witness questionnaires distributed by post to residents of Kununurra and 208 handed out personally by the applicant. A high percentage of those who responded consider that the proposed liquor store is required (88%), is important to tourism (88%), will provide convenience and will have a positive impact on the amenity of the community.
- 21 A number of respondents (61%) consider that the pricing of liquor products offered at the two existing drive through bottle shops is too expensive, and according to the applicant many people are buying liquor on-line 'out of frustration at pricing levels and lack of product range available'.
- 22 Further, 77% of respondents are stated as having no concerns about the possible impact of the proposed liquor store on the locality.
- 23 The applicant detailed the number of alcohol-related offences per 1,000 of population in 2011 in the locality (50.1) compared to other towns in the region selected by the applicant: Derby (58.9); Halls Creek (88.7); Broome (93.3); Wyndham (115.6) and Fitzroy Crossing (215.9), and concluded that 'the locality has a relatively low incidence of alcohol-related crime when compared with what appears to be generally accepted in other areas of the Kimberley region'.
- 24 The PIA outlined the liquor restrictions in Kununurra and Wyndham imposed by the Director in February 2011, noting that the vast majority of these liquor restrictions are in the north of WA where the population of indigenous Australians is high among the general population. The restrictions limit the amount of alcohol that may be purchased per person per day at specified times. The applicant submitted that 'the restrictions have been seen by informed local people as being a good start, but not the solution' and the applicant undertook to support and be an active member of the local Kununurra Liquor Accord.
- 25 Based on observations by the applicant of the two existing bottle shops in September 2014, September 2015 and October 2015, it was submitted that the two existing

outlets are of a poor standard, do not offer a browse style facility, offer limited choice of premium wine and spirits, gave priority to drive through customers, run out of specials quickly, offer beer that is not cold, and will not order items outside of their very basic inventory.

- 26 The proposed product range submitted by the applicant outlines, in general terms, the liquor to be offered for sale, for example: Beer Domestic (full) – 47 lines; Beer Australian Premium – 28 lines; Beer Imported – 62 lines; Wine Red Australia – 340 lines; Wine White Australian – 360 lines, Wine Red and White Imported and a range of other standard and premium liquor products.
- 27 The wine tasting wine club and display and sale of wine accessories and gourmet products are also said by the applicant to be a unique feature of the proposed store, and given the features of the store and the security and management practices, the applicant ‘does not expect any undue offence, annoyance, disturbance or inconvenience will be caused to people who live or work in the locality beyond what would be expected from the operation of a retail facility’.
- 28 The applicant refutes the claim that the proposed store will be duplicating the services and products offered by the existing two liquor outlets maintaining that, ‘the proposed packaged liquor outlet offer is as far removed from the existing large scale, drive through bottle shops as it is possible to get...the proposed store will feature a bright lit, safe and comfortable browse environment for customers to discuss premium wine and spirit selections with knowledgeable staff...the existing packaged liquor outlets feature “no car, no service”, low value, high volume sales’.
- 29 Impulse buying, a potential risk raised by the licensee objector, will also not be an issue according to the applicant as ‘the store will be a destination store, offering mainly premium selection of liquor products...a place which people make an adult decision to go’.
- 30 In response to the concerns expressed by some of the objectors and the EDPH about the impact and increased availability of alcohol on the Kimberley, the applicant makes a number of statements:
 - a) there is no direct connection to the proposed store;

- b) those who want cheap liquor are able to access it now via two highly visible, large scale drive through packaged liquor outlets in the town and will not find what they are looking for in the proposed store;
- c) people with alcohol consumption and dependency problems typically do not seek out \$50 bottles of wine, nor imported beers and ciders at \$60 plus a carton, they seek out the cheap cask wine and cheap mainstream beer;
- d) with its price point and intended range of premium brands, the store will not be the packaged liquor outlet of choice of socially disadvantaged or socially disconnected people seeking cheap liquor; and
- e) it is difficult to see how the addition of a modest, targeted browse style liquor store will have any impact on the availability of cheap liquor.

31 In response to community concerns filed with the objection from the Commissioner of Police, most notably from the Aboriginal Family Law Services that ‘introducing further access to alcohol in the community already struggling with current supply can only be problematic, not only for those with substance misuse and related behavioural issues, but for their families and children’, the applicant points to the existence of the two existing outlets and the absence of any explanation of how the proposed store will have a material impact.

32 The applicant accepted there is a level of alcohol-related harm in the community, but consistently maintained that the harm is closely associated with the excessive consumption of cheap discounted liquor and that the proposed store’s premium products will not be attractive to that market segment. Further, the store’s design and management practices will deter those seeking cheap and discounted liquor.

Evidence and submissions from the Commissioner of Police

33 The Commissioner of Police (“the Police”) objected to the application, pursuant to sections 3 and 73 of the Act, on the grounds that:

- a) the grant of the application would not be in the public interest; and

- b) the grant of the application would cause undue harm or ill-health to people or any group of people, due to the use of liquor.
- 34 The Police made submissions based on evidence of alcohol-related harm in the locality and the extensive knowledge of the Police of public drunkenness, vagrancy, domestic and non-domestic assaults and public nuisance in the locality.
- 35 In response to the materials filed by the applicant, the Police made the following observations, namely:
- a) the expansion of the district does not necessarily justify the grant of the application, and the reference to the potential creation of a second capital at Lake Argyle is not supportive of public interest or consumer requirement;
 - b) there is no evidence to support the contention of the applicant that ‘...cramming a growing population into the same number (or fewer) licensed venues leads to increased harm and ill-health, not a reduction’;
 - c) the responses to the witness questionnaires conducted by the applicant represent only 1.9% of the community and cannot be said to represent the views of the broader community;
 - d) notwithstanding the focus on premium products by the applicant, many survey respondents appear to be under the impression that increased competition will give rise to more competitive and cheaper prices and judging from the applicant’s proposed product list which specifies a range of domestic liquor products, ‘there is no evidence to suggest such alcohol products are premium, quality or are in any way discerning (*sic*) from standard products sold in the locality’;
 - e) there have been no specifics provided as to differentiation between current products offered in the locality and those intended to be sold by the applicant;
 - f) although support for the application from respondents to the questionnaire is acknowledged, the objectiveness and value of the survey evidence as evidence of a consumer requirement is questionable particularly having regard to the

apparent level of understanding of respondents to the types (and prices) of liquor to be sold;

- g) there is no evidence to suggest the tourism or hospitality industries in the State will be impacted by the grant of the application;
- h) in contradiction to the claim by the applicant that the Police canvassed local businesses encouraging them to object to the application, the Police, in performing its function, acted in an impartial and objective manner inviting community organisations and business owners to comment on the application;
- i) whilst the applicant has addressed some aspects of the socio-economic makeup of the locality, such as the median weekly incomes which are above the State average, it has not acknowledged the higher cost of living in Kununurra nor accounted for the higher percentage of residents paying more than 30% of their income on rent or the level of public housing;
- j) the applicant has attempted to minimise the significance of the over representation of Aboriginal people in the community (compared to the State average) by making comparisons with other localities with higher populations of Aboriginal people, as opposed to the State average;
- k) there is no direct evidence to support the contention that Aboriginal people living in the locality are a growing middle class as a result of the burgeoning mining industry in the Pilbara region;
- l) the applicant has not proposed any specific strategies to minimise the potential impact of the grant of the licence upon the “at risk” groups of Aboriginal people or children and young people (particularly in the 0-14 years and 20-29 years of age category);
- m) the proposed security and management systems will do little to minimise harm with respect to the consumption of liquor off premises;
- n) an analysis of the crime data held by Police for the locality leads to an undeniable conclusion that Kununurra experiences a high level of alcohol-related harm, for example, for the period January 2013 to April 2015:

- approximately 60% of all recent sexual assault offences reported were alcohol-related;
 - alcohol-related threatening behaviour offences recorded (63 in total) accounted for double the number of non-alcohol-related offences of that type (30 in total);
 - the rate of domestic assault offences involving the presence of alcohol (455 in total) was more than four times that of non-alcohol-related offences (102 in total);
 - the number of alcohol-related non-domestic assault offences (125 in total) was about one and half times that of non-alcohol related offences of that type (79 in total).
- o) The existing level of harm will be significantly exacerbated should the licence be granted, a conclusion supported by two recent studies (conducted in 2010 and 2012) which found, in line with previous international research, a positive association between outlet density and the rates of domestic violence over time, particularly for packaged liquor outlets, and a strong association between all assault offences and volumes of liquor sold at off-outlets;
- p) this application will increase the availability of alcohol and the level of alcohol-related harm currently experienced in the locality, and (even) a small risk of an increase in the level of harm that will invariably result if the licence is granted, is unacceptable;
- q) two community organisations, the Aboriginal Family Law Service (AFLS), and Reconciliation WA (RWA), have provided letters (to the Police) raising concerns about the potential adverse impact of the application, these concerns including:

Chief Executive Officer, AFLS

- violence within the Aboriginal communities is increasing and the level of violence towards men, women, and children has increased to alarming levels;

- alcohol plays a large part in the frequency of attacks within families;
- despite liquor restrictions, consumers are able to purchase more than the allowed quantity of alcohol by attending both (existing) outlets, and providing a third outlet would only aggravate the issue;
- it would appear incongruent that the Kununurra community would benefit from another liquor outlet at this point in time.

Executive Officer, RWA

- substance abuse is a serious issue in the Kimberley and a root cause of much domestic violence, lateral violence and social unrest;
 - substance abuse is often accepted in the community as a coping mechanism for deeper root causes for people's poor mental health...increasing access to the sale of alcohol will foster and validate access to this very destructive means of coping;
 - the granting of the application will place demands on already overburdened community services;
 - a number of community services are doing incredible work to effect a healthier community and support for this application will do significant damage to this good work;
- r) a letter from the franchisee of Subway Kununurra (located next door to the proposed premises) expressing concern about the potential safety risk for staff and risk of damage to the business;
- s) the local police perspective of the application, provided by the Officer in Charge of the Kununurra Police station who strongly objects to an additional liquor establishment in Kununurra, is that the grant of the licence will result in an increase in anti-social behaviour. Police statistics reveal a reduction in crime and anti-social behaviour after the closing of the Liquorland store in the area

proximate to that store following its closure thereby reducing the demands on police resources; and

- t) the need to minimise harm in the locality far outweighs the competing interest of catering for consumer requirements and, as such, the approval of the application is not in the public interest.

Evidence and submissions from the ABC

36 The ABC has lodged an objection to the application pursuant to section 74(1)(g)(i) and (ii) of the Act. The premises of the ABC are next door to the proposed premises. The ABC submits that the grant of the application will increase the offence, annoyance, disturbance and inconvenience in, and lessen the amenity and good order of, the locality.

37 This view is based on the experience of two staff members who have worked at the ABC premises, one for the past 30 months, the other since May 2015, of the type of behaviour that is already occurring in the immediate vicinity, including people who appear to be intoxicated and/or drinking alcohol congregating in the nearby car park, and outside the ABC Kununurra premises.

38 In response to the applicant's submission that the type of behaviour experienced by the ABC staff has not been observed by neighbouring businesses and other people asked by the applicant to respond to the claim, the ABC submits the sampling undertaken by the applicant is likely to have been selective (i.e., of persons who had already responded to the applicant's initial survey).

39 Additionally, in response to the applicant's question about why the anti-social behaviour had not been reported to Police, if it was of concern to the ABC, the ABC points out that the Police are responsible for a very large area, including remote communities, and a call from the ABC 'to remove drunks from or close to our premises...may well be a low priority'.

Evidence and submissions from Dr Phair

40 At the time of his objection, Dr Phair had been working at the Kununurra Hospital for 5 years with first hand experience in 'the destructive effects of alcohol abuse on the most

vulnerable members of the community'. He also attends the local Alcohol Accord as the hospital representative.

- 41 Whilst acknowledging the debate surrounding the cause and effect of alcohol abuse, Dr Phair detailed the associated consequences, which range from injuries sustained in all kinds of assaults, including domestic violence, stabbings, and acquired brain injuries to intergenerational damage such as foetal alcohol spectrum disorder.
- 42 Dr Phair disputes that the applicant's witness questionnaires are representative of the community view. He also contended that most travellers and tourists understand that they have to accommodate their lifestyle and alcohol consumption habits to the local context.
- 43 Dr Phair sought to provide a strong community (and health professional) view. He submitted that the closure of the Liquorland store had a beneficial effect on the safety and amenity of the main shopping centre, and whilst he cannot be sure that such an approval would have an adverse effect, given the associated risks he considers the application should be rejected.

Evidence and submissions from the licensee objector

- 44 The licensee objector objected to the application on the grounds that if the application were granted:
- a) it would likely cause undue harm or ill-health to people or a group of people due to the use of liquor;
 - b) undue offence, annoyance, disturbance and inconvenience to persons who reside or work in the vicinity would be likely to occur; and
 - c) the amenity, quiet or good order of the locality would be lessened; and
 - d) the grant of the application is not in the public interest.
- 45 The licensee objector highlighted the high concentration of the "at risk" groups of Aboriginal people and young people within the community and, by reference to reports on alcohol indicators, alcohol-related hospitalisations and diseases and crime statistics

generated by the Drug and Alcohol Office and other agencies, the high levels of alcohol related harm in the locality of the Kimberley.

- 46 The licensee objector highlighted research to the effect that:
- a) children and teenagers are more likely to drink alcohol if they are living in areas where a number of packaged liquor outlets are located;
 - b) increasing the density of alcohol outlets in a locality is positively associated with an increase in consumption levels, assaults, drink driving offences, domestic violence and alcohol-related hospitalisations; and
 - c) the central location of the proposed store gives rise to a potential for an increase in the levels of liquor consumed due to impulse buying.
- 47 In addition, the licensee objector contends that given the high level of offences against the person and alcohol-related crime, and the harm and ill-health that is occurring in the locality, duplicating and increasing the density of alcohol outlets may result in an unacceptable increase in the levels of violence currently experienced.
- 48 More specifically, in relation to the application and PIA, the licensee objector submitted that:
- a) whilst it is accepted the liquor restrictions in place in Kununurra impact upon responsible drinkers, 'it would be naive for the applicant to proceed on the basis that only responsible drinkers would be attracted to the applicant's door';
 - b) there are no restrictions that would prevent "at risk" members of the community accessing liquor from the applicant's store;
 - c) the 2014 review of the impact of the liquor restrictions revealed that while some indicators of harm and ill-health and offences declined in the 12 months after the imposition of the restrictions, some indicators increased in the following 12 months, supporting a finding that there remains a significant level of alcohol-related harm occurring within the locality;

- d) in relation to the two main areas of concern to the Police prior to the alcohol restrictions, juvenile related crime and domestic related assaults, domestic assault offences increased in the second 12 months following the restrictions, 90% of which were alcohol-related (far exceeding the proportion state wide) - having regard to the strong link between domestic violence and alcohol misuse, this supports the contention that the grant of the application would not be consistent with the proper development of the liquor industry or the object of minimising harm or ill-health from the use of liquor;
- e) the survey conducted by the applicant is fundamentally flawed and does not reveal what packaged liquor is purchased by the respondents, the frequency of purchases or what specific requirements are not being satisfied by the existing licensed premises;
- f) a review of the draft stock list reveals that the applicant will not restrict its stock to premium products, but will also stock non-premium products;
- g) in view of the number of respondents who indicated that existing prices are too expensive, it could be inferred that they believe a reduction in price would occur due to increased competition if the licence is granted;
- h) whilst there may well be occasions when the licensee objector's beer may not be properly chilled (because of the lead time taken to chill a pallet of beer), only one respondent to the survey questioned the quality of wine.

49 The licensee objector has also provided a statement from the bottle shop manager of the Kununurra Hotel which includes the following:

- a) in general, tourists tend to buy beer and cheap wine – although cask wine is preferred, it is explained that liquor restrictions apply and that cask wine has not been available for the last seven years;
- b) the bottle shop rarely receives complaints about service or product range;
- c) half the bottle shop customers choose the drive through service, the other half shop, browse and make selections;

- d) the bottle shop has an extensive range of liquor products, including premium products (a product list together with the prices of the items and a summary of the top selling items accompanies the statement);
 - e) while the hotel's premium wine selection is not huge, the hotel carries over 30 premium spirits;
 - f) the hotel will organise a special order for a customer upon request;
 - g) if a member of staff believes a customer to be intoxicated, any disagreement will be settled by offering the customer a breath analyser test;
 - h) the hotel meets the requirements of customers as is evident from a survey of customers completed on premises and on the hotel's website (94 respondents or 83.9% and 3 respondents or 2,7% answered yes and no respectively to the question whether the respondent is satisfied with the packaged liquor services provided by the hotel);
 - i) the Kununurra and Wyndham Liquor Accord, of which the hotel is a member, does not support the introduction of an additional packaged liquor outlet due to the on-going alcohol-related issues that occur in Kununurra.
- 50 Whilst there is some comment on the hotel's "No car, no service" practice, and its application, impact and effectiveness, the practice is a voluntary practice employed by the existing licensed premises as a harm minimisation measure.
- 51 The licensee objector submits that Kununurra has a long history of alcohol-related harm, predating the liquor restrictions imposed in 2011, and despite the restrictions, the locality is still experiencing a significant level of alcohol-related harm and/or ill-health. In these circumstances, and in circumstances where the impact of the closure of the Liquorland store in August 2014 cannot yet be determined, the grant of the present application is not in the public interest.

Evidence and submissions from the EDPH

- 52 The EDPH submits that a cautious approach is warranted in respect to the consideration and grant of the application in light of the present harm and ill-health concerns in the local community and the risk factors associated with the application.
- 53 The EDPH has intervened pursuant to section 69(8a)(b) of the Act to make representations regarding harm and ill-health due to the use of liquor, and the minimisation of that harm.
- 54 The EDPH points out that alcohol-related problems in Western Australia are widespread and not limited to specific groups such as young people, the alcohol dependent or Aboriginal people – a significant proportion of the population at least occasionally drink in a manner putting themselves and others at risk of harm in the form of drink driving, absenteeism and health issues such as alcohol-related cancer.
- 55 Alongside these broader community factors, understanding the vulnerabilities of those at risk by virtue of this application is an important harm minimisation consideration.
- 56 The EDPH has highlighted a number of indicators of alcohol-related harm in the community, including:
- a) alcohol-related hospitalisations, which for the period 2008-2012, for all alcohol-related conditions for residents of Kununurra were significantly higher (4.31 times) than the corresponding State rate;
 - b) hospital emergency department presentations, as described by the Director of Nursing at the Kununurra hospital, include presentations for domestic violence, head injuries, physical assaults, fractures consistent with various forms of fighting and sexual abuse, as well as presentations for longer term harm such as malnutrition, chronic diseases, diabetes, renal failure and rheumatic fever;
 - c) Police alcohol-related data which when assessed for Kununurra, the Kununurra District and the State provides a broader understanding of the harm occurring in Kununurra, rather than in a selected number of towns in the Kimberley. An objective analysis of this data reveals the following relevant matters:

- the percentage of domestic assault offences for the 12 months ending 31 December 2014 recorded as alcohol-related is higher in Kununurra (79.3%) than both the Kimberley (72.3%) and the State (39.5%);
- the percentage of alcohol-related domestic assault offences per 1000 persons is higher than both the District and the State;
- the statistics are similar for non-domestic assaults involving alcohol;
- of the 111 drink driving charges for Kununurra for the 12 months ending 31 December 2014, 87.4% (97 of 111) were recorded as having their last drink at a private residence, public place or vehicle (i.e., corresponding to people likely to have been drinking packaged liquor); and
- for the same period, 76.9% (306 of 398) of the treatment episodes at the East Kimberley Community Alcohol and Drug Service identified alcohol as the primary drug of concern.

57 In contrast to the applicant's conclusion from the comparative data, it is submitted that the applicant has not demonstrated that the harm occurring in the broader community is at generally acceptable levels.

58 The EDPH provided a statement from the East Kimberley Co-ordinator at the Community and Drug Service in Kununurra (KCADS), which offers counselling and support to people experiencing problems relating to alcohol. That document outlines some of the Co-ordinator's experiences and observations, including:

- a) alcohol is consistently the main drug of concern of clients seeking treatment and counselling;
- b) alcohol-related violence occurring in the home is a whole of community issue in Kununurra and is not restricted to any specific group of people;
- c) regular drinkers make up the greatest proportion of clients;

- d) people who are drinking packaged liquor are not being monitored and, as such, it is often easier to become intoxicated versus drinking on premises;
- e) while some clients are alcohol price sensitive, not all clients necessarily consume the cheapest alcohol available;
- f) as the proposed liquor store is to be located near a number of popular services, people may find it difficult to avoid the liquor store and visual availability of alcohol in Kununurra can act as a trigger for those trying to change their drinking behaviour; and
- g) the visibility of alcohol for clients of KCADS is likely to be additionally problematic in consideration of the proposed store.

59 The EDPH referred to the extensive research into the relationship between the availability of liquor and the frequency and range of social and health problems in support of the proposition that there is a clear positive relationship between the availability of packaged liquor and particular harms. In the view of the EDPH, this is especially so given the presence of at risk groups in the area who are already experiencing alcohol-related harm. Some of the research findings outlined in the intervention included:

- a) greater outlet density has been found to be associated with increased rates of child maltreatment, assaultive violence, vehicle accidents, pedestrian injuries and injuries amongst young adults;
- b) in a West Australian study, per capita alcohol sales made in liquor stores were found to be closely related to levels of certain alcohol-related harms, such as assaults, road crashes and hospitalisations;
- c) a growing number of studies linked alcohol outlet density and domestic violence, adding to the evidence that alcohol availability is a risk factor for domestic violence;
- d) lower socio-economic populations (which the EDPH considers is a relevant consideration in the context of this application having regard to the demographic of the locality) have also been related to increased rates of domestic violence.

- 60 The EDPH submitted that the closure of the Liquorland store resulted in a reduction of certain types of alcohol-related harm and that this was a relevant factor in determining this application.
- 61 In response to the applicant's implication that the absence of many objections to the application is reflective of the level of support for, or opposition to, the application, the EDPH notes that in contrast to the completion of a questionnaire or survey, completion of an objection is more complex and may not be within the capacity of a community member or stakeholder group to undertake.
- 62 It was further submitted that the grant of the application may result in a downward trend of alcohol prices.

Determination

- 63 In determining this application, the Commission must have regard to the primary and secondary objects of the Act. In the context of this application, there is a tension between two of the primary objects of the Act, they being the object to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor and the object to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
- 64 The approach that the Commission must adopt in its determination of this application is that outlined by His Honour Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing*². Based on that decision, the Commission is required to:
- a) make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - b) make findings about the likely degree of harm to result from the grant of the application;

² [2015] WASC 208

- c) assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
- d) weigh the likely degree of harm, so assessed, together with any relevant factors to determine whether the applicant had satisfied the Commission that it was in the public interest to grant the licence.

Findings as to the existing level of harm and ill-health caused due to the use of liquor

65 The applicant properly acknowledged that there was a high level of pre-existing harm or ill-health caused by the use of alcohol in Kununurra. In written submissions, the Applicant suggested that compared with other towns in the Kimberley, the statistics relevant to an assessment of harm or ill-health were lower in Kununurra than in other towns.

66 Whilst comparisons may sometimes be useful, in the context of this application, it is the actual level of harm or ill-health in the relevant locality that is of significance. Accordingly, the Commission has placed no weight on comparative statistics and solely confined its determination of this application on an assessment of the harm and ill-health caused by the use of alcohol in the town of Kununurra.

67 The evidence relevant to this consideration provided by the Commissioner of Police is as follows:

- a) in 2013 there were 744 incidents in Kununurra of which 323 were alcohol related (43%);
- b) in 2014 there were 675 incidents in Kununurra of which 328 were alcohol related (48%);
- c) in 2013 there were 239 domestic assaults in Kununurra of which 207 involved alcohol (87%);
- d) in 2014 there were 227 domestic assaults in Kununurra of which 181 involved alcohol (80%).

68 Other evidence relevant to a finding of the existing levels of harm or ill-health caused by the use of alcohol in Kununurra included:

- a) letter from Ms Mary Crowley, CEO of the AFLS. This organisation provides assistance to at-risk people in the locality. Ms Crowley provided an insight into the work of the AFLS within the community and the problems currently experienced within the community due to the abuse of alcohol;
- b) letter from Mr James Back, Executive Officer for RWA. This letter noted that the application was not supported due to the existing problems caused within the community due to the use and abuse of alcohol;
- c) statement of the Officer in Charge of the Kununurra Police Station;
- d) statement of Dr Robert Phair, who has worked at the Kununurra Hospital for the previous five years. His evidence was to the effect that there is a very significant on-going issue in the local community associated with alcohol abuse;
- e) evidence provided by the EDPH that the hospitalisation rate for alcohol related conditions is significantly higher than across the rest of Western Australia.

69 Based on the evidence referred to, the Commission has concluded that there is a significant level of pre-existing harm and ill-health caused by the use of alcohol in the town of Kununurra. The abuse of alcohol has led to high levels of alcohol related crimes, high levels of domestic violence, health related issues and general social unrest.

Likely degree of harm or ill-health to result from granting of the application

70 This assessment requires the Commission to predict whether the granting of the licence would result in an increase in the degree of harm or ill-health caused by the use of alcohol in Kununurra. In *Executive Director of Health v Lily Creek International Pty Ltd & Others*³, His Honour Ipp J stated that, 'whether harm or ill-health will in fact be caused to people, or any group of people, due to the use of liquor is a matter for the future and, in the sense referred to at 516 in *Malec v JC Hutton Pty Ltd*, is essentially a

³ (2000) 22 WAR 510

matter of prediction. The Licensing Authority will only be able to determine the likelihood of harm or ill-health occurring by reference to a degree of probability.'

- 71 The applicant submitted that 'no substantive evidence was provided by the respondents in respect of the likely harm to be caused by the grant of the application itself, nor did the Delegate make any findings in relation to this issue specifically'. It was further submitted that 'there is no real substantive evidence that the grant of the application would increase the risk of alcohol related harm or ill-health, or alternatively submits that any such risk would effectively be eradicated or sufficiently minimised as a result of the cumulative effect of factors such as the nature/location of the proposed store, the experience of the Applicant, the existing restrictions on the sale of liquor in the locality and the harm minimisation strategies to be adopted by the Applicant.'
- 72 Having regard to the totality of the evidence, the Commission considers that there is a high likelihood of harm or ill-health that would result from the granting of the application. There are a number of known factors which have given rise to that conclusion, namely:
- a) there are a number of at risk people in the locality;
 - b) there is evidence of a correlation between outlet density and harm and ill-health;
 - c) granting of the licence would increase the volume of liquor available for consumption in a relatively small country town;
 - d) the closing of the Liquorland outlet led to a reduction in crime in the area proximate to those premises. Logically, the introduction of another licensed premise would increase the potential for harm and ill-health.
- 73 The Commission accepts that the applicant would impose extensive harm minimisation measures; however, these and the other relevant matters referred to are not such as to lead to the conclusion suggested on behalf of the applicant that the risk of harm or ill-health to people due to the use of liquor from the granting of the proposed licence would be nugatory. To the contrary, there would be a high likelihood of an increase in harm and ill-health. The increase of availability of alcohol in a relatively small community where there are a number of at risk persons can only lead to such a conclusion.

Assessment of the likely degree of harm to result from the granting of the application against the existing degree of harm

- 74 This consideration also involves a prediction as to the likelihood of whether there will be an increase in the degree of harm from existing levels if the application were granted.
- 75 In *Liquorland (Australia) Pty Ltd v Executive Director of Public Health*⁴, His Honour Edelman J stated that, ‘In assessing the overall question of whether granting the application is in the public interest it is relevant to consider the baseline level of risk and, in that context, the effect of an increase in risk from the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated. Similarly, it is relevant that there are existing “at risk” persons who might be further affected’.
- 76 Based on the *totality of the evidence already referred to, the Commission* is satisfied on balance that there will be some increase in harm and ill-health in the relevant locality if the application were granted, in the context of a locality that already suffers from a high level of harm and ill-health to people due to the use of liquor.

Weighing the likely degree of harm so assessed together with any other relevant factors in determining whether the applicant has satisfied the public interest test

- 77 The Commission is bound to consider other factors in determining this application. This includes the regulation of the sale, supply and consumption of liquor and catering for the requirements of consumers of liquor and related services.
- 78 The applicant points to a number of factors that it submits establish that it is in the public interest to grant the application. These factors include:
- a) the limited current offering and supply of alcohol;
 - b) the current demographics of the locality;
 - c) future development of the locality; and

⁴ [2013] WASC 51

d) the experience of the applicant and the proposed application.

79 Having reached the conclusions referred to in respect to issues of harm and ill-health, the Commission has considered the evidence relied upon by the applicant. The PIA relied upon by any applicant is a significant document in that it should address all of the relevant matters prescribed by the Act. In this instance, the PIA is deficient in a number of material respects, namely:

- a) It refers to material lacking in cogency. For example, the suggestion that Kununurra could benefit from the development of a new northern capital of 150,000 people on the shores of Lake Argyle is based on one on-line news report. The suggestion of a growing aboriginal middle class is also based on an on-line media report that relates to the Pilbara, as opposed to the Kimberley;
- b) provides very little probative evidence in respect of the crucial issue of harm and ill-health;
- c) includes a number of generalisations. For example, there is reference to an observation of Dr Janet Woollard MP that, 'alcohol has been a part of community life for many years. Most Western Australians, most of the time, consume alcohol in a responsible manner'. As a result of that assertion, it is contended in the PIA that, 'it therefore follows that the majority of people in this locality enjoy alcohol responsibly', a contention that is not logically supportable;
- d) it relies on out of date material. For example, there is reference in the PIA to the Kununurra-Wyndham Area Development Strategy. Further research by the Commission revealed that this document was published in December 2000;
- e) concludes with a statement that, 'the proposed intended manner of trade is geared to attracting a clientele that is focussed on quality and value. The proposed liquor store will not be attractive to those seeking quick cheap liquor'. To the contrary, it was apparent during the course of the hearing and by reference to the applicant's proposed product list that products such as non-premium or standard categories of liquor, some of which could not be said to not be in the category of "cheap quick liquor", would be sold by the applicant and

therefore the store would potentially be attractive to those who wanted to purchase such items.

- 80 Notwithstanding the deficiencies in the PIA, the Commission is satisfied that the granting of the licence would cater for the requirements of consumers for liquor and related services. Further, the Commission accepts that the business would be conducted by an experienced operator who would be committed to minimising harm by implementing the measures referred to in the PIA.

Conclusion

- 81 The critical issues in respect to this application are the minimising of harm and ill-health caused due to the use of liquor and catering for requirements of consumers for liquor and related services. There is a tension between these two considerations as on the one hand, it is accepted that there is no liquor store in Kununurra of the type proposed by the applicant, but on the other hand, Kununurra is a town that has a significant level of pre-existing harm and ill-health occasioned by the use of alcohol.
- 82 Notwithstanding the positive aspects of the application, the applicant has failed to discharge the onus of establishing that the granting of the application is in the public interest as required by section 38(2) of the Act. The basis for that determination is that:
- a) the totality of evidence demonstrates there is a significant level of pre-existing harm and ill-health occasioned by the use of liquor in Kununurra - this is reflected by the crime statistics, the health statistics, the evidence of health professionals and the anecdotal evidence put before the Commission;
 - b) the granting of the application, which would lead to an increase in the volume of liquor available in Kununurra and less control over the sale of liquor in Kununurra, would increase the level of harm and ill-health occasioned by the use of liquor; and
 - c) even a small increase in the level of harm or ill-health occasioned by the use of liquor in Kununurra could not be tolerated, given the already significant levels that already exist.

- 83 It was submitted by counsel for the applicant that if the application were to be refused, the Commission would effectively be imposing a moratorium on the granting of liquor licences in Kununurra. That argument cannot be accepted as each application will be considered on its merits. In this instance, the primary object pursuant to section 5(1)(b) of the Act has taken precedence over the other objects, because of the significant social and health issues that exist in Kununurra and the number of persons who are already at risk due to the use of alcohol in that locality.
- 84 The decision of the Delegate of the Director is affirmed and the application for review is dismissed.



SEAMUS RAFFERTY
CHAIRPERSON