

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

Applicant: Commissioner of Police
(represented by Mr Peter Slater of WA Police)

Respondent: Bloo Moons Pty Ltd
(represented by Mr John Prior, Counsel, instructed by
Talbot Olivier Lawyers)

Intervener: Director of Liquor Licensing
(represented by Mr David Leigh of State Solicitor's
Office)

Commission: Mr Jim Freemantle (Chairperson)
Ms Helen Cogan
Mr Greg Joyce

Date of Hearing: 24 March 2010

Date of Determination: 31 March 2010

Premises: Esplanade Hotel, Port Hedland

Matter: Application for review of a decision of the Director of
Liquor Licensing under section 25 of the *Liquor
Control Act 1988*.

Determination: The decision of the Director is affirmed; however
condition 1 of the trading conditions is varied as
follows:

*"With the exception of liquor consumed by lodgers in
their rooms or persons attending a pre-arranged
function or event, liquor may be consumed only by
persons seated at a table."*

Authorities referred to in the decision:

- *Hancock –v- Executive Director of Public Health [2008] WASC 224*
 - *Palace Securities Pty Ltd –v- Director of Liquor Licensing*
 - *Executive Director of Public Health -v- Lily Creek International Pty Ltd & Ors [2000] WASCA 258*
 - *Executive Director of Public Health -v- Lily Creek International Pty Ltd & Ors [2001] WASCA 410*
 - *Spoon by Aramis [2009] SALC (27 March 2009) citing Pierce & Ors v Liquor Licensing Commissioner & Anor (1987) 47 SASR 22*
 - *Facac Pty Ltd v Talbot Hotel Group Pty Ltd & Anor [2001] SASC 445*
 - *Executive Director of Public Health -v- Lily Creek International Pty Ltd & Ors [2001] WASCA 410 (S)*
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Introduction

1. On 9 September 2009, the Director of Liquor Licensing conditionally granted a Hotel Restricted Licence to Bloo Moons Pty Ltd in respect of premises located at 4 Anderson Street, Port Hedland (refer decision A196691). When granting the licence, the Director of Liquor Licensing imposed a number of conditions on the operation of the licence.
2. The licence was subsequently issued on 30 September 2009 (refer decision A197511).
3. On 10 November 2009, the Commissioner of Police, who was a party to the proceedings before the Director of Liquor Licensing, lodged an application for a review of the decision of the Director pursuant to section 25 of the *Liquor Control Act 1988* ("the Act").
4. A hearing was conducted on 24 March 2010.

Preliminary matters

5. The application for review was essentially based on two issues:
 - The effect of the Director's decision (by imposing certain restrictive conditions on the licence) is to so distort a Hotel Restricted licence as to repugn the statutory scheme of classification of licences such that the Decision is *ultra vires* and invalid; and
 - The Director has erred in law in placing conditions on the licence that purport to impose obligations upon the Licensee that are already imposed by statutory provisions within the Act.
6. It was submitted on behalf of the Director of Liquor Licensing that because none of the parties before the Commission have challenged the correctness of the Director's decision granting the licence, that it is open to the Commission to confine its deliberations to the specific points raised by the Commissioner of Police in his review application.
7. The Commission does not accept this submission. In conducting a review under section 25, the Commission is to undertake a full review of the material before the Director of Liquor Licensing and make its own determination on the basis of those materials (refer *Hancock -v- Executive Director of Public Health [2008] WASC 224*). Whilst an Applicant for a review may only be dissatisfied with a component of the Director's decision, the review application enlivens the Commission's obligation to conduct a full rehearing of the original application. The Commission is not confined or restricted to dealing only with those matters of contention, nor constrained by a finding of error on the part of the Director.

8. Consequently, the Commission is to undertake a review of the decisions of the Director on its merits, as and by way of a rehearing of all of the material.

Submissions on behalf of Bloo Moon Pty Ltd for the grant of a hotel restricted licence

9. According to the Applicant's Public Interest Assessment (PIA) it seeks a hotel restricted licence (it must be noted that the Applicant originally applied for a tavern licence but subsequently amended the application to a hotel restricted licence) to facilitate the provision of 4 star accommodation, function and dining facilities to its guests, the business community and local residents. The premises were formerly a run down, closed hotel and the Applicant will be investing \$15m to refurbish a derelict building and provide Port Hedland with a quality hospitality facility. Such services and facilities are currently lacking in what is a fast growing and developing locality.
10. Port Hedland does not currently have a 4 star rated accommodation property. The proposed licensed premises, when fully developed will provide 102 upmarket rooms to cater for tourists and the business traveller. The venue will have a strong emphasis on the provision of quality food for its guests and local residents.
11. In its PIA, the Applicant provides an overview of the existing facilities in the locality, demographics of the area and the purported limited impact that the operation of the venue would have on the amenity of the area and the existing levels of alcohol-related harm or ill-health.
12. In recognition of the existing harm caused by alcohol abuse in the community, the Applicant is seeking a hotel restricted licence in order to restrict packaged liquor sales to the general community. Furthermore, the Applicant, in order to create a lower risk drinking environment, has proposed the following conditions be imposed on the licence:
 - Liquor must be consumed with a meal except for lodgers, those attending a pre-booked function or event, and anyone who has a restaurant reservation or intends to eat in the restaurant; and
 - All liquor must be consumed on the premises with the exception of the sale of packaged liquor to lodgers.
13. Since opening the hotel and trading without a liquor licence, the restaurant in the premises has averaged 100 covers per night.

Submissions on Behalf of the Executive Director Public Health

14. Pursuant to section 69(8a) of the Act, the Executive Director Public Health (EDPH) lodged a Notice of Intervention in respect of the application.
15. The purpose of the intervention was to make representations about the high risk aspects associated with the application and to recommend harm minimisation conditions to be imposed on the licence, should the application be granted.
16. The EDPH provided data on current alcohol availability in Port Hedland and existing alcohol-related problems in the locality. Per capita alcohol consumption in Port Hedland (including South Hedland) was calculated at 21.25 litres for 2004/2005 compared to the state level of 11.22 litres.
17. It was submitted by the EDPH that levels of alcohol consumption are an indicator of the type of drinking culture and levels of harm experienced within a community. As alcohol consumption increases, so do the range of negative social, health and legal consequences.
18. It was further submitted that according to police records in 2009, 81% of assaults in Port Hedland were recorded as involving alcohol. In 2008, there were 451 assaults in Port/South Hedland of which 69% were recorded as involving alcohol.
19. Hospitalisation data for the Pilbara, in which Port Hedland is a major centre, further supports the link between alcohol and assaults in the area. During the period 2002 to 2006, the rate of alcohol-related hospitalisations due to assaults, was over four times higher for the Pilbara Health Region in comparison to the corresponding State rate.
20. As a consequence of the existing levels of alcohol-related harm in the locality as detailed in his submission, the EDPH recommended the following conditions be imposed if the licence is granted:
 - a) Liquor must be consumed with a meal except for lodgers, those attending a pre-booked function or event and anyone who has a restaurant reservation;
 - b) The sale and supply of packaged liquor for consumption off the licensed premises is prohibited, with the exception of the sale of packaged liquor to lodgers;
 - c) The patron standing area of the premises is restricted to the function rooms only (as marked on the plans provided by the Applicant) and the function rooms are only used for pre-arranged functions and events;
 - d) The permitted trading hours of the venue be no longer than:
 - 11am to 12 midnight Monday to Saturday; and
 - 11am to 10pm on Sundays

- e) Food is to be available during the trading hours of the premises;
- f) The restaurant and alfresco area of the premises (as marked on the plans provided by the Applicant) are to be set up for dining at all times;
- g) Shooters, defined as two or more liqueurs (or one or more liqueurs and one or more serves of spirit) shall not be served on the premises;
- h) Entertainment on the premises is restricted to low level "conversational" background music only, except in the function rooms (as marked on the plans) during private pre-booked functions; and
- i) Strict dress and behaviour code signage is to be erected at each entrance to the licensed premises.

Submissions on behalf of the Commissioner of Police

- 21. Pursuant to section 69(6)(c)(ii) of the Act, the Commissioner of Police lodged a Notice of Intervention for the purpose of making representations and introducing evidence on the grounds that harm or ill-health is likely to be caused to people, or any group of people, due to the use of liquor and therefore the grant of the application is not in the public interest.
- 22. A report from Senior Constable Stanley, which accompanied the intervention, provided police data on existing levels of crime and anti-social behaviour in Port Hedland, much of which is alcohol-related.
- 23. According to Senior Constable Stanley, the premises are located in primarily a commercial location, however a large number of persons patronise nearby licensed premises, mainly on Friday nights. Traditionally, Friday and Saturday afternoons and nights are the busiest for Police. Port Hedland experiences a lack of transport options for patrons of licensed premises in the evenings and at night, and this coupled with the consumption of liquor is seen as a significant contributing factor to anti-social behaviour and social disorder in the town.
- 24. It is the view of local police that the grant of a tavern licence would have a negative impact on the community and increase existing levels of alcohol-related harm, particularly in view of the existing liquor restrictions that operate in the town. Given the trading restrictions proposed by the Applicant and the existing alcohol-related problems in the town, the police are of the opinion that a restaurant licence is a more appropriate type of licence to be granted to the Applicant.

Applicant's responsive submission to the Intervention from EDPH

25. By email dated 6 August 2009, the Applicant indicated that they generally accept the licence conditions proposed by the EDPH, with some minor variations.

Determination

26. As explained at paragraphs 5-8 of this decision, when conducting a review under section 25 of the Act, the Commission is to undertake a full review of the material before the Director of Liquor Licensing and make its own determination on the basis of those materials.
27. The Applicant originally applied for the grant of a tavern licence; however the application was subsequently amended to seek the grant of a hotel restricted licence.
28. Pursuant to section 38(2) of the Act, an Applicant for the grant of a hotel restricted licence must satisfy the licensing authority that granting the application is in the public interest.
29. Furthermore, pursuant to section 33(1), the licensing authority has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest; the discretion being only confined by the scope and purpose of the Act (refer *Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241*)
30. The Applicant for the licence seeks to invest \$15m to refurbish an old derelict building and provide the only 4 star accommodation and hospitality facility in Port Hedland, catering for tourists, corporate community and local residents. There was no dispute as to the Applicant's assertion that such services and facilities are currently lacking in Port Hedland, which is a fast growing and developing community. None of the interveners disputed the evidence and information submitted by the Applicant.
31. The intervention from the Commissioner of Police raised concerns about existing levels of harm and the possible impact that the grant of a tavern licence may have on the local community, particularly in light of the existing liquor restrictions imposed on the licences in the town. However, the Applicant subsequently sought to substitute its application for a tavern licence with an application for a hotel restricted licence. Under a hotel restricted licence, packaged liquor cannot be sold to the general public and may be sold only to lodgers.
32. Similarly, the EDPH provided evidence about the high risk aspects associated with the application and recommended harm minimisation conditions to be imposed on the licence, should the application be granted.

33. Having considered all of the material before the Director of Liquor Licensing, the Commission is satisfied that the Applicant has discharged its onus under section 38(2) of the Act and the grant of the application is in the public interest.
34. However, one of the primary objects of the Act is to minimise alcohol-related harm caused to people, or any group of people, due to the use of liquor. As stated by Ipp J in *Executive Director of Public Health –v- Lily Creek International Pty Ltd & Ors [2000] WASCA 258*:

“The potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on the balance of probabilities, would be a powerful public interest consideration.”

Furthermore, as explained by Wheeler J in *Executive Director of Public Health –v- Lily Creek International Pty Ltd & Ors [2001] WASCA 410*:

“...it is not the “risk of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made.”

35. Consequently, a relevant question for the Commission, in a case such as this, is the level of alcohol-related harm, due to the use of liquor, which is likely to result from the grant of the application.
36. In this context, the Applicant is seeking a hotel restricted licence which restricts packaged liquor sales to the general public. In addition, the EDPH has recommended a number of conditions that could be imposed on the licence in order to minimise the risk that the grant of the licence may have on the local community. It is noted that the Applicant generally consents to these conditions.
37. On the basis of the evidence, particularly the evidence presented relating to the existing level of alcohol-related harm in Port Hedland, the Commission is of the view that the grant of the licence should be subject to appropriate conditions to minimise any negative impact that the operation of the licence may have on the local community.
38. One of the conditions proposed by the EDPH is that liquor must be consumed with a meal except for lodgers, those attending a pre-booked function or event and anyone who has a restaurant reservation (reflected as trading condition 1 in the Director’s decision).
39. Notwithstanding the Applicant’s consent to this condition being imposed on the licence, (in fact the applicant proffered a similar condition) the Commission is of the view that the imposition of such a restrictive condition on a hotel restricted licence may be subverting the licence classification system set out in the Act.

40. The Act clearly details the particular obligations and privileges attached to each class of licence. Also, the Act confers on the licensing authority a great deal of discretion and flexibility, which has developed over the years through various amendments to the Act and there has been a gradual blurring of the distinction between licence classes. However, this discretion and flexibility is not unfettered.
41. Many of the amendments to the Act enacted by Parliament over the years are no doubt in response to changing social norms and the expectations of the public for liquor and related services at licensed premises. Nonetheless, throughout various reviews and amendments to the Act, Parliament has deemed it appropriate to maintain a system based on the existence of specific types of licences, which authorises certain commercial activities in relation to liquor. This fundamental aspect of the Act would be rendered meaningless, if through the imposition of conditions a licence of a particular class is distorted beyond all recognition.
42. Whilst there are some authorities to support this approach, these decisions are mainly from South Australia (for example *Spoon by Aramis* [2009] SALC (27 March 2009) citing *Pierce & Ors v Liquor Licensing Commissioner & Anor* (1987) 47 SASR 22 and *Facac Pty Ltd v Talbot Hotel Group Pty Ltd & Anor* [2001] SASC 445). Whilst the Western Australian *Liquor Control Act 1988* (previously the *Liquor Licensing Act 1988*) was originally moulded on the South Australian legislation, there has been a diverging of the Western Australian and South Australian legislation over the years as a consequence of various amendments to the individual Acts. Also, extreme caution should be exercised when considering these authorities because of the specific wording and obligations imposed on hotel licences under the South Australian legislation.
43. Perhaps the most relevant Western Australian authority is *Executive Director of Public Health -v- Lily Creek International Pty Ltd & Ors* [2001] WASCA 410 (S) where the court was considering the appropriateness of imposing a condition on a hotel licence to restrict the sale of liquor for consumption on the premises only to persons who were guests or to guests of a guest. The court concluded that it was beyond power to impose such a condition, with Wheeler J providing a detailed analysis of the relevant provisions of the Act. In essence, because of the obligations imposed by the Act on the holder of a hotel licence under section 41(2)(a) and limitations on the discretion of the licensing authority to vary conditions imposed by the Act, rather than pursuant to the Act, such a condition could not be imposed.
44. However, since that decision, some of the provisions of the Act relied upon by the court in its reasoning have been amended, particularly section 41(2)(a) where the obligation to sell liquor to a person for consumption on the premise has been removed and the obligation to provide certain services under section 108(2) has been deleted.
45. Notwithstanding the above amendments, the Commission remains of the view that the relevant underlying principle of the Act is, and has continued to be, a system based on different licence types and its relevant underlying principle would be defeated if, through

the imposition of conditions, a licence of a particular class is no longer recognisable. If this was the case, the Act would simply allow the licensing authority to grant a licence with conditions to meet the individual circumstances, without the need for an applicant to apply for a licence of a particular class. In addition, the issue of the licence classification system was considered in the most recent review of the Act and it was determined by the review committee that the system of different classes of licence should be retained, which is reflected in the Act.

46. Also, perhaps a further matter for consideration is the public expectation when they enter licensed premises of a particular class. In the case of a hotel (which includes the subsets of tavern, small bar and hotel restricted), there would be an expectation developed over many years, that liquor may be consumed on the premises without some other onerous obligation attached (ie liquor can only be consumed ancillary to a meal). Many people could inadvertently be placed in a situation where they are committing a breach of the Act because a person who attempts to obtain liquor from a licensee otherwise than in a manner authorised under the Act commits an offence (refer s110(4)).

47. Therefore, the Commission would amend the first condition proposed by the EDPH and the applicant to read:

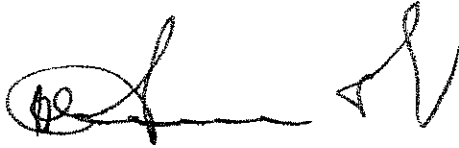
"With the exception of liquor consumed by lodgers in their rooms or persons attending a pre-arranged function or event, liquor may be consumed only by persons seated at a table."

48. The Commission is satisfied that this amended condition, together with the other proposed conditions, as contained in the Director's decision, maintains the integrity of the licence classification system under the Act whilst still suitably addressing the risks associated with the grant of the licence, albeit that the applicant was content with a more restrictive condition. The public may still enter the premises to consume liquor on those premises without an onerous condition that they must consume a meal. However, there is nothing in the Act to suggest that a hotel must consist of a public bar where the public can stand and consume liquor and one's approach should not be blinkered by any preconceived notions of what constitutes the physical layout of a hotel.

49. Accordingly, pursuant to section 25(4) of the Act the Commission affirms the decision of the Director of Liquor Licensing however condition 1 of the trading conditions is varied in accordance with paragraph 44 above.

50. There is one final issue. In his application for review, the Commissioner of Police raised concerns about the Director of Liquor Licensing imposing conditions on the licence that purport to impose obligations upon the licensee that are already imposed by statutory provisions in the Act. The Commission acknowledges that this is undesirable because it creates unnecessary confusion and uncertainty from an enforcement perspective. Where however, the statutory condition is further qualified, as was the case in respect of the condition imposed by the Director relating to free drinking water, it quite rightly needs to be a condition of the licence. It is noted however, that in the decision issuing the

conditionally granted licence (decision A197511) the conditions imposed by statutory provision have a qualifying heading "Also further to the specific trading conditions of the licence, the licensee is reminded of the obligations of a licensee under the Act including the following." This is a more desirable approach.

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**JIM FREEMANTLE
CHAIRPERSON**