

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

- Applicant:** Trinity Flame Pty Ltd
(represented by Mr Ian Curlewis of Lavan Legal)
- Intervener:** Executive Director of Public Health
(represented by Ms Anna Johnson of State
Solicitor's Office)
- Objector present
at hearing:** Kalgoorlie Alcohol Action Project (National Drug
Research Institute, Curtin University);
(represented by Professor Sherry Saggars)
- Other Objectors:** Mossisberg Pty Ltd;
- Paul Callander (School Manager, WA School of
Mines, Curtin University);
- Jonnene Thompson;
- David John Burge;
- Peter and Carolyn Vanderwal;
- Kalgoorlie Local Drug Action Group;
- Peter Reynold Stanley;
- Ruth Monck (together with signatories to a petition);
- Church of Christ Kalgoorlie;
- John Rodney Blencowe; and
- Captain Lynn Jones (Salvation Army).

Commission: Mr Jim Freemantle (Chairperson)
Ms Helen Cogan
Dr Eric Isaachsen

Date of Hearing: 9 March 2011

Date of Determination: 8 April 2011

Premises: The Exchange Hotel

Matter: Application for a review of the decision of the Delegate of the Director of Liquor Licensing to impose conditions on the extended trading permit.

Determination: The decision of the Delegate of the Director of Liquor Licensing is affirmed except condition 12 is varied so that the permit expires on 14 October 2013.

For the sake of clarity, condition 11 is amended so that no liquor is to be mixed with energy drinks rather than supplied with energy drinks.

Authorities cited in determination:

- *Commissioner of Police v Bloo Moons Pty Ltd* (LC 05/2010)
- *Hancock -v- Executive Director of Public Health [2008] WASC 224*
- *Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356*
- *Palace Securities Pty Ltd v Director of Liquor Licensing (1992) 7 WAR 241*
- *Executive Director of Public Health v Lily Creek International Pty Ltd and Ors [2000] WASCA 258*
- *Water Conservation & Irrigation Commission (NSW) v Browning (1947) 74 CLR 492* and *Palace Securities supra*
- *Jericho Nominees v Delium (1992) pg 38*

Introduction

- 1 On 24 August 2009, an application was lodged by Trinity Flame Pty Ltd (“the applicant”) for the grant of an extended trading permit pursuant to section 60(4)(g) of the *Liquor Control Act 1988* (“the Act”) for premises known as the Exchange Hotel and located at 135 Hannan Street, Kalgoorlie.
- 2 In decision A212432 the delegate of the Director of Liquor Licensing granted the application subject to the following conditions:
 - 1) Patrons are prohibited from entering or re-entering the licensed premises after 12 midnight.
 - 2) No trading is permitted on Christmas Day, Good Friday or before noon on ANZAC Day.
 - 3) The area to which the permit relates is that area outlined in yellow on plans dated 7 October 2008.
 - 4) There is to be no liquor discounting or advertising of cheap liquor during the operation of the permit.
 - 5) Advertising in relation to the permit times is restricted to advertising on the premises only.
 - 6) The sale of packaged liquor for consumption off the licensed premises during the hours covered by this permit is prohibited.
 - 7) Liquor sold and supplied is restricted to one (1) bottle of wine not exceeding 750mls or a maximum of four (4) alcoholic drinks per person at any one time.
 - 8) No liquor is to be sold or supplied for consumption on the premises in any vessels with a measurement capacity exceeding 750 ml, except vessels containing premixed drinks (e.g. RTDs) which shall not exceed 375ml.
 - 9) No spirits are to be sold or supplied for consumption on the premises in any non standard measure (i.e. no more than 30ml of spirits is permitted in any vessel).
 - 10) The licensee is prohibited from selling and supplying beverages in such a way that would encourage rapid consumption of liquor, for example, drinks known as ‘laybacks’, ‘shots’, ‘shooters’, ‘test tubes’, ‘jelly shots’, ‘blasters’, or ‘bombs’ or any other emotive title.
 - 11) No liquor is to be supplied with energy drinks. (*For the purposes of this condition **energy drinks** has the same meaning as **formulated caffeinated beverage** within Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.*)

- 12) It is a condition of this permit that the permit is effective from **15 October 2010 to 14 October 2015**.

SECURITY REQUIREMENTS

- 13) Crowd controllers, licensed under the Securities and Related Activities (Control) Act 1996), are to be employed at a ratio of two (2) crowd controllers for the first 100 patrons, and one crowd controller for each additional 100 patrons or part thereof, from 8.00 pm (or the time of opening the premises if after 8.00 pm).
- 14) Security personnel/Crowd Controllers (licensed under the Securities and Related Activities (Control) Act 1996), are to be present to monitor the licensed premises and the behaviour of patrons arriving and departing the premises from 8.00 pm (or the time of opening the premises if after 8.00 pm), until one (1) hour after trading ceases. While these personnel have no authority over the patrons when they are away from the licensed premises, their presence may assist in the orderly dissipation of patrons once they leave the premises.
- 15) A video surveillance system must be in place and operational. The system must comply with the minimum requirements identified in the "Minimum Standards - Closed Circuit Television (CCTV) Security System" Policy or with requirements otherwise approved by this authority. In accordance with the Policy, it is expected that this system will provide and record continuous images of the entrances to the premises from 8.00 pm (or the time of opening the premises if after 8.00 pm), until 1 hour after trading ceases; and
- 16) Images recorded via the video surveillance system must be retained for fourteen (14) days, and must be made available for viewing or removal by the Police or other persons authorised by the Director.
- 3 On 28 October 2010 the applicant lodged an application for a review of the Delegate's decision pursuant to section 25 of the Act. The applicant was not dissatisfied with the outcome of the Delegate's decision *per se*, but was dissatisfied with certain conditions that were imposed on the permit. Those conditions were:
- Patrons are prohibited from entering or re-entering the licensed premises after 12 midnight;
 - No spirits are to be sold or supplied for consumption on the premises in any non standard measure (i.e. no more than 30ml of spirits is permitted in any vessel)' and
 - No liquor is to be supplied with energy drinks.
- 4 Pursuant to section 69(11) of the Act, the Director of Liquor Licensing lodged a Notice of Intervention in respect of the review application, however that intervention was subsequently withdrawn.

5 A hearing before the Commission was held on 9 March 2011.

Submissions on behalf of the applicant

6 The liquor licence for the Exchange Hotel was transferred to the applicant on 6 May 2008. By way of this application, the applicant is seeking to continue the operation of the hotel under the extended hours currently in place at the premises.

7 The applicant is seeking to trade:

Sunday: 10pm to 12 midnight

Monday and Tuesday: 12 midnight until 1.00am the following morning; and

Wednesday to Saturday: 12 midnight to 2.00am the following morning.

8 The Exchange Hotel was originally built in 1893 and is an iconic landmark in Kalgoorlie. It is a multi-faceted hotel which contains two of the most popular bars in town; the Wildwest Saloon and Paddy's Ale House which provides traditional Irish food. The premises, and in particular the Wildwest Saloon, are an important tourist attraction in Kalgoorlie and also a favourite with locals and workers in the town. The premises are well patronised during trading under the extended hours.

9 Since the taking over the operation of the hotel, by the applicant the premises have been responsibly and professionally managed and have an excellent trading record. The applicant has in place procedures and policies, and staff trained in the responsible provision of liquor which minimise the potential for harm occurring from liquor consumed at the premises.

10 In its Public Interest Assessment ("PIA") submitted in support of the application the applicant addressed the matters set out in section 38(4) of the Act and provided details of the locality surrounding the premises; the physical and geographic nature of the area and the demographics of the town. The applicant also provided police crime data for the town which indicates that crime is a significant issue, particularly assaults, however it was submitted that the crime data provides no specific link with the consumption of liquor or any specific link to the operation of the Exchange Hotel. Although rates of alcohol-related hospitalisations for Kalgoorlie are higher than the state rates, the grant of the application should not negatively impact on the police and health figures because the applicant is merely seeking to continue the status quo and the applicant has in place harm minimisation policies and procedures.

11 Although Kalgoorlie has a higher number of juveniles aged 0-14 years of age and a higher indigenous population (7.3%) than Perth and Western Australia the grant of the application is unlikely to negatively impact on these at risk groups. Similarly, the grant of the application is unlikely to negatively impact on the amenity of the area whilst the continued operation of the extended trading permit will have a positive effect, as it will meet the requirements of those shift workers, locals and tourists who require late night

entertainment in the town centre. This is evidenced by the fact that the premises are well patronised during the extended hours.

Submissions on behalf of the objectors

12 Objections to the grant of the application were lodged by:

- Mossisberg Pty Ltd;
- Paul Callander (School Manager, WA School of Mines, Curtin University);
- Jonnene Thompson;
- David John Burge;
- Peter and Carolyn Vanderwal;
- Kalgoorlie Local Drug Action Group;
- Peter Reynold Stanley;
- Ruth Monck (together with signatories to a petition);
- Church of Christ Kalgoorlie;
- Kalgoorlie Alcohol Action Project (National Drug Research Institute, Curtin University);
- John Rodney Blencowe; and
- Captain Lynn Jones (Salvation Army).

13 Mossisberg Pty Ltd is the owner of The Australia, premises located opposite the Exchange Hotel, which provides residential accommodation for international students attending the WA School of Mines. It was submitted that excessive noise from patrons of the Exchange Hotel who smoke outside the hotel; who are ejected from the hotel; or when departing the premises later in the evening create undue offence, annoyance, disturbance and inconvenience for students staying at The Australia. Mr Callander, School Manager of the WA School of Mines raised similar concerns about the negative impact that extended trading hours at the Exchange Hotel has on the students accommodated at The Australia, particularly from patrons congregating outside the premises to smoke and patrons exiting the hotel after midnight.

14 Many of the objectors raised generic concerns about the negative impact that excessive consumption of alcohol is having on the local community. Also, many of the objectors were opposed to a related application to allow adult entertainment at the Exchange Hotel which was lodged by the applicant at the same time as the application for an extended trading permit, however the application for adult entertainment was subsequently withdrawn.

- 15 The Kalgoorlie Local Drug Action Group, the Kalgoorlie Alcohol Action Project and Peter Stanley all provided submissions and data on the extent of existing alcohol-related harm in Kalgoorlie and the risks to the community associated with the grant of the application.

Submissions on behalf of the intervener

- 16 Pursuant to section 69(8a) of the Act, the executive Director Public Health (EDPH) lodged a Notice of Intervention. The purpose of the intervention was to make representations regarding:
- concern in relation to the extension of trading hours at premises associated with alcohol-related harm;
 - ongoing levels of harm occurring at the premises and in Kalgoorlie; and
 - the impact the granting of the application is likely to have on the unacceptable levels of harm/ill-health occurring in Kalgoorlie.
- 17 It was submitted by the EDPH that there are existing problems occurring at the Exchange Hotel. According to Police data, between 1 January 2009 and 29 September 2009 there were 16 reported assaults occurring at the hotel with 56% (9) of these occurring after 12 midnight. In 2008, there were 38 Assaults at the premises, with 74% (28) occurring after 12 midnight. Similarly, between 1 January and 29 September 2009 there were 38 police callouts to the hotel with 17 being recorded as occurring after 12 midnight. Whilst it is understood that in April 2008 the trading hours for the Exchange Hotel were reduced, alcohol-related violence continues to occur at the venue.
- 18 The EDPH also provided data on existing levels of alcohol-related harm occurring in Kalgoorlie which are higher than the state rate. According to the EDPH research data establishes a strong relationship between late night trading and alcohol-related harm. Although the reduction in trading hours at the premises in 2008 saw a reduction in assaults at the premises in 2009, problems still continue to occur at and in the vicinity of the venue.

Responsive submissions on behalf of the licensee

- 19 It was submitted that many of the objections were generalised and speculative. In respect of police data relied upon by the EDPH, these are unpublished police statistics and the underlying data on which these statistics are based is unknown and therefore cannot be challenged or scrutinised. For example, reliance on the number of police callouts to the Exchange Hotel as an absolute statistic without qualification fails to take into account two factors, namely:
- Since the current licensee took over the operation of the premises in May/June 2008, its management of the premises has been rigorous in removing rowdy or anti-social patrons from the premises thereby providing a safer environment for patrons; and

- The number of police callouts to the premises has nothing to do with trading at the hotel. On the contrary, they are evidence of a benevolent and responsive licensee – for example two of the callouts occurred when Aboriginals, who could not be woken, were found sleeping on the sidewalk outside the hotel at 10.00am and 6.40pm respectively. Another related to a traffic accident outside the hotel when police were called.

20 Overall, according to the applicant, the EDPH intervention is a generalised comment on alcohol use in the Kalgoorlie-Boulder/Goldfields region, with reliance on unpublished police data. Importantly, neither the Commissioner of Police nor the local government authority raised any concerns with the application; the operation of the hotel or lodged a Notice of Intervention.

Determination

21 The applicant was granted an extended trading permit under section 60(4)(g) of the Act by the Delegate of the Director of Liquor Licensing, who imposed a number of conditions on the operation of the permit. The applicant has now appealed that decision of the Delegate to the Commission because it is dissatisfied with some of the conditions that were imposed on the operation of the permit.

22 In *Commissioner of Police v Bloo Moons Pty Ltd* (LC 05/2010) the Commission held that notwithstanding that an applicant for a review of a decision of the Director of Liquor Licensing may only be dissatisfied with a component of the Director's decision, the review application enlivens the obligation of the Commission to conduct a full re-hearing of the original application and 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. Therefore, the Commission is to undertake a full review of the materials before the Director and make its own determination on the basis of those materials (refer *Hancock -v- Executive Director of Public Health [2008] WASC 224*).

23 Pursuant to Regulation 9F(b) of the *Liquor Control Regulations 1989* when read with sections 38(1)(b) and 38(2) of the Act, an applicant for the grant of an extended trading permit under section 60(4)(g) must satisfy the licensing authority that granting the application is in the public interest.

24 Section 38(4) of the Act provides:

- (4) Without limiting subsection (2), the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include –
- a) The harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and
 - b) The impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be situated; and

- c) Whether offence, annoyance, disturbance or inconvenience might be caused to people who reside, or work in the vicinity of the licensed premises or proposed licensed premises; and
 - d) Any other prescribed matter.
- 25 The evidence from the applicant is that the Exchange Hotel is an iconic hotel in Kalgoorlie which has operated with extended trading hours for many years. The hotel is an important tourist attraction which is also popular with locals and workers alike. The premises are well patronised during the extended trading hours. Conversely, concerns have been raised by the objectors and intervener about the negative impact the grant of the application may have on the local community and on existing levels of alcohol-related harm.
- 26 When determining an application for an extended trading permit under section 60(4)(g) of the Act, the only question is whether the grant of the permit is justified having regard to all the circumstances and the legislative intention. In answering that question, the Commission has a wide discretion. It is a matter for the Commission to decide what weight to give to the competing interests and other relevant considerations (refer *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356). Of course, advancing the objects of the Act, as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241). In respect of this application, the objects set out in sections 5(1)(b) and (c) are particularly relevant.
- 27 The Commission is satisfied, based on the evidence submitted by the applicant that the grant of an extended trading permit would be consistent with object 5(1)(c) of the Act. The Commission has given weight to the length of time that the premises have operated with late night trading, its iconic status in the town and its attraction to tourists. However, this must be balanced against the matters raised by the objectors and the intervener. By its own admission, the applicant acknowledges that Kalgoorlie experiences rates of alcohol-related harm above the state rate. This, together with the number of assaults at the premises and the number of police call outs to the venue are of great concern to the Commission.
- 28 In weighing and balancing the competing interests in this case, the Commission is satisfied that the grant of a permit is justified, but the Commission also acknowledges the risks associated with late night trading at this venue and is therefore of the view that the grant of the permit should be subject to appropriate conditions to minimise any negative impact that the operation of the permit may have on the local community. As stated in *Executive Director of Public Health v Lily Creek International Pty Ltd and 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. Wheeler J in *Lily Creek* said:

“...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.”

29 During the hearing before the Commission, it was submitted on behalf of the applicant that the licensee was denied procedural fairness through the imposition of these additional conditions on the operation of the permit, which gave rise to this appeal. Furthermore, it was submitted that there was no evidence that the conditions, particularly the lockout condition, would benefit the public. The Commission rejects these submissions.

30 Section 64(1) of the Act empowers the licensing authority, at its discretion, to impose conditions on a licence or permit, having regard to the tenor of the licence or permit and the circumstances in relation to which the licensing authority intends that it should operate. Section 64 must of course be viewed in the context of the Act as a whole and exercised in the public interest. Consequently, the discretion of the licensing authority under section 64(1) is confined to the scope and subject of the Act and is not arbitrary and unlimited (refer *Water Conservation & Irrigation Commission (NSW) v Browning (1947) 74 CLR 492* and *Palace Securities supra*).

31 Section 64(3) expresses, without derogating from the generality of the discretion conferred on the licensing authority, some of the purposes for which the licensing authority may impose conditions which it considers to be in the public interest or which it considers desirable in order to –

....

(c) ensure that the safety, health or welfare of persons who may resort to the licensed premises is not at risk;

(ca) ensure that liquor is sold and consumed in a responsible manner;

....

(cc) minimize harm or ill-health caused to people, or any group of people, due to the use of liquor;

(d) ensure public order and safety, particularly where circumstances or events are expected to attract large numbers of persons to the premises or to an area adjacent to the premises; or

(e) limit –

(i) the kinds of liquor that may be sold;

(ii) the manner in which or the containers, or number or types of containers, in which liquor may be sold;

(iii) the days on which, and the times at which, liquor may be sold;

....

(fa) prohibit entry to the licensed premises after a specified time.

- 32 In the context of this application, the scope and purpose of the Act includes the restriction of the sale of liquor by a scheme of limited prohibition in order to promote public order on and about the licensed premises. As Malcolm CJ stated in *Jericho Nominees v Delium (1992) pg 38*, the public interest, ascertained from the scope and purpose of the Act, is to have liquor outlets consistent with good order and propriety and the proper regulation of such order and propriety.
- 33 There was evidence before the Commission as to the high levels of alcohol-related harm in the region; of assaults at the venue, including assaults after 12 midnight; of police callouts to the venue, including callouts after 12 midnight and evidence from Mr Callander and Mossisberg Pty Ltd about disturbance late at night to students staying at The Australia. As stated in *Lily Creek supra*“It may be that a possibility of harm or ill-health of a particular serious nature will be sufficient to cause the Licensing Authority to impose stringent conditions on a licence or refuse the grant absolutely. The decision in each case will depend on the particular circumstances”.
- 34 The Commission is satisfied that all the conditions imposed by the Delegate of the Director of Liquor Licensing were appropriate in light of the evidence presented, except the Commission is of the view that the permit should only be granted for a period of two years so that the operation of the permit and the management of the licensed premises can be re-assessed against its impact on the local community. As indicated earlier in these reasons, the Commission is concerned at the level of police activity at these premises, particularly late at night; the number of assaults at the premises and the overall levels of alcohol-related harm in the area.
- 35 Accordingly, the decision of the Delegate of the Director of Liquor Licensing is affirmed except condition 12 is varied so that the permit expires on 14 October 2013. For the sake of clarity, condition 11 is amended so that no liquor is to be mixed with energy drinks rather than merely supplied with energy drinks.



JIM FREEMANTLE
CHAIRPERSON