

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

Applicant: Equanimity Investments Pty Ltd
(represented by Mr James Ryan, Mr Patrick Ryan and
Ms Lynn Jones)

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

Intervener: Executive Director of Public Health
(represented by Mr David Leigh of State Solicitor's
Office)

Intervener: Commissioner of Police
(represented by Mr David Leigh of State Solicitor's
Office)

Intervener: Salmon Point Holdings Pty Ltd
(not represented at hearing)

Commission: Mr E. J. Watling (Deputy Chairperson)
Ms H Cogan
Ms K Lang

Date of Hearing: 11 November 2009

Date of Determination: 08 December 2009

Premises: Emphyrean Function Centre

Legislation *Liquor Control Act 1988*
Liquor Control Regulations 1989
Interpretation Act 1984

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

Determination: The Director of Liquor Licensing's decision is quashed and the Application for a Special Facility (Reception or Function Centre) licence is granted, limited to the hours of operation 0700 to 2200.

List of Authorities:

- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Palace Securities v Liquor Licensing* [1992] 7 WAR 241
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258
- *Norbis v Norbis* (1986) 161 CLR 513

1. Background

2. On 29 December 2008, the Applicant applied for a Special Facility Licence (Reception or Function Centre) in respect of premises situated at 12 Lake Street, Northbridge, known as Empyrean Function Centre, pursuant to section 46 of the *Liquor Control Act 1988* ("the Act").
3. On 14 July 2009, by way of Decision No. A194811, the Director of Liquor Licensing refused the Application for a Special Facility Licence ("the Decision") as he was not satisfied that granting the Application would be in the public interest.
4. On 10 August 2009, the Applicant lodged an application with the Liquor Commission of Western Australia ("the Commission"), pursuant to section 25(1) of the Act, for review of the Decision.
5. The Director of Liquor Licensing, Executive Director of Public Health, Commissioner of Police and Salmon Point Holdings Pty Ltd intervened in the review and filed submissions.
6. The Commission conducted the hearing of the review on 11 November 2009. Having heard the parties, the Commission has determined to quash the Director of Liquor Licensing's decision and grant the Special Facility Licence (Reception or Function Centre) subject to the condition that the hours of operation be limited to 0700 to 2200.

2. Preliminary Application

7. On the date of the review hearing, the Director of Liquor Licensing and the Commissioner of Police made application for the matter to be remitted to the Director of Liquor Licensing for fresh consideration pursuant to section 25(4)(c)(ii) of the Act. This was opposed by the Applicant.
8. The Director of Liquor Licensing and the Commissioner of Police argued that relevant circumstances had changed such that the Commission was now unable properly to undertake a review of the application for the Special Facility Licence, given the constraints of section 25(2c) of the Act which

prevent the Commission from having regard to new materials. It was argued that the new circumstances fundamentally altered the nature of the initial application. These circumstances included the removal of a director of the Applicant, the Commissioner of Police's application for a prohibition order against that former director and allegations that the Applicant had sold or supplied liquor unlawfully on Melbourne Cup Day.

9. The passage of time could almost inevitably give rise to an argument that new circumstances had arisen. The lapse of time in the current matter was longer than otherwise due to the Commissioner of Police's previous application for an adjournment, which the Commission had granted. The Commissioner of Police had filed a number of submissions raising a variety of issues against the Applicant since the lodgement of the application for review.
10. Delays in the processing of applications under the Act create significant commercial disadvantage and prejudice to Applicants and are to be avoided. In this case, the changes of circumstances were not relevant to the review of the decision of the Director of Liquor Licensing and could not be considered by the Commission under the Act. The Commissioner of Police has other, more appropriate recourse under the Act in regard to those new issues, which include unproven allegations.
11. The Commission refused the application to remit the matter to the Director of Liquor Licensing for fresh consideration and proceeded to hear the review without further delay.

3. Legal Principles

12. Grants of special facility licences are provided for in section 46 of the Act. Pursuant to section 46(1), the licensing authority shall not grant a special facility licence, except for a prescribed purpose.
13. Regulation 9A of the *Liquor Control Regulations 1989 (WA)* prescribes several purposes for which a special facility licence may be granted. Relevantly, regulation 9A (5) provides for a grant of such a licence for a reception or function centre:

A special facility licence may be granted for the purpose of allowing the sale of liquor at a reception or function centre (being premises primarily used as a venue for functions and receptions) to persons attending a reception or function at the centre.

14. An applicant who makes an application for a grant of a special facility licence must satisfy the licensing authority that granting the application is in the public interest (section 38(2) of the Act).

15. Section 38(4) provides as follows:

(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.

16. The discretion of the licensing authority in section 33(1) of the Act is 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.

17. The licensing authority may refuse an application in the public interest even where an Applicant has otherwise met the requirements of the Act (section 33(2)(a) of the Act).

18. The objects of the Act are set out at section 5:

5 (1) The primary objects of this Act are-

(a) to regulate the sale, supply and consumption of liquor; and

(b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and

(c) 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.

(2) In carrying out its functions under this Act, the licensing authority shall have regard to the primary objects of this Act and also to the following secondary objects –

(a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and

[(b), (c), deleted]

(d) to provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor; and

(e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

19. The reference to “public interest” in section 33(1) of the Act indicates that both sections 5 and 38 of the Act are relevant when making a decision.

20. The importance of the objects in section 5 of the Act is confirmed by the legislative history of the Act.

21. The *Liquor and Gaming Legislation Amendment Bill 2006* introduced several important amendments to the Act, including:
- (i) A public interest test in section 38 of the Act was inserted in order to replace the previous “needs test” (which required that the competitive impact on other businesses in the area to be considered);
 - (ii) Section 5 of the Act was amended to elevate the objects of the former *Liquor Licensing Act 1988* to the primary objects of the Act;
 - (iii) Section 5 of the Act was amended to include object 5(c) as a primary object of the Act (prior to the amendment, the content of object (c) was generally reflected in the secondary objects of the Act only).
22. Section 19 of the *Interpretation Act 1984* provides that regard may be had to extrinsic material (including the Second Reading Speech to a Bill) to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose of object underlying the written law.
23. During the Second Reading Speech to the Bill in the Legislative Assembly on 20 September 2006 (see Parliamentary Debates, WA Parliament, vol 409, p 6342), the then Minister for Racing and Gaming, the Hon. Mr Mark McGowan, stated as follows:

“A key reform is the creation of the public interest test... Under the public interest test, all Applicants will be required to demonstrate that the application is in the public interest and the licensing authority will be required to consider the application based on the positive and negative social, economic and health impacts of the community... it should be noted, however, that the government does not consider proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test. When considering the public interest, the licensing authority is bound by the objects of the Act as set out in section 5.”

4. Application for Review

24. The function of the Commission in relation to an application for review is to undertake a review of the decision of the Director of Liquor Licensing on its merits, as and by way of a rehearing.
25. The only question is whether, having regard to all the circumstances and legislative intention, a grant of a licence is justified. In answering that question, the Commission has a wide discretion (equivalent to that of the Director of Liquor Licensing). It is a matter for it to decide what weight to give to the competing interests and other relevant considerations.
26. When conducting a review of a decision made by the Director of Liquor Licensing, the Commission may have regard only to the material that was before the Director of Liquor Licensing when making the decision: section 25(2c) of the Act.
27. The materials before the Director of Liquor Licensing at the relevant time were :
 1. Notice of Application;
 2. Section 46 submissions;
 3. Public Interest Submissions dated 29 December 2008 and 17 March 2009 (PIA);
 4. Certificate of Local Planning Authority – Section 40;
 5. Intended Manner of Trade dated 8 January 2009 and 1 May 2009;
 6. Notice of Objection lodged by Salmon Point Holdings Pty Ltd T/A Rise Danceclub dated 5 February 2009;
 7. Notice of Objection lodged by the Commissioner of Police received on 12 February 2009;
 8. Correspondence from the Applicant amending application details dated 16 and 17 February 2009;
 9. Applicant's response to the objection by Salmon Point Holdings Pty Ltd dated 17 February 2009;

10. Correspondence from the Executive Director of Public Health provisionally withdrawing his intention to intervene dated 4 March 2009;
 11. Correspondence to Executive Director Public Health requesting a report on harm or ill-health dated 9 April 2009;
 12. Certificate of Local Health Authority – Section 39;
 13. Notice of Intervention lodged by the Commissioner of Police dated 22 May 2009;
 14. Executive Director of Public Health report dated 4 May 2009;
 15. Applicant's response to Executive Director of Public Health report dated 11 May 2009; and
 16. Applicant's response to the Commissioner of Police Notice of Intervention and Objection dated 31 March 2009 and 9 June 2009; together with comment on the Research report prepared for the Commissioner of Police dated April 2009; "Is your house in order? Revisiting liquor licensing practices and the establishment of an entertainment precinct in the Northbridge".
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28. The Applicant sought a Special Facility Licence (Reception or Function Centre) *"To sell and supply liquor to any adult person who has been invited to a group function, private party, business function, or any promotion"* from 7.00am to 3.00am the following morning, seven days a week. The proposed centre could cater for as many as 400 patrons at any one time.
 29. In response to the potential intervention by the Executive Director of Public Health, the Applicant amended the trading hours sought to 7.00am to 12 midnight from Sunday to Thursday and for Friday and Saturday from 7.00am to 1.00am the following day.
 30. The Applicant submits that the proposed function centre *"will be low risk, and not add in any significant way to alcohol related issues in Northbridge"*

because of the corporate focus of its business and because people may only patronise the centre if attending a function by invitation.

31. In addressing the impact on amenity, the Applicant states, *“that there is almost no potential for increased harm or ill-health that would result from the granting of this licence application.”* Given that patrons may only attend by invitation, and a *“good quality fit-out”* of the proposed premises, the Applicant submits that the proposed centre *“will add positively to the amenity of the locality”*.
32. The Applicant further submits that there is *“very little, if any, potential for offence, annoyance, disturbance or inconvenience to people who reside, work or are visiting the locality”*, because the proposed centre is situated *“within a large commercial area”* and patrons may attend by invitation only.

The Commission concurs with the finding of the Director of Liquor Licensing that the:

- objection lodged by the Commissioner of Police on 12 February 2009 and the intervention dated 22 May 2009;
- Western Australian Police - research report prepared for the Commissioner of Police dated April 2009; *“Is your house in order? Re-visiting liquor licensing practices and the establishment of an entertainment precinct in Northbridge”*; and
- report dated 4 May 2009, lodged by the Executive Director of Public Health in accordance with section 69(8)(a) of the Act,

establish that there is already a significant level of alcohol-related harm in Northbridge.

33. In its submission dated 11 May 2009, the Applicant acknowledges that *“the problems of Northbridge are long standing”*. The Applicant does not dispute that the Western Australian Police research report *“highlights some very disturbing facts about harm in Northbridge”*. The proposed premises are large enough to cater for *“400 function guests at one time”*, who will be attracted to a locality in which, as identified by the Executive Director of Public Health, a number of assaults were recorded by WA police as

occurring in the vicinity of the proposed Empyrean Function Centre. Clientele would not be limited to “pre-booked” functions with third parties as the Applicant proposes to offer its own “house events”.

34. The Applicant submits that granting the application will cater for the requirements of consumers for liquor and related services. However, the licensing authority has to weigh and balance this object of the Act with the other primary objects:

(a) to regulate the sale, supply and consumption of liquor; and

(b) to minimise harm or ill-health caused to people or any group of people, due to the use of liquor.

In this regard, harm due to the use of liquor extends to harm caused to people other than the consumer (*Re Gull Liquor, Gingers' Roadhouse, Upper Swan (1998) 20 SR (WA) 321 (at 339-340)*).

35. The Applicant describes the operation of the Empyrean Function Centre as catering for the corporate market (i.e. corporate functions and conferences) which would include “government departments and larger private organisations”. In addressing harm or ill-health in its December 2008 PIA, the Applicant states that the focus of its business will be on corporate events. In its March 2009 PIA, the prospective corporate clients are described as not only coming from the private sector “but also from non government and government organisations.”

36. The Applicant submits that the proposed function centre will be in demand not only in the evenings and at weekends but also during the day and during the week for seminars, sales meetings and product launches.

37. In a letter dated 17 February 2009, the Applicant submitted statements from a number of organisations indicating their intention to use the new function facility. The Applicant’s final PIA submitted on 19 March 2009 included testimonials and a bookings summary document (an updated function booking schedule dated 14 April 2009 was subsequently submitted); the summary also listed functions that were “house events”.

38. The licensing authority must consider *“the mere possibility of harm or ill-health”*. In *Executive Director of Liquor Licensing of Health v Lily Creek International Pty Ltd & Ors [2000] WASCA 258* Justice Ipp stated:

“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 Justice Wheeler In *Executive Director of Liquor Licensing of Health v Lily Creek International Pty Ltd & Ors [2001] WASCA 410*:

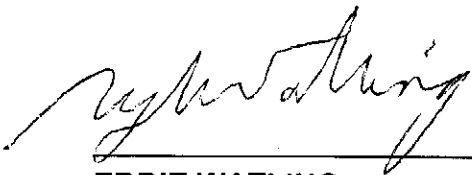
“...it is not the “risk” of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made.”

5. Conclusion

39. The Commission is satisfied that there is public demand for the facilities offered by the Applicant consistent with the object of the Act at section 5(1)(c).
40. The evidence establishes that the greatest demand for police and ambulance services in Northbridge is between the hours of 11pm and 3.00am when clientele from assorted liquor outlets are discharged into the streets, creating social mayhem and disorder.
41. The Commission is satisfied that the ‘relatively small risk of increased alcohol-related harm’ properly identified by the Director of Liquor Licensing in assessing this application can effectively be addressed by imposing a condition restricting the operation of the liquor licence to the hours of 0700 to 2200. This condition is consistent with the character of the premises as a corporate function centre rather than a nightclub.
42. Having considered all of the relevant materials which were before the Director of Liquor Licensing, the Commission is satisfied that the granting of this Special Facilities Licence (Reception or Function Centre) with the

abovementioned condition is in accordance with the primary and secondary objects of the Act. The Commission finds no evidence of any detriment likely to arise from the grant of this licence, having considered all factors relevant to the public interest, including the matters set out in section 38(4) of the Act.

43. Accordingly, pursuant to section 25(4) of the Act, the decision of the Director of Liquor Licensing is quashed and the application for a Special Facility Licence (Reception or Function Centre) is granted subject to the condition that the hours of operation are limited to 0700 to 2200.

A handwritten signature in black ink, appearing to read 'Eddie Watling', written over a horizontal line.

EDDIE WATLING
DEPUTY CHAIRPERSON