



Liquor Commission of Western Australia 2011/12 Annual Report

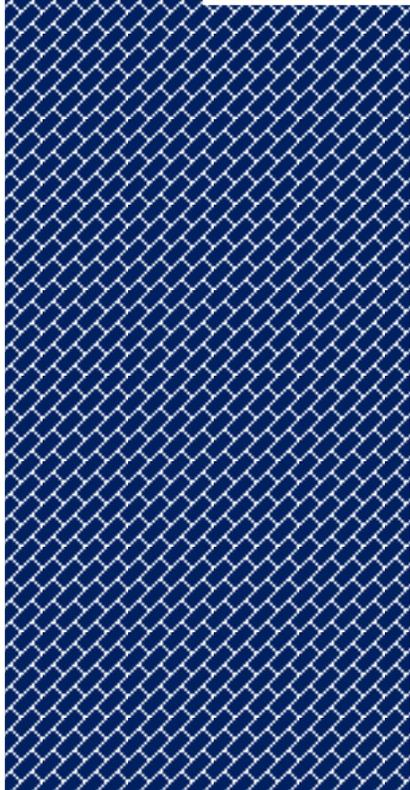


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STATEMENT OF COMPLIANCE

Hon. Terry Waldron, MLA
Minister for Racing and Gaming

In accordance with section 9K of the *Liquor Control Act 1988*, I am pleased to present, for your information and presentation to Parliament, the Annual Report on the activities of the Liquor Commission of Western Australia for the financial year ended 30 June 2012.

The Annual Report has been prepared in accordance with the provisions of section 9K(2) of the *Liquor Control Act 1988*.

Yours sincerely,



Jim Freemantle
CHAIRPERSON

10 September 2012

OVERVIEW OF AGENCY

EXECUTIVE SUMMARY

It is with pleasure that I present the Annual Report of the Liquor Commission of Western Australia for the year ended 30 June 2012.

During the year in review, the Commission carried over 22 applications from 2010/11 and received 41 new applications, making a total of 63 matters dealt with by the Commission. Of these, 47 matters were heard and determined; four were withdrawn; seven were heard but have yet to be determined; and five matters have been carried over to 2012/13.

The number and nature of applications before the Commission has become increasingly complex. In recognition of this fact, the Commission welcomed four new members who were appointed during the year - Seamus Rafferty, Alastair Bryant, Evan Shackleton and Belinda Lonsdale.

Over the year, the Commission by its various determinations has developed a consistent and carefully enunciated position confirming the requirement for sound and objective evidence supporting assertions made in Public Interest Assessments and further, confirming that mere conjecture, supposition and assumptions are not enough in support of an application for a liquor licence.

In hearing a growing number of disciplinary matters, the Commission has increasingly adopted a no tolerance approach towards licensees who fail to comply with their obligations under the *Liquor Control Act 1988*, especially in regards to managing anti-social behaviour in and around licensed premises. To this end, the Commission has imposed a range of conditions on licences to deal with anti-social behaviour, such as restricting trading hours, imposing lock-out conditions and restricting the sale and supply of liquor, thereby ensuring a safe continuation of catering to the requirements of consumers for liquor and related services.

I wish to take this opportunity to thank Commission members for their invaluable contribution to the efficient operation of the Commission. They continue to give their time and expertise willingly in discharging their responsibilities and coping with an ever increasing workload.

Finally, on behalf of the Commission, I thank the Executive Officer Seema Saxena for her dedication and the high level of professionalism she has continued to demonstrate in the role. I also thank Commission Support Officers Adele Murphy and Catherine Chiarelli for providing effective and efficient support services to the Commission.



Jim Freemantle
CHAIRPERSON

OPERATIONAL STRUCTURE

ENABLING LEGISLATION

The Liquor Commission (the Commission) is established under section 8 of the *Liquor Control Act 1988* to provide a flexible system to review the decisions of the Director of Liquor Licensing (the Director), with as little formality and technicality as practicable. The Commission came into effect on 7 May 2007, to replace the Liquor Licensing Court.

The *Liquor Commission Rules 2007* regulate the practice and procedure of the Commission and matters that are related and subject to the *Liquor Control Regulations 1989*, as to the costs and charges payable in relation to proceedings under the Act.

RESPONSIBLE MINISTER

As at 30 June 2012, the Minister responsible for the Racing and Gaming Portfolio was the Honourable Terry Waldron MLA, Minister for Sport and Recreation; Racing and Gaming.

THE RESPONSIBILITIES OF THE LIQUOR COMMISSION

The Commission's primary function is to adjudicate on matters brought before it through referral by the Director of Liquor Licensing, or by an application for a review of a decision made by the Director of Liquor Licensing. The latter is achieved by way of a rehearing and thus makes its own determinations based on the merits of each case. When considering an application for review, the Commission may have regard only to the material that was before the Director of Liquor Licensing when making the decision. The Commission is responsible for:

- Determining liquor licensing matters referred to it by the Director of Liquor Licensing.
- Conducting reviews of certain decisions made by the Director, or by a single member of the Commission.
- Determining complaints and disciplinary matters in accordance with section 95 of the *Liquor Control Act 1988*.
- Awarding costs associated with matters before the Commission.
- Reporting annually to the Minister for Racing and Gaming on the activities of the Commission.
- Reporting to the Minister for Racing and Gaming, when requested to do so, on the jurisdiction and functions of the Commission, including the provision of high-level policy advice relevant to liquor control matters.

The Commission can make the following decisions:

- Affirm, vary or quash a decision subject to review.
- Make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance.
- Give directions as to any questions of law that have been reviewed.
- Give directions to the Director of Liquor Licensing, to which effect shall be given.
- Make any incidental or ancillary order.

Parties to any proceedings before the Liquor Commission have the right to appeal any decision to the Supreme Court of Western Australia on a question of law.

APPEALS WHICH MAY BE HEARD BY THE LIQUOR COMMISSION

The Commission can determine the following matters under the Act:

SECTION 24

The Director may refer the whole or part of any matter that is to be determined by the Director, or any question of law arising from such a matter, for hearing and determination by the Commission.

SECTION 25

Application for review of the Director's decision can be lodged when:

- the decision relates to an application for the grant or removal of a licence;
- the decision is to make, vary or revoke a prohibition order under Part 5A of the Act; or
- the Chairperson so determines under section 9A(2) of the Act.

SECTION 28(4A)

When there is an appeal against the decision of one Commission member, it is to be heard and determined by the Commission constituted by three other members, including a member who is a lawyer as defined in section 3 of the Act.

SECTION 95

Where a complaint is lodged for disciplinary action, one member of the Commission is to be a lawyer as defined in section 3 of the Act.

SECTION 115(AD)

An application for a review of a barring notice issued by the Commissioner of Police can be heard by a Commission constituted by one member.

MATTERS OUTSIDE THE JURISDICTION OF THE LIQUOR COMMISSION

An application for review cannot be lodged against the following decisions of the Director of Liquor Licensing:

- Cancellation of a licence under section 93 of the Act, unless the application for the review is made on a question of law.
- An application for or the conduct of business under an extended trading permit (where the period is greater than three weeks and less than five years) or an occasional licence.
- The imposition, variation, or cancellation of a term or condition of an extended trading permit, or an occasional licence.
- The cancellation or suspension of the operation of an extended trading permit or an occasional licence.
- The assessment of a subsidy.
- Matters relating to the hearing of an objection.
- Finding of fact required to be made in order to dispose of the matter or application.
- A decision made in the course of, and for the purposes of, the administrative duties of the Director not directly related to the outcome of any application or matter before the licensing authority.

Furthermore, the Commission cannot reconsider any finding of fact by the Director of Liquor Licensing as to:

- the qualifications, reputation or character of a person, or the fitness or propriety of a person in relation to an application or licence;
- the adequacy or suitability of any premises, accommodation or services provided, or proposed to be provided under a licence; or
- in relation to a club licence, or an application for such a licence, or the existence of the club, unless the review is sought by the person who lodged the application in respect of which the decision was made; or by the person about whom the finding was made in relation to the qualifications, reputation or character of a person.

ADMINISTRATIVE STRUCTURE

Section 9B of the *Liquor Control Act 1988* provides that the Liquor Commission consists of a Chairperson and other members as determined by the Minister for Racing and Gaming. At least one member of the Commission is required to be a lawyer as defined in section 3 of the Act.

Each member of the Commission is appointed by the Minister for a maximum period of five years. Members are eligible for reappointment.

The member or members who constitute the panel in relation to an application/appeal shall be selected by the Chairperson, who will give consideration to their knowledge or experience.

Executive support for the Liquor Commission is provided by the Department of Racing, Gaming and Liquor.

As of 30 June 2012, the Liquor Commission consisted of nine members:

Mr Jim Freemantle - Chairperson

Mr Freemantle was the Chairperson of the committee appointed by the Government in 2004 to review the Liquor Licensing Act. He is a former Deputy Chairman of Good Samaritan Industries and is Deputy Chairman of Racing and Wagering WA, and Chairman of the Racing and Wagering Western Australia Integrity Assurance Committee. Mr Freemantle is also a former Vice President of the Western Australian Chamber of Commerce and Industry, a former Chair of the Swan River Trust and formerly held the position of Chief Executive of the Home Building Society. Mr Freemantle holds the qualifications of Bachelor of Economics and Master of Administration from Monash University.

Mr Seamus Rafferty - Deputy Chairperson

Mr Rafferty graduated from Notre Dame University in 2001 with a Bachelor of Laws degree. After completing his articulated clerkship, he was a State Prosecutor with the Office of the Director of Public Prosecutions for Western Australia between 2002 and 2009. This involved the prosecution of serious crimes in the District and Supreme Courts on behalf of the State of Western Australia. Since 2009, he has been a sole practitioner, specialising in criminal law. He is a committee member of the Criminal Lawyers' Association and was Secretary between 2009 and 2011.

Mr Edward Watling - Member

Mr Watling is a founding partner and Executive Director of the firm Tourism Coordinates, a Perth-based company specialising in tourism strategic planning and development. Mr Watling has more than 38 years experience in the tourism industry, combining both government and private sector service. In 1984, he was appointed the inaugural General Manager of the Western Australian Tourism Commission (WATC), resigning that office in 1987. Following that, Mr Watling took up a position within the Public Service Commission, where he undertook a range of agency reviews for the Government's Functional Review Committee, after which he served for seven years as a tourism consultant to the Minister for Tourism. Mr Watling has served on several boards and committees, including the Indian Ocean Tourism Association, the Tourism

Council Australia (WA), the Australian Tourism Research Institute, and the Perth Convention Bureau.

Ms Helen Cogan - Member

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

Mr Greg Joyce - Member

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

Dr Eric Isaachsen - Member

Dr Isaachsen has worked more than 25 years in General Practice covering a broad range of professional interests. He is a Senior Sessional Member of the State Administrative Tribunal sitting on matters in the Vocational and Human Rights streams. He has an ongoing interest and involvement in administration and governance at the secondary level of education.

Mr Alastair Bryant - Member

Mr Bryant retired from public service office in November 2010 after 40 years service, principally in the State Taxation Department. During his tenure as a public servant, Mr Bryant held several senior positions including Commissioner of State Taxation and Director General of the Department of Culture and the Arts. He ended his career in the Department of Transport as Acting Managing Director, Transport Services, and for various periods in that Department fulfilled the roles of Director General and General Manager, Licensing.

In addition to holding a Bachelor Degree in Business (Accounting) and Master of Leadership and Management, Mr Bryant is a Fellow of the Institute of Certified Practising Accountants, Australian Institute of Management and Taxation Institute of Australia.

Mr Evan Shackleton - Member

Mr Shackleton graduated from the University of Western Australia in 1996 with a Bachelor of Laws degree. After completing Articles with the Legal Aid Commission, he continued to work in all areas of criminal defence until he left the Commission in 2004 to commence practice as a sole practitioner in criminal defence. He is currently a committee member of the Criminal Lawyers' Association and the Magistrates Court Liaison Committee.

Ms Belinda Lonsdale - Member

Ms Lonsdale graduated from the University of Western Australia with a Bachelor of Laws in 1991 and a Masters of Business Administration in 1999. Ms Lonsdale was admitted to practice in 1993. Since 2003 Ms Lonsdale has been a barrister at Albert Wolff Chambers practising principally in the area of criminal law and disciplinary tribunals.

Ms Lonsdale was President of the Criminal Lawyers' Association in 2005 and 2006. She is currently a Commissioner for Legal Aid, having been appointed to that position in 2006 and is a member of both the Law Society and Bar Association councils.

MAJOR ACHIEVEMENTS FOR 2011/12

The tables on pages 12 to 17 provide details of the number, nature and outcome of applications heard and determined before the Commission as at 30 June 2012.

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

OUTSTANDING MATTERS AS AT 30 JUNE 2012

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

- VHT Perth Pty Ltd t/a VHT Perth
- Perth City Traders Pty Ltd t/a Club Hotel
- Forrest Road Liquor Pty Ltd t/a Forrest Road Liquor
- Tocoan Pty Ltd t/a Zelda's Nightclub
- Svetlana Sergeevna Martin, regarding Euro Deli'sh
- Cranbrook Food Services t/a Cranbrook IGA
- Walter Lenz, regarding Last Drop Beeliar

Furthermore, there were five matters listed but not heard:

- SWS Evolution Pty Ltd t/a Evolution Lounge Bar
- Tocoan Pty Ltd t/a Zelda's Nightclub
- Graeme Edward Doodson, regarding a Prohibition Order
- City of Rockingham, regarding Zelda's Nightclub
- Desi Brothers Pty Ltd t/a Café Royal

APPLICATIONS CARRIED OVER FROM 2010/11

Case No.	Name	Section of Act	Outcome
LC28/2011	Nickolas Martin – Prohibition application	25	Duration of prohibition reduced to three years; conditions of Prohibition Order varied
LC29/2011	Circuit Niteclub Pty Ltd <i>Premises: Up Nightclub</i>	95	Monetary penalty of \$7500 imposed; Shan Van Styn disqualified for being in position of authority for a period of one year; licence conditions varied
LC30/2011	The Waterfront Café and Restaurant Pty Ltd <i>Premises: The Waterfront Café and Restaurant</i>	25	Decision of the delegate of the Director of Liquor Licensing quashed and matter referred back to the Director for reconsideration
LC31/2011	Jun Chul Seo <i>Premises: Hi Mart Victoria Park</i>	25	Application refused
LC32/2011	Nullagine Hotel Pty Ltd <i>Premises: Nullagine Hotel</i>	25	Determination of the delegate of the Director of Liquor Licensing quashed and referred back to the Director for redetermination
LC33/2011	Karen Rose Batty – Barring Notice	115AD	Conditions of Prohibition Order varied
LC34/2011	Woolworths Ltd <i>Premises: Dan Murphy's Bicton</i>	24	Application refused
LC35/2011	Woolworths Limited <i>Premises: Woolworths Liquor Warnbro</i>	Sec 21	Application refused
LC37/2011	Joanna MacLeod and Gareth Hancox <i>Premises: Soho Bar and Kitchen</i>	25	Application refused
LC38/2011	Equanimity Investments Pty Ltd <i>Premises: Empyrean Function Centre</i>	25	Application approved
LC39/2011	Trent Gregory Norwood – Barring Notice	115AD	Withdrawn
LC40/2011	Cellar Door Repertoire <i>Premises: Cellar Door</i>	25	Application refused
LC44/2011	Woolworths Ltd <i>Premises: Dan Murphy's South Fremantle</i>	24	Application approved
LC45/2011	That's Entertainment (WA) Pty Ltd <i>Premises: The Clink Nightclub</i>	95	Application refused
LC50/2011	Andraste Holdings Pty Ltd <i>Premises: The Pier Hotel, Port Hedland</i>	95	Affirmed conditions imposed by Director

Case No.	Name	Section of Act	Outcome
LC51/2011	Topsouth Holdings Pty Ltd <i>Premises: Champagne House</i>	25	Application refused
LC52/2011	Commissioner of Police <i>Premises: Zelda's Nightclub</i>	95	Monetary penalty of \$15,000 imposed; requirement of installation of video surveillance system
LC01/2012	Woolworths Ltd <i>Premises: Dan Murphy's Cannington</i>	24	Application approved
LC03/2012	Woolworths Ltd <i>Premises: Dan Murphy's Canning Vale</i>	24	Application approved
LC04/2012	Woolworths Ltd <i>Premises: Dan Murphy's Cockburn</i>	24	Application refused
LC08/2012	Edward Horace Withnell – Prohibition Order	Sections 30 and 152(b)	Prohibition Order imposed
LC18/2012	Liquorland (Australia) Pty Ltd <i>Premises: First Choice Liquor Superstore Maylands</i>	24	Application refused by majority decision

APPLICATIONS LODGED AND HEARD IN 2011/12

Case No.	Name	Section of Act	Outcome
LC46/2011	Alan Ross Quartermaine – Barring Notice	115AD	Decision varied to allow entry to licensed restaurants in addition to liquor stores
LC47/2011	Australian Leisure and Hospitality Group <i>Premises: Leisure Inn Rockingham</i>	25	Application refused
LC48/2011	Lynette McDougall <i>Premises: De Bernales Tavern</i>	25	Decision of the Director varied; Lynette McDougall's approval as manager withdrawn for 12 months
LC49/2011	Hermal Pty Ltd <i>Premises: Roebuck Bay Hotel</i>	25	Decision of the Director of Liquor Licensing overturned, application upheld
LC53/2011	Walter Lenz <i>Premises: Last Drop, Beeliar</i>	25	Withdrawn
LC54/2011	Karen Rose Batty – Prohibition Order	25	Term of Prohibition Order varied from 4 years to 2 years
LC56/2011	Tahya Jade Gardner – Barring Notice	115AD	Application refused
LC57/2011	Goldbay Enterprises Pty Ltd <i>Premises: Fonty's Pool & Caravan Park</i>	25	Application refused

Case No.	Name	Section of Act	Outcome
LC58/2011	George Mark Lewer – Barring Notice	115 AD	Application dismissed
LC59/2011	Elijah Aotoa John Leilua – Barring Notice	115AD	Application dismissed
N/A	City of Greater Geraldton <i>Premises: L'Attitude 28</i>	95	Withdrawn
LC02/2012	Woolworths Ltd <i>Cost application against Tintoc Pty Ltd</i>	28	Application dismissed
LC05/2012	Luigi Mario Celani – Barring Notice	115AD	Barring Notice varied to allow entry to liquor stores, restaurants and premises accommodating the North Fremantle Amateur Football Club and Mosman Park Amateur Football Club
LC06/2012	West Valley 2000 Pty Ltd <i>Premises: Vintage Wine Sales</i>	25	Application upheld and matter referred back to the Director of Liquor Licensing to allow for a recommencement of the application process
LC07/2012	Mirvac Hotels Pty Ltd <i>Premises: The Sebel Residence East Perth</i>	25	Application refused
LC09/2012	Goodtime Investments Pty Ltd <i>Premises: Katanning Hotel</i>	95	Disqualification of Ms Trina Lane for being in a position of authority for five years; licence to remain suspended until 23/4/2012 to enable transfer of licence with the licensing authority failing which the licence will be cancelled
LC10/2012	Sylvester Pty Ltd <i>Premises: The Gold Bar, Kalgoorlie</i>	95	Monetary penalty of \$10,000 imposed; Amended conditions imposed upon the licence
LC11/2012	Barrio Enoteca Pty Ltd <i>Premises: The Precint Bar & Restaurant</i>	25	Application refused
LC12/2012	OPP Entertainment Pty Ltd <i>Premises: Club Mansion</i>	25	Application refused
LC15/2012	Adam Forsyth – Prohibition Order	25	Withdrawn
LC16/2012	Karlee Anne Robinson – Barring Notice	115AD	Barring Notice varied to allow entry to liquor stores, restaurants and sporting clubs accommodating sports in which Ms Robinson is actively engaged
LC17/2012	Club Bay View	95	Direction Orders issued; matter appealed to the Supreme Court of Western Australia
LC19/2012	Zacheave Pty Ltd <i>Premises: Gnowangerup Hotel</i>	95	Monetary penalty of \$15,000 imposed; Mr Zane Neave permanently disqualified from position of authority
LC20/2012	City of Rockingham vs Tocoan Pty Ltd <i>Premises: Zelda's Nightclub</i>	95	Application refused
LC21/2012	Georgina Lianne Banks – Prohibition Order	25	Application refused

SIGNIFICANT APPEALS BEFORE THE COMMISSION

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

WOOLWORTHS LIMITED (LC34/2011)

Application for a conditional grant of a liquor store licence for premises to be known as Dan Murphy’s Bicton

On 27 July 2009, Woolworths Limited lodged an application for the conditional grant of a liquor store licence for premises to be known as Dan Murphy’s Bicton and located at 378 Canning Highway, Bicton.

The application was advertised in accordance with instructions issued by the Director of Liquor Licensing (the Director). Objections to the grant of the application were lodged by numerous residents as well as Dr Janet Woollard MLA, Member of Alfred Cove, on behalf of concerned constituents.

The Executive Director Public Health lodged a Notice of Intervention and the City of Melville lodged a letter opposing the application.

On 1 February 2011, the Director referred the application to the Commission for determination, pursuant to section 24 of the Act. The Director subsequently lodged a Notice of Intervention.

The Commission heard this matter on 22 June 2011.

Counsel for the applicant submitted that Dan Murphy’s was an established, reputable liquor store brand that successfully operated in other parts of Australia, but was relatively new to the Western Australian market.

The proposed liquor store would provide a range of services which would be hallmarked by large, stylish facilities designed to provide a pleasant and unique shopping experience. The applicant was committed to working to minimise and manage the risk of alcohol-related harm by implementing comprehensive management practices and policies that were in place at its licensed premises throughout Australia.

The purpose of the Director’s intervention was to raise the question of whether the grant of the application was in the public interest, particularly in the context of whether the application catered for the requirements of consumers of liquor when regard was given to the proper development of the liquor industry.

The proximity of the proposed store to the Leopold Hotel First Choice Liquor, which was operated by Coles Group, also had implications for the development of the liquor industry when both operators had aggressive marketing and pricing structures. These chains had at times been selling liquor at below wholesale prices, with some small retailers resorting to purchasing product from these larger chain retailers rather than from producers.

The Executive Director Public Health's intervention identified several factors that had the potential to contribute to alcohol-related harm and ill-health, including the availability of cheap liquor; the large size of the proposed premises; its close proximity to other licensed premises; and the associated increase in the physical and economical availability of packaged liquor in the community.

Residential objectors and the City of Melville were opposed to the grant of the application due to the number of existing liquor outlets in the area and the possibility that another liquor outlet could contribute to anti-social behaviour.

The Commission rejected the notion that the application should be granted merely because the business model had proven to be popular in other localities. The Commission was not satisfied that adequate or compelling evidence had been submitted to demonstrate that granting the licence would cater for the requirements of consumers of liquor and related services contemplated by the applicant at the proposed location.

Notwithstanding that, the Commission was satisfied that the grant of the application would not negatively impact on the local community. The applicant had however failed to prove that the application was in the public interest pursuant to section 38(2) of the Act.

On 30 August 2011, the Commission issued its determination to dismiss the application for a liquor store licence.

MS JOANNA MACLEOD AND MR GARETH HANCOX (LC37/2011)

Application for a review of decision A218158 of the Director of Liquor Licensing in relation to a premises known as the Soho Bar and Kitchen

On 4 October 2011, Ms Joanna MacLeod and Mr Gareth Hancox lodged an application for the grant of a tavern licence for a premises known as the Soho Bar and Kitchen.

Objections to the grant of the licence were lodged by Fremantle Beverages Pty Ltd and Newport Fremantle Pty Ltd. Notices of Intervention were also lodged by the Commissioner of Police and Executive Director of Public Health.

On 20 April 2011, the Director of Liquor Licensing, in decision A218158, determined the matter and refused the application for the tavern licence.

On 17 May 2011, an application for a review of the Director's decision was lodged with the Commission, pursuant to section 25 of the Act. The Director of Liquor Licensing subsequently lodged a Notice of Intervention.

The Commission heard the matter on 22 July 2011.

The applicant submitted the applicant did not wish to run a tavern in the traditional sense but more of a restaurant downstairs and cocktail bar upstairs. The applicant had made it clear that it accepted the conditions contained in the section 40 certificate issued by the City of Fremantle, which included restricting the hours of trade, prohibiting the sale of packaged liquor and imposing management practices. The Executive Director Public Health had stated that the likelihood of harm and ill health being caused by the licence being approved would be greatly reduced if the conditions contained in the section 40 certificate were imposed.

The applicant submitted the application complimented the vision of the City of Fremantle for the International Sailing Federation World Championships which was a major event bringing many tourists as well as competitors to Fremantle.

Counsel for the Commissioner of Police submitted that if the tavern licence was granted, it might increase the likelihood of harm and ill health to patrons and people using other licensed premises in the Fremantle Entertainment Precinct. Counsel submitted crime statistics showing a high level of attendance by Police at this locality. The premises was located in the immediate vicinity of The Clink Nightclub, which was regarded as a "problem premises" by the Police.

Counsel for the Executive Director Public Health submitted that there was already a high density of outlets and granting this licence application would add to the existing high levels of alcohol related harm in Fremantle.

Counsel for the Director of Liquor Licensing submitted that the applicant had failed to provide any objective evidence showing the application was in the public interest.

The submission from Fremantle Beverages Pty Ltd covered many of the issues raised by the interveners. The objector also raised the issue of high level of incidents relating to The Clink and the building accommodating the applicant and The Clink.

The Commission found the applicant had not substantiated that the application was in the public interest. The Commission acknowledged that the application complimented the vision of the City of Fremantle in respect to furthering the tourist experience of the International Sailing Federation World Championships. Whilst this was more in the nature of a statement by the applicant than a well supported submission, the Commission accepted that it was difficult to get strong supporting evidence.

On weighing the evidence provided by the interveners and objectors, the Commission formed the view that on balance the potential for harm was significant and the conditions imposed by the City of Fremantle were insufficient to adequately mitigate this potential for harm.

On 6 September 2011, the Commission issued its determination to dismiss the appeal.

WOOLWORTHS LIMITED (LC04/2012)

Application for a conditional grant of a liquor store licence for premises to be known as Dan Murphy's Cockburn

On 12 January 2010, Woolworths Limited lodged an application for the conditional grant of a liquor store licence for premises to trade as Dan Murphy's Cockburn at Gateway Shopping Centre.

On 22 February 2010, the City of Cockburn lodged a notice of objection to the application. The submissions in this notice of objection were supported by submissions made in letters dated 11 May 2010 and 14 May 2010.

On various dates between 11 February 2010 and 22 February 2010, objections to the application were lodged by residential objectors.

On 11 March 2010, a Notice of Intervention was lodged by the Delegate of the Executive Director Public Health (EDPH) and the submissions in that notice of intervention were further supported by submissions made in letters dated 9 April 2010 and 18 October 2010.

On 31 March 2010, the Director of Liquor Licensing advised the applicant's solicitors that he was exercising his power under section 74(4) of the Act and would not be hearing and considering the residential objections, except those from Grace Liew and the City of Cockburn.

On 2 February 2011, the Director of Liquor Licensing referred the application to the Liquor Commission, pursuant to section 24 of the Act.

The Commission heard the matter on 10 August 2011.

Counsel for the applicant stated that the applicant sought to open a Dan Murphy's liquor store at Cockburn Gateway Shopping Centre. The application was for a conditional licence, as the premises would be within a new, purpose-built building.

The applicant claimed the premises would be a highly controlled, constantly supervised environment which was not conducive to adverse behaviour. The applicant took its

responsibilities in the sale of liquor very seriously. It had a strong track record of responsibly managing licensed premises throughout Australia.

The EDPH submitted evidence regarding the degree of harm or ill-health likely to result from the proximity of the premises to the Cockburn Youth Centre. The Youth Centre provides a wide range of government services to local youth. Many of the clients accessing these services already experienced alcohol and other drug issues.

The EDPH submitted there was a pre-existing level of underage drinking in the area surrounding the Youth Centre. Young people over 18 who accessed the Youth Centre were likely to purchase alcohol more frequently and in greater quantity in response to the presence of the premises, thereby incurring additional alcohol related harm. The submission claimed that those persons able to purchase alcohol would provide a potential source of secondary supply to underage youth congregating at the Youth Centre.

The EDPH stated that the operation of such a large 'liquor supermarket' in close proximity to this focal point for at-risk youth had the potential to promote and normalise the consumption of alcohol by persons already adversely affected by such consumption.

The City of Cockburn submitted evidence addressing the potential for the grant of this application to cause harm or ill health to youth using the Cockburn Youth Centre. It said the Youth Centre offered a wide range of health, support, training and other services, for youth and young persons drawn from throughout the southern metropolitan area, including the locality.

A significant proportion of the youth and young persons utilising the services provided by the Cockburn Youth Centre had existing health issues, including mental health and alcohol and substance abuse issues. There were existing juvenile liquor use and abuse issues occurring in the vicinity of the Cockburn Youth Centre and the site of the proposed premises.

Ms Liew, who spoke at the hearing, objected to the application on the grounds of the existence of 'at risk' groups in the Cockburn locality; the increase in undue disturbance or inconvenience to persons who reside or work in the vicinity of the proposed premises; and the adverse impact to the amenity, quiet or good order of the locality.

The grounds for the objections lodged by other residential objectors were general and largely repetitive and related to perceived problems with harm and ill health; disturbance, annoyance and inconvenience which would arise if the application was granted; and how the amenity, quiet and good order of the area would be negatively affected by the grant of the application.

The Commission found that the residential objections, except that of Ms Liew, were repetitive and there was little if any supporting evidence for their contention that granting the licence would give rise to a loss of amenity and an increase in harm generally. The

Commission also found that the evidence supplied by Ms Liew in support of her objection was persuasive.

The Commission found there was real potential for harm if the licence was granted and there was insufficient evidence that the concerns raised by the EDPH and the City of Cockburn concerning potential harm and ill health had been appropriately addressed by the applicant.

Ultimately, the Commission determined that any benefit of increased competition, range of products and diversity of choice was outweighed by the potential harm and loss of amenity that would result if the application was granted.

On 17 February 2012, the Commission issued its determination to refuse the application.

EDWARD HORACE WITHNELL (LC08/2012)

Application for a Prohibition Order pursuant to section 152B of the Liquor Control Act 1988

On 19 April 2011, the Commissioner of Police lodged an application with the Director of Liquor Licensing for a Prohibition Order against Mr Edward Horace Withnell for a period of five years, pursuant to section 152B of the Act.

Police sought to prohibit Mr Withnell from entering the Blue to the Bone Nightclub and any other type of licensed premises in Western Australia except a restaurant or liquor store. The application was made on the grounds of Mr Withnell's criminal history, his suspected continuing involvement in serious organised crime, his continuing association with an outlaw motorcycle gang, and his suspected involvement in the supervision and management of the Blue to the Bone Nightclub. The Police provided confidential information in support of their application.

On 28 April 2011, the Director of Liquor Licensing referred the matter to the Liquor Commission for determination under section 24 of the Act.

At a directions hearing on the matter on 13 July 2011, the Commission ordered Police to provide Mr Withnell's solicitor with a précis of the confidential material submitted in the application to the Director of Liquor Licensing, together with any further non-confidential information Police would use in their case against Mr Withnell. The order also afforded Mr Withnell the right to respond and seek further clarification in relation to the Police's submission. Subsequently, further submissions were received from Police and from Mr Withnell.

At a further directions hearing on 7 October 2011, the Commission ordered that Police were not required to provide any further redacted information to Mr Withnell, and afforded both parties an opportunity to provide further submissions.

The Commission heard the matter on 21 February 2012.

Counsel for the Commissioner of Police submitted that Mr Withnell has a lengthy criminal history. Mr Withnell had continued to commit offences at regular intervals between 1993 and 2010, which indicated a continued disregard for the law. Mr Withnell had maintained a significant ongoing involvement with an outlaw motorcycle gang.

Evidence submitted by Police supported at least a reasonable suspicion that Mr Withnell had been actively involved in the supervision and management of the Voodoo Lounge Nightclub and the Blue to the Bone Nightclub, and had been involved in drug trafficking. The classified confidential police report also established a reasonable suspicion of Mr Withnell's involvement in other organised crime activities.

Mr Withnell's counsel submitted the Commission could not properly be satisfied that the granting of a Prohibition Order was in the public interest. It was submitted that the disclosed materials relied upon by Police ought to be given little or no weight by a decision maker examining their content critically with due regard to considerations of fairness and good conscience.

It was submitted that Mr Withnell's criminal history was of limited relevance due the length of time elapsed since the most serious convictions and recent history was not suggestive of a current pre-disposition either to violence, abuse of alcohol, or similar anti-social behaviour in public places. Furthermore, the Coffin Cheaters WA was not involved in serious and organised criminal activity, nor was the Club a criminal organisation. Mr Withnell had never held a position of authority within Coffin Cheaters WA.

Mr Withnell's counsel also claimed that Mr Withnell was no longer involved in the entertainment industry or the contracting of services and had no intention of resuming any involvement in the entertainment industry. The aim of Mr Withnell's objection was to preserve his rights of entry to licensed premises only as a patron or consumer of alcohol and related services.

The Commission was satisfied there was sufficient material in the confidential police report to indicate Mr Withnell's links with members of the Coffin Cheaters WA and the Blue to the Bone Nightclub. The Commission was satisfied that it was in the public interest to grant the application sought by the Commissioner of Police.

On 11 April 2012, the Commission issued its determination to grant the Prohibition Order against Mr Withnell.

SIGNIFICANT ISSUES IMPACTING THE LIQUOR COMMISSION

TRENDS OR SPECIAL PROBLEMS THAT HAVE EMERGED

The Need to Demonstrate Consumer Requirements in Public Interest Assessments (PIA)

When applying for a licence, an applicant must satisfy the licensing authority that the granting of an application is in the public interest in accordance with sections 33 and 38 of the *Liquor Control Act 1988* (the Act).

When making a decision, the reference to “public interest” indicates that both sections 5 and 38 of the Act are relevant. In this regard, the primary objects of the Act are set out in section 5. These are to:

- regulate the sale, supply and consumption of liquor;
- minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
- 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.

In making determinations, the Commission must also consider the public interest under section 38, which includes both the positive and negative social, economic and health impacts that the grant of an application will have on a community.

There is now a consistent and carefully enunciated position of the Commission confirming the requirement for sound, and wherever possible, objective evidence supporting assertions made in a PIA.

In determining the positive aspects of an application, mere opinions expressed by an applicant as to the perceived benefits of the grant of their application, in the absence of supporting evidence, falls well short of the level of evidence required to substantiate such a claim. Statements by applicants, without supporting evidence, cannot be construed as facts.

Furthermore, letters of support from business people purporting to speak on behalf of consumers do not go far enough to satisfy the Commission that the general public has a requirement for liquor and related services.

Whilst the Commission found in *Shallcross Investments Pty Ltd v Director of Liquor Licensing (LC26/2010)* that, “it would be helpful to Applicants if the Director’s policy in respect of the PIA could perhaps highlight more clearly the requirement for Applicants to adequately demonstrate the positive aspects of their application and provide evidence

of their claims”, this does not imply, nor should it be inferred that the policy guidance in respect of PIA submissions does not require proper supporting evidence of contentions made in a PIA.

In the absence of relevant supporting evidence, the Commission will determine that an applicant has failed to satisfy the Commission that the grant of a licence is in the public interest as required under section 38(2) of the Act.

Anti-social Behaviour in and Around Licensed Premises

The harm referred to in the *Liquor Control Act 1988* extends to harm caused to people other than the consumer of liquor. This includes harm which may occur through an increase in anti-social or injurious behaviour due to the use of liquor and is not limited to physical harm.

The Commission accepts that licensees cannot always prevent some violent incidents occurring at their premises. However, where there is a frequency of anti-social behaviour in and around licensed premises, this may reflect on a licensee’s permissive attitude towards intoxication and poor management practices. The Commission considers it reasonable to expect that a licensee demonstrates a high level of vigilance and care in the management of their premises.

In a number of determinations, the Commission has imposed a range of conditions on a licence in order to deal with anti-social behaviour in and around licensed premises, thereby ensuring a safe continuation of catering to the requirements of consumers for liquor and related services. Conditions imposed have included:

- Restricting the hours of operation and imposing a one hour lock-out condition on the licence.
- Requiring approved managers and security staff to be trained in the responsible service of alcohol.
- Stricter security requirements, such as the installation of CCTV systems and increasing the number of security personnel.
- Prohibiting the style of entertainment provided to assist in offering a more safer entertainment to patrons.
- Restricting the sale and supply of liquor in order to discourage the rapid intake of alcohol by patrons.

Contiguity of a Licensed Premises

The Commission considered the issue of contiguity of a licensed premises in *Australian Leisure and Hospitality Group Pty Ltd and Director of Liquor Licensing (LC47/2011)*. This matter was highlighted in an application for the review of the decision of the Director of Liquor Licensing to refuse an application for the redefinition of the Leisure Inn Rockingham to include a Dan Murphy's liquor store. The plan showed the proposed redefinition involved the construction of a building separate to the existing buildings that constituted the existing licensed premises.

It was conceded at the hearing by the applicant's counsel that the proposed new building was not physically contiguous with the existing licensed premises. However, it was submitted that the proposed Dan Murphy's store would be joined in "a business sense". The Commission understood that to mean that the store would be owned by the same company that owned the Leisure Inn Rockingham.

The term "contiguous" is not defined by the *Liquor Control Act 1988*. The term is defined in the *Concise Oxford Dictionary* as meaning 'sharing a common border' or 'next or together in sequence'. By its very definition, the term imports a physical aspect.

In determining the meaning of 'contiguous' for the purpose of interpreting section 77(5a) of the *Liquor Control Act 1988*, the *Interpretation Act 1984* allows for the consideration of material not forming part of the written law 'to confirm that the meaning of the provision is the ordinary meaning contained by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law'.

Section 77(5a) of the Act was inserted by section 6(1) of the *Liquor Licensing Amendment Bill 2001*. In his second reading speech, the then Minister for Racing and Gaming, the Hon Nick Griffiths stated that, '[T]he Bill also addresses industry concerns regarding precedent decisions by the Liquor Licensing Court supporting the establishment of non-contiguous, or what have been described as satellite, liquor outlets utilising the provisions of the Act dealing with the alteration or redefinition of licensed premises'.

The Minister further stated that, '[T]he amendments relating to non-contiguous liquor outlets will clarify the intent of the licensing process, by precluding the approval of an application to alter or redefine the licensed premises when the application seeks to include in the licensed premises an area that is not contiguous with the existing licensed premises'.

Having regard to the ordinary meaning of the word, the proposed Dan Murphy's store could not be considered contiguous with the existing licensed premises in any way. The nearest point to the existing licensed premises was 20.85 metres. Further, in considering the Minister's second reading speech and the intent of the legislature, it was the granting of licences such as that applied for in this instance that led to the enactment of section 77(5a) of the Act, so as to stop satellite outlets from being

attached to existing licences. In the Commission's opinion, the proposed Dan Murphy's store would constitute a satellite outlet by virtue of the distance between the proposed new building in which it would operate and the existing buildings.

The submission that the Leisure Inn Rockingham and Dan Murphy's would be linked in a business sense was irrelevant to a determination of this application as the focus of section 77(5a) of the Act is on the physical aspect. In that respect, the buildings did not have a common border nor were they adjacent to each other. On the contrary, they were separated by a car park and a roadway for the use of patrons within the hotel complex. Accordingly, the Commission refused the application. This determination is the subject of an appeal before the Supreme Court of Western Australia.

Issue of Due Process

The issue of whether the Commission had the jurisdiction to hear a matter that had already been dealt with in another jurisdiction arose in the matter of *That's Entertainment (WA) Pty Ltd T/A The Clink Nightclub v The Commissioner of Police (LC45/2011)*.

By way of background, on 12 October 2010, the Commissioner of Police lodged a complaint pursuant to section 95 of the *Liquor Control Act 1988* (the Act) against the licensee of the Clink Night Club. On 14 December 2012, a preliminary hearing in this matter was held by the Commission at which it was determined that the listing of the hearing of the complaint would be deferred pending the outcome of proceedings against the licensee in the Magistrates Court. Subsequently, there was an acquittal of the licensee and its staff in the Magistrates Court regarding the alleged breach of section 115 of the Act.

On 15 July 2011, the applicant's solicitors sought a listing for an interlocutory hearing before the Commission to strike out the section 115 aspect of the section 95 complaint on the basis that the Commission did not have jurisdiction to hear the complaint, as a court of law with a higher standard of proof had already found that there was no contravention of the Act.

The applicant submitted that section 95 of the Act did not permit in its text that disciplinary action may be taken if a licensee had been tried and acquitted of contravening the Act. It only permitted disciplinary action where there had been a conviction or contravention. The licensee had not been convicted of an offence under the Act and therefore could not be disciplined under section 95(4)(f)(i) of the Act.

The contention by the Commissioner of Police that a licensee acquitted of an offence by a Court can be disciplined in the Commission in respect of the same matters for which it had been acquitted in a different jurisdiction was oppressive and was contrary to any notion of justice. It was oppressive for Police to effectively appeal the decision of the Magistrate to the Commission.

The counsel for the Commissioner of Police submitted that the proceedings before the Magistrates Court and the Liquor Commission were separate and distinct with different standards of proof and different rules as to the admissibility of evidence. Furthermore, the disciplinary proceedings were aimed at the public interest in promoting proper standards in the liquor industry so as to ensure the safety, health and welfare of patrons.

Disciplinary proceedings under section 95 of the Act were civil proceedings in which the civil onus applies and even if the factual questions were identical the difference in the onus of proof prevented the issues being the same. The dismissal of the criminal charges arising out of the same facts as the complaint does not prohibit the Commission from hearing and determining the complaint.

The Commission considered that a case for the granting of its strike out application had not been made. The Commission noted that the plain meaning of the Act, in particular section 95, did not prevent it from having jurisdiction to hear the complaint.

The Commission noted there were clear differences between the jurisdictions of the Magistrates Court (criminal) and the Commission (disciplinary), and proceedings in one did not necessarily prevent proceedings in the other. Questions of onus of proof and admissibility of evidence were different in each of the jurisdictions. The Commission considered that the principles of double jeopardy were not applicable to this matter.

On 17 October 2011, the Commission determined that the strike out application be refused. This determination is the subject of an appeal before the Supreme Court of Western Australia.

FORECASTS OF THE COMMISSION'S WORKLOAD FOR 2012/13

It is expected that the workload of the Liquor Commission for 2012/13 will continue to increase, particularly in view of the rise in the number of disciplinary matters brought by the Commissioner of Police. Indications are that the Commission is adequately resourced to carry out its functions efficiently for the time being.

PROPOSALS FOR IMPROVING THE OPERATION OF THE COMMISSION

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

OTHER LEGAL AND GOVERNMENT POLICY REQUIREMENTS

ADVERTISING

Section 175ZE of the *Electoral Act 1907* requires public agencies to report details of expenditure to organisation providing services in relation to advertising, market research, polling, direct mail and media advertising. The Commission did not incur expenditure of this nature in 2011/12.

OTHER GOVERNMENT POLICY REQUIREMENTS

The Commission meets its requirements through arrangements with the Department of Racing, Gaming and Liquor. The Department's Annual Report contains information on how the Department meets the following requirements:

- Disability Access and Inclusion Plan Outcomes.
- Compliance with Public Sector Standards and Ethical Codes.
- Recordkeeping Plans.
- Substantive Equality.
- Occupational Safety, Health and Injury Management.