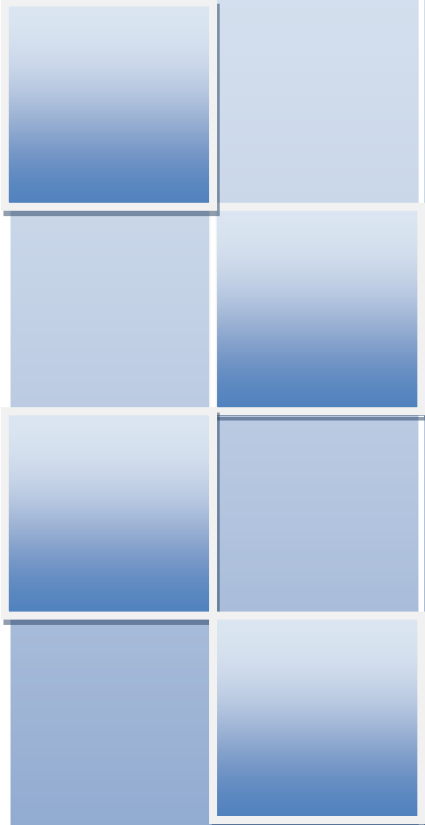




# Liquor Commission of Western Australia 2012/13 Annual Report



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This publication can be made available in alternative formats such as compact disc, audiotape or Braille.

People who have a hearing or speech impairment may call the National Relay Service on 133 677 and quote telephone number (08) 9425 1888.

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## STATEMENT OF COMPLIANCE

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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 2013.

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

19 September 2013

## OVERVIEW OF THE COMMISSION

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### 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 2013.

During the year in review, 55 new applications were lodged with the Liquor Commission and 12 applications were carried over from 2011/2012. As at 30 June 2013, the Commission had heard 40 applications, 13 applications were withdrawn and 14 applications were carried over to 2013/2014.

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. Further, the Commission has confirmed that mere conjecture, supposition and assumptions are not adequate 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 wide range of conditions on some licences to deal with anti-social behaviour, such as restricting trading hours, imposing lock-out conditions and restricting the sale and supply of liquor.

I wish to take this opportunity to thank Commission members and staff for their invaluable contribution to the efficient operation of the Commission.



Jim Freemantle  
CHAIRPERSON

## OPERATIONAL STRUCTURE

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### ENABLING LEGISLATION

The Liquor 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, 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 2013, 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 of Liquor Licensing, 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 to the Director of Liquor Licensing on questions of law that have been reviewed, or
- 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 21**

The Commission has the power to award costs in all proceedings before it. That power can be exercised if, in the opinion of the Commission, the proceedings are frivolous or vexatious.

### **SECTION 24**

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

### **SECTION 25**

Application for review of the decision of the Director of Liquor Licensing 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 must 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 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 of Liquor Licensing 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 2013, the Liquor Commission consisted of eight 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 Chairperson of Good Samaritan Industries and is Deputy Chairman of Racing and Wagering WA, and Chairperson 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 Chairperson of the Swan River Trust and formerly also 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 Law 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 of that organisation between 2009 and 2011.

**Mr Edward Watling - Member**

Mr Watling is a founding partner and Executive Director of the firm Tourist 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 former State Solicitor's Office lawyer where she held the position of Senior Assistant State Solicitor. Ms Cogan was employed with the State Solicitor's Office in the period 1993 to 2005. Ms Cogan had worked for various private and public legal organisations within Australia and overseas prior to her employment with the State Solicitor's Office.

**Dr Eric Isaachsen - Member**

Dr Isaachsen has worked for more than 25 years in general practice covering a broad range of professional interests. Dr Isaachsen 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 Law degree. After completing articulated clerkship 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. Mr Shackleton is currently a committee member of the Magistrates Court Liaison Committee.

**Ms Belinda Lonsdale - Member**

Ms Lonsdale graduated from the University of Western Australia with a Bachelor of Law 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 practicing 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.

**SUMMARY OF APPLICATIONS FOR 2012/13**

The tables on pages 13 to 15 provide details of the number, nature and outcome of applications heard and determined before the Commission as at 30 June 2013.

Full determinations are available from the Liquor Commission's website at [www.liquorcommission.wa.gov.au](http://www.liquorcommission.wa.gov.au)

**OUTSTANDING MATTERS AS AT 30 JUNE 2013**

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

- Woolworths Ltd/Woolworths Supermarket Margaret River
- Liquorland (Australia) Pty Ltd t/a Liquorland Margaret River
- Northbridge Enterprises Pty Ltd t/a The Deen Hotel
- Woolworths Ltd Mundaring
- Liquorland (Australia) Pty Ltd Mundaring
- Commissioner of Police and Jacqueline Oates (Prohibition Order Application)

There were three matters that have been determined, but the reasons are yet to be published:

- Woolworths Ltd/Dan Murphy's South Fremantle
- Wrestpoint Nominees Pty Ltd and Forrest Road Liquor Pty Ltd t/a Farson's For Liquor
- 140 Williams Perth Pty Ltd t/a The Aviary

There were four matters adjourned:

- Commissioner of Police v Club Red Cee
- City of Rockingham v Zelda's Nightclub
- Ms Mary-Anne Kenworthy t/a Langtrees Boutique Hotel
- Commissioner of Police v Narembeen Hotel

## SIGNIFICANT APPEALS BEFORE THE COMMISSION

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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.

### **TOCOAN PTY LTD (LC25/2012)**

*Complaint for disciplinary action pursuant to section 95 of the Liquor Control Act 1988 in relation to premises known as Zelda’s Nightclub*

On 23 March 2012 the Commissioner of Police lodged a section 95 complaint with the Commission against Tocoan Pty Ltd, the licensee of Zelda’s Nightclub, alleging that the continuation of the licence was not in the public interest and the safety, health or welfare of patrons was endangered by an act or the neglect of the licensee.

The premises consisted of two levels, downstairs known as Zelda’s, an adult entertainment club, and upstairs known as Vibe, a nightclub. Both operated under the one licence. Mr Kevin Mann, a Director of the licensee, and Ms Cassia Overton are the approved managers of the premises.

On 17 January 2011, the Director of Liquor Licensing imposed additional conditions on the licence relating to security, issue of pass outs and improved CCTV within the premises and on 24 January 2012, he imposed further conditions on the licence requiring the licensee to refuse entry to any person displaying patches or clothing of any other means identifying them as members of an Outlaw Motorcycle Gang (OMCG).

On 3 May 2012, the Director of Liquor Licensing suspended the licence of Tocoan Pty Ltd in respect of Zelda’s Nightclub pursuant to section 91(1) of the Act, pending the determination of this complaint by the Commission. On 16 May 2012, a review application of the suspension order issued by him was heard and dismissed by the Commission.

The substantive section 95 complaint was heard by the Commission on 7 June 2012.

Counsel for the Police provided details of violent incidents in and around the licensed premises. The first incident occurred on 4 December 2011, when several members of the Rebels OMCG assaulted a patron who suffered facial injuries from the assault. Crowd controllers escorted the injured patron from the premises but made no attempt to remove the offenders or seek assistance from the Police.

The second incident occurred late in the evening of 4 December 2011. In that incident, a member of the Rebels OMCG assaulted another patron. That patron was carried, apparently unconscious, from the premises by the crowd controllers who subsequently stated to police that the patron was drunk and had fallen over and hit his head. Ms Cassia Overton, the approved manager, stated to the police that she had not seen

anything as she was on another floor; however CCTV footage reveals Ms Overton watching crowd controllers taking the patron down the stairs. No attempt was made by either crowd controllers or Ms Overton to remove the offender from the premises or seek police assistance.

The third incident occurred on 17 December 2011, when a large brawl occurred in the Vibe area of the premises between seven members or associates of Rebels OMCG and three patrons, as a result of which serious injuries were sustained by the patrons. The attackers were permitted to drag the victims outside and continue the assault and were then allowed to re enter the premises. During the course of the assault, crowd controllers did not intervene and in fact held back those who were going to the victims' aid.

Counsel for the licensee submitted that the Police had inappropriately relied heavily on the evidence concerning the licensee permitting Rebels OMCG members entry to the premises, thereby neglecting to properly manage patrons (notably Rebels OMCG members and associates) and failing to call police and paramedics when patrons had been subjected to violence. On the contrary, the CCTV footage showed that crowd controllers engaged appropriately in difficult circumstances giving priority to evacuating injured patrons.

It was submitted that prior to the imposition of the clothing condition on 24 January 2012, there was no lawful basis to refuse entry to Rebels OMCG members. In any event there had been no attendance of Rebels OMCG members since the Director of Liquor Licensing had imposed the clothing condition.

The essence of the police complaint that by admitting Rebels OMCG related persons, the licensee demonstrated a wilful disregard for the safety and well being of the majority of patrons, was misplaced as in the first instance, it is the responsibility of the approved manager and crowd controllers to deal with the problem situations on the premises. There was no evidence that, the licensee had wilfully failed to properly conduct the business under the licence.

The Commission rejected this contention on the basis that ultimately the licensee is to be held responsible for all acts and omissions on the licensed premises.

The Commission was of the view that licensee of any licensed premises has absolute discretion to refuse entry to their premises, and therefore rejected the submission that the licensee had no grounds or power to deny entry to the Rebels OMCG members until the Director of Liquor Licensing imposed the dress conditions on 24 January 2012.

The Commission was convinced that the safety and welfare of patrons resorting to the premises had been endangered because of the act and neglect of the approved manager, the crowd control staff and the licensee. Further, the Commission accepted that the general area in which the premises are located was problematic with high levels of antisocial behaviour, littering and graffiti.

The Commission accepted that licensees cannot always prevent some violent incidents occurring at their premises. However, where there was 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 and was satisfied that the licensee did little more than the bare minimum to address security and behavioural issues in and around the venue.

Given the numerous complaints lodged before the Commission, regarding serious concern for safety, health or welfare of patrons, the Commission found that the continuation of the licence was not in public interest. However, rather than cancelling the licence, the Commission determined to impose a range of conditions on the licence to improve the operation of the licensed premises and to ensure the safety and welfare of patrons.

Therefore, on 13 July 2012, the Commission issued its determination to impose the following conditions on Zelda's Nightclub's licence:

- restricting the hours of operation and imposing a 60 minute lock out condition so that the premises would not be trading at the time most of the problems at, in and around the premises regularly occurred;
- prior to the commencement of trading at the premises, the licensee is required to undertake and pass the Course in Management of Licensed Premises and lodge the certificate of training with the Director of Liquor Licensing;
- prior to the commencement of trading at the premises, the licensee is to submit for the approval of the Director of Liquor Licensing, a revised Harm Minimisation Policy, including a House Management Plan and a Code of Conduct;
- all approved managers and security personnel must be trained in the responsible service of alcohol;
- stricter security requirements to be implemented, including an increased number of security personnel, the installation of CCTV systems, the operation of Scantek systems at the entry of the premises and improved lighting on the exterior of the premises;
- restrictions on the sale and supply of alcohol to discourage the rapid intake of alcohol by patrons;
- prohibiting the style of entertainment provided to assist in offering more sober and safer entertainment to patrons;
- the imposition of dress standards. This includes refusing entry to any person wearing any clothing including accoutrements, jewellery, visible tattoos, branding or

any other items that indicates membership or association with an Outlaw Motorcycle Gang;

- the licence to remain suspended until the imposed licence conditions were met by the licensee to the satisfaction of the Director of Liquor Licensing.

### **TOCOAN PTY LTD (LC7/2013)**

*Application for costs pursuant to section 21(4) and (5) of the Liquor Control Act 1988, and rule 11(1) of the Liquor Commission Rules 2007*

On 5 July 2012, Tocoan Pty Ltd (Tocoan) lodged an application with the Commission seeking an order for costs against the City of Rockingham (the Council). The application related to the following matters that were previously determined by the Commission:

- a section 95 complaint filed on 1 October 2010 (refer to *City of Rockingham v Tocoan Pty Ltd [LC20/2012]*);
- a section 117 complaint filed on 1 October 2010 (refer to *City of Rockingham v Tocoan Pty Ltd [LC22/2012]*);
- three interlocutory applications filed on 7 February 2012, 20 February 2012 and 23 February 2012; and
- an appeal pursuant to section 28 of the Act to not administer the interlocutory applications filed on 29 February 2012.

Tocoan submitted that the sections 95 and 117 complaints lodged by the Council were brought vexatiously. Counsel for the Council alleged that there were proper grounds for disciplinary action against Tocoan.

In reviewing the section 95 complaint (LC20/2012), the Commission determined that while the evidence in respect to certain grounds of complaint was lacking, it did not consider that the majority of the grounds were untenable or groundless. The Commission was satisfied that the section 95 complaint was not brought vexatiously and consequently, the application for costs in respect to the section 95 proceeding was refused.

The section 117 complaint (LC22/2012) was heard by the Commission on 29 February 2012. As with the section 95 matter, the Commission dismissed this complaint on the basis that there was insufficient evidence supporting the complaint. In reviewing the complaint, however, the Commission determined there was nothing to suggest the complaint was without any merit and consequently, the application for costs in respect to the section 117 complaint was refused.



In regards to the three interlocutory applications lodged in February 2012, a directions hearing was held on 5 July 2011. At the conclusion of the hearing, various orders were made, including an order that no further evidence would be accepted and that any further submission were to be lodged with the Commission 14 days prior to the hearing (refer to LC26/2011).

On 29 December 2011, the Commission varied the order with the consent of the parties to admit a short DVD into evidence. However, it was ordered that no further evidence would be accepted and that any further submission were to be lodged with the Commission 14 days prior to the hearing (refer to LC60/2011).

Despite the specific orders made by the Commission in July and December 2011 and over 15 months after the filing of the sections 95 and 117 complaints, the council lodged applications on three separate occasions in February 2012 to submit further evidence.

In reviewing the three interlocutory applications filed in February 2012, and having regard to the orders specifying that no further evidence would be taken in respect to both complaints and the nature of the material that was sought to be adduced, the Commission determined the applications were doomed to fail. The Commission found that these applications were vexatious in the sense that there was no merit to the applications and they were unarguable.

In reviewing the grounds of appeal of the Commission's decision to not grant the three interlocutory applications, the Commission considered that each of the 12 grounds of appeal were unarguable, lacking in merit and vexatious.

The Commission accepted that Tocoan was put to unnecessary expense as a result of the filing of the three interlocutory applications in February 2012 and the section 28 appeal and as such, granted the application for costs in respect to the applications and appeal.

On 27 February 2013, the Commission issued the following orders:

- the application for costs in respect to the section 95 complaint was refused;
- the application for costs in respect to the section 117 complaint was refused;
- the application for costs in respect to the applications filed by the council on 7, 20 and 23 February 2012 was allowed; and
- the application for costs in respect to the appeal filed on 28 February 2012 and heard on 29 February 2012 was allowed.

**WOOLWORTHS LIMITED (LC12/2013)**

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

On 19 December 2011, an application was lodged with the Director of Liquor Licensing by Woolworths Limited for the conditional grant of a liquor store licence for premises to trade as Dan Murphy's Joondalup, in the Joondalup Gate Commercial Centre.

On various dates between 19 January 2012 and 7 February 2012, objections to the application were lodged by various entities and individuals which were determined to be not heard as the grounds for objection had not been made out.

On 1 February 2012, a notice of intervention was lodged by the Commissioner of Police. On 17 July 2012, the Director of Liquor Licensing referred the application to the Commission pursuant to section 24 of the Act.

A hearing before the Commission took place on 19 November 2012.

Counsel for the applicant submitted that the proposed Dan Murphy's liquor store would be a "destination" liquor store drawing customers from a wide area rather than a "convenience" liquor store catering for the needs of a local community. The proposed liquor store would carry a wide range of stock including fine wines and deliver highly competitive, often significantly discounted prices, with the business being operated to very high management standards.

The applicant's Public Interest Assessment (PIA) included a report on results of a consumer survey, witness statements and a petition signed by 1675 customers in support of the application. Further it was submitted, that of the 12 existing packaged liquor outlets none were providing a comparable range of products and services. The proposed Dan Murphy's store would therefore provide a new amenity to the locality.

Counsel for the police submitted that police did not support the application as there were sufficient liquor outlets including Dan Murphy's outlet in Currambine in the vicinity of the proposed premises to satisfy the requirements of the public and, if the application was granted, it would likely negatively impact on the amenity of the locality as even a small percentage change in availability and access to alcohol through liquor stores was likely to have an adverse impact on alcohol-related harm in the local community.

Police submitted crime statistics showing existing alcohol-related harm occurring within the area of the proposed premises. The statistics showed there were 290 reported crimes in Edgewater between January 2011 and December 2011. Significantly, the statistics identified 25 police attendances within a 300 metre radius of the proposed premises during this time. Police requested that harm minimisation conditions be imposed on the licence if the application was granted.

The Commission accepted that Dan Murphy's liquor stores were well managed and had adequate, well documented and entrenched harm minimisation policies which to a large extent mirrored the conditions suggested by the Commissioner of Police.

Further, the Commission acknowledged that the report on the consumer survey results and the petition provided an indication of the public's level of support for the establishment of an outlet. However, the Commission has historically treated petitions with caution as they rarely give an indication of the number of people with a contrary view.

Ultimately, the Commission concluded that it was not in the public interest to approve a Dan Murphy's liquor store in this location as it was not consistent with the proper development of the liquor industry, given there were other large outlets providing a diverse range of products, through Dan Murphy's Currambine and Woolworths Joondalup, as well as a number of other convenience liquor store outlets in the locality.

On 28 March 2013, the Commission issued its determination to refuse the application.

### **CELLSAN PTY LTD (LC22/2013)**

*Application pursuant to section 25 of the Act for a review of the decision of the Delegate of the Director of Liquor Licensing.*

On 20 July 2012, Cellsan Pty Ltd, trading as Sandringham Cellars, lodged an application pursuant to section 4(6) of the Act for approval to store packaged liquor at an additional storage facility.

By letter dated 2 January 2013, the Director of Liquor Licensing refused the application. The stated reason for the refusal of the application was that,

*"based on the advice of the State Solicitor, the Director of Liquor Licensing has affirmed his position in that "on or from" is to be read as a composite phrase, separate and distinct from "on and from" so that sections 4(5) and 4(6) of the Act do not apply to liquor store licences. Accordingly, there can be no application for off-site approval for a liquor store licence."*

On 1 February 2013, the applicant lodged an application to review the decision of the Director of Liquor Licensing pursuant to section 25 of the Act. The Director of Liquor Licensing intervened in the proceedings before the Commission pursuant to section 69(11) of the Act.

The Commission heard the matter on 17 April 2013.

Counsel for the applicant filed written submissions in respect to the relevant provisions of the Act, which are summarised below:

- There was no reason, or provision of the Act, which suggested sections 4(5) and 4(6) did not apply to liquor store licences, therefore the applicant was entitled to make an application for off-site storage under section 66 read in conjunction with sections 4(5) and 4(6) of the Act.
- In excluding the right of a liquor store licensee to use an off-site storage facility while permitting other classes of liquor licences to do so, showed the Director of Liquor Licensing had failed to discharge his statutory duty and apply the policy directive which was contrary to the provisions of the Act.
- The Director of Liquor Licensing did not make a proper inquiry on the application by failing to determine the application on its merits as required under section 33 of the Act, and failed to place the proper interpretation on the plain meaning of the words in sections 4(5) and 4(6) of the Act.

In support of the application, the applicant provided the Commission with the Explanatory Memorandum attached to the *Liquor Licensing Amendment Bill 1997* which repealed the previous section 4(6) and inserted a redrafted section 4(6). The explanatory memorandum stated that the previous provision had been repealed and redrafted, *“to enable the Director to approve the storage and delivery of liquor from premises other than a licensed premises for any licence category.”*

The submissions of the Director of Liquor Licensing are summarised below:

- Section 4(5) of the Act applies, *“where the sale of liquor is authorised under a licence on or from the licensed premises and not otherwise”*. A liquor store licence authorised the sale of liquor “on and from” the licensed premises. Therefore, section 4(5) of the Act did not apply.
- A construction of section 4(5) of the Act that employed the disjunctive meaning of “or” rendered the words “and not otherwise” useless. This strongly indicated that the words “on or from” must be read as a single, composite phrase.
- The phrase “on and from” was used consistently throughout the Act to denote liquor store licences and hotel licences (in respect of packaged liquor), whereas “on or from” was used consistently to denote producer’s licences and wholesaler’s licences;
- The legislative history of the licence provisions showed that the use of the phrases “on and from” and “on or from” discussed in the previous point was the result of deliberation by Parliament.
- A construction of section 4(5) of the Act that allowed an off-site application to be made in respect of any kind of licence would undermine a discernible purpose of the Act, which was to regulate the sale, supply, and consumption of liquor using a system of discrete and distinct kinds of licences.

- The construction of section 4(5) of the Act that allowed an off-site application to be made in respect of any kind of licence would give rise to “absurd consequences”.

For the purposes of this determination, the Commission considered the Explanatory Memorandum to the *Liquor Licensing Amendment Bill 1997*. That Memorandum made it clear that section 4(6) of the Act applies to any licence category.

At the hearing of the application, the submission was predicated on the basis of the use of the words “licence on or from” in section 4(5) of the Act. It was submitted that this phrase was peculiar to producers and wholesalers licences. That is, only licences issued pursuant to sections 55(1) and 58(1) of the Act grant an authority to sell liquor “on or from” the licensed premises.

Having regard to the clear intention of Parliament, the Commission did not accept that sections 4(5) and 4(6) only applied to producers and wholesalers licenses. The Commission determined that if the legislature had intended such a position, then it would have been clearly enunciated at the time that the section were enacted.

On 24 June 2013, the Commission issued a direction to refer the matter back to the Director of Liquor Licensing for reconsideration on its merits.

## **SIGNIFICANT ISSUES IMPACTING THE LIQUOR COMMISSION**

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### **TRENDS OR SPECIAL ISSUES THAT HAVE EMERGED**

#### **Quantity versus Quality of Evidence Lodged with the Commission**

The Commission has previously observed that the number and nature of applications before the Commission have become increasingly complex due to applicants retaining the services of legal counsels. This development is to some extent contrary to the intentions of the 2007 liquor licensing reforms which were designed to replace the Liquor Licensing Court with a more flexible system with as little formality and technicality as practicable.

As a result, Commission members are required to review detailed submissions from the counsel of applicants and interveners, requiring them to spend a considerable amount of time in preparing to hear matters.

In this regard, the Commission has noted that counsels are increasingly inclined to submit excessive amounts of supporting material as evidence in proceedings before the Commission, much of which is repetitious and often of little apparent relevance to the hearing.

### **FORECASTS OF THE COMMISSION'S WORKLOAD FOR 2013/14**

It is expected that the workload of the Liquor Commission for 2013/14 will continue to increase. 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**

The Commission will continue improve and streamline the process of handling applications for review, however there are no proposals to amend the operations of the Commission.

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## OTHER LEGAL AND GOVERNMENT POLICY REQUIREMENTS

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### 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 2012/13.

### 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.