

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Spinifex Trading Pty Ltd (Licensee of the Halls Creek Store
(represented by Mr Gavin Crocket of GD Crocket & Co)
- Other Parties:** Director of Liquor Licensing, Intervener
(represented by Mr Craig Bydder and Ms Lana White of State Solicitor's Office)
- Executive Director of Public Health, Intervener
(represented by Mr Craig Bydder and Ms Lana White of State Solicitor's Office)
- Commissioner of Police
(represented by Mr Kevin Seniviratne of WA Police)
- Observers:** Mr Peter Tierney and Mr Garth Rider
(on behalf of Halls Creek Store)
- Mr Peter Fraser of Ilberys Lawyers Pty Ltd
(On behalf of Kireen Nominees Pty Ltd, Licensee of the Kimberley Hotel)
- Premises:** Halls Creek Store, Halls Creek
(Licence No. 6030016329)
- Date of Hearing:** 28 July 2009
- Date of determination:** 3 August 2009
- Date reasons published:** 31 August 2009
- Commission:** Mr J Freemantle (Chairperson)
Ms H Cogan
Mr G Joyce
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of Decision No. A193245 of the Director of Liquor Licensing dated 11 May 2009 relating to conditions imposed under

section 64 on the Halls Creek Store and Kimberley Hotel.

Legislation: *Liquor Control Act 1988*
Interpretation Act 1984

Determination: The decision of the Director of Liquor Licensing dated 11 May 2009 is affirmed and the Application is refused.

Authorities referred to by the Applicant:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *The Executive Director Public Health v Meers* [2007] WASCA 187
- *Friends of Hinchinbrook Society Inc. V Minister for Environment* [1997] 147 ALR 608
- *Jack v Smail* [1905] 2 CLR 684
- *Licensing Court for District of Northam v Warner* [1915] 19 CLR 521
- *Hwang v Celeghin* [1987] WAR 67
- *O'Sullivan v Farrer* [1989] 168 CLR at 210
- *Executive Director of Public Health v Lilly Creek International Pty Ltd and Ors* [2000] WASCA 258
- *In the Matter of an Application by Fiver Pty Ltd for the removal of a cabaret licence: Ex parte The Cabaret Owners Association of Western Australia Incorporated*; unreported, Full Court of Supreme Court of WA; Library No. 21549; 21 December 1989, Malcolm CJ at 45
- *Liquorland (Australia) Pty Ltd v Hawkins and Another* [1996] 16 WAR, Murray J at Page 335 paragraph (b)

Authorities referred to by the Interveners:

Director of Liquor Licensing

- *Executive Director of Public Health v Lily Creek International Pty Ltd* [2000] 22 WAR 510 at [515] – [517]; [2000] WASCA 258 at [23] – [30]

- *Hancock v Executive Director of Public Health* [2008] WASC 224 at [45], [53] – [54]
- *O'Sullivan v Farrer* [1989] 168 CLR at 210 at 216 to 217
- *Re Gull Liquor, Gingers' Road House, Upper Swan* [1999] 20 SR (WA) 321 at 340
- *Spinifex Trading Pty Ltd* (LC 09/2009) at [38] – [48]

Executive Director of Public Health

- *Executive Director of Public Health v Lily Creek International Pty Ltd* [2000] 22 WAR 510 at [515] – [517]; [2000] WASCA 258 at [19] – [30]
- *Hancock v Executive Director of Public Health* [2008] WASC 224 at [45], [53] – [54]
- *O'Sullivan v Farrer* (1989) 168 CLR at 210 at 216 to 217
- *Re Gull Liquor, Gingers' Road House, Upper Swan* [1999] 20 SR (WA) 321 at [340]
- *Spinifex Trading Pty Ltd* (LC 09/2009) at [38] – [48]

Commissioner of Police

- *Hancock v Executive Director of Public Health* [2008] WASC 224 per Martin CJ at Para [39], [42], [43];[45] – [50]; [50] – [52], [53] [54]
- *Edwards v Justice Giudice* [1999] FCA 1836 (23 December 1999) per Finkelstein J at Para 76, 77, per Mason J at Para 34
- *Pearce & Geddes, Statutory Interpretation in Australia, 6th Edition* (2006)
- *The King v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* [1920] Ltd

Authorities referred to in the Commission's Decision

- *Hancock v Executive Director of Public Health* [2008] WASC 224 at [53] – [54]
- *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] 74 CLR 492
- *O'Sullivan v Farrer* [1989] 168 CLR 210 at [216] – [217]
- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* [1992] 6 WAR 380 at [400]
- *Re Gull Liquor, Gingers' Road House, Upper Swan* [1999] 20 SR (WA) 321 at [340]
- *Executive Director of Public Health v Lily Creek International Pty Ltd* [2000] WASCA 258 at [19] – [22]

1. Background and Chronology

The Section 64 Notice:

- 1.1 On 13 January 2009, the Director of Liquor Licensing ("the Director") on his own motion issued a Notice under Section 64 of the *Liquor Control Act 1988* ("the Act") which was served on the Licensees of Halls Creek Store and Kimberley Hotel in which the Director stated that he was satisfied that " *the level of alcohol related harm occurring in the Halls Creek area and in the Kimberley region is such that it would be in the public interest to impose the following conditions on both premises in Halls Creek where the licensee is:*

A. Authorised to sell and supply packaged liquor

- i. The sale of packaged liquor, exceeding a concentration of ethanol in liquor of 2.7 percent at 20°C, is prohibited to any person, other than a lodger (as defined in section 3 of the Act).*
- ii. The sale of packaged liquor in individual containers of more than 1 litre is prohibited except where the sale is to a liquor merchant or with written permission of the Director of Licensing.*
- iii. The sale of beer in individual glass containers of more than 400 millilitres is prohibited.*

B. Authorised to sell liquor ancillary to a meal

- i. The unconsumed portion of any liquor sold for consumption ancillary to a meal exceeding a concentration of ethanol in liquor of 2.7 per cent at 20°C must not be removed from the licensed premises."*
- 1.2 The conditions referred to in the Section 64 Notice also applied to the Licensee of the Kimberley Hotel.
- 1.3 On 13 January 2009 the Section 64 Notice was posted to the Applicant which states that it received the Section 64 Notice on or about 23 January 2009.
- 1.4 In its terms the Section 64 Notice offered an opportunity for the Applicant (as Licensee) to show cause why the conditions should not be imposed and requested that any submissions in that regard be lodged with the Director by no later than close of business on 20 February 2009.

- 1.5 On 20 February 2009, and following correspondence between the Applicant and the Director, the Applicant lodged submissions in relation to the Section 64 Notice.
- 1.6 On 28 April 2009, and following correspondence between the Applicant and the Director, the Applicant lodged further submissions in relation to the Section 64 Notice.
- 1.7 Submissions in response to the Section 64 Notice were also lodged by the Intervener and the Commissioner of Police.

2. Director's Decision Relating to Section 64 Notice ("the Director's Decision")

On 11 May 2009, the Director determined inter alia that as from and including 18 May 2009 the Premises (Licence no. 6030016329) would be subject to the following section 64 conditions:

- 2.1 *"The sale of packaged liquor, exceeding a concentration of ethanol and liquor of 2.7 percent at 20°C, is prohibited to any person, other than a liquor merchant.*

The licensee is to lodge returns of sales data every four months in accordance with the approved form."

3. The First Review Application

- 3.1 On 25 May 2009, the Applicant lodged an Application for Review of the Director's Decision.
- 3.2 On 27 May 2009, the Director lodged a Notice of Intervention pursuant to Section 69(11) of the Act for the purpose of making submissions.
- 3.3 On 17 June 2009, the Executive Director of Public Health by letter from the State Solicitor's Office to the Applicant's Solicitor copied to the Executive Officer Liquor Commission, Peter Slater of WA Police, Peter Fraser of Ilberys Lawyers Pty Ltd and Peter Tierney confirmed he had pursuant to section 69 (8a) of the Act intervened on 20 February 2009 by way of written Notice for the purpose of being recognized as a party to proceedings and therefore under section 25(6)(a) of the Act had standing to be heard on the First Review Application. The Executive Director of Public Health is accordingly recognized as an Intervener.
- 3.4 On 26 June 2009, the Commissioner of Police lodged a Notice of Intervention pursuant to section 3(6) and section 69(6)(c)(ii) of the Act

for the purpose of making representations. The Commission's decision in relation to the Notice of Intervention lodged by the Commissioner of Police is contained in paragraph 7.11 below and accordingly the Commissioner of Police is not recognized as an Intervener.

4. The Application to lift the Imposition of the Conditions Imposed by the Director's Decision as an Interim Measure ("the Second Review Application")

- 4.1 On 25 May 2009, the Applicant lodged an Application to lift the imposition of the conditions imposed on the licence of the premises by the Director's Decision, as an interim measure pending the final determination of the Application to Review the Director's Decision.
- 4.2 On 15 June 2009, the Second Review Application was heard before Mr Eddie Watling (Deputy Chairperson of the Commission).
- 4.3 On 18 June 2009, Mr Watling determined that the Second Review Application was refused and on 1 July 2009 published reasons for his determination.
- 4.4 On 9 July 2009, the Applicant lodged an Application for Review of the decision of the Deputy Chairperson made on 18 June 2009.

**5. Request for the Issue of a Writ of Subpoena to:
(1) Give Evidence (ad testificandum)
(2) Produce Documents or Objects (duces tecum)-(" the Third Review Application")**

- 5.1 On 14 July 2009, the Applicant wrote to the Executive Officer of the Liquor Commission enclosing a Writ of Subpoena which the Applicant required the Commission to issue.
- 5.2 On 17 July 2009, the Chairperson of the Liquor Commission wrote to the Applicant's solicitors and denied the request for the issue of a Writ of Subpoena.
- 5.3 On 23 July 2009, the Applicant lodged a Notice of Review in relation to the decision of the Liquor Commission denying the issue of a Writ of Subpoena.

6. The Review Hearing

- 6.1 By consent of all parties and the Liquor Commission, the Second Review Application and the Third Review Application were not argued at this time and the hearing was confined to argument in relation only to the First Review Application.
- 6.2 The First Review Application was treated as a re-hearing of the matter on the basis of all the evidence and other material before the Director when making his decision.
- 6.3 The following written submissions (all thorough and useful) were considered by the Liquor Commission on the re-hearing of the matter:
 - 6.3.1 Applicant's submissions in support of the First Review Application
 - 6.3.2 Director of Liquor Licensing's submissions in relation to the First Review Application.
 - 6.3.3 Executive Director of Public Health's submissions in relation to the First Review Application.
 - 6.3.4 Submissions for the Commissioner of Police in relation to the First Review Application. (Disregarded- see paragraph 7.11 of the Reasons for Decision)
 - 6.3.5 Supplementary Submissions for the Commissioner of Police in relation to the First Review Application. (Disregarded- see paragraph 7.11 of the Reasons for Decision)
 - 6.3.6 Director of Liquor Licensing's responsive submissions to the Applicant's submissions in relation to the First Review Application.
 - 6.3.7 Applicant's responsive replying submissions in relation to the Interveners submissions made in relation to the First Review Application.
- 6.4 By consent of all parties and the Liquor Commission and on the basis that these were a further clarification of material before the Director in making his decision the following submissions were considered by the Liquor Commission in determining the First Review Application:
 - 6.4.1 Further submissions by the Commissioner of Police (30 July 2009).
 - 6.4.2 Applicant's replying submissions to the further submissions by the Commissioner of Police (31 July 2009).

- 6.5 The Applicant and each of the Interveners and the Commissioner of Police made oral submissions at the Review Hearing.

7. Reasons for Decision

- 7.1 This is an application to the Liquor Commission pursuant to section 25 of the Act for a review of decision No. A193245 made by the Director pursuant to section 64 of the Act on 11 May 2009. Under section 25(4) of the Act, the Commission may affirm, vary or quash the decision the subject of the review.
- 7.2 In conducting its review of this decision, the Commission is not constrained by the need to find error on the Director's part but is to undertake a full review of the materials before the Director by way of rehearing and make its own determination on the merits of those materials: *Hancock v Executive Director of Public Health* [2008] WASC 224 Martin CJ at [53]-[54].
- 7.3 Pursuant to section 64(1) of the Act, the Licensing Authority, in this case the Commission has discretion to impose conditions that vary or cancel any condition previously imposed by the Licensing Authority. Pursuant to section 64(3)(cc) of the Act, the Commission may exercise this discretion to impose conditions which it considers to be in the public interest in order to minimize harm or ill-health caused to people due to the use of liquor.
- 7.4 In *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] 74 CLR 492 Dixon CJ said [505]: "... *there is no positive indication of the considerations upon which it is intended that the grant or refusal of consent should depend. The discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have in view.*" Accordingly in carrying out this review and exercising its discretion the Commission has looked at the Act as a whole and in particular the objects of the Act (section 5), the public interest test (section 38) and the short and long titles. In addition the Commission has examined the Second Reading Speech for the relevant Bill, the policy statements of the Licensing Authority on public interest and the relevant common law cases.
- 7.5 In conducting the review the Commission may have regard only to the material that was before the Director when he made his decision (section 25(2c)). In the preparatory submissions there were some questions raised about the meaning of the verb "may". The

Commission's view is that "may" must be read in the proper construction of the Act and in the context of the surrounding words. "May" must be read in conjunction with "only" and imply the meaning of a mandatory requirement on the Commission to consider only material that was before the Director when he made his decision.

- 7.6 Moreover Parliament's intention is clear from the Second Reading Speech for the relevant Bill and the Explanatory Memorandum: *"Appeals to the Commission must be heard by three members and will be determined on the same evidence presented to the Director of Liquor Licensing."* Hansard, Volume 409, page 6342, 20 September 2009
- 7.7 The preparatory submissions of the Applicant raised the issue of what material was before the Director when he made his decision. There was a series of communications between the Applicant, the Chairperson of the Commission and the Director which resulted in the Director providing additional public information to the Applicant as a matter of courtesy. The Director maintained that all of the material had already been provided to the Applicant prior to his decision, except reference material that was publically available to the Applicant. The Director signed a file note dated 4 June 2009 that confirmed all of the information that was before the Director when he made his decision was in the index that was subsequently provided to the Applicant by the Executive Officer of the Commission by a letter dated 26 June 2009. An index (which provided electronic references) of the 32 public reports referred to in the section 64 Notice was provided to the Applicant on 16 July 2009. It is the Commission's view that this process has cured the Applicant's complaint that he had not seen all the material before the Director and has given him sufficient time to consider this material before the Commission's rehearing.
- 7.8 In respect of whether the Director's actions were a denial of procedural fairness to the Applicant, the Commission is mindful of the guidance provided by Martin CJ in Hancock where at [42] he said:

"Procedural fairness requires a decision maker contemplating making a finding adverse to a party whose interests are likely to be affected by the decision, (to) put the party on notice of that prospect on terms which provide the party with a reasonable opportunity to make submissions in response." There are two issues involved. Firstly the Director did not initially make all of the reference material in the section 64 Notice available to the Applicant on the basis that it was publicly and readily available and secondly the Director did not conduct a hearing but rather exercised his right under section 13(5)(a) of the Act to determine the matter on the papers. However the Director provided a thorough process under the section 64 Notice including ample time for the

Applicant to respond. The record shows that the section 64 Notice was issued on 13 January 2009 whereas the Applicant received the documents on or about 23 January 2009. The Applicant was given time until 20 February 2009 to respond. The Director issued a media release on 15 January 2009. In the Commission's view, whilst it considers there has been no material breach of procedural fairness, the decision would have such a substantial impact on the livelihood of individuals that it might have been advisable to conduct a hearing. The media release would have been better left until after the 20th February 2009. In any event, given that the Application before the Commission is by way of a re-hearing it rectifies any issue of procedural fairness. At [45] Martin CJ said: *"Because the Commission is unable to receive any material other than that which was before the Director at the time of making the decision, if the Director had denied procedural fairness, it will not ordinarily be possible for that denial to be cured in proceedings before the Commission- at least where the cure requires the provision of an opportunity to present evidentiary material"*. In the subject case, and given that this is a rehearing by the Commission, the Applicant has been provided with all the information before the Director at the time he made his decision and given sufficient time to respond.

- 7.9 Pursuant to section 16(1) of the Act, the Commission in any proceedings under the Act, is enjoined to act without undue formality and pursuant to section 6(7)(b) of the Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms. Section 16(11) of the Act provides that the Commission shall ensure that each party to a proceeding before it is given a reasonable opportunity to present its case and, in particular, to inspect any documents to which the Commission proposes to have regard in making a determination in the proceedings and to make submissions in regard to those documents. The Commission has, at all times, sought to comply with this provision and is aware that the Applicant is in a precarious financial position as a result of the Director's decision. There is an obligation on the Commission to progress this matter as expeditiously as possible (section 16(7)(c)).
- 7.10 During the rehearing the Commission was advised by the Applicant that since 1992 there have been 10 previous enquiries into the consumption of liquor that have involved Halls Creek and which have resulted in the imposition of liquor restrictions. In the Applicant's submission to the Director dated 20 February 2009 (pages 8-12), there is a useful summary of these 10 events which demonstrate a constant and consistent concern by the licensing authority about harm caused to the Halls Creek community through excessive use of alcohol. The Licensing Authority has become increasingly restrictive over a 17 year period and it should not come as a surprise to anyone, given the current

harm and ill-health in Halls Creek through alcohol use, that the Director has taken the current step.

7.11 The Applicant's responsive submission dated 27 July 2009 challenged the jurisdiction of the Commissioner of Police to intervene pursuant to section 69(6) of the Act. Submissions were heard on this point and the Commission reserved its decision and allowed the Commissioner of Police to remain at the hearing and make submissions. On consideration of the matter and reading the Act as a whole it is the Commission's decision that there is sufficient doubt as to whether the Commissioner of Police has the power to intervene in a section 64 matter and as a consequence his submissions at the rehearing have been disregarded. Section 69(6) is found in Division 7- "Applications" of the Act. This Division specifically deals with the application for the grant or removal, of a licence or an alteration of licensed premises (section 69(1)). It would appear the Commissioner of Police has no jurisdiction to intervene in section 64 matters found in Division 6- "Conditions, generally".

7.12 Section 38(4) of the Act provides an inclusive definition of the public interest. The Director of Liquor Licensing submitted that section 64(3) (cc) provides a compelling public interest argument to severely restrict the sale of packaged liquor to low alcohol content because of the obvious harm and ill-health being caused to the community in Halls Creek. The public interest test was introduced by amendments to the Act in 2006 and whilst this area of the law has not been thoroughly litigated in this jurisdiction, it is considered at least the following obtains:

In the Second Reading Speech the Minister of the day makes it clear that when tensions arise between the objects, alcohol related harm is a foremost consideration:

"A key reform is the creation of a public interest test for new licences to replace the current needs test. Under the public interest test, all applicants will be required to demonstrate that the application is in the public interest, and the licensing authority will be required to consider the application based on positive and negative social, economic and health impacts on the community" (Hansard, volume 409, page 6342, 20 September, 2006).

In *O'Sullivan v Farrer* [1989] 168 CLR 210 at 216 to 217 the High Court said:

"Indeed, the expression "in the public interest", classically imports a discretionary value judgement to be made by reference to undefined

factual matters,..." (Then it refers to the passage from the judgement of Dixon CJ quoted at paragraph 7.4 above).

Malcolm CJ said in *Jericho Nominees Pty Limited v Dileum Pty Ltd* [1992] 6 WAR 380 at [400]:

"The public interest... involves satisfying the reasonable requirements of the public to have liquor outlets consistent with good order and propriety in relation to the distribution and consumption of liquor..."

The Department of Racing, Gaming & Liquor has produced a document called "Public Interest Assessment- A guide to satisfying the Public Interest Test" (last amended 22 January 2008) and this document states as follows:

"The purpose of the Public Interest Test is based on the principle that all licensed premises operate within the interests of the affected individual community. The Butterworth's Australian Legal Dictionary defines the term "public interest" as:

"An interest in common to the public at large or a significant portion of the public and which may, or may not involve the personal or proprietary rights of individual people".

The public interest provisions enable the licensing authority to consider a broad range of issues specific to each licence or permit application.

Flexibility exists within the test in order to consider the impact that each individual application will have on the relevant surrounding community.

There is no general template that exists for, or that can be applied to, all applications because each community is different and has individual characteristics.

To satisfy the public interest test, an applicant will need to consider and find solutions to any negative impact that may be suffered by sections of the community through the operation of their licensed premises.

In this regard it is important to note that because each community is different, aspects of the public interest as outlined in the Director of Liquor Licensing's Public Interest Assessment Policy may not be applicable to individual applications."

Accordingly the Commission has looked at the Act itself, the Policy of the Department and considered all of the material before the Director and carried out a balancing exercise weighing up the various competing public interest factors and then decided where the balance lies.

7.13 The objects of the Act are crucial to the public interest assessment and are as follows:

“5 Objects of the Act

- (1) *The primary objects of this Act are-*
- (a) to regulate the sale, supply and consumption of liquor; and*
 - (b) to minimize harm or ill-health caused to people, or any group of people, due to the use of liquor; and*
 - (c) to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*
- (2) *In carrying out its functions under the Act, the licensing authority shall have regard to the primary objects of this Act and also to the following secondary objects –*
- (a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and*
 - (d) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and*
 - (e) to provide a flexible system, with as little formality as may be practicable for the administration of this Act”.*

The Commission is enjoined (section 5(3)), where there is inconsistency between the primary and secondary objects, to prefer the former.

7.14 The harm contemplated by the Act is not confined to the consumers of alcohol and extends to harm caused to people other than the consumers of liquor: *Re Gull Liquor, Gingers’ Roadhouse Upper Swan* [1999] 20 SR (WA) 321 at [340].

This is a crucial principle because the point has been made throughout this rehearing that the people most adversely affected are the children in utero, children, elderly people, women and the extended family of the excessive drinker.

7.15 When there is a conflict between the object of minimizing the harm or ill-health caused to people, due to the use of liquor and the other objects set out in section 5, the conflict is to be resolved by way of a weighing and balancing exercise. The outcome of the exercise will depend upon the degree of importance that is attributed to each of the relevant factors in the particular circumstances, bearing in mind the primacy which is to be accorded to the primary objects. *Re Executive Director of Public Health v Lily Creek International Pty Ltd* [2000] WASCA 258 at [19]-[22].

7.16 The material before the Commission in respect of the public interest can be summarized as follows:

7.17 Public interest matters which support the Directors decision:

7.17.1 There are a series of Reports referred to in the section 64 Notice and summarized in the Director's Decision that support the notion that excessive consumption of alcohol is damaging to the health of people. Whilst these Reports have been challenged by the Applicant for their generality and the propositions within them, there can be no doubt that these Reports play a significant role in the debate about alcohol harm to communities and represent existing research into this issue. On 16 July 2009, the Executive Officer of the Commission provided the Applicant with an index of 32 Reports that the Director considered when he made his decision. All of these Reports are available publicly.

7.17.2 There are a range of Reports provided by the Drug and Alcohol Office, Health Department and the National Drug Research Institute, Curtin University of Technology, Perth that are listed in Attachment B of the subject section 64 Notice that contain a large body of research into the impact of alcohol on West Australians. These Reports have provided useful guidance to the Commission.

7.17.3 The Coroner's Report into 22 deaths in the Kimberley Region, February 2008, (which should be read in its entirety) examines alcohol abuse in the Kimberley and concludes:

"evidence at the inquest revealed that alcohol abuse is a massive problem in the Kimberley and there is an urgent need to address this issue in a practical and positive way." (Pages 106-107)

By recommendation 20 the Coroner recommended limiting access to full strength takeaway alcohol over large geographic

areas of the Kimberley including Halls Creek. This is a very significant and practical Report and provides an expose into the harm caused by alcohol abuse.

- 7.17.4 The Report of the Epidemiology Branch of the Department of Health and the Drug and Alcohol Office on the *"Impact of alcohol on the population of Western Australia"* stated:

"Rates of all alcohol-related hospitalizations in total for male, female, aboriginal and non-aboriginal populations in the Kimberley Region were significantly higher than corresponding State rates."

- 7.17.5 A letter dated 2 January 2009 from Dr. Chantal Ferguson Delegate of the Executive Director of Public Health to the Director of Liquor Licensing, provides support for the increase of the restrictions and supplies a range of statistics describing the incidence of alcohol abuse in Halls Creek. The writer advised:

"The abuse of alcohol and the harm caused by alcohol to the community of Halls Creek has been apparent for well over a decade and no combination of restrictions and community action have as yet been sufficiently sustained to make a lasting improvement. However the initial success of the 1992 restrictions show that improvement is possible, if the restrictions are enforced and the community is supported in its attempts to deal with the social circumstances that predispose its members to alcohol abuse. It is recommended that more substantial restrictions be implemented and efforts simultaneously be made to address the factors that have contributed to the lack of sustainable benefit from previous restrictions." (Page1)

Dr. Ferguson says:

"The most recent published hospitalization data is for the four year period 2002-2006. The rates of alcohol-related hospitalizations for males and females in Halls Creek for the period of 2002-2006 were 7.54 times higher than the corresponding State rate."

"The prevalence of drunkenness in Halls Creek is demonstrated by the utilization of the Halls Creek sobering up Centre. The primary purpose of such centres is to provide a safe, care oriented environment in which persons found intoxicated in public may sober up, therefore diverting from Police Lock-ups, so reducing the likelihood of them causing further harm to

themselves or others in the community. The centre is contracted to operate Monday to Friday.

For the years 2000-2007 there have been 12,411 admissions to the shelter” (Drug and Alcohol Office 2008). (Page5)

- 7.17.6 In a statement dated 27 September 2008, Dr. Anthea Henwood, the Acting Senior Medical Officer of the Halls Creek Hospital provided a series of points describing the effects of alcohol abuse in Halls Creek. She says:

“In my experience and in discussion with community members, colleagues and patients, alcohol misuse is a significant problem in our community that results in loss of social inhibitions resulting in a culture that accepts:

- a. intra family violence as normal;*
- b. children having sex at 12 as normal;*
- c. pregnant 14 year olds drinking alcohol as normal;*
- d. spending all your sit-down money on grog and gambling instead of food for your kids as normal;*
- e. threatening the elderly until they give you their pension as normal.” (Point 4)*

Dr Henwood says:

“Alcohol-related presentations to the emergency department by patients at Halls Creek Hospital most commonly include head and facial injuries from bashings, fractured limbs from being hit by steel bars and chains etc, lacerations from being hit with sharp objects, stabbings, abdominal pain and vomiting, seizures, attempted suicides, sexual assaults and situational crisis.” (Point 10)

Dr. Henwood concludes:

“In my professional capacity I see on a daily basis the harm that alcohol is causing to this community. The harms are not insignificant – non consenting sex, being regularly drunk and pregnant, buying alcohol instead of feeding kids, suffocating children after rolling on top of them whilst drunk, old people

having their money and food stolen. Something needs to be done to stop the harm that is occurring". (Point19)

7.17.7 There were a range of letters of request to the Director for restrictions prior to the issue of the section 64 Notice including the following:

- **Jungarni-Jutiya Alcohol Action Council Aboriginal Corporation of Halls Creek:**

"It is our opinion that many people in Halls Creek have lost their way in life and for a number of reasons now live a life of existence with consumption of large amounts of alcohol on a daily basis. This has had a disastrous effect on communal and family lifestyles and unless some intervention happens will continue out to the next generations. Already we see juveniles in a high state of intoxication as a regular occurrence.

The excessive consumption of alcohol is causing massive harm to the health and safety of both adults and children in Halls Creek and surrounding communities. Examples are:

- *Over 25% of babies are being born with Foetal Alcohol Syndrome.*
- *There have been 11 suicides in the past 12 months, all related to alcohol abuse.*
- *Homicides (3 in past 12 months) and widespread physical violence, including sexual abuse of women and children due to alcohol consumption.*
- *Widespread ill health attributed to prolonged excess alcohol consumption."*

- **Principal, Halls Creek District High School**

"Alcohol abuse causes harm or ill health to our students in the following ways:

Students with foetal alcohol spectrum disorder: students at our school are afflicted with this disorder, which causes behavioural and learning difficulties. This disorder is directly caused by alcohol abuse.

Students who do not attend school regularly: Students whose attendance is under 60% are categorised by the Department of Education as being a severe risk. Whilst we have decreased the number of students in the severe risk category from 47% in 2007 to 33% in 2008, that number is still unacceptably high and school abuse is a significant factor in it, because parents who abuse alcohol do not ensure that their children get good night's sleep and are woken up and prepared for school.

Students who experience trauma in their home life: The abuse, violence and extreme dysfunction which exists in the home lives of students whose family abuse alcohol impacts not only upon their attendance at school, but also affects their ability to pay attention and their behaviour at school, all of which adversely affects their ability to learn."

- **Wirrimanu Aboriginal Corporation**

"Balgo Community wrote to the Department in February supporting the call for a ban on a takeaway alcohol except low strength beer in Halls Creek.

We are writing to inform you that we still support any action that the Department takes to decrease the availability of alcohol in Halls Creek.

As we stated in our previous letter we are greatly worried about the impact of alcohol from Halls Creek in our community. We worry about the people drinking there. They cannot be safe when there is so much grog and children in particular the ones who suffer the most from too much alcohol being available.

Our community has recently come out of administration and we are working hard to rebuild our community. Our main priority is to make Balgo a safe and happy place to live for our families. We think that if there was less take away alcohol in Halls Creek many of our young people in particular would come home to Balgo.

Please support the Aboriginal people in our region asking for your help."

- 7.17.8 In a report dated 5 December, Senior Sergeant Tim Norrish, Officer in Charge of the Halls Creek Police Station states the following:

"People in Halls Creek have accepted that there are no packaged alcohol sales on Sundays and they have learnt to factor this into their purchasing/drinking practices and either go without on the Sunday or buy additional amounts to cover that period. However, very few purchase additional alcohol to enable them to drink on Sundays.

Sundays have become effectively a "Grog Free Day" with the community, heavy drinkers and agencies "taking a breather" and utilizing the day accordingly. From the police perspective, Sundays are a day when minimum staff is required; few tasks require attendance and few offences are committed." (Page 22)

In conclusion Senior Sergeant Tim Norrish said:

"Policing strategies and current Section 64 Restrictions have shown some positive changes in Halls Creek. However more needs and can be done in part, through the addition of further restrictions and increasing the control abilities by police. The placing of additional conditions on the Licenses of our Licensed Premises can assist our goals." (Page 27)

- 7.17.9 A letter dated 24 December 2008 from Terry Murphy, Director General, Department for Child Protection, to the Director of Liquor Licensing stated:

"Excessive alcohol consumption is somewhat normalized in Halls Creek. This has devastating effects on children, families and the community more generally.

From an early age, many children are witnessing parents and extended family members drinking to excess. Because of this, the children have less social and educational opportunities as their parent's do not actively encourage school attendance, community participation or social interaction outside of the family.

Most incidents involving adults consuming alcohol and resulting in violence that is reported to the Department by the WA Police occur in the evening, late into the night or in the very early hours of the morning. These reports almost always involve children being present in the house, often asleep or under the supervision of another family member who is not so intoxicated."

- 7.17.10 On 25 February 2009, the Director sought advice from the Police and the Health Department on the effectiveness of banning the sale of full strength beer at Fitzroy Crossing since 2 October, 2007 and he received reports from both these agencies.

Detective Inspector S. George said in a covering letter dated 20 March, 2009:

"The imposition of liquor restrictions in Fitzroy Crossing has been successful in achieving significant reductions in violence in the community as is evident by the data provided. In comparison, levels of violence and offending behaviour in Halls Creek have remained significantly higher than experienced in Fitzroy Crossing."

In the Report itself (the Beros Report) a range of statistics were provided including the following:

"In the six months between October 2006 and March 2007 (pre-restrictions), Fitzroy Crossing Police were called to attend 350 domestic/disturbance/assault incidents. In the same period post restrictions (October 2007 to March 2008) this number fell to 153. This is a 56% reduction in incidents.

In the six months between April, 2007 and September, 2007 (pre-restrictions), Fitzroy Crossing Police were called to attend 254 domestic/disturbance/assault incidents. In the same period post restrictions (April 2008 to September 2008) this number fell to 222. This is a 13% reduction in incidents.

In the five months between October 2008 and February 2009 Fitzroy Crossing Police attended 160 domestic/disturbance/assault incidents, compared with 307 for the same calendar period prior to liquor restrictions. That shows a 48% reduction in incidents.

In the 17 months since restrictions were imposed at Fitzroy Crossing, there has been a 41% reduction in calls for police to attend domestic/disturbance/assault incidents. The above graph shows that in all but one month since restrictions (July 2008) there has been a reduction in the number of incidents. This trend is continuing into 2009."

7.17.11 On 20 March 2009, the Delegate of the Executive Director Public Health, Dr. Andrew Robertson stated:

"This submission demonstrates the significant positive impact that the Fitzroy Crossing liquor restrictions continue to have. The ongoing improvements 12 months into the restrictions, particularly on acute harm that is reflected in Emergency Department presentations, is encouraging. Such improvements are needed greatly in Halls Creek, as can be seen by

corresponding Emergency Department presentations for the town....

In comparing July 2006 to September 2007 (pre-restriction) with October 2007 through to December 2008 (post restriction):

	Fitzroy Crossing residents	Halls Creek residents
Alcohol-related ED presentations (MDC 20 & 21)	There was a 38.4% reduction in the average number of alcohol-related ED presentations in Fitzroy Crossing residents.	There was an 11.6% increase in the average number of alcohol-related ED presentations in Halls Creek residents.
Pre	48.47 average presentations a month	74.3 average presentations a month.
Post	29.87 average presentations a month	82.93 average presentations a month.
All ED presentations	There was a 40.5% reduction in the average number of all ED presentations in Fitzroy Crossing residents.	There was an 8.5% increase in the average number of all ED presentations in Halls Creek residents.
Pre	386.87 average presentations a month.	636.27 average presentations a month.
Post	230.33 average presentations a month.	690.4 average presentations per month.
ED Presentations for Alcohol/Drug Use (MDC Code 20)	There was a 26.4% reduction in the average number of Alcohol/Drug Use MDC recorded ED presentations in Fitzroy Crossing residents.	There was a 17.9% increase in the average number of Alcohol/Drug Use MDC recorded ED presentations in Halls Creek residents.
Pre	9.33 average presentations a month.	4.47 average presentations a month.
Post	6.87 average presentations a month.	5.27 average presentations a month.
Injury/Poison/Toxic Drug Effect (MDC Code 21)	There was a 41.2% reduction in the average number of Injury/Poison/Toxic Drug Effect MDC recorded ED presentations in Fitzroy Crossing residents.	There was an 11.2% increase in the average number of Injury/Poison/Toxic Drug Effect MDC recorded ED presentations in Halls Creek residents.
Pre	39.13 average presentations a month.	69.87 average presentations a month.
Post	23 average presentations a month.	77.67 average presentations a month.

Data source: WA Country Health Services, March 2009.

7.18 Public Interest matters which support the Applicant's position:

- 7.18.1 The Commission was told that the Director's decision would cause extreme financial stress to the Applicant. The Applicant's Accountant (Abbott's Pty Ltd) provided a letter dated 19 February 2009 which stated " On the basis of the information supplied by you regarding current turnover levels of low strength product and using current margins and expected expenditure

reductions you could expect a substantial trading loss in excess of \$400,000 P/A should these restrictions eventuate." The Commission accepts that the Director's decision places the Applicant in a difficult financial position.

- 7.18.2 There were 2 public meetings held in Halls Creek, one on 11 December 2008 and the second on 12 February 2009 with an estimated attendance of 400 to 500 people. The Applicant submitted that *"the vast majority of the community exercised its right to voice disapproval at any proposed additional restrictive conditions being added to the two licensees' liquor licences in the town"* (Applicant's submission dated 20 February 2009) .

As a result of those meetings there were a large number of letters submitted (approximately 73) to the Director expressing concern about the possibility of the proposed ban. The letters express a variety of concerns about the proposed restrictions including the following:

- i. Restrictions do not have broad community support.
- ii. The restrictions will only shift the problem to another area.
- iii. Young people will turn to drugs.
- iv. Takes away the rights of the individual particularly to have a drink at home.
- v. Penalizing the entire community for the sake of a few.
- vi. People can not enjoy a drink in their own home.
- vii. Business in the town will be badly affected.
- viii. The hotel will become badly overcrowded.
- ix. Tourists will not come to the town.
- x. Prohibition won't stop the problem drinkers drinking.
- xi. Disincentive for workers to come to the town.
- xii. The problem drinkers will go to Broome and cause trouble.

- xiii. Road accidents will increase because of the extra travel and people drink driving.

In addition to these letters, approximately 490 people signed a petition asking the Director not to implement the proposed decision. All of these issues raised are valid points and need careful consideration. Given that the population of Halls Creek Town is approximately 1487 persons and the population of the Shire of Halls Creek is approximately 3659 this represents a significant protest against the Director's decision.

Whilst the Commission was very conscious of the weight of public opinion thus expressed, it placed a far greater weight on the submissions whether by a letter or report from people who could reasonably be regarded as experts and were qualified in their position and experienced in dealing with consequences of alcohol consumption in Halls Creek as set out in 7.17.

- 7.18.3 The Applicant submitted to the Commission that there was a significant tourist industry in Halls Creek-

"It is estimated there are 229,500 "visitor nights" which equates to approximately 620 visitors per day. The average stay in the Shire of Halls Creek is between 1-3 days" (page 20, Applicant's submission dated 20 February 2009) The Applicant argued that the restrictions would adversely affect tourism. Whilst this may be so, the Commission does not accept that it is necessarily so.

- 7.18.4 The Halls Creek Chamber of Commerce wrote to the Director on 22 April 2009, expressing its concern about the proposed restrictions. It said the social fabric is being *"torn to shreds"* by inappropriate Government decisions. There will be adverse social consequences and this "band aid" fix will not be successful.

- 7.18.5 The Applicant submitted that the existing restrictions have had a positive effect in decreasing the harm and ill-health to the Halls Creek community and provided statistics to support that view and stated that as a consequence further restrictions are unnecessary.

Notwithstanding, the material before the Director indicates a high and ongoing level of harm.

7.19 Other Public Interest Considerations

- 7.19.1 Professor Fiona Stanley AC, in delivering the 2008 Annual Hawke Lecture said:

*"Hence while I strongly support the women of Fitzroy Crossing in their proposals to cut alcohol sales to reduce this domestic violence and all the problems associated with intoxication, this needs to be done with the understanding that by itself it will not be the sustainable solution. **There is no single panacea.** For every complex problem there is a single solution and it's usually wrong. The other recommendations of the various reports mentioned earlier will also need to be implemented. As well, to remove alcohol without providing alcohol withdrawal programs, rehabilitation and support is almost inhumane."*

- 7.19.2 The Commission accepts Professor Stanley as highly credible and an expert in this matter.
- 7.19.3 Professor Stanley supports the prohibition of alcohol sales to reduce harm but she points out firstly that this is not a panacea and secondly that back up services are required particularly dealing with withdrawal and rehabilitation.
- 7.19.4 The Commission puts significant weight on Professor Stanley's view supporting cutting alcohol sales qualified by the possibility of dysfunctional consequences of alcohol withdrawal if not fully addressed.

8. Summation

- 8.1 In assessing where the public interest lies the Commission is required to carry out a balancing exercise particularly in respect of the competing primary objects of the Act and the weighting to be given to section 5(1)(c) of the Act (the liquor and tourism industries) matters and section 5(1)(b) of the Act (minimise harm and ill-health) matters.

The Commission gave a significantly higher weighting to section 5(1)(b) of the Act for the following reasons:

- i. The Act is the *Liquor **Control** Act 1988* (emphasis added).
- ii. *The long title of the Act, namely "An Act to regulate the sale, supply and consumption of liquor....to minimize harm or ill-health caused to people, or any group of people due to the use of liquor."*

- iii. Liquor is recognized as a harmful substance and its use needs to be controlled. It is clear from the material before the Director that there is widespread harm and ill-health currently occurring in Halls Creek as a consequence of excessive alcohol consumption.
- iv. A reading of the Act as a whole indicates that the intention of the legislature is to control the use of alcohol particularly where harm and ill-health are in evidence.
- v. As referred to in 7.12, the Second Reading Speech makes it clear that when tensions arise between the objects, alcohol related harm is a foremost consideration "*As a matter of policy, a comprehensive test will apply to applications for licences that have a greater risk of contributing to alcohol related harm*". Hansard, Volume 409, page 6342, 20th September 2006. Whilst this specifically concerns licence applications it does give a guide to the legislature's intention concerning harm and ill-health.
- vi. The Department's Public Interest Assessment Policy states that questions to be asked about the public interest of 'harm or ill-health' are:

"Are there any 'at risk' groups (as identified by the West Australian Drug and Alcohol Strategy 2005-2009) and sub-communities situated within the locality in which the proposed premises are located? The Applicant should identify any potential 'at risk' groups who may travel through or resort to the locality of the proposed premises and who may be affected by its operation, regardless of whether those persons reside within the boundaries of the town or suburb in which the proposed premises are located.

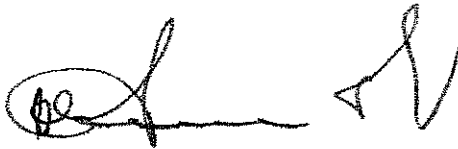
For example, 'at risk' groups or sub-communities might include:

- *Children and young people;*
- *Aboriginal people and communities;*
- *People from regional, rural and remote communities;*
- *Families;*
- *Migrant groups from non-English speaking countries;*
- *People in low socio-economic areas*
- *Mining communities or communities with a high number of itinerant workers; and/or*

- *Communities that experience high tourist numbers.*"

Most of these at risk groups are heavily represented in Halls Creek.

- 8.3 All of the public interest matters, on both sides of the argument, identified in paragraph 7.16, 7.17 and 7.18 above are important. The Director's decision will have extensive consequences for Halls Creek and the people who live in it. Against that is the serious harm and ill-health currently occurring through excessive alcohol use not only to the drinker but to, children in utero, children, elderly people, women and the extended family. When the public interest of chronic harm and ill-health is at stake it must attract a higher weighting than the other considerations. There has been a range of more moderate restrictions applied over a 17 year period with minimal success.
- 8.4 The Commission thus affirms the Director's Decision and the Application is refused.



MR JIM FREEMANTLE
CHAIRPERSON