

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

Applicant: Carnegies Realty Pty Ltd
(represented by Mr Tim Monaghan of Dwyer Durack Lawyers)

First Intervener: Director of Liquor Licensing

Second Intervener: Commissioner of Police

Third Intervener: Executive Director of Public Health
(all interveners represented by Mr Brendyn Nelson of State Solicitor's Office)

Commission: Mr Eddie Watling (Deputy Chairperson)
Mr Michael Egan (Member)
Ms Belinda Lonsdale (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the delegate of the Director of Liquor Licensing to refuse an extended trading permit for the "National Hotel" in Fremantle.

Premises: National Hotel
98 High Street
Fremantle

Date of Hearing: 29 September 2015

Date of Determination: 18 December 2015

Determination: The application is partially approved to provide extended trading hours on Wednesday, Thursday, Friday and Saturday from 12 midnight to 1:00 a.m. the following day.

Authorities referred to in determination:

- *Carnegies v Director of Liquor Licensing* [2015] WASCA 208
- *Liquorland (Australia) Pty Ltd v Executive Director Public Health* [2013] WASC 51
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241.
- *Executive Director, Public Health v Lily Creek International Pty Ltd* (2000) 22 WAR 510.

Background

- 1 On 3 July 2013, Carnegies Realty Pty Ltd (“the applicant”) lodged an application for an Extended Trading Permit (“ETP”) to enable the National Hotel, Fremantle to trade:

Wednesday and Thursday	12 midnight	to	1:00 a.m. the following day;
Friday and Saturday	12 midnight	to	2 a.m. the following day; and
Sunday	10 p.m.	to	12 midnight,

a total of eight (8) additional trading hours per week.
- 2 A Public Interest Assessment (“PIA”), and numerous annexures, were submitted in support of the application.
- 3 On 30 August 2013, an Intervention Notice was lodged both by the Commissioner of Police (“the Police”) and the Executive Director of Public Health (“EDPH”).
- 4 Submissions and responsive submissions were subsequently lodged by all parties and pursuant to sections 13 and 16 of the *Liquor Control Act 1988* (“the Act”), the application was determined by the Delegate of the Director of Liquor Licensing (“the Director”) on the papers.
- 5 On 28 March 2014, the Director refused the application for reasons stated in decision number A224220.
- 6 On 15 April 2014, pursuant to section 25 of the Act, the applicant lodged an application for review of the decision of the Director.
- 7 Intervention Notices were subsequently lodged by the Police, EDPH and the Director, (collectively referred to as the “Interveners”) with all parties providing submissions and responsive submissions in the period leading to a hearing of the Liquor Commission of Western Australia (“the Commission”).
- 8 The matter was heard before the Commission on 23 July 2014, and the Commission’s determination refusing the application was published on 17 October 2014.
- 9 On 6 November 2014, pursuant to section 28 of the Act, the applicant lodged an appeal with the Supreme Court of Western Australia (“the Supreme Court”) on the grounds:
 - 1 *The Commission erred in law by failing to apply itself to the real question to be decided, or by misunderstanding the nature of the opinion it was to form.*

- 2 *The Commission erred in law:*
- (a) *by taking into account an observation that was purported to have been made but was not in fact made [in an earlier decision of the liquor licensing court]; and*
 - (b) *by erroneously applying what was said in a passage in a decision in the Supreme Court of Victoria,*

in reaching the conclusion that ‘the public interest is best served in the circumstances of this application by refusing it’.
- 3 *The Commission erred in law by failing to give sufficient reasons for concluding that the decision of the delegate of the Director of Liquor Licensing refusing the application for an extended trading permit should be affirmed.*
- 4 *The Commission erred in law by failing to take into account a relevant consideration, namely the secondary objective in section 5(2)(a) of the Liquor Control Act 1988 (WA).*
- 10 The appeal was heard before the Supreme Court on 5 May 2015, which delivered its finding on 11 June 2015:
- allowing the Appeal;
 - quashing the Decision of the Commission; and
 - referring the application back to the Commission for reconsideration.
- 11 Ground 1 (refer to paragraph 9 above) of the appeal was upheld with the Supreme Court accepting the applicant’s submission that the Commission was required to:
- 1. make findings that specifically identified the existing level of harm and ill-health in the relevant area (Fremantle) due to the use of liquor;
 - 2. make findings about the likely degree of harm to result from the grant of the application;
 - 3. assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - 4. weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether the appellant had satisfied the Commission that it was in the public interest to grant the application.

- 12 Grounds 2 and 4 (refer to paragraph 9 above) were upheld and ground 3 was dismissed.
- 13 Following the Supreme Court determination, submissions and responsive submissions were lodged by all parties and the matter proceeded to a re-hearing before the Commission on 29 September 2015.

The Hearing

- 14 The Commission confirmed that the proceedings were to be a re-hearing of the section 25 application for review and would involve a consideration of all aspects of the ETP application as well as those referred to specifically in the Supreme Court judgement in respect to harm and ill-health matters.

Submissions on behalf of the applicant

- 15 It was submitted that a licensed hotel has traded on the current site since the 1870's, with the current four storey 'Federation Free' style structure being developed in the 1890's and that following a catastrophic fire which effectively gutted the premises internally in 2007, faithful heritage restoration works, both internally and on the exterior, have returned this historic building to its former glory.
- 16 The only significant difference in layout from the hotel prior to the fire damage is the loss of the original billiard room on the ground floor to allow for much needed additional toilet facilities.
- 17 It was further submitted that the applicant has identified a significant section of the public who have a desire to socialise during the extended hours sought, as evidenced by 163 consumer surveys, 11 statements from patrons intending to frequent the venue during extended trading hours and one (1) statement of a Director of the licensee company provided with the PIA.
- 18 Considerable tourism data was submitted, including details of cruise ship visits scheduled for Fremantle emphasising the economic importance of this sector to the City of Fremantle.
- 19 In addition it was submitted that a variety of liquor, dining and entertainment services are available in the City of Fremantle, with the CBD being a popular tourism precinct,

that Fremantle is one of Perth's major entertainment and nightlife hubs and that by its very nature, Fremantle is a "destination" precinct.

- 20 The applicant also submits that granting of the applied for ETP will support the city's late night economy, assist in the proper development of the liquor industry and support the further development of tourism in the locality. Further, crime prevention and community safety in the evenings and early morning will also be improved on High Street near the premises.
- 21 It was submitted that the additional trading period applied for under an ETP only totals eight (8) hours per week and that the positive aspects of the application far outweigh any degree of alcohol related harm which may be caused by the grant of the application.
- 22 The applicant accepts that there is evidence capable of supporting a finding that there is a level of harm due to the general use of alcohol in the Fremantle area and that in the case of a number of specific harms, the levels are higher in Fremantle than the corresponding State average at the relevant times.
- 23 However, the applicant submits that harm evidence cannot be assessed in a vacuum and that the Commission is therefore required to consider not only the degree of existing alcohol related harm in Fremantle, but also the relevance of harm evidence to this specific application. In this respect it was submitted that:
 - (a) in the present case, the relevance of much of the harm evidence cited by the Interveners is diminished by its lack of specificity in the context of the circumstances of this particular application;
 - (b) all of the harm evidence cited is geographically relevant in that data relates to the Fremantle area; however, it is not sufficient for harm evidence to be merely relevant to the locality, it must be relevant to the application;
 - (c) in the present case, the harm evidence suffers from a range of problems in terms of relevance to the circumstances of this particular application:
 - the Computer Aided Despatch System (CADS) data does not indicate what proportion (if any) of the relevant police attendances involved incidents that were alcohol related;
 - none of the harm evidence cited gives any clue as to the profile of the persons suffering the relevant harms;

- almost all of the harm evidence fails to disclose whether it involved the consumption of alcohol on licensed premises rather than the consumption of packaged liquor in private homes or other unlicensed places;
- only some of the harm evidence suggests a correlation between existing harm in the locality and the times the applicant proposes to trade;
- only one form of harm evidence suggests a correlation between existing harm and the consumption of alcohol at licensed venues in Fremantle, namely, drink driving data, which shows that the majority (72%) of drink drivers over the relevant three (3) year period indicated that they had consumed their last drink at a licensed venue in Fremantle.

24 In *Carnegies v Director of Liquor Licensing [2015] WASCA 208* (“Carnegies decision”) the Supreme Court held [at paragraphs 42 to 43] that in making findings, the Commission was required to address the particular application both at a general and a specific level. In his decision Allanson J noted that:

“... the Commission made no findings regarding the nature of the services to be offered, the conditions under which the applicant would operate the premises, and the particular section of the public which the premises were designed to attract” (Carnegies decision at [26]).

25 It was submitted by the applicant that the Interveners in the present case make little reference to the general or specific aspects of the application and appear to invite the Commission to make findings of the likelihood of harm being caused without reference to the specifics of the application itself.

26 In submissions of the Director, reference is made to the ages of the applicant’s prospective patrons and that the likely profile of these patrons is in the “at risk” category in terms of alcohol related harm. The applicant submits that this is without basis as the applicant submitted evidence in the form of consumer surveys which shows that the age of respondents is spread over the age brackets from 20 to 50+, with the proportion in the 20’s and 30’s age brackets by no means overwhelming.

27 The particulars of the applicant’s proposal, including the nature of the proposed operation, the restrictive trading conditions and the section of the public catered to, all support a conclusion that the grant of the application would not be likely to cause an unacceptable increase in harm in the locality.

- 28 Any perception of risk of harm must be considered in the context of the range of restrictive trading conditions volunteered by the applicant and by any additional conditions considered appropriate by the Commission.
- 29 It was submitted that the following matters are relevant to assessing the likelihood of increased harm or ill-health as a consequence of the granting of this application:
- (a) the application is for an ETP (not for a permanent liquor licence) – section 64(g) of the Act;
 - (b) the permit may be cancelled at any time – section 60(8a) of the Act;
 - (c) the permit may only be granted for a fixed period (maximum of 5 years);
 - (d) the applicant is an experienced and responsible licensee;
 - (e) the premises have been recently restored and renovated to a high standard;
 - (f) the premises are located in an inner city entertainment precinct with few residential premises in the vicinity;
 - (g) the premises are subject to a hotel licence which includes accommodation rooms;
 - (h) the applicant's premises will cater to persons seeking to socialise during later hours seeking an alternative to youth focused venues such as nightclubs, will cover a broad range of ages including 'mature' aged persons and will be unlikely to include any 'at-risk' persons;
 - (i) the applicant intends to operate under a number of restrictive trading conditions, specifically:
 - a) lockout to apply 30 minutes prior to expiry of extended trading on each of the relevant days;
 - b) a late night food menu to be available during all extended trading hours;
 - c) function customers to be required to order food;
 - d) the applicant to maintain membership of Fremantle Accord;
 - e) no promotions, advertising or incentives which would encourage cheap or discounted drinks or that would encourage the rapid or excessive consumption of alcohol;
 - f) shots, laybacks, test tubes or any other shooter style drinks to be prohibited during extended trading hours;

- g) low and mid strength beers to be available;
- h) no liquor to be served with energy drinks during extended trading hours;
- i) outlaw motor cycle gang members to be refused entry (in the usual terms);
- j) no sale of packaged liquor during extended trading hours;
- k) CCTV to operate at all times;
- l) licensee to provide crowd control officers at a ratio of 2 for the first 100 patrons and 1 per 100 patrons thereafter from 8 p.m. on any night that the hotel trades during extended trading hours; and
- m) signage to be provided in all bar areas relating to relevant offence provisions under the Act.

30 It was submitted that the licence conditions suggested by the applicant are wide ranging and comprehensive and specifically address issues of relevant potential harm.

31 It was further submitted that, in any event, the positive aspects of the applicant's proposal outweigh any perceived risk of harm in terms of the balancing exercise required to determine the ultimate question of whether the grant would be in the public interest.

Submissions by the Director of Liquor Licensing (First Intervener)

32 It was submitted that the Director's decision to refuse the application was on the basis he could not be satisfied that it was in the public interest because:

- (a) there is a high level of alcohol related harm and ill health in Fremantle;
- (b) the grant of the application is likely to result in an increase in the level of alcohol related and ill-health in Fremantle; and
- (c) there is a strong public interest in minimising that harm, which outweighs other factors in favour of granting the application.

33 The evidence of harm relied upon, which was provided by the EDPH and the Police, included:

- (a) the rate of alcohol related hospitalisations for residents of Fremantle are significantly above the State rate;
- (b) the verified assault rate for Fremantle is dramatically higher than the State rate;

- (c) 47% of assaults in Fremantle between January 2010 and July 2013 were alcohol-related;
 - (d) there are a significant number of drink driving offences being committed in the suburb of Fremantle; and
 - (e) the vast majority of people who commit drink driving offences had been drinking at licensed premises prior to committing that offence.
- 34 The Police also provided evidence that:
- (a) 11.4% of all offences committed in Fremantle between March 2012 and February 2013, were alcohol related; and
 - (b) 42% of violent offences committed in Fremantle during the same period were alcohol related.
- 35 It was observed that the applicant's submissions place heavy reliance on the principles enunciated in the Carnegies decision yet the Carnegies decision was not that the refusal of the application was inherently wrong and that the application must be granted; rather the Supreme Court identified errors in the expression of the Commission's reasons, which demonstrate a potentially incorrect application of the law, particularly with relation to alcohol related harm and ill-health.
- 36 Whilst the Carnegies decision provides clear guidance as to the approach to be taken in assessing applications under the Act, with particular reference to the consideration of issues of harm and ill-health, the decision cannot be examined and applied in isolation. Principles from other relevant Supreme Court authorities, properly applied, remain apposite, particularly *Liquorland (Australia) Pty Ltd v Executive Director Public Health [2013] WASC 51*.
- 37 It was acknowledged that any assessment must be made on a case by case basis, and equally, such assessment should not ignore "any existing harm or ill-health" when considering the "overall level which is likely to result if a particular application is granted"; nor should the assessment proceed without regard to the "proved circumstances of the particular area".
- 38 Further, even if the harm evidence is characterised as "general" in nature, as described by the applicant, this does not mean it is irrelevant. It is unnecessary for there to be some "significant connection" or "nexus" between the evidence relating to harm and ill-health and the proposed premises before that evidence can be considered in the context of determining the likelihood of an increase in alcohol related harm.

- 39 In assessing the likelihood of increased harm or ill-health, the Commission should consider the grant of the permit in a particular location, with such consideration subsuming the known evidence about the past and proposed operation of the premises.
- 40 It was submitted that a likely increase does not have to be found to be “significant” to be characterised as unacceptable or intolerable. A small increase, in the context of a high baseline level of risk, is less likely to be tolerated, therefore any increase does not have to be characterised as “high” or “significant” to attract weight in the balancing exercise to be undertaken by the Commission.
- 41 The Commission is entitled to afford significant weight to the likely increase in alcohol related harm, even if such an increase has been assessed as “low” against a highline baseline risk.

Submissions by the Commissioner of Police (Second Intervener)

- 42 An Intervention Notice was lodged by the Police on the grounds that:
- “If the particular application was granted and/or conditions not imposed public disorder or disturbance would be likely to result, or as to any other matter relevant to the public interest – sections 69(6)(c)(ii) and (iv) of the Act.”
- 43 It was submitted that after reviewing the applicant’s PIA and application, the Police had concerns regarding the following;
- the failure of the applicant to meet the public interest test;
 - the existing alcohol related harm; and
 - the existing liquor outlets operating during the applicant’s proposed ETP.
- 44 It was submitted that the Director’s Policy on Public Interest Assessment requires the applicant to consider any groups or sub-communities within the locality, including those living in proximity to, travelling through or resorting to the locality.
- 45 In response to the PIA, in which the applicant made reference to thirty six (36) consumer surveys, the Police asserted that the number of surveys does not encapsulate a proportionate representation of the wider community, and therefore fails to reflect the proposed larger clientele in its entirety and that any local concerns or objections for the extended trading hours may have been constrained.

- 46 It was submitted that the proposed extended trading hours are unwarranted and will entice patrons to remain at the premises longer, exposing patrons to alcohol over a prolonged period which may result in them being more susceptible to over-consumption, thereby leading to higher instances of drunkenness and alcohol related harm.
- 47 It was further submitted that as the premises operating within standard trading hours will enable four hundred and fifteen (415) patrons (the patron capacity of the premises) to attend and consume large quantities of liquor without necessarily consuming food, trading until the early hours of the morning, in particular 2 a.m. on a Friday and Saturday, would only exacerbate drinking patterns and alcohol related problems.
- 48 In relation to assessing the risk of harm, it was submitted that the applicant cannot guarantee that “at-risk” groups will not be negatively affected or that no level of harm will emanate from the premises as a result of increased trading hours. Increased trading hours will primarily see the premises as a place for patrons, including “at risk” groups, to congregate and consume alcohol after midnight, having frequented other licensed premises in the locality.
- 49 The Police contend that the applicant also implies the premises will not have an adverse impact on the amenity; however, there have been adverse changes in alcohol related harm and offending, public disorder, patron behaviours and liquor consumption patterns in the locality since the premises last traded in 2007.
- 50 In addition it was submitted that the applicant cannot assume that extended trading hours will not cause offence and annoyance on the basis the applicant’s operating procedures will be implemented.
- 51 The Police submitted a range of statistics including the following:
- (a) between March 2012 and February 2013, two thousand five hundred and twenty (2,520) reported crimes were recorded in the suburb of Fremantle, of which three hundred and fourteen (314) were alcohol related - this is a significant increase compared to the same period March 2006 and February 2007 (i.e. when the premises last operated) when there were nine hundred and thirty three (933) reported crimes of which eighty seven (87) were alcohol related;
 - (b) the police Computer Aided Despatch (CAD) system has also recorded three thousand two hundred and sixty (3,260) relevant police attendances in the

suburb of Fremantle between March 2012 and February 2013, of which five hundred and twenty eight (528) were within a 250m radius of the premises and one hundred and three (103) of these attendances occurred within the periods of the proposed ETP.

- 52 It was submitted that in the suburb of Fremantle there are eighty nine (89) existing licensed premises, with one (1) hotel licence and three (3) tavern licences operating with an active ETP to 1 a.m. on Friday and Saturday.
- 53 In summary, it was submitted that there is nothing unique about the application or venue which warrants an increase in hours, and that the application does not support the objects of the Act insofar as the minimisation of harm to people due to the consumption of liquor, or the development of the liquor industry is concerned, rather, an increase in hours will likely be detrimental to both.
- 54 However, if the Commission is of the opinion that the application is in the public interest then the trading hours of the ETP should be consistent with those which applied to the premises prior to closure in 2007, i.e. until 1:00 a.m. on Friday and Saturday and 10 p.m. Sunday. A number of other conditions were also proposed.

Submissions by the Executive Director of Public Health (Third Intervener)

- 55 The EDPH made representations regarding the potential for the application to cause harm or ill-health to people, or any group of people due to the use of liquor, and the minimisation of that harm. The grounds of the EDPH intervention are premised on the following submissions:
- alcohol is a significant factor in presentations to the Fremantle Hospital Emergency Department, particularly late at night and on weekends;
 - police data show harm occurring during late night trading time in Fremantle, where the National Hotel is located,
 - alcohol related assault offences in Fremantle peak during the late night trading times being sought by the applicant;
 - the peak in harm occurring in Fremantle is consistent with research that demonstrates that late night trading can facilitate increased consumption and alcohol related harm, not only inside the venue, but once patrons leave; and

- this application would increase the number (415) of people that will be drinking alcohol at an identified problem time and area for alcohol related issues.

56 It was submitted that at the time of lodging the application (July 2013) there were six (6) licensed premises in the locality operating with an ETP, none of which had been granted to permit trading past 1:00 a.m.

57 It is acknowledged that the premises have not traded since 2007 and therefore more recent data for Fremantle cannot be attributed to the National Hotel specifically; however, it is submitted that harm in the locality is a relevant consideration in the weighing and balancing exercise regarding the environment that the venue will be operating within, and the potential for further harm if this application is granted for late night trading.

58 Information provided by the Co-Director at the Fremantle Hospitality Emergency Department states:

In terms of the data we do have, there was at least 556 patients during the financial year ended June 2013 with a primary diagnosis of alcohol intoxication, The presentations on Saturday and Sunday are similar and these two days are clearly busier than the rest of the week with 37% of the presentations occurring on those two days. The most common hour to present is between midnight and 1:00 a.m., with 46% of all presentations occurring between 8:00pm and 3:00 a.m.

59 It was submitted that consistent with Police data showing that alcohol offence rates are higher in the suburb of Fremantle when compared to the sub-district and the State, alcohol related violence is a significant contributor to hospitalisations in Fremantle.

60 It is also relevant to consider the impact that the grant of the application may have on the risk of alcohol related road trauma where statistics show that a significant number of those apprehended for drink-driving had their last drink at licensed premises. This suggests that some patrons chose to drive versus taking public transport when attending licensed premises in Fremantle.

61 Whilst it is acknowledged that the last train to depart Fremantle on Friday and Saturday nights is 2:46 a.m., the applicant has not addressed the issue of lack of public transport during the proposed ETP hours to trade until 1:00 a.m. on Wednesday and Thursday when the last train to depart Fremantle is at 12:01 a.m.

62 It was submitted that given extended trading hours are associated with increased consumption and there are limited public transport options available during the trading

hours proposed, the increased risk of drink-driving and associated harm, is a relevant concern related to this application.

63 In support of the contention that alcohol related harm in the locality of Fremantle is currently at concerning levels the EDPH highlighted the following:

- nearly 1 in every 2 assaults (47%) in the suburb of Fremantle was recorded as alcohol related;
- the assault offence rate per 1,000 persons in the locality of Fremantle was higher than the Fremantle Sub District, South Metro Police District and the State;
- a majority (55%) of alcohol related assault offences in the suburb of Fremantle occur on the weekend, followed by Thursdays and Fridays;
- more than 1 in 3 (36%) alcohol related assault offences occur during the late night trading hours being sought by the National Hotel;
- 72% of drink-driving charges for the suburb of Fremantle involved a licensed premises in Fremantle as the place of last drink;
- alcohol is a significant problem in relation to Fremantle Hospital Emergency Department presentations, particularly late at night and on weekends;
- alcohol intoxication (primary diagnosis) presentations at Fremantle Emergency Department most commonly occur between 12 midnight and 1:00 a.m.; and
- hospitalisations for alcohol related assault were significantly higher than the State rate for the Fremantle Statistical Local Area in both Fremantle inner city and Fremantle remainder.

64 In view of the fact the current levels of harm are most serious on the days of the week and during the time of day for which the extended trading has been sought, the EDPH submits that an ETP, as proposed, will potentially exacerbate the risk of harm in the locality.

65 It was submitted that should the Commission consider granting this application the ETP only be permitted until 1:00 a.m. on Fridays and Saturdays and that the licensee be conditioned to provide food during ETP times.

Determination

- 66 The circumstances of this application are that the initial application for an ETP was refused by the Director, refused on application for review by the Commission and then returned for further review by the Commission following a successful appeal by the applicant to the Supreme Court. This current review is a rehearing of all materials before the Director when making the decision (section 25(2c) of the Act), and a consideration of the determination of the Supreme Court and the subsequent submissions lodged by all parties in accordance with section 25 of the Act.
- 67 In conducting a review pursuant to section 25 of the Act, the Commission is not required to find an error in the Director's decision, it is required to undertake a full review of the merits of the materials before the Director and make its own determination based upon those materials (*Hancock v Executive Director of Public Health* [2008] WASC 224).
- 68 Pursuant to section 25(4) of the Act, the Commission may:
- (a) affirm, vary or quash the decision subject to the review;
 - (b) 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;
 - (c) give directions as to any questions of law reviewed, or to the Director to which effect shall be given; and
 - (d) make any incidental or ancillary order.
- 69 Section 38(2) of the Act provides that an applicant must satisfy the licensing authority that granting the application is in the public interest. To discharge its onus under section 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community.
- 70 Determining whether the grant of an application is "in the public interest" requires the Commission to exercise a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* [2007] WACA 175 and *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241).
- 71 The applicant seeks approval to operate under an ETP that provides an additional hour of trading on Wednesday and Thursday (12 midnight to 1:00 a.m.) and an additional 2 hours of trading on Friday and Saturday (12 midnight to 2:00 a.m.). Whilst

an additional 2 hours of trading on a Sunday (10:00 p.m. to 12 midnight) was also sought, a 2015 Notice issued under the Act, (section 31(6) and (7)) extended the permitted trading hours under a hotel licence to 12 midnight on a Sunday. As the Commission cannot ignore a change in the law relating to trading hours on Sunday brought about by the Notice, it is unnecessary for the Commission to make a determination on this aspect of the application. Therefore the total additional hours sought under the proposed ETP is reduced from 8 hours to 6 hours.

- 72 The Commission in its previous determination accepted that the premises will provide an attractive late night entertainment venue attracting both local population and tourists and meets the requirement of the object of the Act set out in section 5(1)(c).
- 73 Whilst the premises are no doubt an attractive late night entertainment venue for the local population and tourists alike, it is questionable whether the applicant has demonstrated that there is a strong requirement of consumers, if a requirement exists at all, for late night trading on Friday and Saturday until 2:00 a.m. the following day , having regard to the development of the liquor industry, the tourism industry and other hospitality industries in the State (i.e., within the meaning of section 5(1)(c)).
- 74 It appears there may be a requirement of consumers for trading until 1:00 a.m. in the locality, as a number of venues already trade until that time. However, the consumer survey evidence presented by the applicant is not convincing evidence of a requirement of consumers for Friday and Saturday trading until 2:00 a.m. the next day, which could be said to be representative of the locality or in the best interests of the development of the liquor, tourism or other hospitality industries in the State.
- 75 Further, the evidence relating to the visitation of cruise ships to Fremantle in support of the contention that the ability to trade to 2:00 a.m. is a requirement of tourists and is important to the economy and attractiveness of Fremantle as a tourist destination, is also unconvincing.
- 76 Moreover, the Commission noted that the City of Fremantle supports the grant of an ETP until 1:00 a.m. only. Whilst no reason was provided for this apparent policy, there is no convincing evidence, or any evidence at all, that late night trading (i.e., trading beyond 1:00 a.m.) of venues such as those operated by the applicant will contribute to the development of the liquor industry, tourism industry of other hospitality industries or enhance the attractiveness or amenity of the City.

77 The Commission is also required to consider whether the likelihood of an increase in harm and ill health as a consequence of granting this application outweighs any of the purported benefits detailed in the PIA and subsequent submissions. In making this assessment the Commission is guided by the process determined in the Carnegies decision.

Make findings that specifically identify the existing level of harm and ill-health in the relevant area (Fremantle) due to the use of liquor

78 Each of the Interveners has provided strong evidence as to the existing high level of harm and ill-health in the Fremantle district. Police data on reported alcohol related crimes and CAD recorded attendances, together with EDPH statistics, particularly those relating to the Fremantle Hospitality Emergency Department presentations, show that there is currently a high level of alcohol related harm in Fremantle.

79 The applicant has in fact acknowledged that there is evidence capable of supporting a finding that there is a level of harm due to the general use of alcohol in the Fremantle area and that in the case of a number of specific harms, the levels are higher in Fremantle than the corresponding State average at the relevant times.

80 The Commission also notes that, no data has been presented which specifically attributes the level or types of harm to the existing ETP's under which other hotels/taverns are trading in Fremantle on Saturday and Sunday until 1:00a.m. the next day.

81 Based on this evidence the Commission finds that alcohol related harm in Fremantle is at a high level, but the Commission also recognises that some of the data lacks in specificity in the context of the circumstances of this particular application.

Make findings about the likely degree of harm to result from the grant of the application

82 With regard to the additional one (1) hour of trading sought for each of Wednesday and Thursday nights (12 midnight to 1:00 a.m.), the Commission considers that, on the balance of probabilities, the grant of this component of the application is unlikely to contribute to the degree of harm and ill-health in the community that would outweigh the benefit to consumers of liquor of the additional trading hours.

83 The only hotel/tavern ETP operating in Fremantle on Wednesday and Thursday is Little Creatures Loft, which is situated in Fremantle Fishing Boat Harbour, some

distance away from the Fremantle CBD and the National Hotel. The proposed ETP would provide consumers with another option in close proximity to the many other food, beverage and entertainment outlets in the centre of the City.

84 Despite the uncertainty of public transport options during this period, there is nothing before the Commission to indicate the degree to which patrons of licensed premises in Fremantle rely on public transport, other than the taxi system. Therefore there is no basis to conclude that an ETP should not be granted due to the absence of public transport, primarily the urban rail system, on these days after 12 midnight.

85 However, the extended trading hours to 2:00 a.m. sought for Friday and Saturday fall within a period when there are a higher number of recorded instances of harm and ill-health in Fremantle although, at the same time, these periods are generally consistent throughout the metropolitan area as the community traditionally participates in social and entertainment activities over the weekend.

86 That Fremantle has a higher level of alcohol related harm and ill-health has been accepted by all parties.

87 The ability for up to 415 patrons (the patron capacity of the premises) to be able to consume alcohol for an additional two (2) hours on Friday and Saturday needs to be considered in the context of the existing structure of liquor services in Fremantle over this period:

- there are five (5) hotel/tavern licences operating with an ETP to 1:00 a.m. on Friday and Saturday nights;
- there are three (3) nightclubs licensed to operate until 5:00 a.m.; and
- none of the hotel/tavern licences operating under an ETP have a lockout provision.

88 It is difficult to determine the extent to which current trading beyond midnight at the hotels and taverns in Fremantle is having an undue effect on the level of harm and ill-health in the community, as the statistics are mostly of a general nature. However, the extensive data provided by the EDPH (at paragraph 63 above) clearly highlights a particular and a very concerning problem with alcohol related harm after midnight in the wider Fremantle Sub District.

89 It is open to the Commission to infer from this general data that an increase in trading hours or an increase in the number of venues trading during these problematic times

may result in an increase in harm of the type reported by Police and experienced at hospital emergency departments.

90 Whilst it is not possible to attribute the harm caused to particular venues, there is little doubt in the Commission's mind that trading beyond midnight increases the risk of harm occurring. That is not to say, of course, that trading should not be permitted during those hours, but it is a relevant factor when weighing the likelihood of harm against any perceived benefits that may be evident.

91 Notwithstanding the comments above, the absence of lockout conditions on hotel/tavern licences referred to above (para 88) would seem to indicate that there are no significant migration issues as patrons seek to relocate to premises seeking longer term drinking options.

92 The mix of venue types operating in Fremantle provides people with different options, but as was submitted by the applicant, the type of clientele frequenting its premises and premises of a similar nature are, at least to some degree, different from those who frequent nightclubs.

93 Extending trading at the applicant's premises beyond the trading hours available at other similar Fremantle venues (i.e., beyond 1:00 a.m.) could, on the face of it, lead to problems with patrons migrating from other hotel and tavern premises, both before and after 1:00 a.m., even if lockout provisions are imposed. Extending trading hours for Friday and Saturday to 1:00 a.m. the next day would, however, be consistent with what already applies to other hotel/tavern licences in Fremantle.

Assess the likely degree of harm to result from the grant of the application against the existing degree of harm

94 Unquestionably the grant of the applied for ETP will add competition into the marketplace. As a result, patrons of other Fremantle establishments may well seek to change allegiances and frequent the applicant's premises as their venue of choice, which, essentially would have the effect of not increasing the number of people consuming alcohol in the locality over the period of the ETP.

95 Conversely, the applicant's premises, being recently redeveloped, has the capacity to attract a new market which will result in additional patrons to the hotel and therefore to the Fremantle entertainment precinct.

96 In either case, the Commission is not persuaded that even at a full capacity of 415 new or existing patrons, the granting of an ETP to 1:00 a.m. on Friday and Saturday will result in an increase in the level of harm and ill-health to the degree that approval of the application would not be in the public interest. Whilst harm is clearly occurring, the expectations of consumers and the history of trading in Fremantle, and the benefits that accrue, appear to be well accepted in the community.

97 In the view of the Commission there is a very real risk that an ETP to 2:00 a.m. may result in an unacceptable escalation of harm and ill-health issues due to the fact that the applicant's premises would be the only hotel/tavern trading to this time, a time which has clearly been shown to present a higher likelihood of harm. Further, whilst lockout provisions may mitigate the risk of harm from migration from other premises, even with lockout provisions the grant of the application may expose the hotel to a mix of clientele more inclined to be associated with the negative aspects of alcohol consumption.

Weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether it is in the public interest to grant the application.

98 As stated, and as has been accepted by all the parties, the level of alcohol related harm in the City of Fremantle is high, and in the view of the Commission is very concerning. Any proposal to increase the trading hours of licensed outlets should therefore be approached with caution.

99 Ultimately, however, in weighing and balancing all of the factors of this application, the Commission is not persuaded that any harm or ill-health that may result from the granting of an ETP for one (1) additional hour of trade on a Wednesday, Thursday, Friday and Saturday outweighs the benefits to consumers of liquor. Trading until 1:00 a.m. by hotels and taverns in Fremantle appears to meet the expectations of consumers, both locals and visitors alike, and to be an accepted practice within the community.

100 At present hotel/tavern licences operating under an ETP in Fremantle all cease trading at 1:00 a.m. The three (3) nightclubs in Fremantle are available to cater for those patrons who seek social and entertainment activities to 5:00 a.m.

101 The Commission is of the view that this liquor licensing structure is currently appropriate for the location and adequately meets the requirements of consumers.

- 102 The Commission recognises and accepts that Fremantle is a significant entertainment precinct within the Perth metropolitan area, catering for both local clientele and a vibrant and expanding tourism market.
- 103 As indicated, the Commission is not persuaded that there is a strong requirement on the part of local consumers of liquor, if there is a requirement at all, within the meaning of section 5(1)(c) of the Act, for the additional hour of trading from 1:00 a.m. to 2:00 a.m.
- 104 The extent of the patronage to be expected from the tourist market in relation to the period of the applied for ETP is difficult to quantify from the material supplied by the applicant. As an example, the applicant has submitted that Fremantle's growing cruise ship market will be an important sector of the market to be catered for under the ETP. While the Commission acknowledges the growing significance of this market to Fremantle and the State in general, it is well known that in nearly every instance, cruise ships arrive early in the morning and depart by 10:00 p.m. the same day.
- 105 Accordingly the cruise ship market will have no requirements for extended trading hours at the National Hotel, other than possibly for those who join or leave the ship at Fremantle. Even then, this would be a relatively small number and the general age group (60+ years) (refer annexure NN of PIA) of cruise ship passengers would not appear to expect to have early morning social/entertainment provided.
- 106 In the view of the Commission, given the evidence of harm that is currently experienced after midnight and during the hours for which the ETP has been sought, there is a strong likelihood that allowing trading beyond 1:00 a.m. will result in an increase in that harm, which would be not only not beneficial, but would in fact be detrimental, to the liquor, tourism and hospitality industries in the State.
- 107 A supplementary submission provided by the applicant (on the invitation of the Commission) restated that the evidence presented was considered sufficient to substantiate that the grant of the application in the terms sought i.e. trading on Friday and Saturday until 2:00 a.m. the next day, would be in the public interest and consistent with the relevant provisions of the Act. The applicant also offered to accept a lock out commencing at 1:00 a.m. if the application was granted until 2:00 a.m. on Friday and Saturday. The applicant also submitted that if the Commission was minded to grant the application to limit closing on Friday and Saturday to 1:00 a.m. the next day, then a lock out condition not be imposed.

Summary

108 Section 5 (1)(b) of the Act provides that one of the a primary object is:

“To minimise harm or ill-health caused to people, or any group of people, due to the use of liquor”;

which, in this case must be weighed and balanced against one of the other primary objects section 5(1)(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”.

109 In undertaking this exercise the Commission is conscious of the role of Fremantle as an entertainment precinct and a significant State tourism destination.

110 The Commission has also considered the position stated in *Executive Director, Public Health v Lily Creek International Pty Ltd (2000) 22 WAR 510*:

“it is significant that the primary objective in s 5(1)(b) is to ‘minimise’ harm or ill-health, not to prevent harm or ill-health absolutely. The word ‘minimise’ is consistent with the need to weigh and balance all relevant considerations”.

111 In evaluating the circumstances of the locality and considering all of the material presented by the parties, the Commission is persuaded that the granting of an ETP to allow the National Hotel to trade from midnight on Wednesday, Thursday, Friday and Saturday until 1:00 a.m. the following day is in the public interest.

112 Accordingly, the decision of the Director is quashed, and the application is partially approved to provide extended trading hours on Wednesday, Thursday, Friday and Saturday from 12 midnight to 1:00 a.m. the following day, a total of four (4) additional trading hours per week.

113 The Commission has also considered the request by the Police and EDPH for particular conditions to be applied should the application be granted. However, in view of the limited number of hours provided for in this ETP, the Commission is of the view that the public interest will be served by applying those conditions that are currently in place for other hotel/tavern licensed premises in Fremantle with extended trading hours to 1:00 a.m.

114 The applicant is however, encouraged to adopt those proposed operational procedures as referred to in paragraph 29(i) above, where they are not specifically provided for in the licence conditions.

A handwritten signature in black ink, appearing to read 'Eddie Watling', written in a cursive style.

EDDIE WATLING
DEPUTY CHAIRPERSON