
Jurisdiction : Liquor Licensing Court of Western Australia

Application No : CRT 35/98

Location : Perth and Kununurra

Coram : Judge Rodney Greaves

Heard : 17, 22 and 23 September 1999

Delivered : 9 December 1999

Premises : Lily Creek International Hotel

Application : Conditional grant of a hotel licence

Applicant : Lily Creek International Pty Ltd
Lot 2387, Victoria Highway
Kununurra, Western Australia

Objectors : 1. Peter John Sayers and Deborah Lee Sayers
2. Augzen Pty Ltd
Licensee - Gullivers Tavern
3. AAPC Properties Pty Ltd
Licensee - Kununurra Hotel

Intervener : Executive Director of Public Health

Catchwords:

Hotel licence - Evidence sufficient to establish grant necessary to provide for reasonable requirements of public for liquor, accommodation and related services - Sale of packaged liquor to and consumption of packaged liquor by group of people of Aboriginal descent found on evidence to have caused harm and ill health - Inference not reasonably open on evidence that grant of this application may cause undue harm or ill health to this group - Application granted - *Liquor Licensing Act 1988*, ss5(1)(b), 33(1)(2), 38, 41, 62, 69(8), 74(1)(a)(b)(d)(g).

Representation:*Counsel:*

Applicant : Mr A Wilson
Objector : Mr I Curlewis
Intervener : Mr G Tannin and Mr B King

Solicitors:

Applicant : Chalmers & Partners
Objector : Phillips Fox
Intervener : Crown Solicitor's Office

Case(s) referred to in judgment(s):

Charlie Carter Pty Limited v Streeter & Male Pty Limited (1991) 4 WAR 1
Re Charlie Carter (Kununurra) Pty Ltd (1991) 8 SR (WA) 169
Re Gull Liquor (1999) 20 SR (WA) 321

Case(s) also cited:

Nil

GREAVES J:

Introduction

The Director of Liquor Licensing ("the Director") has referred this application for the conditional grant of a hotel licence at Lot 2387, Victoria Highway, Kununurra for determination pursuant to s24 of the *Liquor Licensing Act 1988* ("the Act"). The application is made pursuant to ss41 and 62 of the Act. Counsel for the applicant described the application as an application "for a fully potent hotel licence". The proposed premises are uncompleted and the applicant therefore seeks a conditional grant of a hotel licence in accordance with s62 of the Act. The applicant proposes that when completed the premises should be subject to the conditions imposed by s41(2) of the Act which provides:

- (2) Subject to this Act, during permitted hours the licensee of a hotel licence is authorized to keep open the licensed premises, or part of those premises, and, while those premises are open, is required —
 - (a) to sell liquor on the premises to any person for consumption on the premises; and
 - (b) unless the licence is a hotel restricted licence, to sell packaged liquor on and from the premises to any person."

The applicant also proposes that the court should make any conditional grant of the hotel licence subject to the following further conditions upon completion of the premises, pursuant to s64(3)(c) which provides:

"Without derogating from the generality of the discretion conferred on the licensing authority, the licensing authority may impose conditions which it considers to be in the public interest or which it considers desirable in order to —

...

- (c) ensure that the safety, health or welfare of persons who may resort to the licensed premises is not at risk;

... "

The further proposed conditions are those contained in Exhibit 23:

- "• No cask wine sales.
- No takeaway/package liquor sales before 12 noon on any day, except to bona fide lodgers of the hotel.
- Drive-through bottle shop service restricted to persons in vehicles at all times ('vehicle-only service').
- Permitted hours only otherwise."

The licensees of the Kununurra Hotel, Gullivers Tavern and the Country Club Hotel lodged objections to the application, the grounds of which are contained in the proposed amended notice of objection dated 12 August 1999. By a notice dated 12 February 1999, the Executive Director, Public Health intervened in these proceedings for the purpose of introducing evidence or making representations in relation to the harm or ill health caused to people, or any group of people, due to the use of liquor, and the minimisation of that harm or ill health, pursuant to s69(8a) of the Act.

The affected area for the purposes of the application is a radius of 15 kilometres from the proposed site, which may be seen depicted at Figures 6A and 9 of Exhibit 15, the report of the town planner, Mr Christopher Thompson.

The law to be applied in the determination of this case

I turn first to the law which is to be applied to the determination of this application on the evidence before the court. In *Re Gull Liquor* (1999) 20 SR (WA) 321, the court observed at p339 of its reasons:

"There appears to be little disagreement in the field of liquor control that the complete prohibition of the sale of liquor is not

effective in the control of the perceived consequences of the consumption and use of liquor. What Parliament has sought to do in this amended legislation is to achieve a balance between making liquor available in the community and curbing the perceived consequences of its consumption and use."

A little later, at p340 of the report, the court continued:

"Given the balance which I have explained is inherent in the statement of the primary objects of the Act in s5(1), I think that this construction of the words in s5(1)(b) of the Act will promote the purpose or object underlying the Act, in accordance with s18 of the *Interpretation Act*. I have found the preceding examination of the four questions propounded helpful in the exercise of determining the proper construction of s5(1) in the scheme of the Act as a whole, having regard to the operation of s33, 38, 64, 69(8)(a) or 74(1)(b) and (d) of the Act. I am in no doubt that by the introduction of s5(1) of the Act and its correlates, Parliament intended to extend the scheme of the Act beyond the scope and purpose of the Act prior to its amendment, as determined by this Court in the *Action Food Barns* case and in *Re Woolworths Supermarket Derby*.

In my opinion the scope and purpose of the Act as amended now involves in this context attempting a balance between what may sometimes be seen to be contradictory purposes. Parliament has retained the scheme of limited prohibition of the sale of liquor under licence. The scope and purpose of that scheme now includes making provision for the reasonable requirements of the public for liquor for consumption on and off licensed premises. At the same time, it includes controlling the availability of liquor, and thereby its consumption on and off licensed premises, in order to promote public order and minimise harm or ill health to people, or to any group of people, due to the use of liquor.

As I have explained, I am further of the opinion that it was the intention of Parliament that the Licensing Authority should refuse the grant of a new licence or otherwise place conditions on the grant of a new licence where the Licensing Authority is of the opinion that such a course is necessary on the merits to minimise harm or ill health caused to people, or any group of people, due to the use of liquor. What the *Action Food Barns* case and in *Re*

Woolworths Supermarket Derby did not decide, of course, was the nature of the harm or ill health which it was the intention of Parliament may, after consideration of the merits in any one case, result in the refusal of a grant or the imposition of conditions within the scope of the Act. Owing to the conclusions which the court reached about the scheme of the Act prior to its amendment, it was not necessary to consider and decide that question in those cases.

When the Licensing Authority comes to decide the merits of a particular application under ss33 and 38 of the Act, it can now be seen that s5(1)(b) in its context provides a positive indication of the considerations by which the decision is to be made in the exercise of its discretion in the public interest. It will be for the Licensing Authority in each case to consider the merits of the case on the evidence and information before it and determine how it should exercise its discretion within the scheme of the Act as I have explained it.

It will be necessary for the Licensing Authority to identify on the evidence and information before it in each case the fact or facts which it considers should on the merits activate its discretion to grant or refuse the grant of a category A licence under s38 or 33 of the Act or to impose conditions upon a grant. In each case, the Licensing Authority may identify such fact or facts of its own motion in accordance with s16(1)(b) of the Act and the general law relating to procedural fairness.

It seems to me, however, that it may not be necessary for the Licensing Authority to determine in every case whether controlling the availability of liquor may be effective to control consumption, and if so, whether it may be effective to minimise harm or ill health, as I have explained them. The Act as amended requires the Licensing Authority to attempt the balance which I have spoken about in each case and assumes that the attempt will, so far as possible, be effective in each case in whatever way the Licensing Authority exercises its discretion in accordance with the Act on the merits.

Otherwise, in carrying out its functions under s38, 64(3), 74(1)(b) or 74(1)(d) of the Act, the Licensing Authority is required to have regard to the primary objects of the Act in s5(1), as I have

explained them, and to exercise its discretion under s33(1) and (2) of the Act in the public interest. It may also decide to exercise that discretion upon an intervention pursuant to s69(8a) or 69(11) of the Act, such as those in this case. The Licensing Authority may formulate policy about those matters of which it requires to be satisfied in the exercise of its discretion in one application or another or in certain types of application, provided that policy is made known to interested parties. It may not formulate policy which seeks to pre-determine issues under the Act without consideration of the merits of the particular application.

In *Re Charlie Carter (Kununurra) Pty Ltd* (1991) 8 SR (WA) 169 at 182, the court made the following observation in the course of exercising its discretion in the public interest under s33(1) of the Act:

"I have come to the conclusion that in the end it is in the public interest that people of Aboriginal descent and others be left to determine their own future individually and collectively. In my opinion, it is not in the public interest that a facility such as this proposed liquor store, where it should otherwise be available to the community, should be denied because it appears to the court that it might be better for some members of the community if the application were refused. Such an approach would seem to smack of paternalism the consequences of which may be as devastating if not more so than the over-consumption of alcohol."

In the course of its reasons, the court in *Re Gull Liquor* also made the following observations about the place of the word "undue" in s74(1)(b) in the scheme of the Act, as follows:

"I turn to the place of the word 'undue' in s74(1)(b) in the scheme of the Act. It is to be observed that this word does not occur in s5(1)(b), 64(3)(cc) or 69(8a) of the Act. In my opinion, it occurs in s74(1)(b) of the Act owing to the grammatical construction of that subsection which provides for a ground of objection. Otherwise, I am of the opinion that the occurrence of the word 'undue' in s74(1)(b) of the Act does not, on a literal construction of this subsection, mean that this subsection is to be construed differently from those sections which I have mentioned where the similar provision appears. Given the balance which I have just mentioned, what I think the word 'undue' in s74(1)(b) of the Act

means is that an objector who relies upon this ground of objection must establish on the balance of probabilities, and on the merits of the case as a whole, that the grant of the application would cause harm or ill health to people or any group of people which, on the evidence is found to be undue when considered against the weight of the evidence in support of the grant of the further licence applied for."

The proper approach to the application of s38 and s74(1)(d) of the Act to the evidence in this case is now well established. I think it will be sufficient to say that those provisions are to be applied in accordance with the judgment of the learned Chief Justice in *Charlie Carter Pty Limited v Streeter & Male Pty Limited* (1991) 4 WAR 1 at 9 *et seq*, with whom Pidgeon and Walsh JJ agreed.

Before leaving s5(1)(b), s33(1), s38(1) and s74(1)(d) of the Act I think it may be useful in this case to say something about what I might call the popular approach to their construction. This approach cannot perhaps be better illustrated than by reference to the evidence of Professor Dennis Gray in Exhibit 20 at p22 when he said:

"In closing, it should be noted that research conducted in both Western Australia and nationally has highlighted the ways in which the provisions of liquor licensing legislation and the way in which it is administered are often an impediment to Aboriginal efforts to address alcohol-related problems. In Kununurra - by not granting the application for an additional liquor licence, or granting it only under the most stringent conditions - the opportunity exists to use recent changes to the Western Australian Liquor Act to support Aboriginal initiatives in this area. In addition, this would also go some way to addressing what is a problem for the whole community."

Professor Gray explained this evidence at p87 of the transcript when he said:

"... The procedures by which persons may object to the granting of licences or permits or procedures by which they may make objections are such that particularly for people who are a long

way from the city who have limited facility at English, the procedures themselves present an impediment and I think that recently the changes to the Licensing Act have recognised some of the difficulties faced by Aboriginal communities and have empowered the court to make decisions that assist Aboriginal people and these particular groups to use the law to help them address problems."

Professor Gray refers to his paper "*Indigenous Australians and Liquor Licensing Legislation*" dated June 1999, where at para 1.1 of the paper the authors (including Deidre Bourbon and Sherry Saggers) say:

"As an instrument of social policy, liquor licensing legislation has the potential to aid indigenous community efforts for self-determination and control over the supply and consumption of alcohol. However, at present this is compromised by culturally biased provisions within legislation, a lack of effective enforcement, and inadequate liaison between licensing authorities and indigenous communities. Furthermore, although there are provisions for community participation in liquor licensing matters, few provisions obligate licensing authorities to actually heed community wishes. Therefore, interpretations and applications of legislation are often subject to how those in charge of licensing authorities exercise their discretionary powers."

At para 3.1, the authors continue:

"... If harm minimisation is to have an optimal effect, governments need to establish legislative and practical avenues for indigenous communities to create and implement strategies in a manner that promotes self-determination and culturally appropriate methods of minimising the harms associated with indigenous alcohol abuse."

My purpose in referring to these passages as an illustration of what I have called the popular approach to the construction of the substantive provisions of the Act in this context should not be misunderstood. Firstly, this illustration is but one of many similar commentaries about the Act and its purposes. I do not single it out for particular criticism. Secondly, I make no comment at all on the authors' opinions about liquor control by legislation.

Thirdly, I observe that the popular approach to the construction of these provisions expresses no recognition of their place in the scheme of the Act as a whole but, putting it shortly, seems to regard the primary objects of the Act as the scheme of the Act itself. As I hope the excerpts from the judgment of this Court in *Re Gull Liquor* demonstrate, if the Act is to be construed and applied according to law, plainly the popular approach is not sufficient for the determination of any one case.

I shall turn to the application of these provisions to the evidence in this case shortly, but before doing so there are two evidentiary questions which it is necessary to mention. The first relates to the role of expert evidence in these proceedings, the second to the standard of proof which the court should require in drawing inferences from the facts and opinions expressed in this case on the evidence in the determination of the ultimate issues. In this case, the first question relates to the weight which should be given to evidence of opinion relating to liquor consumption and to liquor control. The learned authors of *Cross on Evidence* (Australian Edition) say at para 29050:

"If the court comes to the conclusion that the subject of investigation does not require a sufficient degree of specialised knowledge to call for the testimony of an expert, evidence of opinion will generally be excluded, especially where the witness is produced merely to present in a cogent and vivid form the case of the party calling that witness. The danger of this evidence is that it dresses up matters which are within the ordinary experience of the tribunal of fact in a beguiling scientific garb which may conceal the blemishes within."

The second question is related to the first insofar as the determination of the ultimate issue involves a determination by the court of the weight to be placed on the evidence. As will become apparent, much of the opinion evidence expressed in this case is in its nature by way of inference from available data, and in some respects lack of available data. In this context, the

court is required to determine the weight to be placed on these opinions and inferences.

The onus of proof upon the applicant and objectors is upon the balance of probabilities. No such onus is placed on the intervener. I am of the opinion, however, that the same standard of proof should be required in the determination of the ultimate issues.

I take the law to be as stated by the learned authors of *Cross on Evidence* (Australian Edition) at para 9055:

"Where satisfaction of the civil standard of proof depends on inference, there must be something more than mere conjecture, guesswork or surmise. That is, there must be more than 'conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture'. (*Nominal Defendant v Owens* (1978) 22 ALR 128 at 132 where the Full Ct of the Fed Ct quotes from *Bradshaw v McEwans Pty Ltd* (1951) HC of A, unreported)."

At para 29010, the learned authors also observe:

"...there comes a point where an inference, although expressed by a qualified person, enters upon the field of mere speculation and will therefore be rejected as such."

The learned authors refer to *Nominal Defendant v Owens* again.

The ultimate issue for determination on the evidence in this case is whether the conditional grant of a hotel licence for these premises is necessary to provide for the reasonable requirements of the public for liquor and related services or accommodation in the affected area. This is the one issue under s38(1) and s74(1)(d) of the Act. Under s38(1) of the Act, the onus is upon the applicant to satisfy the court on the balance of probabilities that the grant is necessary. Under s74(1)(d) the onus is upon the objectors to satisfy the court on the balance of probabilities that the grant of the application would cause undue harm or ill health to people, or any group of people, due to the use of liquor. Likewise, the onus is upon the objector and the intervener to satisfy the

court on the balance of probabilities that the application should be refused in the public interest, in order to minimise harm or ill health caused to people, or any group of people, due to the use of liquor pursuant to s33(1) and s5(1)(b) of the Act.

As I think the evidence in this case will quickly demonstrate the ultimate issue for determination is whether the objectors and the intervener have established on the balance of probabilities that the grant of the application would cause undue harm or ill health to people, or any group of people, due to the use of liquor, or whether the application should be refused in the public interest in order to minimise harm or ill health to people, or any group of people, due to the use of liquor. As I have already explained, the issue under s74(1)(b) is to be determined on the same evidence as the court is required to exercise its discretion under s33(1) of the Act in accordance with the primary object in s5(1)(b) of the Act.

I think at this stage it is also necessary to observe that this is an application for a hotel licence, which of its nature authorises the holder to sell packaged liquor to the public for consumption off the premises. It is not an application for a hotel restricted licence, in accordance with s41(1)(b) of the Act. I make this observation because throughout the hearing both the objectors and the intervener have not opposed the conditional grant of a hotel restricted licence for these proposed premises. In the end, it is for the court to exercise its discretion on the evidence in accordance with the Act as I have explained it. It is for the court to determine whether the application for a hotel licence should be granted or refused, or granted subject to conditions.

I turn now to a consideration of the evidence and the merits.

The premises which the applicant proposes should be licensed conditional upon completion

The plans of the proposed premises are Exhibit 14. At para 6.01 *et seq* of Exhibit 15, the Town Planner, Mr Christopher Thompson, describes the proposed premises as follows:

- "6.01 The site of the Lily Creek International Hotel is located on the northern side of Victoria Highway and to the south of Bandicoot Drive, approximately one kilometre south west of the Kununurra town centre.
- 6.02 The site of the hotel is land formerly used for and zoned for industrial purposes but now zoned for holiday accommodation purposes.
- 6.03 On the south side of Victoria Highway is located the Centenary Tree Park and the Kimberleyland Holiday Park, the largest caravan park complex in Kununurra.
- 6.04 The hotel complex consists of several buildings incorporating the following:
- Restaurant and bar complex,
 - 72 motel style rooms,
 - A function room,
 - An entry/reception building containing shop and offices and including a porte cochere,
 - A courtyard and swimming pool,
 - Substantial on-site carparking.
- 6.05 Access to the site is via a service road connected to the Victoria Highway. On-site circulation is by a perimeter driveway, a central loop to the entry/reception and a smaller loop to a drive-in bottleshop.
- 6.06 The restaurant and bar complex will have a total floor area of approximately 1250m² and accommodate a restaurant/cocktail bar, kitchen, coolroom, dry store, freezer, two offices, two blocks of male and female

ablution facilities, bistro lounge, lounge bar, bulk cold store, keg cold room, stock cold room, sports bar, drive-in bottleshop and a store.

- 6.06.1 The Restaurant/Cocktail Bar of 220m² has 2.5 metres of buffet servery and 9.5 metres of bar counter. An area of outdoor dining is located on the north side of the Restaurant/Cocktail Bar.
- 6.06.2 A Bistro Lounge of 76m² and a Lounge Bar of 78m² combine to form one volume which is in part divided by a peninsular bar into two functional areas. The Bistro Lounge has 8 metres of servery counter and 17 metres of bar counter is shared by the Bistro Lounge and Lounge Bar. An area of beer garden is to be located on the north side of the joint bar area.
- 6.06.3 A Sports Bar of 150m² with 13.2 metres of bar counter is located at the eastern end of the building.
- 6.06.4 A bottleshop containing a browse area of 50m² with a one-way covered driveway of 56m². The bottleshop driveway is a loop road connected to the perimeter driveway.
- 6.07 A core of kitchen, stores, coolroom and strategically located ablution facilities result in an efficient and custom friendly facility.
- 6.08 The Entry/Reception building is located immediately behind the restaurant and bar complex and is accessed via an internal loop road which passes through a substantial porte cochere.
- 6.09 The porte cochere is sufficiently high to allow a tourist coach to park and about 160m² in area. The building containing entry, reception, offices and shops has an area of 440m².
- 6.10 Extended east from the entry/reception building is a wing of six luxury executive units each 65m² in area and located at the end of this luxury wing is a 355m² function room.

- 6.11 Extending west from the entry/reception building is a boomerang shaped wing containing 18 motel units.
- 6.12 The balance of the motel units are in five buildings in the northern part of the site, surrounding a large open plan garden/courtyard area within which will be constructed a 500m² swimming pool. The landscaped courtyard will have an area of approximately 1500m².
- 6.13 The 53 standard and 13 budget business motel units will each have an area of 40m² and be capable of accommodating two queen size beds or a queen size bed and two single beds. The typical unit will have a 12m² covered verandah opening onto the central landscaped courtyard. A further 9m² of verandah is provided to the rear elevation.
- 6.14 Each unit will have a full en-suite, built-in cupboards, dining setting for four and two seater sofa and television.
- 6.15 The overall construction will consist of a steel framed structure, faced externally with sawn limestone blocks and finished internally with plasterboard. All buildings will be roofed with Colorbond steel and be fully airconditioned.
- 6.16 Carparking is provided in angle parking from off the perimeter and loop driveways for both guests and visitors. Site parking is provided for 192 vehicles.
- 6.17 The Lily Creek International Hotel will be the only HMG development to have an outlook over the foreshore and Lake Kununurra. The quality of design and finishes will meet international tourist standards of excellence only matched in the East Kimberley region by the El Questro Homestead."

The principal witness for the applicant, Mr Charles Barbagallo also describes the proposal at para 24 *et seq* of Exhibit 25. This evidence, which was not challenged, reveals that the proposed premises offer a substantial tourist facility.

The hours during which the applicant proposes it should be authorised to sell to the public from the premises upon completion for consumption on and off the premises

Pursuant to s97(2) of the Act the holder of a hotel licence is authorised to sell liquor for consumption on and off the premises between 6.00am and midnight seven days a week. Subject to the conditions proposed in Exhibit 23, which I have already referred to, the applicant proposes in Exhibit 23 that the licensee be authorised to sell liquor from the premises during permitted hours. The applicant also proposes in Exhibit 25, para 62 that it should be authorised to sell liquor in the tavern for consumption on the premises between 10.00am and midnight Monday to Saturday and 10.00am to 10.00pm on Sundays.

The conditions which the applicant proposes the court should impose upon the licence upon completion of the premises, and their purpose

The applicant also proposes that the licensee be prohibited at all times from selling cask wines from the proposed premises and that its authority to sell packaged liquor for consumption off the premises be restricted to people in motor vehicles at all times. At para 55 *et seq* of Exhibit 25, Mr Barbagallo explains the proposed conditions as follows:

- "55. The Executive Director of Public Health has intervened in relation to the proposal to sell packaged liquor from the proposed drive-through liquor store and the proposed extension of trading hours until 3.00am contained in the submissions initially filed with this application.
- 56. I have now been advised and accept that it is not appropriate to apply for an extended trading permit in an application for a conditional grant and I abandon that aspect of the application.
- 57. However, the proposal to include a drive-through facility is not abandoned.
- 58. I have given considerable thought to the claim that the sale of packaged liquor from this proposed premises will

increase the likelihood of alcohol related harm or ill health to people or any group of people.

59. Since early 1999 Kununurra has had in place a formalised Accord.
60. At the time of lodging my application the Accord was being trialed and I referred in the submissions filed with the application to the current agreement between the existing liquor store owners in Kununurra that no liquor store will trade before noon and no liquor store would sell 4 litre wine casks on Wednesdays and Thursdays.
61. In my submissions I said that the Applicant intended to sell liquor (through the drive-through) only to customers that come through the drive-through in a vehicle and that people walking in from the street would not be able to purchase liquor to take away for consumption off the premises.
62. I adhere to that proposed restriction and otherwise would propose to trade in the Tavern between 10 am and midnight Monday to Saturday and 10 am to 10 pm on Sunday.
63. In fact, I propose that if the application is granted, the licence be further restricted by the following conditions:
 - (a) no cask wine sales;
 - (b) service to the general public through the drive-through bottle shop will be restricted to people in vehicles, that is, in-vehicle-service only;
 - (c) no packaged liquor sales before noon on any day other than to bona fide hotel residents;
 - (d) otherwise, trading within the permitted hours under the Act.
64. I would also liaise with the local police and the Miriwong-Waringarri patrol in an effort to identify persons associated with street drinking.

65. I believe it is very unlikely with the implementation of the above measures that the sale of packaged liquor under these restrictions will lead to an increase in street drinking in the vicinity of the Lily Creek International Hotel.
66. These proposed restrictions are more restrictive than the voluntary restrictions of the Kununurra Accord. I believe they amount to quite stringent measures and will not increase street drinking in the vicinity of the Hotel or contribute to excessive alcohol consumption.
67. Although the proposed hotel is situated on a major highway, it is located approximately 1 kilometre from the town site and I do not believe it is likely that the result of granting the licence will be to cause a congregation of Aboriginal persons in the near vicinity. The position of the proposed hotel across the road from Celebrity Tree Park does not in my opinion automatically mean that the Park will become a popular meeting place for the consumption of alcohol.
68. First, the kind of alcohol which seems to be associated with street drinking is cheap cask wine which can be easily accessed and taken away and consumed unsupervised.
69. Secondly, the popular congregation places already in Kununurra where public drinking predominantly occurs are the already established town camps behind the Water Authority in Coolibah Drive; a camp site near Kelly's Knob; and a camp site near the Ord River Sports Club.
70. These campsites are established meeting places for Aboriginal persons near the town's services whereas the location of the Lily Creek International Hotel is not as central to the services in the centre of town.
71. The Hotel Kununurra seems to be the most popular hotel with Aboriginals and there is often a congregation of Aboriginal persons outside the Hotel Kununurra under the trees on Messmate Way. Another congregation place is in White Gum Park near Gulliver's Tavern. Both of these places are in the town's central area.

72. These persons are mostly on foot and I think it is unlikely that they would migrate to the proximity of Lily Creek International simply because the hotel had a drive-through bottle shop and I think it is even less likely that they would do so when it becomes generally known that service through the drive-through will be to persons in vehicles only and cask wine will not be sold at all.
73. By liaising with the Miriwong-Waringarri patrol and by trading under the proposed restrictions I believe the problem of street drinking will not arise in the vicinity of the hotel.
74. I believe that the application for the conditional grant of a hotel licence at this location is an appropriate application and that the proposed style of operation of these premises is not likely to increase the level of alcohol related harm in Kununurra.
75. The provision of a service road between the Victoria Highway and the boundary of the Lily Creek International Hotel complex will in my opinion further reduce the risk of harm to pedestrians on Victoria Highway from vehicles accessing the drive-through bottle shop."

During cross-examination, Mr Barbagallo conceded that the operation of the proposed condition that sale of packaged liquor from the drive-through bottle shop be restricted to people in motor vehicles is "a complex question".

Counsel for intervener challenged Mr Barbagallo about the efficacy of the proposed condition, to which he responded:

"I am saying that it's the most practical scheme that you can come up with that would minimise the harm."

In re-examination, he asserted that it would not take Aboriginal people "too long to recognise that they would not get it from my outlet."

He also asserted that the drive-through bottle shop was "always part of the financial projections." He accepted the proposition that the sale of packaged liquor is a significant advantage in the operation of hotel premises

such as those proposed. There is no doubt in this case that the projected revenue from the sale of packaged liquor markedly enhances the feasibility and ultimate profitability of the proposed premises.

The reasonable requirements of the public for liquor and related services or accommodation in the affected area

As I have already observed, s38(1) and s74(1)(d) of the Act require the court to determine whether the conditional grant of this hotel licence is necessary to provide for the reasonable requirements of the public for liquor and related services or accommodation in the affected area. Counsel for the intervener made his position clear when he said that the intervener has no objection to the grant of a licence for the proposed hotel. He observed that "the sole nature of the objection is to any packaged liquor being sold to the public by any means and through the drive-through bottle shop." I shall come to the case for the objectors shortly but I think it may be fairly observed that if this were an application for a hotel restricted licence they would not object to it. In the course of discussing the correct approach to the determination of this application under the Act, I observed that in the end it is a question for the court whether the application should be granted at all, and if so, upon what conditions. Once again, I make these observations because they are I think relevant in the consideration of the question whether the grant of a hotel licence is necessary to provide for the reasonable requirements of the public for liquor and related services or accommodation in the affected area.

The applicant relied upon the evidence of Julie Harris, Executive Director of Abacus Research to support its case under s38(1) of the Act. That evidence is contained in Exhibit 17. The reliability of this evidence was not challenged and indeed the intervener and applicant relied upon the data at p21 which revealed that 38 per cent of respondents supported the inclusion of the proposed drive-through bottle shop facility in the hotel premises while 57 per

cent did not. A further five per cent held no opinion. Otherwise, the evidence of this witness revealed a very high level of support for the proposed premises. I shall return to the issue under s38(1) and s74(1)(d) of the Act when I have examined the grounds of objection and the evidence in support of those grounds.

The grounds of objection

As I have said, the grounds of objection are set out in the proposed amended Notice of Objection dated 12 August 1999. The first ground of objection is that the grant of the application would be contrary to the public interest, under s74(1)(a) of the Act. It is asserted that the granting of the application would constitute an unnecessary duplication of the packaged liquor facilities already available and provided to persons within or resorting to the affected area.

The second ground of objection is that the grant of the application would cause undue harm or ill health to people, or any group of people, due to the use of liquor, under s74(1)(b) of the Act. The particulars relied upon in support of this ground of objection appear at para 2.1 *et seq* of the notice as follows:

- "2.1 The existing premises and the applicant's premises are located in a small country town with a finite population the liquor needs of which are currently adequately serviced, to the point of being in danger of being over serviced.
- 2.2 The objectors' current liquor servicing practices reduce the potential adverse effects of liquor on local groups of persons.
- 2.3 The objectors' current liquor servicing practices are for the benefit of the local community.
- 2.4 There is currently a fine balance between the supply and service of liquor, and the impact of liquor upon the health

and well being of the community. This balance will be upset by the grant of this application.

- 2.5 The grant of an hotel licence to the applicant would have an adverse impact upon the current balance which has been obtained through monitored and defined service practices of the existing premises, thereby leading to an increase in the potential harm and ill health to people, or any group of people.
- 2.6 The grant of another hotel licence will render it more difficult for those suffering from alcohol addiction to control their liquor consumption or abstain from liquor.
- 2.7 Such increase in consumption will therefore contribute to an increase in the percentage of people who suffer, cause harm or ill health to themselves and/or others as a result of the excessive consumption of liquor.
- 2.8 The grant of the application will result in further discounting of packaged liquor products sold in the affected area which is likely to result in the greater consumption of packaged liquor by persons living in, resorting to or passing through the affected area."

The third ground of objection is that the grant of the application is not necessary to provide for the requirements of the public, under s74(1)(d). The particulars in support of this ground of objection are to a similar effect as those under s74(1)(a) of the Act.

The fourth ground of objection is that if the application were granted undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur or the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened, under s74(1)(g) of the Act. The particulars provided in support of this ground of objection are contained at para 4.1 of the notice as follows:

"The proposed premises will be located in an area adjacent to residential dwellings, a caravan park and public open space. Should the application be granted, purchases of packaged liquor from the proposed premises are likely to go to the open space to loiter and consume liquor which will lead to a diminution of the amenity, quiet and good order of the locality."

The fifth and final ground of objection is that the grant of the application would otherwise be contrary to the provisions and intent of the Act, under s74(1)(j).

The first witness for the objectors was Mr Geoffrey Warnock who is a Director of Augzen Pty Ltd, the licensee of Gullivers Tavern. His evidence about these premises is contained in Exhibit 31. As far as the premises are concerned it is sufficient to say that the tavern comprises two bars, a restaurant, and a bottle shop and drive-in of 90 square metres.

Mr Warnock also gave evidence that he has been instrumental in putting together the alcohol accord in Kununurra. This licensee now trades from 12 noon each day and does not sell four litre wine casks on Wednesdays and Thursdays. Mr Warnock gave evidence that this licensee does not supply liquor to intoxicated people. He said that the motivation behind the objection was "the commercial aspect of it". He continued:

"With the accord we have reduced our hours of sale and subsequently there has been a reduction in the sale of alcohol in the takeaway area. The other side of it is that within the community you can see the improvement that has occurred with this happening and the concern is that, you know, if another takeaway outlet is allocated to the area further pressures will go on the licensed premises that are in the area and working under the accord and it might be necessary to have a re-look at the whole situation as far as the commercial operation is concerned. Mr Warnock rightly acknowledged that this licensee is "no where near the threshold of going broke" and did not deny that it is a "profitable operation."

He acknowledged in cross-examination that he is a director of Jazzline Nominees Pty Ltd which is the holder of a conditional grant of a cabaret licence for premises adjacent to Gullivers Tavern.

Mr Warnock acknowledged that this licensee does not voluntarily limit packaged liquor sales through the drive-through to occupants of motor vehicles because, he said, it discriminates against them, if they are not intoxicated.

He expressed the opinion that the accord has been effective and resulted in less drinking in public places. He continued:

"The local indigenous people, the ones that are visible drinking these days are the outsiders. Like, they come in Kalumburu, Port Keats, Turkey Creek and communities such as that and I think because they are probably more obvious because they don't have places to go to and the pressure goes on - the police put pressure on in certain areas and then you will see that they will move to another area. At different stages we have had groups sitting out opposite the airport drinking under the trees just over the road from the airport and back at the channel on the way out to the airport. They just - you know, they move to areas where they're not humbugged."

Mr Warnock went on to acknowledge that all licensees have experienced a reduction in packaged liquor sales consequent upon the voluntary accord. He expressed the opinion that the accord has been "effective" and explained why, as follows:

"Well, we had a situation where quite a number of people were drunk by midday, you know, and just lying around the streets and being a nuisance in general by, you know, sort of just being drunk and sort of - how would - well, humbugging is the word that comes back again, and there are two ways of looking at it. Maybe it has just become not quite as obvious, the drink problem, but to a visitor to the community driving through and that the town takes on a different appearance altogether, you know, if you don't have people drunk, lying around and trash and empty casks lying around all over the place and rubbish in general."

Mr Warnock was prepared to agree that the conditions proposed by this applicant in Exhibit 23 would be at least as effective as the voluntary accord.

Finally, Mr Warnock gave evidence that "the outsiders" to whom he referred earlier come to Kununurra because:

"The restrictions in their own communities. Those that sort of have the inclination to have alcohol problems, they rebel every now and again and they decide to come and get on the booze."

Mr Wayne Fernie, the manager of the Kununurra Hotel followed Mr Warnock. Mr Fernie's evidence is contained in Exhibit 32. The trading hours of the hotel are 10.00pm to midnight. The hotel ceases selling packaged liquor at 11.00pm Monday to Saturday and 10.00pm Sundays. Mr Fernie gave evidence that the hotel sells packaged liquor only in accordance with the Kununurra alcohol accord after 12.00 noon. It does not sell four litre casks of wine on Wednesdays and Thursdays. After 7.00pm, the hotel sells packaged liquor in the driveway only to occupants of a motor vehicle.

Photographs of part of the hotel premises are contained in Exhibit 15. The facilities at the hotel are described at para 5.03 of Exhibit 15. The hotel bottle shop comprises a driveway of 84 square metres and a cool room of 96 square metres, together with a wine store of 170 square metres.

In cross-examination, Mr Fernie acknowledged that the objection of this licensee is commercially based. The objection is to the grant of a hotel licence authorising the sale of packaged liquor other than to guests.

Mr Fernie agreed that people of Aboriginal descent from Port Keats, Kalumburu and Turkey Creek, particularly, come to Kununurra "solely" for the purpose of obtaining liquor.

The next witness for the objectors was Mr Peter John Sayers who is the proprietor of the Country Club Hotel and a hotel restricted licence for those premises. His evidence is contained in Exhibit 33. Mr Sayers is not authorised

to sell packaged liquor to the public and it was quite plain from his evidence and his demeanour that he is opposed to the grant because he sees competition from the proposed premises as a financial threat.

Mr Kevin Williams is a former volunteer ambulance driver who deposed to the fact that a high proportion of people requiring attention from the ambulance service were affected by alcohol. Mrs Barbara Johnson, the proprietor of Duncan House, a bed and breakfast establishment in Kununurra, gave evidence that she had participated on a Family and Children's Services Advisory Committee, where she had observed the effect of alcohol consumption by residents of the affected area.

The objectors also called Mrs Lyn Smith who is the current Chair of the St John Ambulance Service in Kununurra. She said:

"Since I have been involved with St John Ambulance, which is about five years, the general feeling is that a lot of their transports are Aboriginal and a lot of them are associated with alcohol and just wasting a lot of our volunteers' time."

She produced Exhibit 40 and accepted that the number of recorded transports of people affected by alcohol was fairly low. I turn now to the evidence called by the intervener.

The case for the intervener

I have already set out the terms of the notice of intervention dated 12 February 1999. Counsel for the intervener submitted that "the nature of the objection we make is abundantly clear." It may be worth observing again that the Executive Director, Public Health intervened in these proceedings pursuant to s69(8a) of the Act. Strictly, he did not exercise that right by way of objection, pursuant to s73(1) of the Act. Very little turns on whether the participation of the Executive Director, Public Health in these proceedings is described as an intervention or an objection. It is, nevertheless, I think

important in considering the evidence introduced by the intervener to give consideration to the identity and interest of the intervener, while distinguishing the nature and extent of the intervention.

The identity of the Executive Director, Public Health is clear. His interest in these proceedings is to introduce evidence or make representations in relation to the harm or ill health caused to people, or any group of people, due to the use of liquor, and the minimisation of that harm or ill health.

The nature and extent of the intervention is particularised in the notice. It will be observed, however, that the notice does not assert the consequences which should follow if the court finds the facts or any of the facts relied upon established by the evidence adduced. The case for the intervener, however, was conducted on the basis that if the court found the facts, or any of them, asserted in the notice established by the evidence, the court should refuse the application. The case for the intervener was that the court should not in its discretion grant the application either with or without the conditions proposed by the applicant. These observations illustrate the extent of the intervention. In this case, therefore, it is necessary I think not only to distinguish the identity and interest of the intervener from the nature and extent of the intervention, but also to separate the nature and extent of the intervention.

The primary evidence introduced by the intervener was that of Associate Professor (Medical Anthropology), National Centre for Research into the Prevention of Drug Abuse, Curtin University of Technology, Dr Dennis Gray. His evidence is contained in Exhibit 20. His qualifications and experience are set out at pp3 and 4 of Exhibit 20. In his introduction, at p7 of Exhibit 20, Dr Gray states:

"This report has been prepared in the context of the application by Lily Creek International Pty Ltd for a hotel licence in Kununurra, Western Australia. The thrust of the report is that - in the interests of public order and public health - such a licence should either not

be granted or should be granted subject to stringent conditions. In the sections of the report that follow, a review is made of: the literature on the relationship between the availability of alcohol, levels of consumption and related harm; the level of alcohol consumption in Kununurra; indicators of alcohol - related harm; attempts - especially by aboriginal people - to address alcohol related problems in Kununurra; and, the likely impact of granting the requested licence."

Dr Gray mentions some of the literature which has grown up out of what might be described as the availability-consumption debate. He also mentions certain factors which control availability including the frequency of outlets. He expresses the opinion that:

"The reviewers are unanimous in their conclusions that - although the relationship is complex and may vary in magnitude over time and place - there is a clearly demonstrable, positive relationship between the availability of alcohol and the level of consumption."

At p11 of Exhibit 20, Dr Gray refers to data contained in a study of the consumption of alcohol in Kununurra and its impact on the health of local residents, which was conducted by Dr Jim Codde, Director in the Health Information Centre of the Health Department of Western Australia, which became Exhibit 24.

The study is dated March 1999 and presents the latest available data on alcohol consumption and examines the impact of alcohol on the health of local residents using mortality and hospital morbidity information. The data relied upon by Dr Codde and reproduced by Dr Gray was used to calculate per capita consumption rates for people over 15 years for the 10 year period 1988 to 1998. The report also provides comparative data for both the Kimberley region as a whole and Western Australia. The mean level of consumption over that 10 year period in the Wyndham/East Kimberley region was almost twice that in the State as a whole.

Dr Codde also records that the rate of death through alcohol related conditions in the Wyndham/East Kimberley region is 4.2 times that of the State. He says that during the 10 year period, this result equates to a total of 35 deaths in the region of which 78 per cent were Aboriginal. He says that hospital admission data provide another view that involves a greater cross section of the community. During a four year study period the rate of hospital discharge for alcohol related conditions for non-Aboriginal people living in the Wyndham/East Kimberley region was significantly greater than the State rate. Although similar to the State rate, Wyndham/East Kimberley resident Aboriginal admission rate for alcohol related conditions are almost three times higher than the non-Aboriginal rate.

At p19 of Exhibit 20, Dr Gray gives some account of attempts to address alcohol related harm in Kununurra as follows:

"The problems associated with high levels of alcohol consumption in Kununurra have been recognised by some segments of the Kununurra population. In an attempt to address aspects of these problems, in May 1997, negotiations began between the Police and licensees over the establishment of a licensing 'accord'. Various options were considered, some were trialed, and a formal 'accord' was finalised and signed by licensees in May 1999. Conditions of the 'accord' include a ban on the sale of wine in casks of four litres on Wednesdays and Thursdays, and a ban on takeaway sales of alcohol before 12:00 pm on any day. In addition, from their bottle-shops, some licensees only sell packaged alcohol to persons in vehicles. There appear to be mixed opinions about whether these measures are working, but no formal assessment of the effectiveness of either the accord or the restriction on takeaway sales has been undertaken.

Aboriginal attempts to address alcohol-related problems have been long standing. In 1985, the Waringarri Aboriginal Corporation established the Waringarri Alcohol (Counselling) Project. The Alcohol Project was a town based project aimed at supporting people with alcohol problems and raising general awareness about alcohol issues. Two years later, with limited

resources, Waringarri began working towards the establishment of an alcohol treatment centre and, in 1990, the first residential buildings were transported to an outstation at Marralam where the treatment program is now based. Among the project's objectives were to improve the health of clients, educate them about the effects of alcohol, and to provide them with strategies to prevent the misuse of alcohol. In 1992, with volunteer labour and the use of a four wheel drive vehicle belonging to the Alcohol Project, Waringarri established the Miriwong Patrol. Among the aims of the Patrol were to reduce street drinking and associated anti-social behaviour, and to reduce the number of people taken into custody by the police. In 1996, Waringarri's alcohol projects were further expanded with the establishment of the Moongong Dawang Sobering Up Shelter, the aim of which was to provide short term care for intoxicated persons and an alternative to placing them in police custody. Together, these projects now comprise one of the most comprehensive attempts by an Aboriginal community anywhere in Australia to deal with alcohol problems.

Waringarri's alcohol projects were the subject of a comprehensive review by Sputore *et al* in 1998. Importantly—though there were some differences of opinion about how best to achieve them—the objectives of the program had broad Aboriginal community support. Of the projects, the Miriwong Patrol and the Moongong Dawang Sobering Up Shelter were found to be the most successful in achieving their objectives. Although they had achieved some limited successes, the effectiveness of the Alcohol (Counselling) Project and the Marralam Alcohol Treatment Program were handicapped by lack of staff training and under-resourcing by government funding agencies.

Waringarri remains committed to tackling alcohol-related problems among Aboriginal people in Kununurra. The problems identified in the project evaluation have been recognised by the Commonwealth Department of Health and Aged Care's Office of Aboriginal and Torres Strait Islander Health (OATSIH). OATSIH has already provided some additional management training for the staff of the alcohol projects and, in late August 1999, is convening a meeting of funding agencies and other key stakeholders to address some of the other problems identified in the evaluation.

The projects conducted by Waringarri Aboriginal Corporation, in particular, are evidence of concern by a significant proportion of the population of Kununurra to address alcohol-related problems in the town.

Dr Gray goes on to make some observations about comparative outlet density. He suggests that the overall ratio of licences per 1000 persons aged over 15 in Kununurra is 1.41 times that in Western Australia. It should be observed that the data contained in table 5 is incorrect in that it records existence of three hotel licences in Kununurra, whereas there are only two (the Hotel Kununurra and Gullivers Tavern). It also records a cabaret licence which at present is a conditional grant only. Finally, it records a special facility licence which does not authorise the sale of packaged liquor to the public.

Dr Gray then concludes:

"Given what has been said previously about the relationship of outlet density, it is likely that the granting of another liquor licence in Kununurra will result in increased consumption and related harm - although it is not possible to predict the magnitude of this. Already, the levels of alcohol-related mortality and morbidity in the Wyndham/East Kimberley SLA are markedly higher than in the State as a whole and any significant increased in availability is likely to have the affect of increasing this disparity. It is important to note that consumption is not at such a level in Kununurra that "saturation" point has been reached, and that one more licence will not make an appreciable difference.

... Although no Australian research into the location of liquor outlets and their relation to road crashes could be identified, it is likely that - given the association between consumption and road crashes - the siting of the proposed liquor outlet adjacent to the Victoria Highway is likely to lead to at least some increase in the now relatively low levels of road crashes in the Wyndham/East Kimberley SLA. It is also likely that this would be exacerbated if the outlet had a takeaway facility as this would both provide the scope for opportunistic purchase and consumption of alcohol by travellers on the highway, and pose a risk for (particularly aboriginal) pedestrians using the facility.

Importantly, the granting of the licence is likely to undermine the efforts of Waringarri Aboriginal Corporation to reduce consumption and related harm. Aboriginal people are often advised to do something themselves about excessive alcohol consumption by some members of their communities. In Kununurra, they have certainly made an effort to do this. In their attempts to do so they have identified the availability of alcohol as an important factor in the high levels of consumption in their communities."

In cross-examination Dr Gray accepted that in expressing the opinion that the grant of this licence will result in increased consumption and related harm, the opinion was not formed taking into account the proposed conditions contained in Exhibit 23.

Dr Gray also accepted that the data contained in Exhibit 24 pre-dates the introduction of the Kununurra accord in May 1999. He accepted that there has been no formal assessment of the effectiveness of the Kununurra accord. Dr Gray expressed the opinion that it is unpredictable whether the grant of this application will make an appreciable difference to the incidence of alcohol related harm and ill health in the affected area. Speaking of Exhibit 23, Dr Gray continued:

"Those restrictions appear to me to ameliorate the effects of this particular licence - but not necessarily alcohol consumption in the town of Kununurra because the whole thrust of my report is about the high level of consumption in Kununurra and the harm that stems from it and the possibility that an additional licence may increase those already high levels of consumption and harm."

Dr Gray also expressed the opinion that it is impossible to predict the magnitude of the increase in consumption and related harm consequent upon any grant,

"Because I think there are so many variables at work in these situations. The support of the community for restrictions, the other measures which may or may not be in place, and I think the results of those evaluations of restrictions that have been done in

Halls Creek, Derby, Tennant Creek, Curtin Springs in the Northern Territory, all show that the restrictions have resulted in some reduction in consumption but the level varies considerably from about a 50 per cent reduction in Curtin Springs to about 20 per cent in Tennant Creek down to a very small percentage in Derby."

The next witness for the intervener was Senior Sergeant Colin Murray who is the officer in charge of the Kununurra Police Station and whose evidence is contained in Exhibit 35. He says:

"To date the police have initiated the Kununurra liquor accord, which causes a monthly meeting of people involved in the liquor industry, health, Aboriginal Affairs Department, night patrol and aboriginal alcohol groups to discuss avenues of minimising the social impact of alcohol consumption. Police have also run an effective campaign during 1998 designed to clear away the number of people gathering in the vicinity of the drive-through bottle shop of the Hotel Kununurra. In previous years, there had been large numbers of people attracted to the takeaway section of a/the hotel which led to proportional acts an antisocial behaviour. After much effort, this problem has been solved, however it remains an area that police have to continually supervise to ensure that the problem does not recur. Kununurra liquor accord initiatives are quite effective and I believe lessen the impact on the general public. The overall amount of alcohol purchased will probably not alter to any marked degree if another takeaway licence is granted. The problem that I perceive is that it will attract people, particularly Aboriginal community people to position themselves in the vicinity of that outlet. I can see that the problem may be exacerbated by having the outlet on the fringe of town and on the highway which allows passage of heavy vehicles."

In cross-examination Sergeant Murray expressed the personal view that "If there's one liquor outlet or 20 people will still probably consume nigh on the same". He stressed that his concern was the location of the premises adjacent to the highway.

The intervener also called Mr Edward Carlton to give evidence which is contained in Exhibit 36. Mr Carlton is employed by the Waringarri Aboriginal Corporation as coordinator of its alcohol and substance abuse projects. At para 9 of his evidence, Mr Carlton observes:

"Another licence will increase the number of sources and availability of alcohol within Kununurra. This licence includes a walk-in and buying alcohol option which is against the voluntary code already in operation. This aspect if approved is likely to result in the breaking down of the code in other alcohol providers and a dramatic increase in access to alcohol by aboriginal people. This will increase the level of problems in Kununurra and surrounding areas.

...

The Victoria Highway is a major road and carries a high volume of traffic during the tourist period. Any alcohol licence on this thoroughfare will increase the risks of an alcohol-affected person being injured especially when one town camp is directly over the road. Any increase in alcohol accessibility will increase the level of alcohol and related problems to aboriginal people in Kununurra and surrounding communities as already described."

In cross-examination, Mr Carlton interestingly observed that in his opinion the proposed restriction upon the sale of packaged liquor to occupants of motor vehicles only was of little consequence, because "it's still a problem for our community."

Finally, Dr Stephen Lefmann, who is a medical practitioner in the employ of the East Kimberley Aboriginal Medical Service, gave evidence which is contained in Exhibit 37. Dr Lefmann explains the consequences which alcohol abuse may have for the consumer, his or her family and the wider community. He continued:

"The foreshore of Lake Kununurra is almost opposite this motel complex. Aboriginal people already congregate in one area of this foreshore to drink alcohol on a daily basis. Having a liquor outlet

close nearby would only promote a higher proportion of these people congregating here and making a nuisance of themselves when in a state of drunkenness. This I personally cannot accept as walkers, joggers, sightseers are constantly using the foreshore or viewing the splendour of the lake from exactly this location. They should not be subjected to harassment by drunks for money, and should not have to put up with the scene being spoiled by the copious amounts of rubbish that the drunks leave lying around when they leave. Vehicles using the highway are only metres away from this drunken group of people. Closer to town in a park opposite a hotel and drive-through bottle shop, drunks in numbers stagger close to the road to try to cross the road, and on occasions, are hit by cars. They really are a hazard to themselves and also to drivers. I personally see this drunkenness problem and its spin-off problems increasing enormously if liquor is made available from yet another drive-through bottle shop. It is quite easy to ask and pay someone with a vehicle to buy the alcohol for those without a car."

I shall return to the evidence called by the intervener when I come to exercise the discretion of the court in accordance with the law as I have explained it. Before doing so, however, it is necessary to consider whether the applicant has satisfied the statutory criteria for grant.

The ultimate issue under s38(1) and s74(1)(d) of the Act

The evidence for the applicant to which I have referred is, in my opinion, sufficient to establish on the balance of probabilities that a significant section of the public residing in, resorting to and passing through the affected area has a subjective requirement to obtain liquor, accommodation and related services at these proposed premises. Save in respect of packaged liquor for consumption off the premises, the evidence for the applicant in this regard is quite unchallenged.

Counsel for the objectors and the intervener were at pains to point out that the market survey evidence in Exhibit 17 revealed that 38 per cent of the resident population expressed a requirement to purchase packaged liquor at

these proposed premises. It was submitted that the court should not conclude on this evidence that the subjective requirements of the public which I have identified are objectively reasonable. I reject that submission for two reasons. Firstly, I am of the opinion that 38 per cent of the resident population is a significant section of the public in the affected area. Secondly, I am of the opinion that the licensed premises already existing in the affected area do not provide for the requirements of the public residing in, resorting to or passing through the affected area for liquor, accommodation and related services, including packaged liquor for consumption off the premises, in hotel premises of a size and standard which this applicant proposes. In my opinion, the evidence establishes on the balance of probabilities that these proposed premises will plainly improve the facilities for tourists resorting to and passing through this affected area, whether they choose to occupy accommodation offered by the applicant or not. I conclude, therefore, that the evidence for the applicant, which on this issue was largely unchallenged, establishes on the balance of probabilities that the subjective requirements of the public for liquor, accommodation and related services in this affected area are objectively reasonable. In my opinion, on the balance of probabilities, the case for the objectors under s74(1)(d) of the Act fails and I conclude that the applicant has discharged the burden upon it under s38(1) of the Act.

The ultimate issue under s5(1)(b), s33 and s74(1)(b) and (g) of the Act

I have said that it was the intention of Parliament that the Licensing Authority should refuse the grant of a new licence or otherwise place conditions on the grant of a new licence where the Licensing Authority is of the opinion that such a course is necessary on the merits to minimise harm or ill health caused to people, or any group of people, due to the use of liquor.

As I have explained, the nature of the case for the objectors and the intervener is that the grant of this application would cause undue harm or ill health to certain people of Aboriginal descent who reside in or resort to the affected area, and in particular Kununurra. The extent of the case for the objectors and the intervener was that the court should not in its discretion grant the application either with or without the conditions proposed by the applicant, other than by the grant of a hotel restricted licence prohibiting the sale of packaged liquor to persons other than lodgers and restricting other sales to liquor sold for consumption on the licensed premises.

In addition, as I have explained, the objectors rely on the ground of objection under s74(1)(g) of the Act the nature of which is that owing to the location of the proposed premises, the grant of the application will lead to a diminution of the amenity, quiet and good order of the locality.

In this case, the determination of the ultimate issue under s5(1)(b), s33(1) and s74(1)(b) of the Act must I think begin with the observation that the applicant itself acknowledges the potential for harm which the consumption of liquor has for certain people of Aboriginal descent residing in and resorting to Kununurra. That recognition is reflected in the conditions proposed by the applicant. The applicant does not, however, acknowledge that the grant of this application will increase the level of harm to people of Aboriginal descent and third parties.

The data relied upon by Dr Gray establishes on the balance of probabilities the existing level of potential harm which the consumption of liquor has for certain people of Aboriginal descent residing in and resorting to Kununurra.

The evidence of Mr Edward Carlton likewise establishes on the balance of probabilities that existing level of harm.

The question which requires consideration in the determination of this objection is whether the evidence establishes on the balance of probabilities that the grant of the application is more likely than not to cause undue harm or ill health from the consumption of liquor to the extent that the court in its discretion should refuse to grant the application.

Dr Gray spoke of the "possibility that an additional licence may increase those already high levels of consumption and harm" in the affected area. He said it was unpredictable whether the grant of this application will make an appreciable difference to the incidence of alcohol related harm and ill health in the affected area. He accepted that there are "so many variables at work". In my opinion, it is plain from the evidence of Dr Gray as a whole that his opinion about the determination of this ultimate issue is conditioned by his place in what I have called the availability - consumption debate. In the end, it is a question for the court to determine and in my opinion it is a question within the ordinary experience of the tribunal of fact.

Dr Lefmann identified the existing harm caused by the consumption of liquor to this group of people of Aboriginal descent and then said he saw "this drunkenness problem and its spin-off problems increasing enormously if liquor is made available from yet another drive-through bottle shop". Exposed as Dr Lefmann is to the existing levels of harm caused by the consumption of liquor, I accept that it is an opinion which Dr Lefmann genuinely holds, but it is an opinion on the ultimate issue which the court must be left to determine on the whole of the evidence.

I find as a fact that the sale of packaged liquor to and the consumption of packaged liquor by the group of people of Aboriginal descent in question in this case has caused and continues to cause harm and ill health to members of their community and third parties. In accordance with the law as I have explained it, it is no more than mere conjecture, guesswork or surmise to infer

from this evidence, however, that the grant of this application may cause harm or ill health to this group of people which is undue, when considered against the weight of the evidence in support of the grant of a further hotel licence in this affected area. To refuse this application on the evidence before the court in the belief that the refusal will more likely than not minimise harm or ill health to this group of people, would in my opinion likewise be no more than conjecture. Furthermore, so far as it is material in the determination of any one case, I do not accept the proposition on the evidence before the court in this case that to grant this application will detract from "the practical avenues for indigenous communities to create and implement strategies in a manner that promotes self-determination and culturally appropriate methods of minimising the harms associated with indigenous alcohol abuse" referred to by Dr Gray et al (ante). Accordingly, in my opinion it has not been established on the balance of probabilities that it is in the public interest to refuse this application.

Counsel for the objectors and counsel for the intervener further submitted that the court should refuse the grant of this application owing to its location on the Victoria Highway. This submission was advanced on the basis that people of Aboriginal descent approaching the premises to purchase packaged liquor on foot would be a danger to themselves and others on the highway. It was also advanced on the basis that the location of the premises on the Victoria Highway would promote the sale of packaged liquor to motorists. I am of the opinion that the first basis for this submission is also a matter of mere conjecture or surmise which on balance should not lead to the refusal of this application. The second basis for the submission in my opinion has no merit. In my opinion, the impulse purchase of packaged liquor by motorists is no more likely to occur at the proposed premises than those already existing in the affected area.

The objection under s74(1)(g) of the Act is based upon the location of the premises adjacent to residential dwellings, the caravan park and public open space. On the evidence, I find as a fact that a section of the population residing in the affected area is annoyed by groups of people of Aboriginal descent who frequent various locations in the townsite of Kununurra. The evidence in this case once again does not in my opinion establish on the balance of probabilities that the level of annoyance is likely to change as a result of the grant of this application.

I am, therefore, of the opinion that the grounds of objection under s74(1)(b) and (g) fail. For the reasons which I have given, I am also of the opinion that the court should not refuse the grant of this application in the public interest. It remains to determine whether the grant of the application should be made subject to the conditions proposed by the applicant in Exhibit 23. I do not find it necessary to consider the submissions of counsel for the intervener that the condition restricting packaged liquor sales to customers in vehicles is an invitation to the court to condone a possible breach of s13(b) of the *Racial Discrimination Act 1975 (Commonwealth)* and of s36(2) of the *Equal Opportunity Act 1984 (WA)*. It seems to me that in the first instance after this applicant begins to trade, it should be left to join the Kununurra accord. If in the future it becomes apparent to the Licensing Authority that the accord is not effective it will then be open to the Licensing Authority to impose conditions on all those licences then existing in the affected area as it then sees fit.

Accordingly, in my opinion, this application should be granted in accordance with these reasons but otherwise subject to the lawful requirements of the Director of Liquor Licensing.

I certify that this and the preceding 39
pages comprise the reasons for judgment
of his Honour Judge Greaves

9 / 12 / 1999 Daniel Associate