

JURISDICTION : LIQUOR LICENSING COURT OF WESTERN AUSTRALIA

LOCATION : PERTH

CITATION : RE LILY CREEK INTERNATIONAL; LILY CREEK INTERNATIONAL PTY LTD -v- SAYERS & ORS
[2001] WALLC 4

CORAM : GREAVES J

HEARD : 28 FEBRUARY 2001

DELIVERED : 19 APRIL 2001

FILE NO/S : LLC 46 of 2000

PREMISES : LILY CREEK INTERNATIONAL
Victoria Highway
Kununurra WA 6743

MATTER : Application for a conditional grant of a Hotel Licence

BETWEEN : LILY CREEK INTERNATIONAL PTY LTD
Applicant

AND

PETER JOHN SAYERS
DEBORAH LEE SAYERS
First Objector

AUGZEN PTY LTD
Second Objector

AAPC PROPERTIES LTD
Third Objector

EXECUTIVE DIRECTOR OF HEALTH
Intervener

Catchwords:

Hotel licence - Evidence sufficient to establish grant necessary to provide for reasonable requirements of public for liquor, accommodation and related services - Minimisation of harm or ill health caused to people, or any group of people, due to the use of liquor - Whether harm or ill health will in fact be caused to people, or any group of people, due to the use of liquor to be determined by reference to a degree of probability - Expert evidence concerning the relationship between the availability of liquor and consumption of liquor - Weight to be attributed to expert evidence - Evidence uncontroverted - Factors relevant to the assessment of weight - Examination of research and data relied upon by expert - Expert evidence of insufficient weight to lead to conclusion that grant of licence will increase consumption of liquor in affected area - Evidence establishing no more than a small possibility grant may cause harm or ill health to people, or to any group of people, due to the use of liquor in the affected area - Mere possibility of harm or ill health always a relevant consideration - extent of harm or ill health likely on evidence such that Court should not refuse application to minimise harm or ill health - Application granted

Legislation:

Liquor Licensing Act 1988, s 5(1)(b), s 5(2), s 38, s 41, s 62, s 69(8), s 74(1)(a), s74(1)(b), s74(1)(d), s74(1)(g)

Result:

Application granted

Representation:

Counsel:

Applicant	:	Mr A D Wilson
First Objector	:	Mr J F I Curlewis
Second Objector	:	Mr J F I Curlewis
Third Objector	:	Mr J F I Curlewis
Intervener	:	Mr G T W Tannin

Solicitors:

Applicant	:	Chalmers & Partners
First Objector	:	Phillips Fox
Second Objector	:	Phillips Fox
Third Objector	:	Phillips Fox
Intervener	:	State Crown Solicitor

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

H v Schering Chemicals Ltd (1983) 1 All ER 849
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638
Pownall & Conlan Management Pty Ltd (1995) 12 WAR 370

Case(s) also cited:

Nil

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GREAVES J:

Introduction

1 The Full Court has remitted this application for re-hearing in the light of the reasons of Ipp J. In the course of those reasons at [50], Ipp J concluded that this Court should re-hear "the overall factual questions". At [19] *et seq* of his reasons Ipp J said:

"It is obvious, however that tension may arise between the object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor and certain of the objects contained in s 5(2). There will be occasions when s 5(2) objects could only be achieved by the grant of licences for the sale and supply of liquor in circumstances under which such grants may tend to cause harm or ill-health to people. Section 5 makes it plain that the Licensing Authority is required to bear s 5(2) objects in mind as well as the primary objects when fulfilling its functions. This indicates that the Licensing Authority must undertake a weighing and balancing exercise when conflict between objects arises.

It is significant that the primary object in s 5(1)(b) is to 'minimize' harm or ill-health, not to prevent harm or ill health absolutely. The word 'minimize' is consistent with the need to weigh and balance all relevant considerations. This concept also underlies those sections of the Act that provide for objections to the grant of licences on grounds based on harm or ill health to people. Section 73(2) provides (subject to that section) for a right to object to an application made under the Act 'on any ground permitted by s 74'. Section 74(1)(b) permits an objection to be made on the ground 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'. The word 'undue' in s 74(1)(b) emphasises that the Licensing Authority is required to undertake a comparative task where there is a conflict between the primary object in s 5(1)(b) and the other objects described in s 5(2).

It follows that the mere fact that s 5(1)(b) is a primary object does not necessarily mean that where harm or ill health may be caused to people by the grant of a licence, no licence should be granted. Where there is a prospect of harm or ill-health being

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caused by the grant of a licence, and that grant will advance s 5(2) objects, the resolution of the conflict that then arises will depend on the degree of importance that is to be attributed to each of the relevant factors in the particular circumstances (bearing in mind that the object under s 5(1)(b) is to be accorded primacy).

The Licensing Authority may decide that the possibility of harm or ill health is so remote or so insignificant that it should not be taken into account. It may be that a possibility of harm or ill health of a particularly serious nature will be sufficient to cause the Licensing Authority to impose stringent conditions on a licence or refuse the grant absolutely. The decision in each case will depend on the particular circumstances."

2

His Honour then referred to *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 and the judgment of Deane, Gaudron and McHugh JJ at 643 which was not cited to the court at the hearing of this application. His Honour then continued:

"Whether harm or ill-health will in fact be caused to people, or any group of people, due to the use of liquor is a matter for the future and, in the sense referred to in *Malec v JC Hutton Pty Ltd*, is essentially a matter of prediction. The Licensing Authority will only be able to determine the likelihood of harm or ill health occurring by reference to a degree of probability.

In my opinion, where the degree of probability is less than 51 per cent, it does not follow that the possibility of such harm or ill health is to be ignored. In my view, there is nothing in the wording of s 5(1)(b) that leads to such a view. On the contrary, the public interest considerations that underlie s 5(1)(b) indicate that the potential of harm or ill health is to be taken into account irrespective of whether the prospect of harm or ill-health is a possibility or a probability. The wording of s 69(8a) is also indicative of an intent to this effect.

Section 33 of the Act confers upon the Licensing Authority an absolute discretion to grant or refuse an application on any ground that the Licensing Authority considers in the public interest. The potential of harm or ill health to people, irrespective of whether the harm or ill health is proved on a balance of probabilities, would be a powerful public interest

consideration. The section is therefore consistent with the view that the mere possibility of harm or ill-health would always be a relevant matter for the Licensing Authority when discharging its functions."

3 At [45] of his reasons, Ipp J went on to explain that the matters which may influence the weight to be attributed to opinion evidence are innumerable. He mentioned examples such as the certainty of the facts on which the opinion is based, the persuasiveness of the reasoning involved and the inferences that are drawn, the experience and skill of the witness, the reliability of the procedures used, the degree of knowledge on which the opinion is based and which is required for the opinion, and the impartiality of the witness.

4 Ipp J then referred to some of the evidence of Professor Gray, Sergeant Murray, Mr Edward Carlton and Dr Stephen Lefmann. At [59], his Honour observed:

"The opinion evidence to which I have referred was not controverted. Other than the internal conflicts between the testimony of Prof Gray and Sgt Murray as to whether a further outlet would result in increased alcohol consumption, there were no conflicting opinions. Whether the conflicting inferences drawn by Prof Gray and Sgt Murray give rise to equal degrees of probability is seriously open to question. After all, Prof Gray based his inference on a considerable body of research as well as experience, while it is not clear what gave rise to the opinion expressed by Sgt Murray. Further, Prof Gray is an acknowledged expert on the relationship between the availability of alcohol and the level of consumption, while Sgt Murray, arguably, is not."

5 Ipp J concluded his reasons with the following remarks in relation to the evidence of Professor Gray:

"Prof Gray's testimony concerning the relationship between availability of liquor and consumption of liquor was said by him to be based on his research and experience. In my opinion, this question does not fall within the ordinary experience of a judicial officer. It is open to serious question (on which I do not express a concluded view) whether even a specialist tribunal such as the Liquor Licensing Court has the knowledge and experience with which to deal with the issue, but this is not the

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ground on which the factual finding was justified by the learned Judge. As mentioned, his Honour put it on the basis that the issue was simply a question within the ordinary experience of the trier of fact - in other words, by any court. In my opinion, this is an issue which could only be reliably commented upon by a person who is knowledgeable on the issue by reason of appropriate research or experience or both. It is not a matter within the ordinary knowledge of a judicial officer.

The learned Judge did not himself put to Prof Gray any personal view to the contrary. In my view, before making a finding against Prof Gray in this regard, in circumstances where it was not otherwise known that the learned Judge would rely on his own knowledge to reject Prof Gray's testimony, his Honour was required to put to Prof Gray the factual basis on which he was considering coming to a different conclusion to that expressed by the witness."

6 At the re-hearing, counsel for the Executive Director submitted that the evidence of Professor Gray concerning the relationship between availability of liquor and consumption of liquor does not fall within the ordinary experience of a judicial officer. He submitted that as an alternative factual basis for a different conclusion was not put by any party to Professor Gray, his evidence on this matter must be accepted. For this proposition, counsel relied upon pars 72 and 73 of the reasons of Ipp J.

7 It seems to me that what the court is now required to do in re-hearing the overall factual questions in the light of the reasons of Ipp J is to reconsider the evidence in accordance with the approach explained in pars 19 to 22, 27 to 29 and 45 of the reasons of Ipp J. Ultimately, as Ipp J observed at [69] of his reasons, the court must weigh the evidence in the balance in accordance with the usual rules.

The evidence of Professor Gray

8 I turn firstly to the data which Professor Gray relies on when he expresses the conclusion at AB443:

"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

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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 increase in availability is likely to have the effect of increasing this disparity."

9 At AB433, Professor Gray refers to document 29 at AB308 of March 1999 entitled "Consumption of Alcohol in Kununurra and its Impact on the Health of Local Residents" published by the Epidemiology and Analytical Services Health Department of Western Australia. At AB436, Professor Gray states:

"... [I]t is estimated that per capita consumption of alcohol in the Wyndham-East Kimberley SLA was 24.07 litres among Aboriginal people, and 17.47 litres among non-Aboriginal people. That is, while non-Aboriginal people were responsible for a proportion of consumption less than their proportion of the regional population - 76.8 versus 82.0 per cent - their per capita level of consumption was still 74 per cent greater than in WA as a whole."

10 In cross-examination, Professor Gray accepted that this estimate was made prior to the introduction of the Kununurra Alcohol Accord in May 1999. He accepted that the data is not evidence of the consumption level for individual people but in the absence of that kind of data, it is used as the standard both in Australia and other countries as a reasonable estimate of consumption and a means of making comparisons between different areas. Professor Gray referred again to document 29 at AB438D when he said:

"... The capital EAS Report examined mortality over the 10 year period 1988 to 1997. Over the period, it was determined that 35 deaths were alcohol-related. Of these 78.5 per cent were Aboriginal and, as the report indicates, this was significantly higher than the 47 per cent of the population that Aboriginal people represented. When adjusted for age and sex, the rate of alcohol-related deaths per 1000 persons in the Wyndham-East Kimberley was 4.2 times that in the state as a whole.

Staff of the EAS Branch also examined hospital discharges for alcohol-related conditions for the four year period 1994 to 1997. Over this period, they identified a total of 585 episodes

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attributable to one of 29 alcohol-related conditions. A small number of acute conditions, including assaults (40.2 per cent), fall injuries (11.1 per cent), road injuries (6.3 per cent), and fire injuries (1.9 per cent) accounted for 59.5 per cent of the total. Of the total number of alcohol-related discharges, 79 per cent were of Aboriginal people.

The EAS report compared the rates of admissions for alcohol-related conditions for Aboriginal and non-Aboriginal people in the Wyndham-East Kimberley SLA, and compared those with rates for Western Australia as a whole. EAS staff found that, over the four year period, there had been a significant reduction [*sic - in*] the Aboriginal discharge rate for the Wyndham-East Kimberley; however, it was still almost three times the rate among non-Aboriginal people. The Wyndham-East Kimberley discharge rate for Aboriginal people was similar to that for Aboriginal people in the State as a whole, but the non-Aboriginal discharge rate was 2.95 times that of non-Aboriginal in Western Australia (13.3 per 1000 person years compared to 4.5 per 1000 person years)."

11 In Table 5 at AB453 Professor Gray sets out what he says is the number of licences and number of licences per 1000 persons over 15 years in Kununurra. In cross-examination, Professor Gray accepted that there are two, not three hotel/tavern licences in Kununurra and that there is no operating cabaret licence. He accepted, in those circumstances that his conclusion at AB442E about the density of licences in Kununurra is wrong and that such density is close to the density in Western Australia as a whole.

12 In expressing the conclusion at AB443 that 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, Professor Gray also observed at AB443E:

"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."

13 In cross-examination, Professor Gray explained his opinion. He said that the grant "may make an appreciable difference ...it's unpredictable ..."'

14 In respect of this evidence, Ipp J said at [48] of his reasons:

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"In cross-examination, however, Prof Gray said that one more licence '*may*' make an appreciable difference'. He was asked whether it '*will*' make an appreciable difference, but was not prepared to go that far. Other evidence of Prof Gray in cross-examination was to the same effect. For example, he referred to '*the possibility*' that an additional licence may increase the already high levels of consumption and harm.

There are two points to be made in connection with this evidence. Firstly, it is not entirely clear whether Prof Gray was referring to the '*magnitude*' of harm that would ensue, rather than whether some harm of some kind would inevitably follow from the grant of a licence. Secondly, it is by no means certain whether Prof Gray was using the word '*may*' and '*possibility*' in the sense that a lawyer uses these terms in connection with the civil standard of proof, namely proof on a balance of probabilities. Prof Gray's evidence in this respect can readily be understood as the opinions of a scientist who is not intending to express an opinion as to the degree of likelihood of harm occurring as this issue would be understood by a lawyer. These aspects of his evidence were not canvassed when he testified."

15 At AB116B, Professor Gray explained in cross-examination that in his opinion "The main problem is excessive alcohol consumption." He expressed the opinion that a grant may increase consumption and that it is not possible to predict the magnitude of the increase.

16 At AB126AB Professor Gray stated:

"... 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."

17 Professor Gray repeated at AB126D that it is not possible to predict the magnitude of the increase in consumption and that his report is based on the premise that unrestricted availability will result in increased consumption. I then asked Professor Gray at AB127A "Why is it not possible to predict the magnitude?" and he replied:

"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."

18 It is important in my opinion to note the precise context of this evidence. Professor Gray expressed the opinion at AB126CD that the applicant's proposed restrictions in Exhibit 23 "will restrict the availability of alcohol from this particular venue but if the net result is a further increase in consumption in the town as a whole, then despite these restrictions there is still the potential for the premise to contribute to an increase in consumption in the town." He added, as I have said, that it is not possible to predict the magnitude of the increase in consumption and that his report is based on the premise that unrestricted availability will result in increased consumption. It is in this context that Professor Gray answered my question why it is not possible to predict the magnitude of the increase in consumption. His opinion, which I have quoted, was that it is not possible to predict the magnitude of the increase in consumption, whether that increase is predicated upon the grant of this licence or the grant of this licence restricted by the conditions contained in Exhibit 23.

19 Professor Gray then referred to the support of the community for restrictions and the other measures which may or may not be in place, in this case such as the Kununurra Accord. Owing to its recent origin, there is no evidence of the efficacy of that accord but Professor Gray was plainly of the opinion that conditions imposed on the licence were more likely to be effective than the accord because they are capable of enforcement. While the enforceability of such conditions is patent, it seems to me that Professor Gray's opinion remains that it is not possible to predict the magnitude of the increase in consumption upon a grant of this application. Professor Gray's opinion is that an unconditional grant may increase consumption, that a grant restricted by the conditions in Exhibit 23 will restrict the availability of liquor from the applicant's premises, but there is still the potential for the premises to contribute to an increase in consumption of liquor in the town of Kununurra.

20 I have observed that at AB116B, Professor Gray expresses the opinion that the main problem is excessive alcohol consumption in the town of Kununurra, particularly in the case of some people of Aboriginal descent, but also in relation to the community as a whole.

21 The question must be asked, therefore, upon what evidence does Professor Gray rely in reaching the conclusions which I have mentioned. Firstly, he makes the statement at AB443E *et seq*, which I have already referred to, that consumption is not at such a level in Kununurra that "saturation" point has been reached. In order to understand the foundation of his opinion, it is necessary to have regard firstly to the basic premise upon which his report is based and to the research at AB429 *et seq*.

22 It should be kept in mind that Professor Gray's opinion at AB443D to which Ipp J referred is founded upon data about outlet density in Kununurra which Professor Gray acknowledged was incorrect. The error of course does not vitiate his opinion but it makes it all the more necessary to examine what he says about "outlet density" as the foundation for his opinion. At AB431AB, Professor Gray makes it clear that he was of the opinion that Kununurra is an area of high outlet density when he says:

"Despite the international literature which demonstrates the relationship between outlet density and consumption, there has been no attempt to reduce outlet densities in northern Australia - even though there are high densities in many areas."

23 At AB429DE Professor Gray expresses the opinion that: "The international literature also demonstrates that consumption levels are influenced by the availability of alcohol." At AB430, Professor Gray continues:

"[T]he authors of the reviews are unanimous in identifying a number of factors which, to varying degrees, influence availability. The factors most clearly demonstrated to influence consumption are controls on price via the taxation system, and restrictions on the minimum drinking age. The reviews also conclude that while earlier work was equivocal in its results, the most recent, methodologically sound, studies demonstrate that outlet densities (defined as the number of outlets per unit of population) have a significant positive effect on alcohol sales. Outlet density has also been shown to be associated with the frequency of alcohol-related motor vehicle crashes.

...

[T]he 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. ... They cautioned, however, that the effectiveness or ineffectiveness of such measures is contingent upon public support and compliance."

24 It will be observed that Professor Gray distinguishes between factors which influence availability and factors which influence consumption. He notes the well recognised view that price is the most influential factor known to influence consumption. He says at AB429C that the literature on the relationship between the availability of alcohol and levels of consumption and related harm has been reviewed by d'Abbs, Gray, Togni *et al* which his report is based on. It will be noted that the first proposition which Professor Gray makes at AB429C is that there are numerous international studies - going back over 30 years - which demonstrate a positive relationship between levels of per capita consumption in populations and the frequency and range of social and health problems. It should be observed that translated this is a restatement of the well known relationship between the consumption of liquor and the occurrence of social and health problems.

25 A brief examination of Part 3 of the report "Alcohol-related problems in Katherine: A Report Prepared for Morgan Buckley (Solicitors)", referred to by Professor Gray at AB429C reveals quickly that, as Professor Gray acknowledged, his overview in these proceedings is based upon that work. It is, perhaps, helpful to note in the first instance that the report was commissioned by the Northern Territory Liquor Commission in the course of proceedings in which the Commission was considering the variation of trading hours for the sale and supply of packaged liquor in Katherine. It was not considering the grant or refusal of a licence.

26 The material in Chapter 3 of the report which, as I have said, Professor Gray relies heavily upon in this case, should also be viewed in the context of the observations in Chapter 2 of that report under the sub-heading "Approaching community alcohol-related problems: a conceptual framework", where the authors observe at p 4:

"The problems associated with the misuse of alcohol are not homogeneous and they fall into three categories:

- problems of *intoxication* - such as violence and road crashes;

- problems of *chronic excessive consumption* - such as liver cirrhosis and psychological impairment; and,
- problems of *dependence* - such as impairment of control and withdrawal symptoms.

These problems can be further distinguished according to the levels at which they occur. These levels are:

- *drinkers* themselves - including involvement in the criminal justice system and health problems;
- *drinkers' families* - including domestic violence and loss of money for food; and
- *drinkers' communities* - including unemployment, and strains on health services.

d'Abbs and Jones go on to point out that these distinctions are important, not just for analytical purposes, but also as a basis for developing strategies to reduce those problems. As they, and others, have indicated, no single measure is capable of ameliorating all of the harmful consequences of alcohol misuse at all levels. They state that, given the multi-causal nature of alcohol problems, any strategy that aims to reduce them must include measures that address all of the factors they have outlined. Following May (1992) and recommendations of the Royal Commission into Aboriginal Deaths in Custody (1991), these include:

- controls on the *availability* of alcohol;
- programs and services designed to change drinking practices;
- measures to reduce risks associated with particular *drinking environments*; and,
- measures to overcome social and economic disadvantages and to enhance the *social and economic opportunities* available to members of the population to which the drinkers belong.

They caution that to build an intervention strategy based on only one set of factors is to invite failure."

27 A final caution is pertinent in considering Part 3 of the report under the subheading "Liquor licensing and the reduction of alcohol problems: a brief review" the introduction to which I think it is now important to set out in full:

"As indicated by d'Abbs and Jones, control over the availability of alcohol is one of several measures that can be taken to address alcohol-related problems. Such control has been exercised with increasing frequency in remote and rural areas of Australia and its imposition in Katherine is the subject of current hearings. Before reviewing the effectiveness of these measures in Australia, we wish to briefly summarise the rationale for them and the international evidence for their effectiveness.

It has long been known that there are positive relationships between levels of per capita consumption of alcohol and the frequency of certain health and social problems (Bruun *et al* 1975). For example, studies from the United States, Canada, the United Kingdom, Sweden, and Finland demonstrate positive correlations between per capita rates of alcohol consumption and a variety of health and social indicators including cirrhosis and cancer mortality rates, hospital admissions for alcohol dependence, drunkenness convictions, drink driving offences, and crimes of violence (Anglin *et al* 1995; Kendall 1984; Mann *et al* 1991; Norstrom 1987; Osterberg 1988). As the model outlined by d'Abbs and Jones suggests, these relationships are both variable and complex. Nevertheless, they are clearly demonstrated by the evidence.

Since the pioneering work of Bruun *et al* (1975) over 25 years ago, it has been recognised that levels of consumption are themselves influenced not only by demand factors arising among drinkers, their drinking settings and cultures, but also by the availability of alcohol - that is, 'the ease with which alcohol may be purchased for consumption' (Gruenewald 1993:60). Numerous studies have been undertaken into this relationship and have focused - albeit unequally - on a range of measures; some of which are implemented at the national and others at the local level. These measures include: legal systems for control and the structure of regulatory agencies; forms of retail availability; price; minimum age limits for consumption; the

density of alcohol outlets; types of beverages; and hours and days of sale.

There are several review articles that critically review the findings of these studies (Edwards *et al* 1994; Gruenewald 1993; Single 1988; Stockwell 1994). The interventions which have the most clearly demonstrated effectiveness are controls on price via the taxation system, and restrictions on the minimum drinking age. Indeed, work by Gray and Chikritzhs has shown that the imposition of a levy on the sale of cask wine in the Northern Territory led to a significant reduction in alcohol consumption (Gray & Chikritzhs 1999). The reviews also conclude that while earlier work was equivocal in its results, the most recent, methodologically sound, studies demonstrate that outlet densities (defined as the number of outlets per unit of population) have a significant positive effect on alcohol sales.

Findings with regard to the influence of hours and days of trading are more equivocal. Edwards *et al* conclude that:

'Most of the studies of changes in hours of sale and opening days for alcohol outlets have demonstrated increased drinking associated with increased number of hours, and decreased drinking with elimination of days of sale together with associated changes in alcohol problems (1994:144).'

Gruenewald, however, argues that too few studies of their effect have been conducted and has called for more research into the issue (1991:73); and Stockwell asserts that the results of such studies are equivocal, though *minor* variations in trading hours are likely to have little impact on overall levels of consumption (1995:120).

Despite this, and general agreement on the need for more research into particular aspects of these relationships, 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. In a review conducted under the auspices of the European Office of the World Health Organisation, Edwards *et al* have written:

'The weight of the empirical evidence has supported the argument that limitation on the availability of alcohol can be an effective part of a public health approach to reduce alcohol consumption, and thus to alleviate problems associated with alcohol. While many of these problems are established at state and national levels, others can be established at the community level. The counter argument to the effectiveness of alcohol availability restriction, "that people will obtain alcohol no matter the difficulty, particularly heavy drinkers", is, on the showing of the empirical evidence, not valid (Edwards *et al* 1994:143).'

They caution, however, that their effectiveness or ineffectiveness is contingent upon public support and compliance (1994:145)."

28 Following the introduction, there appears the data which Professor Gray summarises in his evidence. The authors of the report conclude at p 13:

"As well as reporting on outcomes, d'Abbs and Togni also discussed issues emerging from the evaluations which need to be considered by any group intending to impose or advocate restrictions. These issues are:

- representation or "who speaks for the "community"?";
- what sort of restrictions on availability should be imposed?;
- what additional measures should be introduced?;
- selective versus universal restrictions; and
- the role of the liquor licensing authority."

29 It will be observed that this conclusion is consistent with the opinions expressed in the earlier study which the authors of the report rely on under the title "An examination of the appropriateness and efficacy of liquor licensing laws across Australia" of January 1994:

"It will be argued here that there is no single answer to so general a question as 'what is the relationship between alcohol availability and alcohol harm'. Rather, both the concepts of 'availability' and of 'harm' are multi-faceted and so it may be

more useful to seek out specific relationships between types of availability and types of alcohol harm while also paying attention to social, cultural and economic conditions prevailing in particular communities. It will be argued that there are some clear and unequivocal conclusions which can be drawn from the relevant literature and which any genuine attempt to devise liquor laws with a view to reducing alcohol problems should take note of. It will be also argued that there are still substantial gaps in our knowledge-base arising from deficiencies in much of the research conducted to date to unravel these complex questions. First, it is necessary to examine in more detail both the nature of the 'availability hypothesis' and that of alcohol harm."

30 At p 59 in s 6.2 of that study, the authors refer to the research evidence on the availability theory which is relevant in this context and I set out in full:

"Ten major reviews of the international research literature concerning alcohol availability, consumption and harm were identified, though there are doubtless several others. Characteristically, they all discuss the same set of studies and come to similar conclusions. Of these reviews, one originates from Australia, one from New Zealand, one from the UK, one from Scandinavia, two from Canada and three from the USA. A further review was commissioned by the World Health Organisation and makes reference to a number of studies and data sets from third world countries which are not discussed to by other reviewers.

A number of common conclusions arising from the studies contained in these reviews are worth discussing here. Table 6.1 summarises the directions in which the available evidence points in relation to broad categories of controls on availability and types of alcohol problems. It should be stressed that we are only considering the impact of control strategies here and not their inappropriateness. An appraisal will be provided in Chapter 12 of the extent to which various controls on availability are acceptable in the current climate of opinion in Australia today.

Strength of research evidence for the impact of alcohol control policies on alcohol consumption and problems

ALCOHOL CONTROLS

PROBLEM INDICATOR	PRICE	NUMBER OF OUTLETS	HOURS OF SALE	DRINKING AGE
CONSUMPTION OF:				
All drinkers	**	*	0	X
Heavy drinkers	**	?	*	*
PROBLEMS OF:				
INTOXICATION -				
• Drink driving	**	X	0	**
• Other	*	*	0	**
REGULAR USE	**	*	?	0
DEPENDENCE	**	?	?	*

Code

- ** strong support
- * some support
- 0 conflicting
- X not supported
- ? little or no data"

31

It is quite plain from the evidence of Professor Gray and the research material on which he relies and which forms part of his evidence that his experience and skill in harm minimisation strategies is well recognised and considerable. He also has recent experience of the affected area as may be seen from his "evaluation of Kununurra-Waringarri Aboriginal Corporation's Alcohol Projects" August 1998 which in conjunction with others he prepared for the National Centre for Research into the Prevention of Drug Abuse at Curtin University of Technology, which evaluation was funded by the Health Department of Western Australia.

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While that evaluation does not examine alcohol availability and consumption the introduction provides a helpful background both to the experience of Professor Gray and to the local conditions in the affected area. I refer to the introduction.

"The poor social conditions and health status, and the impact of excessive alcohol consumption among some segments of Australia's Aboriginal and Torres Strait Islander populations have been well documented. The situation in the Kimberley region of Western Australia, and the towns of Kununurra and Wyndham within it, are no different. The results of a survey undertaken in 1994, showed that approximately 31 per cent of aboriginal dwellings had no running water, 27 per cent had no electricity or gas connected, and 23 per cent had no garbage collection. Forty-eight per cent of the Kununurra Aboriginal population had minimal or no formal education and 72 per cent earned \$12,000 or less per year. The despair associated with such factors has been found to contribute to the up-take and misuse of alcohol and other drugs. In the Kimberley region as a whole, based on the results of a stratified sample survey, Hunter estimated that – although 54 per cent of Aboriginal women and 24 per cent of Aboriginal men did not currently consume alcohol – those who did drink were more likely to do so at harmful levels. The harms caused by the excessive use of alcohol and other drugs not only detrimentally effects the health, social and economic well-being of the individual drinkers but has the similar effects on family and community members.

To address the harms caused by alcohol and other drug use, Aboriginal and Torres Strait Islander community organisations have established a wide range of intervention projects. As yet, few of these have been formally evaluated and there is an absence of guidelines for best practice in the implementation of such interventions. For example, a review of over 284 indigenous drug projects revealed that 50 per cent of them lacked adequate evaluation components. Furthermore, of the data that is collected little would 'enable any meaningful assessment of service delivery'. However, despite these findings and the methodological difficulties involved, many organisations are interested in improving the level of project evaluation that they undertake.

In the East Kimberley Region, to address excessive alcohol consumption and the harm associated with it, Kununurra-Waringarri Aboriginal Corporation (hereafter referred to as Waringarri) has established a night patrol, a sobering-up shelter, a drop-in counselling service and a residential rehabilitation centre; and the Ngnowar-Aerwah Aboriginal Corporation in Wyndham has established an alcohol counselling service, a community education and training project, a patrol, and a rehabilitation centre. In November 1995, Waringarri sought assistance with an evaluation of its alcohol projects from Aboriginal Research Program staff at the National Centre for Research into the Prevention of Drug Abuse (NCRPDA). In the words of the Waringarri Alcohol Projects coordinator, the reason for undertaking such an evaluation was 'to see that we're (Waringarri) on the right track'."

32 Given Professor Gray's position as Professor of Medical Anthropology at the National Centre for Research for the Prevention of Drug Abuse at Curtin University of Technology and given his experience to which I have referred, I have no difficulty in concluding that the opinions expressed by Professor Gray are honestly and genuinely held. The question which requires consideration is the certainty of the facts on which his opinions are based and the weight which should be attributed to his opinion that the grant of this application may increase consumption of packaged liquor in this affected area and may thereby cause harm or ill health to people in the affected area or any group of people in the affected area. On the evidence, there is no question about the relationship between the excessive consumption of liquor and harm or ill health in this affected area, and particularly but no exclusively to people of Aboriginal descent. In my opinion, however, the facts and research to which Professor Gray refers establish no satisfactory foundation for the opinion that the grant of this application may increase the consumption of packaged liquor in this affected area. In my opinion, it certainly does not provide a foundation for a conclusion that the grant may increase consumption to the extent that it may increase related harm and ill health.

33 In this regard, it is necessary to have regard to Ipp J's observation at par 49 that Professor Gray's evidence in this respect can readily be understood as the opinions of a scientist who is not intending to express an opinion as to the degree of likelihood of harm occurring as this issue would be understood by a lawyer. As his Honour observed that par 27, the Licensing Authority will only be able to determine the likelihood of harm or ill health occurring by reference to a degree of probability. He

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observed that s 33 of the Act is consistent with the view that the mere possibility of harm or ill health would always be a relevant matter for the Licensing Authority when discharging its functions.

Other evidence for the intervener

34 The remaining witnesses for the intervener were Senior Sergeant Colin Murray, Mr Edward Carlton and Dr Stephen Lefmann. In my opinion, it is sufficient to set out my reference to their evidence beginning at AB40B:

"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

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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:

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'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! "

35

Ipp J referred to this evidence at [54] *et seq* of his reasons which I set out for convenience:

"The Executive Director relied further on the testimony of Sgt Murray, the senior sergeant in charge of the Kununurra police station, a man with considerable experience of alcohol-related offences in Aboriginal communities. Unlike Prof Gray, Sgt Murray was of the opinion that the grant of the licence would be unlikely to alter to any marked degree the overall amount of alcohol purchased in Kununurra.

It was an open question as to whether the view expressed by Prof Gray was to be preferred to the view expressed by Sgt Murray. Plainly, the view expressed by Prof Gray was based on research and experience and was fortified by academic analysis. Sergeant Murray's view was based on his personal experience. It was a matter for the learned Judge to determine which of these two views he preferred. He does not appear to have embarked on this exercise.

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Sergeant Murray was of the opinion that the proposed drive-in bottle store would attract people in the Aboriginal community to the vicinity of that outlet which was on the fringe of the town and on the highway which allows passage of heavy vehicles. He expressed the view that the safety and security of the people attracted to that area would be at risk.

Mr Edward Carlton, the coordinator of the Waringarri Alcohol Project, testified. Mr Carlton has been concerned with the containment of alcohol abuse in the Kununurra area for some 10 years. He has considerable experience in the area and holds the degree of bachelor of science and Aboriginal community management and development and has studied and worked in the area of alcohol education amongst the community for many years. He is plainly an expert on the topic. He expressed the opinion that the grant of a licence would break down voluntary arrangements and agreements made by the Aborigines in the Kununurra area concerning limitation of alcohol use. He said that it would result in 'a dramatic increase in access to alcohol by Aboriginal people'. He was of the view that that would 'increase the level of problems in Kununurra and surrounding areas'. He said, also:

'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 [sic] people in Kununurra and surrounding communities as already described.'

Dr Stephen Lefmann, a medical practitioner with the East Kimberley Aboriginal Medical Service, was also called as a witness by the Executive Director. Dr Lefmann testified that he had been employed with the East Kimberley Aboriginal Medical Service for nearly 13 years. He described in graphic terms the health problems suffered by Aboriginal children and Aborigines generally in consequence of alcohol consumption. He expressed the opinion that the problem of drunkenness 'and its spin-off problems' would increase 'enormously' if the licence were to be granted.

The opinion evidence to which I have referred was not controverted. Other than the internal conflicts between the testimony of Prof Gray and Sgt Murray as to whether a further outlet would result in increased alcohol consumption, there were no conflicting opinions. Whether the conflicting inferences drawn by Prof Gray and Sgt Murray give rise to equal degrees of probability is seriously open to question. After all, Prof Gray based his inference on a considerable body of research as well as experience, while it is not clear what gave rise to the opinion expressed by Sgt Murray. Further, Prof Gray is an acknowledged expert on the relationship between the availability of alcohol and the level of consumption, while Sgt Murray, arguably, is not."

36 It is important to observe, as Ipp J did, that this opinion evidence was not controverted. I accept that it is not clear from the evidence what gave rise to the opinion expressed by Sergeant Murray. Ipp J and the other members of the Full Court expressed the opinion that Professor Gray based his inference that a further outlet would result in increased alcohol consumption in the affected area on a considerable body of research as well as experience. In the absence of research or experience emerging from the evidence (or elsewhere) which demonstrates a relationship between the number of licensed premises in an affected area such as this and per capita consumption of alcohol, it is plain that their Honours were referring to the considerable body of research and experience which, as I have said previously, demonstrates clearly the relationship between consumption and harm.

37 It is to the relationship between consumption and harm that the evidence of Mr Edward Carlton and Dr Stephen Lefmann is principally directed. Not surprisingly, neither of those witnesses referred to research or experience demonstrating a relationship or the extent of the relationship between the grant of this licence and increased consumption. As Ipp J observed, both Mr Carlton and Dr Lefmann have long experience of alcohol abuse in the Kununurra area. I have referred to their evidence demonstrating their experience and their concern about alcohol abuse in this affected area. I accept that the grant of this application would increase access to liquor by people residing in and resorting to the affected area, including people of Aboriginal descent. Once again, so far as the evidence of Mr Carlton and Dr Lefmann is understood to suggest that the grant of this application may increase consumption of liquor in this affected area, I observe there is no research or experience to support that conclusion. It is also necessary to observe that Mr Carlton was not

asked to explain and did not explain the basis for his opinion that the grant of this licence is likely to result in the breaking down of the Kununurra accord.

38 The primary concern of Mr Edward Carlton and Dr Stephen Lefmann was plainly about the location of the proposed premises on Victoria Highway near the foreshore of Lake Kununurra where people of Aboriginal descent congregate.

39 Finally, in relation to the alleged relationship between availability and consumption, it is interesting to examine the material referred to by Professor Gray in the text "Alcohol Policy and the Public Good" published in 1994 which derives from a project set up by the European office of the World Health Organisation. In chapter 6 of that text, under the heading Access to Alcohol, and the affects of availability on consumption and alcohol-related problems", the authors explain that the intention of this chapter is to explore the objective evidence for benefits from any measures which affect individual access to, or availability of alcohol, as instruments of public health. They suggest that demand and supply of alcohol can be mutually stimulating and re-enforcing of one another. They assert that if alcohol is readily available and convenient to purchase, people will purchase it. They refer to research suggesting that sudden change in alcohol availability may affect consumption but they point out that the data relied upon relates to extreme cases where alcohol availability is either suddenly increased or suddenly reduced and that these studies should be approached with caution. They point out that early studies of outlet density suggested that this factor had little effect on alcohol consumption. They refer to studies using data from the United Kingdom which suggest that availability measured in terms of outlet densities may be related to consumption but observe that interpretation is limited by the shortness of the series studied (at most 25 years). No more extensive research is referred to. In this context, it is also worth noting that while research may indicate that increased outlet density may increase sales, no such research demonstrates an equivalent increase in per capita consumption.

Weight to be attributed to evidence of Professor Gray and other evidence

40 It is upon this examination of the research and data relied upon by Professor Gray that I come to consider the weight which should be placed upon his conclusion that it is likely that the granting of another liquor licence in Kununurra will increase consumption and related harm. Thereafter, I shall refer again to the evidence of Sergeant Murray,

Mr Carlton and Dr Lefmann. In considering the weight to be given to the opinion of Professor Gray, I am particularly conscious of the fact that the Full Court expressed the view that Professor Gray based his inference that a further outlet would increase alcohol consumption in the affected area on a considerable body of research as well as experience.

41 I also refer again to the submission on behalf of the Executive Director that as an alternative factual basis for a different conclusion was not put by any party to Professor Gray, his evidence concerning the relationship between availability of liquor and consumption of liquor must be accepted in this case. As Ipp J explained, however, it is for the court to assess the weight to be attached to the evidence of Professor Gray as an expert. Counsel for the Executive Director acknowledged the court may examine the research and data which Professor Gray relies upon in order to determine the weight which should be placed on his conclusion that the granting of another liquor licence in Kununurra will increase consumption and related harm in this affected area. As I believe I have demonstrated, the research is not difficult to understand. The court is able to assess the material as the court would other expert evidence. The court is not involved in an assessment of matters peculiar to liquor licensing, but whether and to what extent the inferences which Professor Gray has drawn from research material written in plain English are reliably drawn and should be relied upon. In this context, it may be helpful I think to keep in mind what Anderson J said in his judgment in the Full Court in *Pownall & Conlan Management Pty Ltd* (1995) 12 WAR 370 at 390. While the court was concerned with the somewhat different question of the necessary foundation for expert evidence, I believe the following remarks reflect the approach to the evidence of Professor Gray which I have outlined:

"Expert opinion is to be judged like any other evidence. It must be comprehensible and reach conclusions that are rationally based. The process of inference that leads to the conclusions must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about the reliability of them. This requirement is not satisfied by evidence from an expert which says, in effect:

'I have examined the costings and estimates made by others and on the strength of my own expertise and experience in the field I believe them to be reasonable.'

Such a forensic device overlooks the most important rule that it is for the court to judge the reliability of evidence given in support of the case. If an opinion relies on facts that must be proved or assumptions that must be verified, it is to the court that they must be proved and verified, not to the expert witness."

42 I accept in the present case that the research and data relied upon by Professor Gray need not be proved and verified but the court can and should examine the research and data to determine whether the inferences advanced are reliably drawn. In *H v Schering Chemicals Ltd* (1983) 1 All ER 849 at 853, Bingham J said:

"If an expert refers to the results of research published by a reputable authority in a reputable journal the court would, I think, ordinarily regard those results as supporting inferences fairly to be drawn from them, unless or until a different approach was shown to be proper."

43 It should be said immediately the opinion of Professor Gray under consideration is obviously an opinion which he honestly holds. It is equally obvious that it is an opinion which he has reached by reasoning from research carried out in quite different circumstances from those existing in the affected area in this case. Most of the research was carried out overseas in circumstances and conditions far removed from an affected area in a small West Australian country town where, contrary to the opinion of Professor Gray, the existing number of outlets in proportion to the population is not above average. As Ipp J pointed out, Professor Gray expressed the opinion that the most recent methodologically sound studies demonstrate that outlet densities (defined as the number of outlets per unit of population) have a significant positive effect on alcohol sales. So far as the research relied upon does demonstrate that effect, the outlet density in this particular affected area is not above average. Furthermore, and importantly, it is to be observed that Professor Gray's opinion refers to the effect of outlet densities on sales and not consumption. While the research demonstrates a correlation between sales and consumption, in my opinion neither the research nor the evidence as a whole in this case demonstrates that sales in this affected area will increase significantly as a result of any grant of this licence.

44 Furthermore, the overseas research is less than convincing in supporting the conclusions advanced. Having expressed these views, I should make it abundantly clear again that I accept the opinion of

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Professor Gray that there is a positive relationship between levels of per capita consumption and the frequency and range of social and health problems in this affected area.

45 If I am wrong in my conclusion about the weight which Professor Gray's opinion is due in this regard, it is then necessary to determine on the evidence the extent of any increase in consumption likely upon a grant of this application. The question which now requires consideration is the extent of such increase in consumption by reference to a degree of probability. Given the current average outlet density in the affected area, and notwithstanding that in absolute terms I accept the affected area has not reached saturation point, the evidence suggests to me there is no more than a possibility of a small increase in consumption of liquor in this affected area from a grant of this application. There is, therefore, no more than a possibility of a small increase in harm or ill health consequent upon the grant of this application. If it is assumed that such a possibility exists on the evidence, then regard must be had to that possibility in considering the exercise of discretion under s 33 of the Act in deciding whether a grant should be made at all and if so, whether subject to conditions necessary to reduce that harm.

46 Finally, in relation to the evidence of Professor Gray, I have deliberately not yet referred to his evidence in relation to road traffic matters. Professor Gray refers to data from "Analysis of Road Crash Statistics" prepared by Data Analysis Australia for the Department of Transport's Office of Road Safety for the period 1 July 1987 to 30 June 1997. Professor Gray records that on a per capita basis, there were fewer road crashes in the Kimberley region than in Western Australia as a whole, which result he describes as "surprising" given the high rate of alcohol consumption. He concludes, however, in the absence of more detailed analysis, it is not clear whether the result is an artefact of reporting or what factors might explain the result. In my opinion there is nothing in this material which should lead the Court to conclude on the evidence that there is more than a mere possibility of harm likely to result to drivers and other road users from the consumption of liquor which may be sold at these premises.

47 I return now to the evidence of Sergeant Murray, Mr Carlton and Dr Steven Lefmann. I have observed that their primary concern was about the location of the proposed premises on Victoria Highway near the foreshore of Lake Kununurra, where people of Aboriginal descent congregate. The evidence is that people of Aboriginal descent already congregate in one area of the foreshore of Lake Kununurra to drink liquor

on a daily basis. The opinion of these witnesses is that the grant of this application may increase the risk that a person affected by liquor will be injured on the Victoria Highway in proximity to the premises. As Ipp J observed, this also is essentially a matter of prediction and the Court is only able to determine the likelihood of such harm occurring by reference to a degree of probability.

48 On the evidence, there is already a risk that those people who congregate on the foreshore and are affected by liquor may come to harm on the highway. In my opinion, the likelihood of increased risk of harm resulting from the grant of this application must be small, since this group must already cross the highway moving between the town of Kununurra and the foreshore.

49 The opinion of these witnesses is that the proposed premises will also attract people of Aboriginal descent to the premises and to the foreshore who do not currently frequent the foreshore. This also is a matter of prediction. Given the number of licensed premises in the town, I think there is a possibility of a small increase in the number of people of Aboriginal descent who may be attracted to these premises and not other premises. There must, therefore, be a similar likelihood of harm to such people if they become intoxicated.

50 In re-hearing the overall factual questions in accordance with the directions of the Full Court, it will be observed that counsel did not suggest and the reasons of the Full Court did not require the court to embark upon a reconsideration of all the issues previously determined, but to re-hear on the evidence as a whole and reconsider the evidence presented on behalf of the Executive Director of Public Health by way of intervention, in accordance with the directions of the Full Court. It is for the court to determine in this case whether harm or ill-health will in fact be caused to people, or any group of people, due to the use of liquor in the future and that is essentially a matter of prediction which the court is only able to determine the likelihood of by reference to a degree of probability. The mere possibility of harm or ill health will always be a relevant matter for consideration. As Ipp J pointed out, the court may decide that the possibility of harm or ill health is so remote or so insignificant that it should not be taken into account. It may be that a possibility of harm or ill health of a particularly serious nature will be sufficient to cause the imposition of stringent conditions or result in the refusal of the grant. The decision must depend in each case on the particular circumstances.

Conclusions

51 I have re-examined the evidence presented on behalf of the intervener in the context of the overall factual questions and I conclude on that evidence that there is at most no more than a small possibility the grant of this application may cause harm or ill health to some people of Aboriginal descent due to the use of liquor. While that possibility must be taken into account in considering whether to grant or refuse the application, or to grant it subject to conditions, I am of the opinion on the evidence in this case that the possibility and the extent of any increased harm to that section of the public is not such that the court should refuse the application in order to minimise harm or ill health.

52 I am conscious that in this regard the applicant has itself proposed that any grant of this application should be subject to the conditions contained in Exhibit 23, referred to at AB11. Counsel for the intervener submitted that the evidence of Mr Carlton and Mr Fernie doubted the practicality and effectiveness of the proposed conditions. I agree. While it may not be entirely clear, it is for this very reason I expressed the opinion at AB47 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.

53 I am conscious that this is the same conclusion which I reached earlier, but I do so on this occasion after examination of the evidence and the overall factual questions in accordance with the directions of the Full Court. I am also conscious that in declining to impose the conditions proposed in Exhibit 23, I am declining to impose conditions proposed by the applicant itself. Given the conclusions which I have reached on the evidence about the likely extent of harm or ill health resulting from the grant of this application, I do not consider that at the moment the conditions proposed are necessary or likely to be effective. As I have said, if evidence subsequently satisfies the Licensing Authority that the Accord is not effective and that conditions should be imposed in this affected area, then I consider they are more likely to be effective in such circumstances if all the licensed premises then existing in the affected area are considered in the public interest as a whole. I therefore decline to impose the conditions on this licence at the moment.

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54 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 32 pages comprise the reasons for judgment of his Honour Judge Greaves.

18/14/2001

Associate