

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Boom Tick Pty Ltd
(represented by Mr Peter Fraser of Ilberys Lawyers Pty Ltd)
- Other Parties:** Director of Liquor Licensing, Intervener
(represented by Ms Rachael King of State Solicitor's Office)
- Tim Caporn, Observer
(on behalf of Boom Tick Pty Ltd)
- Commission:** Mr Jim Freemantle (Chairperson)
Ms Helen Cogan
Mr Greg Joyce
- Date of Hearing:** 4 February 2010
- Date of Determination:** 26 February 2010
- Date of Reasons Published:** 19 March 2010
- Premises:** Ambar Nightclub and Villa Nightclub
- Matter:** Application for Review of decision of the Director of Liquor Licensing dated 30 November 2009 to impose conditions on the licenses of the premises operated by the Applicant under section 25 of the *Liquor Control Act 1988* ("the Act").
- Legislation:** *Liquor Control Act 1988*
- Determination:** Having considered all of the relevant materials which were before the Director, the Commission is satisfied that the imposition of all three conditions is in accordance with the primary and secondary objects of the Act; the application is refused and the decision of the Director of Liquor Licensing is affirmed.

Authorities referred to by the Applicant:

- *Beachpoint Properties Pty Ltd v Tycom Pty Ltd* unreported decision of 1 November 1999 Appeal 2881/4 SCWA referred to with approval in a decision of *Re: Pland No 4/94* delivered 4 March 1994
- *Hippo Inn LLC 08/80*
- *Palace Securities Pty Ltd v The Director of Liquor of Liquor Licensing* (1992) 7 WAR 241 at 249
- *Executive Director of Health v Lilly Creek International Pty Ltd and Others* (2000) WAR 510 ("Lilly Creek No 1") at pages 515, 517 and 525
- *Liquor (Australia) Pty Ltd v Austie Nominees Pty Ltd* Library No 990160 delivered 1 April 1999 at page 22
- *C.A.L No 14 Pty Ltd v Motor Accident Insurance Board, C.A.L No 14 Pty Ltd v Scott* [2009] HCA 47 at paragraph 54
- *Hancock v Executive Director of Public Health and Others* [2008] WASC 224 at paragraphs 39, 53 and 54
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356

Authorities referred to by the Intervener:

- *Executive Director of Health v Lilly Creek International Pty Ltd* (2000) WAR 510; [2000] WASCA 258
- *Hancock v Executive Director of Public Health* [2008] WASC 224 at paragraphs 45 and 53 -54
- *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216-217
- *Public Services Board of NSW v Osmond* (1986) 159 CLR 656
- *The Commercial Registrar of the Commercial Tribunal of Western Australia; Ex parte Perron Investments Pty Ltd* [2003] WASCA 198
- *Re: Gull Liquor, Ginger's Road House, Upper Swan* (1999) 20 SR(WA) 321 at 340

Other:

- Hansard, Volume 409, Page 6342, 20 September 2006

1. Background

- 1.1 On 27 October 2009, the Director of Liquor Licensing wrote to the Applicant as Licensee of the Ambar Nightclub as follows:

NOTICE UNDER SECTION 64
LIQUOR CONTROL ACT 1988

The Commissioner of Police has raised with me his concerns about the level, nature and severity of violence and anti-social behaviour within areas with a high concentration of licensed premises, and in particular, in the Northbridge entertainment precinct.

*The research report prepared for the Commissioner of Police entitled “**Is your house in order? Re-visiting liquor licensing practices and the establishment of an entertainment precinct in Northbridge**”, identified the harm or ill-health caused to people, or any group of people, due to the use of liquor; a copy of the report is available at www.police.wa.gov.au*

The harm or ill-health and impact on the amenity of Northbridge is illustrated by the analysis of offences against “the person” and disorderly conduct, together with the St John Ambulance data and data from the Department of Health’s Emergency Department Information System; the latter demonstrates an overall trend of increased presentations to the emergency department over time, as well as a consistent peak of presentations from Friday nights through to Sunday mornings.

Working with a number of Northbridge licensees, the business community of Northbridge, Perth City Council and other community groups, the Government has identified a range of initiatives to be implemented for the 2009/2010 summer to:

- 1. Reduce the level of alcohol-related harm in Northbridge; and*
- 2. Encourage a broader section of the community to enjoy Northbridge as a safe and vibrant entertainment precinct.*

The Northbridge strategy includes nightclubs in Northbridge closing at 5:00 am on Saturday and Sunday mornings and being subject to a lockout from 3:30 am. For other licences in Northbridge that trade after 1:00 am on Saturday and Sunday mornings, a lockout is to apply from 2:00 am. Other initiatives include:

- Liquor sold and supplied during the last hour of trade being restricted to no more than four (4) drinks per person at any one time; and*

- *No liquor is to be sold or supplied in non-standard measures after 1:00 am; that is, no shooters or shooter-style drinks such as "shots", "lay-backs", "jelly shots" or "test tubes" and no jugs or pints of spirits.*

I have determined that in addition to any other condition or requirement to which a nightclub in the metropolitan area is subject, it would be in the public interest and desirable to impose the following conditions on all nightclubs in the metropolitan area for the 2009/2010 summer ending at 12 midnight, on 26 April 2010:

(A) On a Friday or Saturday, the permitted hours are from 6:00 pm midnight and then continuing to 5:00 am the next day.

(B) On a Saturday and Sunday from:

- (i) 3:30 am to 5:00 am persons (other than 'authorised persons') are prohibited from entering or re-entering the licensed premises;*
- (ii) 4:00 am to 5:00 am liquor sold and supplied is restricted to no more than four (4) drinks per persons at any one time; and*
- (iii) 1:00 am to 5:00 am no liquor is to be sold or supplied in non-standard measures, including:*
 - *No jugs or pints of spirits; or*
 - *No shooters (including liqueurs and/or spirits served in a 30 ml receptacle) and shooter style drinks (e.g. 'shots', 'jelly shots', or 'test tubes')*

(C) If there is an inconsistency between (A) or (B) and any other condition to which the licence is subject under the Liquor Control Act 1988, the condition that is more onerous for the licensee prevails.

The majority of nightclub licensees in Northbridge have agreed to trial these trading conditions for the 2009/10 summer.

SECTION 64 PROCEEDINGS

Section 64 of the Liquor Control Act 1988 ('The Act') provides that the licensing authority, may, at its discretion and of its own motion, impose conditions in addition to those specifically imposed by the Act, or in such a manner as to make more restrictive a condition specifically imposed by the Act.

Subsection (3) specifically indentifies that, without derogating from the generality of the discretion conferred on the licensing authority, it may imposed conditions which it considers to be in the public interest or desirable in order to –

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

- *minimise harm or ill-health caused to people, or any group of people, due to the use of liquor;*
- *limit the kinds of liquor that may be sold;*
- *limit the manner in which or the containers, or number or types of containers in which liquor may be sold; or*
- *prohibit entry to the licensed premises after a specified time.*

In considering matters before it, the licensing authority is bound to have regard to the objects of the Act set out in section 5, and in particular, the primary objects which are –

- (a) to regulate the sale, supply and consumption of liquor; and*
- (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and*
- (c) to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.*

The primary objects take precedence over any other object set out in section 5 of the Act.

SHOW CAUSE

Pursuant to section 64(2a), as the licensee of a nightclub in the metropolitan area, you are afforded an opportunity to show cause why these conditions should not be imposed. Written submissions in this regard must be lodged at the above address by no later than the close of business, Wednesday 25 November 2009.

- 1.2 On 9 November 2009, the solicitors for the applicant wrote to the Director of Liquor Licensing as follows:

NORTHBRIDGE

We act on behalf of Boomtick Pty Ltd, Licensee of the Ambar and Villa Nightclubs.

Our clients have recently received notification of the recent changes announced by the State Government with respect to nightclub trading hours and 3:30 am lockout (“the changes”).

We note that the locality of Northbridge is clearly defined in the report prepared for the WA Police Service, “Is Your House in Order”, as outlined on page 5 of the report.

With this in mind, we request urgent clarification as to why our client has received notification of the changes for both the Ambar and Villa nightclubs.

The address for each of these premises is as follows:

- *Ambar Nightclub – 104 Murray St, Perth;*
- *Villa Nightclub – 187 Stirling St, Perth*

We also note that both of these premises are not located in the Northbridge precinct, as per the City of Perth's town planning scheme.

We therefore request urgent confirmation that the changes applied to Northbridge nightclub venues does not apply to our client's premises.

- 1.3 On 12 November 2009, the Director of Liquor Licensing wrote to the solicitors for the Applicant as follows:

NORTHBRIDGE: BOOM TICK PTY LTD

I refer to your letter of 9 November 2009.

As the majority of nightclub licensees in Northbridge have agreed to trial the proposed conditions for the 2009/2010 summer, to avoid a migration of patrons from the Northbridge precinct to licensed premises in adjacent suburbs that trade after 1:00 am on Saturday and Sunday, the section 64 notice was issued to Boom Tick Pty Ltd as licensee of Ambar and Villa nightclubs.

- 1.4 On 25 November 2009, the solicitors for the Applicant lodged with the Director of Liquor Licensing submissions in response to the Director of Liquor Licensing's letters in relation to the matter.

- 1.5 On 30 November 2009, the Director of Liquor Licensing wrote to the Applicant as follows:

LIQUOR CONTROL ACT 1988: SECTION 64 – IMPOSITION OF CONDITIONS

On 27 October 2009, pursuant to section 64(2a) of the Act, I issued a notice that for the 2009/2010 Summer ending at 12 midnight, 26 April 2010, I had determined it would be in the public interest and desirable to impose restrictive conditions on metropolitan nightclub licences. The information and evidence in support of that finding was identified in the notice of 27 October 2009 and in a subsequent letter dated 12 November 2009.

The harm or ill-health and the impact on the amenity of Northbridge is identified in the research report prepared for the Commissioner of Police entitled "Is your house

in order? Re-visiting liquor licensing practices and the establishment of an entertainment precinct in Northbridge". In this regard, the licensing authority is entitled to rely on the evidence of the Commissioner of Police.

For the reasons outlined in its submission dated 25 November 2009, the licensee submits that the imposition of the proposed conditions upon the Ambar Nightclub "would be contrary to the public interest."

While the term "public interest" is not defined in the Act, it is defined in Butterworth's Australian Legal Dictionary as:

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

In O'sullivan v Farrer (1989) 168 CLR 210 the term "public interest" was described as a term of "wide import". In this case the majority of the High Court, referring to Dixon J's judgement in Water Conservation and Irrigation Commissioner (NSW) v Browning (1974) 74 CLR 492 said that:

"...the expression "in the public interest", when used in a statute, classically imports a discretionary value judgement to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and the purposes of the statutory enactments may enable...given reasons to be[pronounced] definitely extraneous to any objects that legislature could have had in view".

In this regard, public interest has been variously described as referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of its citizens and also for the benefit of society, the public or the community as a whole. (The public Interest: We know it's important but do we know what it means. (2006) AIAL Forum No 48 12-25 at p. 13)

The imposition of the restrictive conditions on metropolitan nightclub licences in the public interest is about:

- i. the disorderly conduct and the associated disturbance of the amenity/good order of Northbridge by people who resort to the area on account of the late night licensed venues trading there; and*
- ii. not creating an incentive for patrons to, not only migrate to licensed premises outside the Northbridge precinct, but also to migrate from nightclub to nightclub because of differential statutory trading conditions.*

With respect to the latter, there is the possibility that migration to adjacent suburbs will adversely impact on the amenity/good order of those suburbs if the restrictive conditions are imposed on the late night licensed venues trading in Northbridge. Furthermore, the migration is not limited to between the hours 5am to 6am.

Accordingly, I have determined that, in addition to any other condition or requirement to which nightclub licence 6070007674 is subject, as from and including 7 December 2009 and ending at 12 midnight Sunday 25 April 2010, it would be in the public interest and desirable for nightclub licence 6070007674 [Ambar Nightclub] to be subject to the conditions that -

- (A) On a Friday or Saturday, the permitted hours are from 6:00pm to midnight and then continuing to 5:00am the next day.*
- (B) On a Saturday or Sunday from:
 - (i) 4:00am to 5:00am persons (other than an "authorised person") are prohibited from entering or re-entering the licensed premises;*
 - (ii) 4:00am to 5:00am liquor sold and supplied is restricted to one(1) bottle of wine not exceeding 750mls or a maximum of four (4) alcoholic drinks per person at any one time; and*
 - (iii) 1:00am to 5:00am no liquor is to be sold or supplied in non-standard measures, including no:
 - *jugs or pints of spirits; or*
 - *Shooters (including liqueurs and/or spirits served in a 30ml receptacle) or shooter style drinks (e.g. 'shots', 'jelly shots' or 'test tubes')***
- (C) If there is an inconsistency between (A) or (B) and any other condition to which the licence is subject under the Liquor Control Act 1988, the condition that is more onerous for the licensee prevails.*

An amended licence is enclosed herewith.

- 1.6 On 30 November 2009, the Director of Liquor Licensing wrote to the Applicant in the same terms as set out in 1.5 above save that the reference was to Licence No. 6070025635 [Villa Nightclub].
- 1.7 On 10 December 2009, the solicitors for the Applicant lodged an Application for Review of the Decision of the Director of Liquor Licensing in respect of the Ambar Nightclub and the Villa Nightclub, the grounds for the application for review were set out as follows:

- 1. The Director of Liquor Licensing gave insufficient reasons for his decision.
- 2. The imposition of the restrictive conditions are not in the public interest.

3. There is no evidence or insufficient evidence upon which a finding can be made that:
 - (a) The imposition of restrictive conditions upon late night licensed venues trading within the Northbridge Entertainment precinct would act as an incentive for patrons to migrate to licensed premises outside the Northbridge Precinct, but also to migrate from nightclub to nightclub because of differential statutory trading conditions.
 - (b) The migration of patrons to adjacent suburbs will adversely impact upon the amenity/good order of those suburbs.
- 1.8 On 18 December 2009, the Director of Liquor Licensing gave notice to the Liquor Commission that he would be intervening in the matter for the purpose of making submissions.
- 1.9 On 21 January 2010, the State Solicitor's Office on behalf of the Director of Liquor Licensing lodged submissions in the matter.
- 1.10 On 28 January 2010, the solicitors for the Applicant lodged submissions in the matter which stated, inter alia, that the solicitors for the Applicant referred to and relied upon the submissions lodged on 25 November 2009 by the solicitors for the Applicant.

2. Hearing

- 2.1 On 4 February 2010, at the hearing of the matter, the solicitors for the Applicant and the State Solicitor's Office (for the intervener) spoke to the submissions made and referred in 1.4, 1.8 and 1.9 above and made additional submissions. Mr Caporn also made submissions as to the nature of the nightclubs.
- 2.2 In brief summary, the solicitors for the Applicant argued that:
 - 2.2.1 They were not disputing the appropriateness of the restrictions in relation to the Northbridge area but were disputing the appropriateness of the restrictions in relation to the 'non Northbridge area' in which the Ambar nightclub and the Villa nightclub are situated.
 - 2.2.2 They hold no issues with the restrictions in relation to the Ambar nightclub other than the closing times and the 'lock out' and the only issue in relation to the Villa nightclub was the 'lock out'.

2.2.3 There was no evidence before the Director of Liquor Licensing in relation to the issues of 'migration' from one area to another or if there was 'migration' how the persons migrating might behave – these were matters requiring evidence not the 'specialist knowledge' of the licensing authority.

2.2.4 Due to the nature of the Ambar Nightclub (a small 'niche' establishment) and the Villa Nightclub (although licensed as a nightclub it is not a typical nightclub but a venue [available for hire] for showcasing DJs or artists) there was no evidence to establish that 'migration' would take place – only a prediction of such behaviour unsupported by any evidence.

2.3 In brief summary the State Solicitor's Office for the intervener argued:

2.3.1 That premises outside the Northbridge area were subject to the restrictions set out in the letter dated 30 November 2009 from the Director of Liquor Licensing.

2.3.2 That the transfer of harm (by 'migration') was a real possibility not speculation.

3. Legal Principles

3.1 The following legal principles of the Act apply:

3.1.1 Section 64 of the Act permits the licensing authority (subject to the Act) at any time of its own motion and at its discretion to impose conditions and to vary or cancel any conditions previously imposed by the licensing authority, having regard to the tenor of the licence and the circumstances in relation to which the licensing authority intends that it should operate. (section 64(1), (1a) and (2)).

3.1.2 Section 64(2a) of the Act states that the licensing authority may give written notice requiring the (relevant) licensee to show cause to the licensing authority why the condition should not be imposed, varied or cancelled.

3.1.3 Section 64(3) of the Act permits the licensing authority to impose conditions which, with discretion, it considers to be in the public interest or which it considers desirable in order to (deal with) those matters enumerated in subsections (3)(a) to (m) inclusive which include:

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

- (ca) Ensure that liquor is sold and consumed in a responsible manner; or
 - (cc) minimise harm or ill health caused to people, or any group of people, due to the use of liquor; or
 - (e)(i) Limit the kinds of liquor that may be sold;
 - (e)(ii) The manner in which or the containers, or number or types of containers in which liquor may be sold;
 - (fa) prohibit entry to the licensed premises after a specified time
- 3.1.4 Section 16(1)(a) requires the Liquor Commission to act without undue formality.
- 3.1.5 Section 16(1)(b)(ii) requires the Liquor Commission to make its determination on the balance of probabilities.
- 3.1.6 Section 16(7)(b) requires the Liquor Commission to act according to equity, good conscience and the substantial merits of the case.
- 3.1.7 Section 25(2c) requires the Liquor Commission to have regard only to the material that was before the Director of Liquor Licensing when he made his decision.
- 3.1.8 Section 33 provides that the Liquor Commission has an absolute discretion to grant or refuse an application under the act on any ground, or for any reason, that the licensing authority (relevantly the Liquor Commission) considers in the public interest. Such discretion is only constrained by the Act itself (*Water Conservation and Irrigation (NSW) v Browning* (1947) 74 CLR 492 Dixon CJ at 505). In conducting a review of a decision of the Director of Liquor Licensing, the Liquor Commission is not constrained by the need to find error on the Director's part but is to undertake a full review of the materials before the Director by way of rehearing, and make its own determination on the merits on the basis of those materials (*Hancock v Executive Director of Public Health* [2008] WASC 224 Martin CJ at [53 -54]).

4. Reasons

- 4.1 There is no one perfect solution to the problem of alcohol related law and order issues in Northbridge, however, the Commission is satisfied that the trial conditions that have been introduced are in the public interest. A trial for a fixed and limited period over the summer months is likely to produce results which can assist in finding an appropriate strategy to address these issues. This is a powerful public interest consideration. The negative effects of the conditions on the commercial operation of the Applicant is real but of less consequence due to the limited period of the trial. The commission has no role in, or responsibility for, the assessment of commercial factors in reaching its determinations beyond the application of section 5(1)(c) of the Act.
- 4.2 The Commission finds the imposition of restrictive conditions on licences across the metropolitan area is in the public interest, having considered all factors relevant to the public interest, including the matters set out in section 38(4) of the Act. The real harm and ill-health caused by the consumption of alcohol at night in Northbridge satisfies the Commission that the limited trial of restrictive conditions on all nightclub licensees in the metropolitan area is in the public interest particularly to address the issue of migration of patrons to area of lesser restriction. The reasoning for this is set out in 4.7 and 4.8.
- 4.3 However, the Commission accepts the Applicant's submission that the trial will have a negative effect on his business and his patrons will potentially suffer some inconvenience as a result of these conditions. None-the-less, the level of alcohol related harm and antisocial behaviour in Northbridge justifies the imposition of these conditions for a limited trial period over the 2009/2010 summer period, in an effort to improve the current unacceptable level of harm to the community and to assist in identifying appropriate remedial actions that might be taken in the future.
- 4.4 The Commission took into account that the applicant was only objecting to two conditions in respect of Ambar Nightclub (early closing time and lock out) and one condition in respect of Villa Nightclub (lock out) but accepted the other conditions.
- 4.5 There is no evidence that either of the venues run by the Applicant are trouble hot spots. To the contrary, the Commission found that the Applicant has clearly established that it has acted responsibly and taken appropriate steps to reduce alcohol related harm at the two venues.

- 4.6 However, the Applicant does sell alcohol to patrons at night and all licensed premises contribute to some degree to the overall problem. The Applicant does not dispute that it should be part of a holistic solution. Although the trial conditions imposed may not be a perfect solution to the existing problems, the Commission is satisfied that they are reasonably imposed in the public interest.
- 4.7 The Commission has also considered the rationale of imposing the conditions on all metropolitan nightclubs, not those just in Northbridge. The basis of this decision is to remove any incentive for patrons to migrate from nightclub to nightclub because of differential statutory trading conditions.
- 4.8 The Applicant argued that patron migration is unlikely to be a major factor between nightclubs in Northbridge and nightclubs run by the Applicant which are outside the Northbridge precinct (albeit the Commission notes within walking distance) is a strong one, as is the applicant's argument that both Ambar and Villa Nightclubs are specialised venues targeted to a particular audience less likely to migrate between different nightclubs. However, the fact that this is part of a trial that is now almost completed compels the Commission to support the application of the conditions in their totality rather than to consider geographical segmentation at this time.

5. Conclusion

It is not disputed that ongoing serious alcohol related harm exists in Northbridge.

The conditions, introduced as a trial for the 2009/2010 summer period, are aimed at reducing the current high level of alcohol related antisocial behaviour and harm in Northbridge. The Applicant is critical of the imposition of these conditions, as its two nightclubs are outside Northbridge.

In considering all of the material before the Director when making the decision and also the representations made by the Applicant at the Review Hearing, the Commission is of the view that it is in the public interest to allow the conditions imposed for the trial period to be completed.

Should these conditions have been introduced on a permanent basis, rather than for a twenty weeks trial period, then the Commission may have taken a different view, particularly as the Police Research Report "Is your house in order? Revising liquor licensing practices and the establishment of an entertainment precinct in Northbridge" identifies a number of key factors that are outside of the scope of the trial conditions that have been applied to metropolitan nightclubs.

With eight weeks of the twenty weeks trial period remaining the removal of the conditions at this time will not allow a full analysis of the impact of the conditions, which in turn, will impact the development of long term strategies to address alcohol related harm for the benefit of the Northbridge entertainment precinct, its businesses and its patrons.

Accordingly, pursuant to section 25(4) of the Act, the Director's decision is affirmed.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

JIM FREEMANTLE
CHAIRPERSON