

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

Applicants: Salmon Point Holdings Pty Ltd
Profligate Pty Ltd
Garama Pty Ltd
Mezcla Pty Ltd
M & M Entertainment Pty Ltd
Smithers Jones Pty Ltd
Strathalbyn West Perth Pty Ltd
Zafiro Pty Ltd
*(all the Applicants represented by Mr Dan Mossenson
of Lavan Legal)*

Other Parties: Director of Liquor Licensing, Intervener
*(represented by Ms Rachael King of State Solicitor's
Office)*

Observers: Mr Brad Hancock and Mr Simon Barwood
(on behalf of Salmon Point Holdings Pty Ltd)
Mr Tim Brown
(on behalf of Profligate Pty Ltd)
Mr Shane Bowler
(on behalf of Zafiro Pty Ltd)
Mr Peter Palmer
(on behalf of Smithers Jones Pty Ltd)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Ms Karen Lang (Member)

Date of Hearing: 17 February 2010

Date of determination: 4 March 2010

**Date of reasons
Published:** 23 March 2010

Premises: Rise Danceclub
Connections Nightclub
Club 234
Dusk Lounge
Xotica Nightclub
Geisha Bar
Metropolis Fremantle
The Sapphire Bar

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 Applicants:

- *Briginshaw v Briginshaw and Another* [1938] 60 CLR 336
- *Water Conservation and Irrigation Commission (New South Wales) v Browning* [1947] 74 CLR 492
- *Palace Securities Pty Ltd and Another v Director of Liquor Licensing* (1992) 7 WAR 241
- *Explorer Cruise Lines Pty Ltd v Burundi Holdings Pty Ltd* (unreported Full Court 40 of 1993) (BC 9301556)
- Adams, Phillip R, *Committee Appointed to Inquire into and Report on the Operation of Liquor Laws* (Government Press: 1969)
- Collection of amendments made to the Cabaret/Nightclub section of the Liquor Act/Liquor Licensing Act and Liquor Control Act
- Minchin P et al, *Report of the Independent Review Committee* (Government Press: 2005)
- *Lonergan Pty Ltd v The Commissioner of Police for the State of Western Australia* (unreported Full Court 92 of 1994 and 89 of 1995) (Lib No. 960309A)
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Equinimity Investments Pty Ltd* Liquor Application LC 27/2009
- *Executive Director of Public Health v Lily Creek International Pty Ltd* (2000) 22 WAR 510
- *Associated Provincial Picture Nominees Ltd v Wednesbury Corporation* [1948] 1 KB 223
- *Bold Gem Pty Ltd* Decision A191578
- Forbes, J R S "*Disciplinary Tribunals*" 2nd Ed (The Federation Press: 1996)
- *Australian Workers Union and Others v Bowen & Others (No 2)* [1948] 77 CLR 601
- *Hansard*, Volume 409, page 6341, 20 September 2006

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- *Milk Investments Pty Ltd, Gate 1, IGA Liquor Plus* Decision A193949
 - *CAL (No 14) Pty Ltd (t/as Tandara Motor Inn) and Another v Motor Accidents Insurance Board (Matter No H7/2009) – (2009) 260 ALR 606*

Authorities referred to by the Intervener which are not referred to by the Applicants:

- *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 63846-
 - *O’Sullivan v Farrer* (1989) 168 CLR 210 at 216 to 217
 - *Public Services Board of NSW v Osmond* (1986) 159 CLR 656
 - *Re Commercial Register of the Commercial Tribunal of Western Australia; Ex parte Perron Investments Pty Ltd* [2003] WASC 198
 - *Re Gull Liquor, Gingers’ Roadhouse, Upper Swan* (1999) 20 SR (WA) 321 at 340
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1. Background

1. On 27 October 2009, the Director of Liquor Licensing (the "Director") gave notice to the Applicants under section 64(2a) of the *Liquor Control Act 1988* (the "Act") of his being satisfied that it would be in the public interest to impose conditions on the premises operated by each of the Applicants (and in fact all nightclubs in the metropolitan area) as a trial during the summer of 2009-2010. In that letter, the Director invited the Applicants to show cause why the conditions should not be imposed, by lodging written submissions by not later than close of business on Wednesday 25 November 2009.
2. On November 13 2010, the Director further wrote to the Applicants to clarify that the section 64 notice was issued to metropolitan nightclubs so that differential trading conditions do not become an incentive for patrons to migrate from Northbridge to nightclubs outside the Northbridge precinct.
3. On November 25 2009, each of the Applicants lodged its response to the section 64(2a) show cause notice.
4. By letter dated November 30 2009, the Director notified the Applicants that the following conditions would be imposed upon each of the Applicant's licences as from and including 7 December 2009 and ending at 12 midnight Sunday 25 April 2010 (the "Decision"), pursuant to section 64 of the Act:
 - (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.

5. Subsequently, the Applicants each lodged an application with the Liquor Commission of Western Australia ("the Commission"), pursuant to section 25(1) of the Act, for review of the Decision.
6. On December 23 2009, the Director intervened in the review and filed submissions.
7. The Commission heard the eight reviews together on 17 February 2010. Having heard the parties, the Commission refused the application for an interim order and affirmed the Director's decision.

2. Legal Principles

8. Section 64(1) of the Act provides:

" Subject to this Act, in relation to any licence, or to any permit, the licensing authority may at its discretion impose conditions –

 - (a) in addition to the conditions specifically imposed by this Act; or*
 - (b) in such a manner as to make more restrictive a condition specifically imposed by this Act,*

and may vary or cancel any condition previously imposed by the licensing authority, having regard to the tenor of the licence or permit and

the circumstances in relation to which the licensing authority intends that it should operate.”

9. Section 64(3) relevantly provides:

“.....the licensing authority may impose conditions which it considers to be in the public interest or which it considers to be desirable in order to –

...

(cc) minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; or

...

(d) ensure public order and safety, particularly where circumstances or event are expected to attract large numbers of persons to the premises or an area adjacent to the premises...

10. The discretion of the licensing authority to impose conditions in section 64 of the Act is only confined by the scope and purpose of the Act.

11. The objects of the Act are set out at section 5:

5 (1) The primary objects of this Act 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.

(2) In carrying out its functions under this Act, the licensing authority shall have regard to the primary objects of this Act and also to the following secondary objects –

(a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and

[(b), (c), deleted]

(d) to provide adequate controls over, and over the persons directly or indirectly involved in the sale, disposal and consumption of liquor; and

(e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

12. The reference to “public interest” in both sections 5 and 38 of the Act are relevant when making a decision.
13. The importance of the objects in section 5 of the Act is confirmed by the legislative history of the Act.
14. The *Liquor and Gaming Legislation Amendment Bill 2006* introduced several important amendments to the Act, including:
 - (i) A public interest test in section 38 of the Act was inserted in order to replace the previous “needs test” (which required that the competitive impact on other businesses in the area to be considered).
 - (ii) Section 5 of the Act was amended to elevate the objects of the former *Liquor Licensing Act 1988* to the primary objects of the Act;
 - (iii) Section 5 of the Act was amended to include object 5(c) as a primary object of the Act (prior to the amendment, the content of object (c) was generally reflected in the secondary objects of the Act only).
15. Section 19 of the *Interpretation Act 1984* provides that regard may be had to extrinsic material (including the Second Reading Speech to a Bill) to confirm that the meaning of a provision is the ordinary meaning conveyed

by the text of the provision taking into account its context in the written law and the purpose of object underlying the written law.

16. During the Second Reading Speech to the Bill in the Legislative Assembly on 20 September 2006 (see Parliamentary Debates, WA Parliament, vol 409, p 6342), the then Minister for Racing and Gaming, the Hon. Mr Mark McGowan, stated as follows:

“A key reform is the creation of the public interest test.... Under the public interest test, all Applicants will be required to demonstrate that the application is in the public interest and the licensing authority will be required to consider the application based on the positive and negative social, economic and health impacts of the community... it should be noted, however, that the government does not consider proliferation of liquor outlets to be in the public interest and proliferation is not an outcome that would be supported by the public interest test. When considering the public interest, the licensing authority is bound by the objects of the Act as set out in section 5.”

17. The licensing authority must consider *“the mere possibility of harm or ill-health”*. In *Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WASCA 258* Justice Ipp stated:

“The potential of harm or ill-health to people, irrespective of whether the harm or ill-health is proved on the balance of probabilities, would be a powerful public interest consideration.”

Furthermore, as explained by Justice Wheeler in *Executive Director of Health v Lily Creek International Pty Ltd & Ors [2001] WASCA 410*:

“...it is not the “risk” of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made.”

3. Application for Review

18. The function of the Commission in relation to an application for review is not confined to finding faults with the decision of the Director but is to undertake a full review of the decision of the Director by way of a rehearing, ab initio, and make its own determination on the merits.
19. When conducting a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision: section 25(2c).

The materials before the Director were:

Salmon Point Holdings Pty Ltd v Director of Liquor Licensing

Show cause letter dated 27 October 2009, by the Director of Liquor Licensing to the Licensee.

Letter dated 13 November 2009, by the Director of Liquor Licensing to the Licensee.

Response dated 25 November 2009, by Salmon Point Holdings Pty Ltd to the Director of Liquor Licensing.

Profligate Pty Ltd v Director of Liquor Licensing

Show cause letter dated 27 October 2009, by the Director of Liquor Licensing to the Licensee.

Response dated 25 November 2009, by Dan Mossenson (representing the licensee) to the Director of Liquor Licensing.

Garama Pty Ltd v Director of Liquor Licensing

Show cause letter dated 27 October 2009, by the Director of Liquor Licensing to the Licensee.

Response dated 25 November 2009, by Jessica Patterson (representing the licensee) to the Director of Liquor Licensing.

M & M Entertainment Pty Ltd v Director of Liquor Licensing

Show cause letter dated 27 October 2009, by the Director of Liquor Licensing to the Licensee.

Response dated 25 November 2009, by Jessica Patterson (representing the licensee) to the Director of Liquor Licensing.

Mezcla Pty Ltd v Director of Liquor Licensing

Show cause letter dated 27 October 2009, by the Director of Liquor Licensing to the Licensee.

Letter dated 13 November 2009, by the Director of Liquor Licensing to the Licensee.

Response dated 25 November 2009, by the Licensee to the Director of Liquor Licensing.

Zafiro Pty Ltd v Director of Liquor Licensing

Show cause letter dated 27 October 2009, by the Director of Liquor Licensing to the Licensee.

Letter dated 13 November 2009, by the Director of Liquor Licensing to the Licensee.

Response dated 25 November 2009, by Shane Bowler, General Manager, Sapphire Bar to the Director of Liquor Licensing.

Smithers Jones Pty Ltd v Director of Liquor Licensing

Show cause letter dated 27 October 2009, by the Director of Liquor Licensing to the Licensee.

Response dated 11 November 2009, by Peter Palmer to the Director of Liquor Licensing.

Email dated 23 November 2009, by Peter Palmer to the Director of Liquor Licensing.

Strathalbyn West Perth Pty Ltd v Director of Liquor Licensing

Show cause letter dated 27 October 2009, by the Director of Liquor Licensing to the Licensee.

Letter dated 13 November 2009, by the Director of Liquor Licensing to the Licensee.

Response dated 23 November 2009, by Michael Graham to the Director of Liquor Licensing.

Further response dated 23 November 2009, by Michael Graham to the Director of Liquor Licensing.

4. Reasons

20. 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. This is a powerful public interest consideration. The negative effects of the conditions on the commercial operations of the Applicants are 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. As the Applicants have acknowledged that trading between the hours of 5.00am and 6.00am on a Saturday and Sunday is at a relatively low level, the conditions imposed are not considered to be in conflict with Section 5(1)(c) of the Act.

21. 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 licences in the metropolitan area is in the public interest particularly as the issue of potential migration of patrons

particularly from one area of restriction to one of lesser restrictions, specific reasons for this finding are set out in 4.9 and 4.10.

22. However, the Commission accepts the Applicants submission that the trial will have some negative consequences for law abiding licensees without a history of liquor licensing infringements and that responsible nightclub 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.
23. The Applicants are correct in their arguments that nightclubs suffer more impact on their trading hours during the trial than other types of licences; that the period of greatest offending behaviour (between 11pm and 3am) is not directly targeted by these conditions and extended trading permits and special facility licences are more likely to contribute to the alcohol related harm than the Applicants' nightclubs, which close at 6am, are smaller, charge door entry fees and control entry and are proactive in reducing the risk of alcohol related harm.
24. There is no evidence that any of the venues run by the Applicants are trouble "hot spots". To the contrary, we find that the Applicants have established that they have acted responsibly in taking a variety of highly commendable steps to improve security and reduce alcohol related harm at the various venues.
25. However, all of the Applicants sell alcohol to patrons at night and all Northbridge licensees contribute to some degree to the overall problem. The Applicants do not dispute that they 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.
26. There is no requirement under the Act for equal treatment by the licensing authority in the imposition of conditions.

27. Furthermore, the Commission when reviewing the conditions imposed by the Director does not find them to be particularly onerous.
28. The Commission has also considered the rationale for 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.
29. The Applicants argument that patron migration is unlikely to be a major factor, between nightclubs in Northbridge and nightclubs in Subiaco, Fremantle and Joondalup is a strong one, 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 Applicants are critical of the imposition of these conditions, as they consider them to be discriminatory in nature by singling out the nightclub sector. Had similar operating conditions been imposed on extended trading permits and special facility licences that apply to a large number of Northbridge licences, the Applicants have indicated that they would have been more accepting of the order.


In considering all of the material before the Director when making the decision and also the representations made by all parties at the Review Hearing, the Commission is of the view that it is in the public interest to allow the conditions 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?"

Revisiting liquor licensing practices and the establishment of an entertainment precinct in Northbridge” and the Western Australian Nightclub Association response identify a number of key factors that are outside 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 not allow for long term effective strategies to be developed and implemented 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