

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

Applicant: Spinifex Trading Pty Ltd
(represented by Mr Gavin Crocket of GD Crocket & Co and Mr Garth Rider of N.M.H Pty Ltd)

Other Parties: Director of Liquor Licensing, Intervener
(represented by Ms Lana White of State Solicitor's Office)

Executive Director of Public Health
(represented by Ms Lana White of State Solicitor's Office)

Commissioner of Police
(represented by Mr Peter Slater of WA Police)

Observers: Ms. Lara Spagnolo of Ilberys Lawyers Pty Ltd
(On behalf of Kireen Nominees Pty Ltd)

Detective Inspector Steve George of WA Police

Senior Constable Glen Beros of WA Police

Premises: Halls Creek Store, Halls Creek
(Licence No. 6030016329)

Date of Preliminary Hearing: 15 June 2009

Date of determination: 18 June 2009

Date of reasons published: 1 July 2009

Commission: Mr. Eddie Watling (Deputy Chairperson)

Legislation: *Liquor Control Act 1988*

Authorities referred to by the Applicant:

- *Ward v Williams* (1955) 92 CLR 496
- *O'Sullivan v Farrer* (1989) 168 CLR 210
- *Hermal Pty Ltd v Director of Liquor Licensing*; unreported; FCt SCt of WA 2001; WASCA 356
- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241

Authorities referred to by the Interveners:

- *XTWK v Australian Securities and Investment Commission* [2007] AATA 1890
- *Mc Donald v Director- General of Social Security* (1984) 1 FCR 354
- *Dart and Director-General of Social Services* (1982) 4 ALD 553
- *Commonwealth and Quirke* (1986) 9 ALD 92
- *Executive Director Public Health v Lilly Creek International Pty Ltd* [2001] WASCA 258
- *O'Sullivan v Farrer* (1989) 168 CLR 210
- *Water Conservation and Irrigation Commission (NSW) v Browning* (1974) CLR 492
- *Coleman v Lazy Days Investments Pty Ltd* (1994) 55 FCR 297

Introduction

This appeal before the Liquor Commission (“the Commission”) was heard on June 15, 2009. After hearing the submissions from the parties to the proceeding the Commission determined to dismiss the appeal and indicated that the reasons for the determination will be published in due course. Provided below are the reasons of the Commission for having dismissed the appeal.

Issue

1. On May 25, 2009 an application for a preliminary hearing to set aside the conditions imposed pending the final determination of the review of the decision of the Director of Liquor Licensing (“the Director”) dated May 11, 2009 was lodged with the Liquor Commission pursuant to section 25 of the Act, those conditions being:

The sale of packaged liquor, exceeding a concentration of ethanol and liquor of 2.7 per cent at 20°C, is prohibited to any person, other than a liquor merchant;

The licensee is to lodge returns of sales data every four months in accordance with the approved form.

Preliminary Matters

- By letter dated June 11, 2009 to the parties to the proceeding, the Commission confirmed that due to the nature of the hearing a more liberal view would be taken to the application of Section 25 (2c) of the Act, in that new material, such as data and statistics relevant to the original material upon which the decision was based, would be regarded on the basis that it is a further exposition of the original material before the Director.
- Further, with regard to the Applicant’s contention that the Executive Director of Public Health and the Commission of Police had no *locus standi* in the review it was the Commission’s view, that in order to achieve a fair and just outcome, it was important for all parties that had input into the material that was before the Director when making the decision, to have equal rights in the process of the preliminary hearing.
- Although Mr Slater representing the Commissioner of Police submitted that the scope of the powers of the Commission in its proper construction is a mechanism of administrative review that is designed to preclude the consideration of any additional material including submissions, the Commission ruled for the hearing to proceed on the basis of applying the

precepts of natural justice and that any testing of the powers of the Commission would be available to all parties at a later time.

Background

1. On January 13, 2009 the Director issued a Notice under Section 64 of the Act to the licensees of Halls Creek Store and Kimberley Hotel setting out proposed conditions to be applied and providing the opportunity for the licensees to show cause why these conditions should not be imposed. Written submissions were required to be lodged no later than close of business February 20, 2009.
2. On February 20, 2009 the Applicant, Licensee of the Halls Creek Store, lodged a submission suggesting a "circuit breaker" by adopting a set of self-imposed conditions to be added to those already in place rather than having the proposed new conditions applied.
3. Numerous correspondence during the course of the proceeding before the Director between the Solicitor for the Applicant, Mr Crocket and the Director was considered by the Commission.
4. On May 11, 2009 the Director having considered the March 2009 submissions from the Executive Director Public Health and the information provided by the WA Police and the February and April submissions from the Store and the Hotel determined on the balance of probabilities and in the public interest to impose the conditions on the Halls Creek Store and Kimberley Hotel licences.
5. On June 8, 2009 the Applicant lodged an interim application to lift the imposition of the conditions placed on the Halls Creek Store, pending the final determination of an application for a review, also lodged on the same date.
6. On June 11, 2009 intervention submissions were received from the Executive Director of Public Health and the Director.
7. On June 11, 2009 the Commissioner of Police advised that a Notice of Intervention would be lodged for the review hearing.
8. On June 12, 2009 the Applicant lodged a final submission and a declaration by the licensee.

The Hearing

Applicant's Submission

9. Mr. Crocket referred to the processes that had been applied leading to the January 13 2009, Section 64 Notice and through until the May 11, 2009 decision of the Director to impose the subject conditions. It was contended that these processes were flawed and not justifying of the decision reached.
10. It was pointed out that there had been many changes to conditions and drinking habits in Halls Creek over the years and that the Director in reaching the decision had ignored these factors.
11. There had been numerous studies and revised conditions over a long period of time (17 years) and the Director, in reaching his decision, had not taken the resultant improvements in relation to health issues into consideration.
12. The validity and relevance of some of the material and statistics that were before the Director when making the decision was challenged.
13. The fact that the Hotel was still able to sell full strength liquor across the bar was a contradiction to the conditions placed on the sale of packaged liquor by both the Store and the Hotel.
14. Mr. Crocket stated that there were approximately 230,000 tourists who travelled through the Halls Creek region each year and that their requirements had been totally ignored. There were probably around 50 people in the community who might be regarded as chronic alcoholics and yet the total community was being affected by the conditions.
15. Mr. Crocket pointed out the serious financial implications for the business of the Applicant as a direct consequence of the conditions being applied. The business was now holding an estimated \$90,000 in un-saleable stock.
16. It was submitted that the business was heading for bankruptcy, although, to cease trading was not an option, as to do so risked the licence being suspended under sections 92 and 93 of the Act.

Mr. Crocket submitted a copy of a letter dated June 9, 2009 to the Director pointing out that the issue of continuing to trade while insolvent placed the business operation in an invidious situation as not only would the Applicant be exposed to a myriad of serious legal consequences

under the Corporation Law, if he ceases to trade the Halls Creek Store for more than 28 days, the licence would be placed in suspension with the right of the Director to cancel the licence.

The following was requested:

- a. Request the Director lift the conditions on the licence pending the outcome of the Review Proceedings.*
- b. Advise what action the Director will take if our client ceases trading ie, whether he will suspend then cancel the licence.*
- c. Whether the Director has made a recommendation to the Western Australian Government to compensate our client for the losses it is incurring, by suggesting an ex gratia payment be made to the licensee of the Halls Creek Store, because the prescribed conditions have extinguished our clients statutory rights to operate the business of the liquor store.*

It was further pointed out in the letter that:

In the 10 days leading up to the restrictions being imposed, the local Police conducted an excessively large Halls Creek anti-drinking campaign by issuing infringement notices and pursuing a vast avenue of procedures by issuing summonses and issuing fines for drinking in public etc. A campaign of this nature has not occurred in the 40 years our client's family has traded in Halls Creek. It is questionable why a campaign of this nature is, or was necessary, given the views reached by the Director and the Police ie, that the restrictions automatically result in a curtailing of drunkenness.

we request to be provided with all the information concerning the 10 day campaign so that we are able to deal with it.

We request to be advised how our client is to dispose of his stock, full strength liquor, for the conditions on the license make it unlawful "to deal" with the stock... "

17. Ms White submitted a letter from the Director in response to Mr Crocket's letter dated June 9, 2009 as detailed in 27 below.
18. Mr. Crocket advised that if the conditions were not lifted there would not be a licensee of Halls Creek Store (due to bankruptcy) by the time of the review hearing. The licensee has a good trading record and the total community does not need such restrictive conditions imposed on the Applicant's licence.

Intervention of the Director of Liquor Licensing and the Executive Director of Public Health

19. Ms. White stated that the conditions were in place and had been for four weeks and no purpose would be served in lifting them during the period leading to the review hearing.
20. While reference had been made to the level of chronic alcoholics, this was not the only issue, as binge drinking was also a major problem in the Halls Creek area.
21. There were no restrictions on the licensee selling stock to a liquor merchant and there was no evidence to confirm that the business was facing bankruptcy.
22. Tourist visiting the region had access to the full range of alcohol beverages at the Hotel and if lodging there, also to packaged full strength liquor. Full strength liquor was also available with a meal at licensed restaurants.
23. This was an issue of health versus business and it is in the public interest to give priority to health issues.
24. Should the conditions be lifted after the four week period that had expired it would further aggravate the situation with a potential rush back to full strength liquor consumption. Faced with the uncertainty of that access being once again restricted from a review hearing this would be likely to again encourage binge drinking and public drunkenness. This is likely to result in a sharp increase in hospital admissions; assaults; police work and domestic violence.
25. The 17 years of studies and the corrective actions taken to date had not been effective and the conditions now imposed were a major step towards addressing the issues.
26. The onus is on the Applicant to show why the orders should be stayed and it has not been demonstrated that the circumstances are sufficiently exceptional for the appeal to be successful.
27. Ms White submitted a copy of a letter forwarded to Mr. Crocket by the State Solicitors Office, on behalf of the Director in response to the June 9 , 2009 letter referred to in 16 above advising:

"a. The Director has no power conferred upon him to re-open his original decision and would be functus officio in this role as your

client has already commenced review proceedings before the Commission.

- b. The Director has the power to suspend and cancel a licence issued: sections 92 and 93 Liquor Control Act 1988. The Director has an obligation to give the licence holder a reasonable opportunity to make submissions to be heard. The Director can suspend the licence if it appears that the licensee has ceased to carry on a business at the licensed premises; or where the licensee is a body corporate, an event described in section 102(1)(a) or (b) of the Act. The Director has discretion in regards to these matters. He is not able to provide an indication as to future decisions.*
- c. No.*
- d. The Director has had no involvement with the "10 day" police campaign you refer to so has no information in relation thereto.*
- e. The conditions imposed are set out at page 16 of the Director's decision, which includes "the sale of packaged liquor, exceeding a concentration of ethanol and liquor of 2.7 per cent at 20 degrees Celsius, is prohibited to any person, other than a liquor merchant". Your client may sell stock to a liquor merchant."*

Intervention of the Commissioner of Police

- 28. Mr Slater advised that the Commissioner of Police concurred with the submissions filed for the Executive Director of Health.
- 29. The number of alcoholics was not indicative of the alcohol problems in Halls Creek as there were wider issues associated with general and binge drinking.
- 30. The fact that the Hotel could still sell full strength liquor across the bar was due to consumption at the Hotel being able to be monitored in a regulated environment.
- 31. The financial aspects submitted by the Applicant were not relevant to the decision and that it should be recognised that it is a privilege not an entitlement to hold a liquor licence.
- 32. Mr.Slater submitted an email dated June 12, 2009 from Senior Sergeant Graham Sears, Officer in Charge, Kununurra Police Station and an email of the same date from Senior Sergeant Brad Warburton, Officer in Charge, Balgo Police Station advising of the impacts since the

introduction of the packaged liquor conditions imposed on the Halls Creek Store and the Kimberley Hotel.

33. Mr Slater also submitted statistical data compiled by the Halls Creek Police, detailing arrests, charges and offences for the 12 week periods before and the 4 weeks after the introduction of the packaged liquor conditions. These statistics showed a considerable reduction in arrests, charges and offences in the 4 weeks subsequent to the imposition of the conditions compared to the 4 weeks of the same period in the previous year.

Responses to the submissions by the Applicant and the Respondents

34. Mr Crocket observed that while the statistics submitted by the Commissioner of Police showed an improved situation. The fact was that there had been a gradual improvement already occurring due to the licensee's management practices and the conditions that existed prior to the May 11, 2009 decision. Further, additional "self imposed" conditions had been offered prior to the Director's decision as a "circuit breaker".
35. Mr. Crocket pointed out that an objective to "clean up" Halls Creek was outside the scope of the Act and that this "*band aid treatment*" was not going to work as the problem would not evaporate and would only move somewhere else.

Elaborating on the response of the Director in his letter dated June 11, 2009 Mr Crocket contended that it was unlikely that a liquor merchant buyer could be found as the quality of the stock was deteriorating every day – a situation aggravated by the high temperatures.

36. Ms White responded by observing that given that stock quality was deteriorating and was no longer saleable then it was no longer an issue with respect to the application to lift the conditions.

Determination

37. The determination was published on June 18, 2009:

"The application for the lifting of the conditions until the determination of the review hearing is published is refused."

Reasons

38. At the time that the determination was published the following reasons were provided:

"1. Pursuant to section 5 of the Liquor Control Act 1988, the primary objects are –

- (a) to regulate the sale, supply and consumption of liquor; and*
- (b) to minimize 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 considering all of the material submitted and presented by the Applicant and the Respondents and weighing the potential outcomes as applied to objects 5(1)(b) and 5(1)(c) above, the Commission finds that it would not be in the public interest to lift the applied conditions as an interim measure prior to the review hearing.

Detailed reasons for the determination will be published in due course."

An expansion of the reasons now follows:

- 39. The harm and ill-health issues associated with the consumption of alcohol in the Halls Creek region have been recognised for some considerable time- a fact acknowledged by all parties to the hearing.
- 40. Over the last 17 years there have been numerous studies undertaken and various actions and trading conditions implemented to address the situation, however, while there is evidence of improvements, the fact remains that there are still serious harm and ill-health issues that exist in Halls Creek, due to the consumption of alcohol.
- 41. The decision of the Director to impose the subject conditions on the liquor licence of the Halls Creek Store is a further move towards applying remedial action to what, as evidenced by police and health reports before the Director when making the decision, is an unacceptable situation.

42. In seeking to have the conditions lifted prior to the review hearing, the applicant has raised doubts over the processes and the validity of the decision reached and the appropriateness of the conditions applied. These are matters that will be tested at the review hearing.
43. As indicated in 38 above, this is a matter which requires a balanced approach in the application of sections 5(1)(b) and 5(1)(c) of the Act. While section 5(2) of the Act sets out secondary objects, pursuant to section 5(3) where there is any inconsistency, the primary objects take precedence.

In this matter the primary objects are considered by the Commission to have precedence.

44. In all of the material before the Director when making the decision and in the material submitted and presented by the Applicant and the Respondents to the hearing, there is a clear identification of the longstanding alcohol related harm and ill-health issues in Halls Creek.
45. The impact of the conditions on the trading operations of the Halls Creek Store is recognised from both a business financial aspect and also in the wider context of the objects of section 5(1)(c) of the Act.
46. In weighing and balancing the competing arguments about the public interest in applying sections 5(1)(b) and 5(1)(c) in regard to the situations outlined in 43 and 44 above, the Commission finds that the harm and ill-health issues are such that it would not be in the public interest to lift the applied conditions as an interim measure, prior to the review hearing.

With regard to the financial implications that the applied conditions have for the Applicant, there is no requirement within the Act for the licensing authority to take into consideration any economic factors as they relate to individual businesses. The Commission's responsibility is to administer the Act in accordance with the primary objects as outlined in section 5(1) of the Act and in this instance does so with a considerably stronger weighting being applied to the object as set out in section 5(1)(b).

47. While the appropriateness of the processes and the conditions applied by the Director in the decision of May 11, 2009 are yet to be tested in a review hearing, the Commission considers that to lift the conditions until that time will present a very clear risk of immediate harm and ill-health occurring in the Halls Creek community, to the extent that the outcome would likely to be highly detrimental to the interests of that community. These risks are also considered to far outweigh the loss of amenity to the community in the period until the determination of the review hearing.

48. The Commission does, however, acknowledge the difficult business position being faced by the Applicant in the sense that no interim relief until the review hearing, is available from the potential application of sections 92 and 93 of the Act, restricting the trading decisions that can be made and requiring the business to keep operating even under loss making circumstances. The Commission is not in a position to address this rather unfortunate position.



MR EDDIE WATLING
DEPUTY CHAIRPERSON