

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

- Applicant:** Palmerville Pty Ltd trading as Utakarra Liquor Barn  
(represented by Mr Gavin Crocket of GD Crocket & Co)
- Other Parties:** Colin Wilson Findlay and Deborah Sue Findlay,  
Respondents  
(represented by Mr John Robertson of Williams & Hughes Lawyers)
- Director of Liquor Licensing, Intervener  
(represented by Ms Tamara Cole of State Solicitor's Office)
- Commission:** Mr Jim Freemantle (Chairperson)  
Ms Helen Cogan  
Ms Karen Lang
- Date of Determination:** 20 July 2009
- Premises:** Utakarra Liquor Barn
- Matter:** Application for Review, Section 25 of the *Liquor Control Act 1988* ("the Act")
- Determination:** The application is adjourned pending the determination by a competent Court or Tribunal of the dispute between the Applicant and the Respondents concerning contractual issues relating to the Lease of the premises and the rights of the parties to possession of the premises.

**Authorities referred to by the Applicant:**

- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* Appeal no.6 of 1990  
(Unreported, Full Court of Supreme Court of WA) 18 June 1990  
(*Jericho 1*)
- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR page 380  
(*Jericho 2*)

- *Dalgety Wine Estates Pty Ltd v Rizzon and Another* [1979] (141) CLR page 552

**Authorities referred to by the Respondents:**

- *Bowtell v Goldsborough Mort & Co Ltd* (1906) 3 CLR 444 at page 451
- *Kelly v R* (2004) 205 ALR 274 at page 302
- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* Appeal no.6 of 1990 (Unreported, Full Court of Supreme Court of WA) 18 June 1990
- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR page 380
- *Sanderson v Fotheringham* (1885) 11 VLR 190 at page 192
- *Awada v Linkhart (In Liq)* (2002) 55 NSW LR 745 at page 750
- *Hancock v Executive Director of Public Health* [2008] WASC 224 at [50] and [51]
- *Blair v Curran* (1939) 62 CLR 464
- *Parkin v James* (1905) 2 CLR 315

**Authorities referred to by the Intervener:**

- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* Appeal no.6 of 1990 (Unreported, Full Court of Supreme Court of WA) Appeal no.6 of 1990, 18 June 1990 (*Jericho 1*)
- *Jericho Nominees Pty Ltd v Dileum Pty Ltd* (1992) 6 WAR page 380 (*Jericho 2*)

**Legislation:** *Liquor Control Act 1988*  
*Interpretation Act 1984*  
*Commercial Tenancy (Retail Shops) Agreements Act 1985*  
*Evidence Act 1906*

## **1. Background**

The following chronology is compiled from material lodged with the Intervener and before his Deputy when making her decision on 20 January 2009 in respect of which decision this application is before the Commission and is set out in order to establish the background to the Application presently before the Commission.

- 4 March 1986, – The Applicant obtained transfer of the Liquor Licence for the premises (Licence no. 6030003897).
- The Applicant occupied the premises, most recently as lessee pursuant to a written lease dated 19 March 2003 from Newpride Nominees Pty Ltd (“the Lease”) the then registered proprietor of the land on which the premises are situated (“the Land”). On its face the Lease commenced on the date of settlement or purchase of the Land by Newpride Nominees Pty Ltd and expired five years thereafter, absent any exercise by the lessee of the option to renew the Lease, or any “holding over” by the Applicant.
- On or about 31 March 2008, the Respondents became the registered proprietors of the Land and accordingly the successors in title to Newpride Nominees Pty Ltd as Lessor pursuant to the Lease.
- On 21 May 2008, the Respondents served on the Applicant a 30 day Notice of Termination of the Lease, on the basis that the Applicant was ‘holding over’ under the Lease.
- On 4 July 2008, the Respondents entered into possession of the premises.
- On 5 July 2008, the Applicant re-entered into possession of the premises.
- On 8 July 2008, the Respondents gave written Notice to the Applicant that it was required to vacate the premises.
- On 11 July 2008, the Applicant vacated the premises.
- On 18 August 2008, the Respondents lodged an application for a protection order under Section 87 of the Act.
- On 22 August 2008, the Applicant’s’ solicitor advised the Director of Liquor Licensing that there was a major dispute between the Applicant and the Respondents concerning the rights to occupation of the premises.

- On 22 August 2008, the Applicant lodged a Notice of Objection to the application for a protection order lodged by the Respondents on 18 August 2008.
- On 29 August 2008, the Applicant lodged an application to suspend the licence and an application for a protection order under Section 87 of the Act.
- On 3 September 2008, the licence was suspended by the Director of Liquor Licensing pursuant to Section 92 of the Act.
- On 4 November 2008, following correspondence received from the Applicant and the Respondents, the Director of Liquor Licensing advised that the matter was adjourned until the parties could resolve the issue of tenure of the premises.
- On 11 November 2008, the Respondents wrote to the Director of Liquor Licensing stating that loss was occurring and determination of Respondents application for a protection order was urgent.
- On 21 November 2008, the Director of Liquor Licensing advised the Applicant and the Respondents that the matter (the application by the Respondents for a protection order and the Applicant's objection to that application) would be determined on the papers and that as the Applicant did not have tenure and did not occupy the premises a finding adverse to the Applicant was likely.
- On 2 December 2008, the Applicant lodged a notice of intention to surrender the licence.
- On 4 December 2008, the Director of Liquor Licensing advised the Applicant that its interest in the Licence was terminated and the Applicant's application for a protection order (made on 28 August 2008) was refused and that as the Applicant's interest in the licence was terminated, the Applicant could not surrender the Licence.
- On 5 December 2008, the Applicant made submissions to the Director of Liquor Licensing as to why the Respondents should not be allowed access to the Licence.
- On 20 January 2009, the Deputy Director of Liquor Licensing advised the Applicant that a protection order should be granted to the Respondents and the suspension on the licence lifted.

- On 19 February 2009, the Applicant lodged an application pursuant to Section 25 of the Act seeking a review of the decision of the Deputy Director of Liquor Licensing dated 20 January 2009.
- On 15 April 2009, a directions hearing in the matter of the Applicant's application dated 19 February 2009, was held before Mr Jim Freemantle, Chairman of the Commission (at which all parties were represented) and on that date the Commission determined that the parties should submit grounds showing whether or not the Commission has jurisdiction to determine the issue of rightful occupancy of the premises. The parties were given 14 days to submit the grounds and were thereafter provided 7 days to make responsive submissions.
- On 15 May 2009, the parties were advised that the Commission proposed to determine the matter before it on the papers, i.e. without the necessity for a hearing and no objection was received to the proposal.

## **2. Application for Review**

- 2.1 As appears from the matters referred to above under the heading "Background" the only relevant part of the application presently before the Commission (i.e. the Applicant's application made on 19 February 2009, to review the Deputy Director's decision of 20 January, 2009) is the question of whether or not the Commission has jurisdiction to determine the issue of rightful occupancy of the premises.
- 2.2 The Commission considers that it is both appropriate and necessary to determine the question of its jurisdiction before the Commission can properly and competently determine the application presently before the Commission which decision;
- 2.2.1 granted a protection order to the Respondents; and
- 2.2.2 lifted the suspension on the licence.

## **3. The Review Process**

### **General**

- 3.1 All the evidence and material before the Deputy Director of Liquor Licensing when making the decision dated 20 January 2009, was

available to and considered by the Commission prior to the order being made at the directions hearing on 15 April 2009.

- 3.2 The Submissions and Responsive Submissions made by the Applicant, the Respondents and the Intervener to the Commission in response to the order of the Commission following the directions hearing relating to the issue presently before the Commission, i.e. the question of its jurisdiction to determine the issue of rightful occupancy of the premises, were considered by the Commission and are summarised as set out in paragraph 4 below.

#### **4. Applicant's Submissions (On Preliminary Issue)**

- 4.1 The Applicant referred to and quoted the Preamble to the Act as follows:

*"An Act to regulate the sale, supply and consumption of liquor, the use of premises on which liquor is sold.... and for related matters."*

- 4.2 The Applicant referred to and quoted the definitions in the Act as follows;

"lease"; and

"licence"; and

"licensed premises"; and

"licensee"; and

"owner"; and

"premises".

- 4.3 The Applicant referred to Sections 30B, 72, 73, 74, 77, 81, 84(3), 87, 89, 94(3)(d), 99 and 104 of the Act as being sections of the Act which relate to jurisdiction over persons other than the licensee and particularly parties who have an interest in the property from which the licence operates and submitted that it follows that the Licensing Authority has jurisdiction to deal with owners of property in their different capacities, examples of which were given. The Applicant submitted further that the policy of the Act is quite clear and a party whose rights/activities "touch and concern" the operation of licensed premises falls within the power of the Licensing Authority and the

parties status and rights are to be dealt with on the merits of the application.

- 4.4 The Applicant submitted that the Licensing Authority has extremely broad and wide powers to deal with all applications before it, such powers being fettered only by two elements, namely the application is dealt with on its merits and the application is dealt with to serve the best interests of the public.
- 4.5 The Applicant referred to *Jericho Nominees Pty Ltd v Dileum Pty Ltd (Jericho 1)* as authority for the proposition that the Licensing Authority has the complete jurisdiction to deal with contractual disputes where the dispute involves the rights and obligation of the parties to a liquor licence.
- 4.6 The Applicant submitted that considering the provisions of the *Liquor Act 1970* (“the 1970’s Act”) in particular, section 88 which related to transmission of liquor licences in circumstances where the licensee was obliged to vacate the licensed premises, that because the provisions caused hardship, the legislation had been changed.
- 4.7 The Applicant referred to the provisions of sections 86,87,88 and 89 of the Act which had replaced the entire ‘Transition Provisions’ of the 1970 Act.
- 4.8 The Applicant referred to the heading of “Disputes as to leases” and plain meaning of Section 89 of the Act. The Applicant contended that the heading to the section means the Licensing Authority has the power to examine and make a determination on the circumstances surrounding the dispute arising from a lease and concluded that in its plain meaning, the section reflects:
  - 4.8.1 where there are premises;
  - 4.8.2 where there is a dispute;
  - 4.8.3 where the dispute is between owner or lessor and a licensee or former licensee; and
  - 4.8.4 the dispute pertains to the terms of the lease;
  - 4.8.5 the lease relates to the operation of the licence which was carried on by the former licensee (tenant);
  - 4.8.6 the dispute relates to compensation to be paid for the lease (or former lease); and

4.8.7 the Licensing Authority believes these issues “impact on the requirements to be met under this Act”; then

the Director has jurisdiction to deal with the matter as he determines fit and to make specific orders.

4.9 The Applicant submitted further that the powers of the Licensing Authority are extremely broad under this section for the Licensing Authority is entitled to prescribe to the parties how the dispute is to be dealt with.

4.10 The Applicant submitted that Parliament’s purpose in the introduction of sections 87-89 of the Act is clear in providing the Licensing Authority with full authority to:

- a) deal with lease disputes where they impact upon licensed premises and the right of a party to a licence;
- b) deal with disputes arising from leases over licensed premises, particularly at the end of the lease; and
- c) ensure quasi-judicial tribunals, courts and other statutory bodies are excluded so that the Licensing Authority may exclusively determine the rights and interests of a party or parties to a liquor licence in a given set of circumstances.

4.11 The Applicant summarised its submissions as follows:

4.11.1 There is a Full Court authority which reflects that the Licensing Authority has full jurisdiction to hear and determine matters involving disputes over leases where those matters impact directly on the rights to the business of liquor licences.

4.11.2 Further, section 89 (of the Act) is clear in giving the Licensing Authority the power to hear and determine lease disputes.

4.11.3 The scope and nature of the Act make it clear the Licensing Authority has power over a number of persons, parties, statutory institutions etc, where these third parties are involved in or have some relationship with licensed premises.



## **5. Submissions by the Respondents (On Preliminary Issue)**

5. The Respondents provided submissions “in opposition to the Applicant’s application for review of the Deputy Director’s decision” summarised as follows:
  - 5.1 Submissions concerning the Applicant’s reference to the suspension of the licence on 3 September 2008, (refer to “Background” at 1 above) and whether that decision should have been made pursuant to section 89 rather than section 92 of the Act.
  - 5.2 The Respondents refer to and quote the provisions of Section 89 of the Act.
  - 5.3 The Respondents submitted that the Commission does not have jurisdiction to “determine the issue of rightful occupancy of the premises” for two reasons:
    - 5.3.1 because the decision to suspend the licence (made on 3 September 2008) was not made pursuant to Section 89 of the Act; and
    - 5.3.2 the Supreme Court is the appropriate forum for the determination of substantive rights between the parties.
  - 5.4 The licence was suspended under Section 92 of the Act because the Applicant had ceased trading and had vacated the licensed premises. The Applicant did not approach a court of competent jurisdiction to seek relief against forfeiture of its alleged leasehold interest in the premises. An adverse influence ought to be shown from the Applicant’s failure to seek, from the Supreme Court, relief against forfeiture.
  - 5.5 The Deputy Director had detailed written submissions and contemporaneous documents before her relating to the leasing dispute. The Applicant failed to satisfy the Deputy Director that the Applicant had the right to occupy the premises.
  - 5.6 Section 89 of the Act does not on any construction create a power in the Director to determine a leasing dispute. On a proper construction of Section 89 of the Act, the two alternatives in sections 89(a) and 89(b) of the Act are, respectively (i) suspension of the licence; or (ii) the granting of a protection order in respect of the licence. The phrase “pending determination of the dispute in the manner approved by the Director” must be read in the context of the introductory words of the provision that provides for the two alternative outcomes. The

“requirements be met under the Act” are met by the two alternatives created in Section 89(a) and 89(b), namely suspension order or protection order. The requirements of the Act would not be met by the Director, in an administrative capacity, taking it upon himself to determine private rights in relation to a lease dispute.

- 5.7 Section 89 of the Act has not been judicially considered. Save for a reference to Section 89 in the headnote in *Jericho (2)* there is no analysis or judicial consideration of that section by the Court in the *Jericho (2)* judgement.
- 5.8 *The Liquor Licensing Bill* (the Respondent referred to a footnote for explanation of the transition to the *Liquor Control Act 1988*) was tabled in the West Australian Parliament in 1988 before the current practice of issuing explanatory memorandum to assist in the interpretation of the proposed legislation.
- 5.9 The second reading speech of the *Liquor Licensing Bill* did not meaningfully consider Section 89 and the Bill was referred to a Committee in the Legislative Council but was ‘put and passed’ without any meaningful consideration of Section 89.
- 5.10 It is simply not plausible that it was never the intention of Parliament (that) the phrase in Section 89 of the Act: “*pending determination of the dispute in a manner approved by the Director*” was intended to empower the Director, acting administratively, to adjudicate on a private dispute regarding a lease of licensed premises.
- 5.11 If, on the Applicant’s construction of Section 89 of the Act (which [construction] is denied) the Director, acting administratively has power to adjudicate on “disputes as to leases”, the Commission is constrained by Section 25 (2c) of the Act which provides, relevantly:
- “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.” (emphasis added)*
- 5.12 In adjudicating on “Disputes as to leases”, in the context of a review under Section 25 (2c) of the Act, the Commission would not be able to consider any of the normal issues, facts and contentions that would be the subject of an unrestrained claim for relief against forfeiture that a litigant could bring in a superior court because of the constraints placed on the Commission by Section 25 (2c) of the Act.
- 5.13 The Applicant would not be permitted to introduce new evidence referred to in the Minutes of Proposed Directions submitted to the

Commission in relation to the directions hearing on 15 April 2009, because of the constraints placed on the Commission by Section 25 (2c) of the Act.

- 5.14 If the Commission did conduct a review that complied with Section 25 (2c) of the Act, made a finding or published written reasons in respect of the “rightful occupancy of the premises...” that entitled either the Applicant or the Respondents to possession of the [Property], the finding or written reasons of the Commission would be prejudicial because it would inevitably have been made without recourse to all the relevant evidence and may be admitted in subsequent proceedings.
- 5.15 Any decision of the Commission creates the potential for issues of *res judicata* or issue estoppel that could be run by the unsuccessful party in the superior court that could frustrate the subsequent proceedings where the meaningful relief would be sought. Put simply the Applicant is seeking to circumvent the need to make an application to the Supreme Court for relief against forfeiture. The very real practical problems and prejudices that would arise if the Commission was to adjudicate on the lease dispute gives rise to a strong inference that it was never the intention of Parliament that the Commission, acting in an administrative capacity, determines disputes of this nature.
- 5.16 Section 25(2c) of the Act restricts the materials available to the Commission for the purposes of the review to only those materials before the Director and imposes on the Commission the requirement to make a determination on the basis of those materials alone. There was sufficient material before the Director to make the decision which was made under Section 92 of the Act. The Commission cannot on the evidence available (and no further evidence is admissible: see Section 25 (2c)) make a decision about the vastly different questions of fact and law that the Applicant contends arises under Section 89 of the Act. In any event were the Commission to make such a determination it would be a judicial determination not an administrative determination.
- 5.17 In *Hancock v Executive Director of Public Health (2008) WASC 224* Martin CJ said at [51] it is clear that the functions of the Commission when undertaking such a review are properly characterised as administrative, rather than judicial.
- 5.18 The Respondent submits:

5.18.1 the Commission does not have jurisdiction to determine the issue of the rightful occupancy of the premises ; and

5.18.2 for the reasons articulated in the submissions by the Respondents dated 8 April 2009 the Director's decision to suspend the Licence under Section 92 of the Act is correct and ought to be affirmed by the Commission.

## **6. Intervener's Submissions (On Preliminary Issue)**

6. The Intervener's submissions on the Preliminary Issue under the following headings are summarised as follows.

### **6.1 Issue**

The preliminary issue to be determined is whether the Commission has jurisdiction to determine the rightful occupancy of the premises under the Act.

### **6.2 Facts**

The Respondents set out relevant details of the following matters-

- The Notice of Application lodged on 18 August 2008 by the Respondent for a protection order pursuant to Section 87(1)(b) of the Act and the basis for that application.
- The Notice of Objection lodged on 22 August 2008, by the Applicant to the Respondents Notice of Application lodged on 18 August 2008 and the basis for that objection.
- The Notice of Application lodged by the Applicant on 29 August 2008, to suspend the Licence pursuant to Section 89 of the Act to allow:
  - a) the resolution of the civil dispute concerning the right of possession of the Licensed premises;
  - b) the Director to make a determination under Section 89 of the Act; and
  - c) the Director to determine whether a protection order should be granted.

- The Notice of Application lodged by the Applicant on 18 August 2008, for a protection order to protect “its legal rights to the liquor store licence”.
- The suspension on 3 September 2008, by the Director of the Licence, pursuant to Section 92 of the Act.
- The suspension of the Licence on 3 September 2008, was not conditional on a dispute as to a lease being determined in a manner approved by the Director pursuant to Section 89 of the Act.
- A letter dated 3 October 2008, from the Applicant’s Solicitors to the Director concerning clause 45.3 of the Lease which provides for the Liquor Licence to be held for the reversionary benefit of the lessee on the expiration or sooner determination of the term of the Lease.
- The Notice of Intention lodged on 2 December 2008, by the Applicant to surrender the Licence and the grounds for that Notice.
- The letter dated 1 December 2008, from the Applicant to the Director seeking to have the Licence cancelled “pursuant to Section 92, 92(a) and 93 of the Act.”
- The Director’s decision on 4 December 2008:
  - a) terminating the Licence pursuant to Section 37(5)(b) of the Act because the Applicant had ceased to occupy the premises.
  - b) refusing the Applicant’s application for a protection order on the basis that the Applicant had;
    - i. confirmed that the Respondents had terminated the Lease and the Applicant had vacated the licensed premises; and
    - ii. could not demonstrate a right to occupy the premises.
- Correspondence between the Applicant and the Director relating to the Director’s decision on 23 January 2009, to:
  - a) grant a protection order over the licensed premises to the Respondents pursuant to Section 87(1)(b) of the Act; and

- b) lift the Order of Suspension dated 3 September 2008.
- The lodgement on 19 February 2009, by the Applicant for review of the Director's decision dated 23 January 2009.

### 6.3 Legal Principles

#### 6.3.1 Application for a Protection Order by the Applicant

The Intervener referred to and quoted the provisions of Section 87(1) of the Act and submitted-

- There is no scope for the Applicant for a protection order under Section 87(1) to be one and the same as the Licensee.
- The Director can only grant a protection order to an Applicant.
- Protection Orders exist to provide relief to persons who are affected, or likely to be affected, by the death, permanent disability or actions of a licensee.
- It is not possible for a licensee to be an Applicant because any protection order would carry a right to carry on the business of a licence as if that person was a licensee.
- The determination by the Director as to the rights of the Respondents to occupy the premises for the purposes of Section 37(5) was not requested to be made.

#### 6.3.2 Application for a Protection Order by the Respondents

- The Commission only has to determine whether or not the Director ought to have granted a protection order to the Respondents and in so doing conducts a re-hearing having regard only to the material before the Director when making his decision : Section 25(2c) of the Act.
- The application by the Respondents for a protection order was made pursuant to Section 87(1)(b) – so the first issue for the Commission is that the Licence was suspended – that is not in dispute.

- The only other question for determination is whether the suspension is likely to result in loss if a protection order is not granted – this is a question of fact.
- Whether a lease construction issue needs to be determined will depend on the facts, in particular, whether the parties raise, as relevant, an intermediate fact upon which the likelihood of causal loss from refusal depends.
- The Respondents have submitted that if a protection order was not granted the Respondents would suffer losses, which were described as loss of rental income, holding costs and loss of spin off trade.
- The causal losses described do not appear to require the determination of any dispute as to the Applicant's and Respondents' rights and obligations under the Lease.
- If the Applicant can satisfy the Commission at this stage or at hearing that a relevant factual lease issue is indispensable to the ultimate conclusion, the Commission can determine the issue for the purpose of this proceeding and any such determination would not represent any generally enforceable determination of rights under the lease.
- In the event that the Commission is satisfied that the licence was suspended and such suspension is likely to result in loss if a protection order is not granted, the Commission still has discretion as to whether to grant a protection order. This discretion is justified by the fact that there is discretion to impose conditions as the Director sees fit.

#### 6.4 Conclusion

The Commission has jurisdiction to determine the rightful occupancy of the premises if the Applicant can demonstrate that it is an issue that is indispensable to the consideration of whether loss is likely to be caused if a protection order is not granted under Section 87(1)(b) of the Act.

## **7. Responsive Submissions**

- 7.1 The Applicant lodged responsive submissions-
- 7.1.1 to the submissions by the Respondents on the preliminary issue;  
and
  - 7.1.2 to the Intervener's submissions on the preliminary issue
- 7.2 The Respondents lodged responsive submissions-
- 7.2.1 to the submissions by the Applicant on the preliminary issue;  
and
  - 7.2.2 to the Intervener's submissions on the preliminary issue.
- 7.3 The Intervener lodged responsive submissions to the Applicant's submissions on the preliminary issue.

## **8. Brief Summary of Responsive Submissions**

The Commission considers it appropriate to give only a brief summary of the responsive submissions as follows:

- 8.1 Responsive submissions by the Applicant to the submissions by the Respondents
- 8.1.1 Reference was made to *Jericho 1* and *Jericho 2* and to Sections 89 and 84 of the Act being identical to the provisions of the Repealed Act. The two Full Court decisions are binding on the Licensing Authority and demonstrate that the Licensing Authority has the power to hear and determine aspects of lease disputes where the Liquor Licence is considered, and why would Section 89 be in the Act unless the (Liquor) Licensing Authority had such power.
  - 8.1.2 The submissions then made reference to the following particular paragraphs of the Respondents' submissions:
    - paras 1-4
    - paras 5; 5.1, and 5.2
    - para 6
    - para 7



- para 8
- para 9
- paras 10-12
- paras 13-17
- para 19-22

and pointed out essentially why the matters referred to in those paragraphs were either wrong or addressed questions of fact and do not address the question of the Commission's jurisdiction.

## 8.2 Responsive submissions by the Applicant to the submissions by the Intervener

8.2.1 The submissions referred to certain of the evidence and facts set out in the Intervener's submissions as being incorrect as follows:

- The Lease between Newpride Nominees as lessor and the Applicant as lessee **did not expire on 20 March 2008.** (emphasis added) There is a large dispute about the issue as to whether a new lease was entered into, or the option was exercised to continue Licensee/Lessee's rights under the existing Lease.
- It is an error to suggest the option was not exercised under the existing lease agreement. There is evidence before the Licensing Authority on this aspect.
- Submissions referred to matters relating to assumptions of ownership of the Licensed premises, alleged breaches of the covenant under the Lease or new Lease or in terms of an exercise of the option, the Respondents re-entry of the licensed premises, the Applicant's forcible eviction from the licensed premises without a Court Order or without any proper civil remedy.
- Submissions referred to matters considered to be irrelevant to the issue of the Commission's jurisdiction including the content of the Notice of Objection by the Applicant's to the Respondents application (not specified), the Applicant's

application to suspend the Licence, the Applicant's application for a protection order, the Directors suspension of the Licence, the Directors reasons for the decision of 4 December 2008, the Director's decision, the Applicant's letter to the Director of 5 December 2008, the Director's decision of 20 January 2009, the granting of the protection order on 20 January 2009.

- Submissions concerning the Notice of Intervention being defective and not relevant to the issue of the Commission's jurisdiction.
- Submissions concerning the consent of all parties to the jurisdiction of the Licensing Authority.
- Submissions concerning the power of the Director to cancel a licence, to grant a protection order.
- Submissions concerning the power of the Licensing Authority to entertain all applications before the Licensing Authority and the Licensing Authority being obliged and statute bound to make determinations about licences.

### 8.3 Responsive submissions by the Respondents to the submissions by the Applicant

8.3.1 (Summary) The cases relied on by the Applicant are *Jericho 1* and *Jericho 2*. Neither of these case held (or even considered) the Licensing Authority had jurisdiction to determine a leasing dispute. The principles enunciated in these cases have no application to the facts of this case.

8.3.2 Section 89 of the Act does not give the Licensing Authority the authority to "hear and determine leasing disputes." The Director (who is not legally trained) is acting in an administrative capacity and cannot be expected to perform the functions of a court.

8.3.3 The submission the "scope and nature of the Act make it clear the (Licensing) Authority has power over a number of persons..." is so general that it is meaningless.

#### 8.4 Responsive submissions by the Respondents to the submissions by the Intervener

8.4.1 (Conclusion)... Even if the (Commission) determines it has jurisdiction to determine a leasing dispute (which is denied as no such jurisdiction exists under Section 89 of the Act and in any event that section is not enlivened in “this proceeding”), it is futile for the (Commission) to pursue the determination because (the Applicant) has no relevant loss and no standing to obtain a protection order under Section 87(1)(b) of the Act or at all.

#### 8.5 Responsive submissions by the Intervener to the submissions by the Applicant

8.5.1 The submissions referred to:

- The provisions of the *Interpretation Act 1984* in relation to the Applicant’s reference to the Preamble to the Act;
- The purpose of the definitions in the Act;
- *Jericho 1* and *Jericho 2* and the Applicant’s claims of the matters for which those cases are authority;
- The lack of relevance of the explanatory memorandum to the *Liquor Licensing Amendment Bill 1997* and other matters in connection with that legislation;
- The heading and provisions of Section 89 of the Act;
- The Intervener’s (initial) submissions concerning whether a lease construction issue needs to be determined will depend on the facts of the case and whether the parties raise as relevant an intermediate fact upon which the determination of an application under the Act depends, and that any such determination by the Director or the Commission would not represent any generally enforceable determination of rights under a lease.

8.5.2 The Intervener did not make any responsive submissions to the submissions made by the Respondents.

## 9. Further Submissions

### 9.1 Applicant

On 23 June 2009, the Applicant's Solicitors referred the Commission to the decision of the High Court in *Dalgety Wine Estates Pty Ltd v Rizzon and Another* [1979] (141) CLR at page 552 ("*the Dalgety Case*").

The Applicant stated that the decision was a direct authority on the point of the Licensing Authority having jurisdiction to deal with Liquor Licensing matters which arise from, are incidental to and impact upon parties Liquor Licensing rights under a lease agreement.

The Applicant sent a copy of its letter of 23 June 2009, together with a copy of the decision, to the Solicitors for the Respondents and the Intervener.

### 9.2 Respondents

On 1 July 2009, the Solicitors for the Respondents made submissions in response to the Applicant's further submissions, summarised as follows:

9.2.1 The Respondents objected to the Applicant introducing new material after the Commission made orders for delivery of submissions and whilst the Commission was in the process of deliberation of its decision.

9.2.2 The "*Dalgety Case*" is irrelevant because it was concerned with the *South Australian Licensing Act 1967* which has been repealed and replaced with the *Liquor Licensing Act 1997 (SA)*.

9.2.3 The 1967 South Australian Act constituted the Licensing Court of South Australia which was a Court of Record and comprised a Chairman (a Judge), a Deputy Chairman and a Licensing Court Magistrate.

9.2.4 The 1967 South Australian Act provided a statutory basis for an objection to the removal of a liquor licence and an application was made to remove a liquor licence in breach of a negative stipulation in a lease and a parallel Supreme Court proceeding was commenced seeking specific performance of the negative stipulation.

- 9.2.5 Section 61 of the 1967 South Australian Act contained the relevant provision concerning jurisdiction of the Licensing Court of South Australia but the jurisdiction of that Court as it then existed has no relevance to the Licensing Authority in this State as the now repealed 1967 South Australian Act related to a "Court"- not an administrative body such as the Liquor Commission of WA.
- 9.2.6 The functions of the Liquor Commission are administrative not judicial and the *Dalgety Case* is irrelevant and not "on point" as the Applicant asserts.
- 9.2.7 The Licensing Court of South Australia and the statutory jurisdiction to deal with an application to remove a liquor licence cannot be compared to the Liquor Commission and its decision to suspend a licence.
- 9.2.8 The Liquor Commission ought to attach no weight to the *Dalgety Case* which is clearly distinguishable and has no application to the matter before the Liquor Commission.

### 9.3 Intervener

- 9.3.1 Having regard to the matters before the Licensing Court of South Australia and the Supreme Court of South Australia and the provisions of sections 57(1) and 61(1) of the *Licensing Act 1967 (SA)*, *Dalgety Case* is not a authority for the proposition that the Director has jurisdiction to deal with liquor licensing matters which arise from, are incidental to and impact upon parties liquor licensing rights under a lease agreement and the jurisdiction of the Liquor Licensing Court of South Australia under the 1967 South Australian Act has no bearing on the jurisdiction of the Director under the *Liquor Control Act 1988 (WA)* and therefore the Applicant's submission concerning the *Dalgety Case* has no legal basis.

## **10. Reasons for Commissions Decision**

### **10.1 Materials and documents considered**

10.1.1 On reaching it's decision on the preliminary issue the Commission considered:

- the order made at the directions hearing;
- the material that was before the Director when the Director made the determination dated 20 January 2009;
- the submissions on the preliminary issue received from the Applicant, the Respondents and the Intervener ("the Initial Submissions");
- The responsive submissions by the Applicant, (to the Initial Submissions by the Respondents and the Intervener), the Respondents (to the Initial Submissions by the Applicant and the Intervener) and the Intervener (to the Initial Submissions by the Applicant); and
- the further submissions by the Applicant, the Respondents and the Intervener.

10.1.2 The Initial Submissions and the responsive submissions were thorough and useful although it should perhaps be said that they went further than necessary in that they dealt with matters not strictly relating to the preliminary issue – which is that of the Commission's jurisdiction. Be that as it may, the Commission considered the Initial Submissions and the Responsive Submissions in detail.

10.1.3 Notwithstanding the Respondents' objection, the Commission also considered the further submissions.

### **10.2 Commission's Findings**

10.2.1 There is clearly a dispute between the Applicant and the Respondent concerning the Lease and the right of occupancy of the premises and there is no disagreement between the parties on this issue and the dispute is a dispute contemplated in Section 89 of the Act.

- 10.2.2 As appears from the chronology and all the submissions, the relevant provision of the Act which the Commission is required to consider in relation to the matter before it- which is the Applicant's application for review of the Director's decision dated 20 January 2009 is Section 89, and whether or not in terms of that section the Director has jurisdiction to determine the dispute between the Applicant and Respondents concerning the Lease, as part of the review of that decision of the Director.
- 10.2.3 The Commission finds none of the arguments in favour of it having the requisite jurisdiction, persuasive, in particular the Commission does not accept that *Jericho 1* is authority in relation to the circumstances of the matter before it which is an application for review of the Director's decision to grant a protection order to the Respondents and the suspension on the licence lifted, nor does the Commission accept that the *Dalgety Case* is authority on the point as submitted by the Applicant. The Commission considers that the *Dalgety Case* is distinguishable from the matter before the Commission for the reasons submitted by the Respondents and the Intervener.
- 10.2.4 On the plain meaning of the words in Section 89 of the Act, the Commission finds that it does not have the jurisdiction to determine the Lease dispute. The words in Section 89(a) "... pending the determination of the dispute in a manner approved by the Director (emphasis added)..." do not give powers to the Director himself to determine the dispute- the section gives power to the Director to suspend the operation of the Licence pending the determination of the dispute in a manner approved by the Director as stated above.
- 10.2.5 Pursuant to the provisions of Section 33 of the Act, the Commission has an absolute discretion to grant or refuse an application under the Act on any ground or for any reason that the Commission considers in the public interest.
- 10.2.6 Section 33 of the Act requires the Commission to deal with an application on its merits, after such inquiry as the Commission thinks fit.
- 10.2.7 The Commission considers that it is not possible for it to deal with the application before it on its merits unless and until the Lease dispute is determined in a manner approved by the Director as contemplated in Section 89 of the Act.

10.2.8 The Commission considers that even if it is seen to be erring on the side of caution, the application presently before it should be adjourned pending determination of the Lease dispute in a manner approved by the Director, which the Commission contemplates, will be by a competent court or tribunal and the Commission makes an order accordingly.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, followed by a smaller, more distinct signature.

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**MR JIM FREEMANTLE**  
**CHAIRPERSON**