

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicants:** Kimberley Accommodation (East) Pty Ltd
Leedal Pty Ltd
(represented by Mr Sam Vandongen SC, instructed by Mr Peter Fraser and Mr Timothy Monaghan of Dwyer Durack Lawyers)
- Interveners:** Director of Liquor Licensing
(represented by Mr David Leigh of State Solicitor's Office)
- Objectors in attendance:** Commissioner of Police
Chief Health Officer
(represented by Mr David Leigh of State Solicitor's Office)
- Marninwarantikura Fitzroy Women's Resource Centre
(represented by Mr Mark Gerus of Gilbert + Tobin Lawyers)
- Objectors not in attendance:** Commissioner for Children and Young People
McCusker Centre for Action on Alcohol and Youth
Ian Charles Hill and Kura Lee Hill
Ms Justine Wiltshire, representing 28 members of the Halls Creek Community
- Commission:** Mr Seamus Rafferty (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Mr Alex Zilkens (Member)
- Matter:** Applications for variation of trading conditions by Kimberley Accommodation (East) Pty Ltd (trading as Kimberley Hotel) and Leedal Pty Ltd (trading as Crossing Inn) pursuant to section 25 of the *Liquor Control Act 1988*
- Premises:** Kimberley Hotel, Roberta Avenue, Halls Creek
Crossing Inn, Sanford Road, Fitzroy Crossing

Date of Hearing: 29 August 2017

Date of Determination: 11 September 2018

Determination: The applications are dismissed and the decision of the delegate of the Director of Liquor Licensing is affirmed.

Authorities referred to in the determination:

- *Woolworths Limited v Director of Liquor Licensing* 2013 WASC 227
- *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258
- *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC 51
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208

Background

- 1 On 29 August 2017 the Commission conducted a hearing to determine applications for review of the decision of the Director of Liquor Licensing (“the Director”) pursuant to section 25 of the *Liquor Control Act 1988* (“the Act”) refusing applications to vary the licensing restrictions on Leedal Pty Ltd, the licensee of the Crossing Inn in Fitzroy Crossing and Kimberley Accommodation (East) Pty Ltd, the licensee of the Kimberley Hotel in Halls Creek. For the purposes of these reasons, given the commonality of issues in respect to both applications, the parties are referred to as the “applicants”.
- 2 The procedural history of the matter is as follows:
 - a. Following an inquiry into the extent of alcohol related harm in Fitzroy Crossing and surrounding areas, a number of restrictive trading conditions were imposed on the licence for the Crossing Inn on 2 October 2007, including a condition that, ‘the sale of packaged liquor, exceeding a concentration of ethanol in liquor of 2.7% at 20 degrees Celsius, is prohibited to any person, other than a lodger (as defined in section 3 of the Act)’;
 - b. Following a similar inquiry relating to Halls Creek and surrounding areas, the same condition was imposed on the licence for the Kimberley Hotel on 11 May 2009;
 - c. On 24 December 2015, the applicants lodged applications pursuant to section 64 of the Act seeking to vary the restrictive condition relating to the sale of packaged liquor by replacing 2.7% in the condition with 3.5%;
 - d. On 11 January 2017, the delegate of the Director refused both applications on the basis that, ‘the applicants have failed to discharge their onus under section 38(2) of the Act.’;
 - e. On 27 January 2017, the applicants applied for a review of the decision of the Delegate pursuant to section 25 of the Act.
- 3 The applicants are effectively applying to vary the licences which only allows the sale of 2.7% alcohol (“low alcohol liquor”) to allow the sale of 3.5% alcohol (“mid-strength alcohol”). The Director properly determined that it was appropriate that section 38(2) of the Act applied to these applications, therefore it is incumbent on both applicants to establish on the balance of probabilities that it is in the public interest to grant each application.
- 4 At first instance the applications were dealt with together on the basis that it had been submitted by the applicants that due to the geographic proximity of Fitzroy Crossing and Halls Creek, it was appropriate to do so. Given the significant overlap of issues common to both applications, the Commission also has dealt with both applications together.
- 5 Given that this matter is a review conducted pursuant to section 25 of the Act, the Commission can only take into account the evidence that was before the Delegate at first instance.

Parties to the Proceedings

- 6 In respect to the Crossing Inn application, objections were filed by the following parties:
- a. The Executive Director, Public Health (now the Chief Health Officer: “CHO”);
 - b. The Commissioner of Police (“Police”);
 - c. The Commissioner for Children and Young People (“CCYP”);
 - d. Marninwarntikura Fitzroy Womens Resource Centre (“MWRC”); and
 - e. The McCusker Centre for Action on Alcohol and Youth (“MCAAY”).
- 7 In respect to the Kimberley Hotel application, objections were filed by the following parties:
- a. The CHO;
 - b. Police;
 - c. The CCYP;
 - d. The MCAAY;
 - e. 28 members of the Halls Creek Community (“Halls Creek Community”); and
 - f. Ian Charles Hill and Kura Lee Hill.
- 8 The Director intervened in these proceedings pursuant to the power conferred by section 69(11) of the Act. A preliminary issue arose as to whether the Director could introduce evidence in a section 25 proceeding, given the wording of the section that allows him to intervene in these proceedings. Section 69(11) states:
- ‘The Director may intervene in any proceedings before the Commission, including proceedings relating to a decision or determination made by the Director, and may introduce evidence, make representations and examine or cross-examine any witness, on any question or matter.’*
- 9 That section appears to run contrary to section 25(2c) of the Act which states:
- ‘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.’*
- 10 There appears to be a tension between the operation of the two sections, in that one section states that the Commission can only have regard to the evidence at first instance and the other provision allows the introduction of evidence in proceedings to which the Director intervenes. For reasons which will become clear, the Commission has not needed to resolve this issue as the ultimate decision in this matter has been reached independent of any evidence sought to be relied on by the Director.

Statutory Framework

- 11 In *Woolworths Ltd v Director of Liquor Licensing*¹ His Honour Buss JA set out the statutory framework for a determination of an application in which an applicant had to satisfy the Commission that the granting of an application was in the public interest in the following terms:
- a. by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;
 - b. the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;²
 - c. the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act, as set out in section 5(2) of the Act;
 - d. the factual matters which the Commission is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act;
 - e. section 5(2) is mandatory whereas section 38(4) is permissive;
 - f. on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - i. catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and
 - ii. facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.
- 12 Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:
- a. the grant of the application would not be in the public interest; or
 - b. the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor; or
 - c. that if the application were granted:
 - i. undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or

¹ [2013] WASCA 227

² *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute.

- ii. the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened; or
 - d. that the grant of the application would otherwise be contrary to the Act.
- 13 In a case in which issues of harm and ill-health are the primary considerations relating to an application, that being one of the primary objects set out in section 5 of the Act, the approach that the Commission must adopt in its determination of an application is that outlined by His Honour Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing*³. Based on that decision, the Commission is required to:
- a. make findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - b. make findings about the likely degree of harm to result from the grant of the application;
 - c. assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - d. weigh the likely degree of harm, so assessed, together with any relevant factors to determine whether the applicant had satisfied the Commission that it was in the public interest to grant the licence.

Summary of Evidence and Submissions

- 14 Before summarising the evidence relied upon by each party, it needs to be recognised that the Commission has been provided with voluminous amounts of material in respect to these applications for review. It would simply be impractical to summarise every piece of evidence relied upon by each party. The fact that a piece of evidence has not been referred to in these reasons, does not mean it has not been considered. The Commission has considered all of the evidence relied upon by the parties and referred to evidence that is considered significant in reaching its ultimate conclusion.

The Applicants Submissions

- 15 The applicants accepted that the restrictive conditions imposed in Fitzroy Crossing in 2007 and Halls Creek in 2009 'have been effective in reducing the levels of alcohol-related harm and/or ill-health occurring within the town sites.'⁴ However, it was submitted that an unintended consequence of the restrictions of the imposition of the conditions had been:
- a. the establishment of a thriving black market in the sale of full strength liquor; and
 - b. regular "sly grog runs" to Broome, Wyndham, Kununurra and Derby for the purchasing of full-strength liquor.

³ [2015] WASC 208

⁴ Applicant's Submissions dated 24 December 2015

- 16 It was submitted that as a result of the practices referred to, that the following consequences have arisen:
- a. binge drinking in both Fitzroy Crossing and Halls Creek;
 - b. the breaking up of families;
 - c. increase in unreported acts of domestic violence;
 - d. children roaming the streets late at night on the basis that they do not feel safe at home; and
 - e. shifts in drinking patterns, in that people drank more at home as opposed to in the open.
- 17 Ultimately, it was contended that the granting of the applications needed to occur so as to discourage:
- a. purchases of full-strength liquor on the black market; and
 - b. sly grog-runs to towns in which there were no restrictions on the purchasing of full-strength liquor.
- 18 Senior counsel for the applicants articulated the argument in favour of granting the applications in the following manner at the hearing conducted on 29 August 2017:

'But in essence, the argument is one of a cost benefit analysis, in other words, that the cost of obtaining full strength liquor and the benefits – perceived benefits to those who do it in that way, will be alleviated by the introduction of mid-strength alcohol as a diversion. So in other words, the cost of mid-strength alcohol and the availability of it when compared to the cost and availability of full strength alcohol, obtainable via grog runs and sly grogging will divert a lot of those people, we don't suggest all of those people. We have never suggested that. Divert a sufficient number of those people in order for it to be found that it is in the public interest for that to occur.

That in essence is the applicant's case. It is about the idea that the introduction of an alternative, at a low cost, at a much higher convenience, will divert those who are using sly grogging and grog runs at very high cost, to the detriment not only of themselves but to their families and the communities.⁵

- 19 The evidence relied upon by the applicants in support of the applications included:
- a. submission from the Shire of Halls Creek to the Standing Committee on Indigenous Affairs Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander Communities dated 17 April 2014;
 - b. evidence relating to the practice of sly grogging in Fitzroy Crossing;
 - c. letter from Margaret Glass, Youth and Community Development Manager at the Shire of Halls Creek dated 22 July 2016;
 - d. statement of Albert Kennedy;
 - e. statement of Bernadette Williams;

⁵ Transcript page 9

- f. statement of Catherine Ridley;
- g. statement of Darren Foynes;
- h. statement of Debra Beck;
- i. statement of David Rundle;
- j. statement of Edna Cherel;
- k. statement of Elizabeth Jingle;
- l. statement of Loretta Bradshaw;
- m. statement of Lillian Chestnut;
- n. statement of Leanne Jubadah;
- o. statement of Lynette Till;
- p. statement of Murringee Hunt;
- q. statement of Musa Mono;
- r. statement of Marilyn Rogers;
- s. statement of Natasha Taylor;
- t. statement of Olive Watson;
- u. statement of Patrick Bradshaw;
- v. statement of Rosemary Rosewood;
- w. statement of Rosemary Yaloot;
- x. statement of Selina Middleton;
- y. statement of Sharyn Morris;
- z. statement of Trevor Bedford;
- aa. statement of Tessa Wilson and Tom Lawford;
- bb. statement of William Johnston;
- cc. statement of William Uhl;
- dd. statement of Flora Ahchoo;
- ee. statement of Geraldine Demi; and
- ff. statement of Janet Jingle.

20 It was submitted on behalf of the applicants that the evidence relied upon evidenced wide support for the relaxation of the conditions to permit the sale of mid-strength alcohol and that such a relaxation may deter a significant portion of the community from purchasing alcohol on the black market or practicing sly grog runs.

CHO Submissions

- 21 In objecting to the applications, the CHO submitted that:
- a. the granting of the application would cause undue harm or ill-health to people, or any group of people due to the use of liquor;
 - b. the restrictions imposed in 2007 and 2009 had had a positive impact in both communities in respect to harm and ill-health related issues;
 - c. there is still a high level of harm and ill-health in both communities due to the use of liquor;
 - d. the granting of the applications would result in a 30% increase in the alcohol content of packaged liquor available in both communities;
 - e. research demonstrates a strong positive correlation between access to packaged liquor and levels of alcohol related harm; and
 - f. if the applications were granted there would be convenient access to higher strength packaged liquor than what is currently available which is therefore likely to increase the alcohol related harm and ill-health within both communities.
- 22 The CHO relied upon the following evidence in support of its objection:
- a. statement of Dr James Fitzpatrick dated 18 July 2016;
 - b. statement of Dr Roger Brown dated 14 October 2016;
 - c. statement of Dr Gary Fisher dated 26 August 2016;
 - d. combined statement of Dr James Harris and Robyn Cotterill;
 - e. statement of Elizabeth Curtis dated 30 August 2016;
 - f. statement of Marilyn Hake dated 15 November 2016;
 - g. statement of Hayley Diver dated 26 August 2016;
 - h. statement of Jane Bean dated 26 August 2016;
 - i. statement of Cheryl Durrans dated 29 August 2016;
 - j. statement of Deborah Lee Carter dated 25 August 2016;
 - k. statement of S Murray dated 14 November 2016; and
 - l. statement of Maureen Carter dated 26 August 2016.
- 23 Each of the deponents was either a medical practitioner or service provider with an intimate knowledge of harm and ill-health related issues in both communities. Hospitalisation and treatment data for both towns was also provided in support of the objection.

Police Submissions

- 24 In objecting to the applications, the Police submitted that:
- a. the 2007 and 2009 restrictions had a positive impact in both communities;
 - b. there is still a high level of harm and ill-health in both communities due to the use of liquor;
 - c. the granting of the applications would likely result in an increase in harm and ill-health due to the use of liquor and undo the benefits of the restrictions previously imposed; and
 - d. the applicants had provided no qualitative data and limited objective evidence to support the claim that the granting of the applications would actually decrease alcohol related harm and ill-health occurring in each community.
- 25 The evidence relied upon by the Police in support of its objection is:
- a. crime data relating to both towns;
 - b. various witness statements from local residents and local service providers;
 - c. crash data for the Kimberley region; and
 - d. other expert reports.
- 26 It was ultimately submitted that in this case the potential harms clearly outweigh the potential benefits of granting the applications.

MWRC Submissions

- 27 The MWRC members are Fitzroy Valley women from the Walmajarri, Bunuba, Gooniyandi, Wangkajunga and Nyikina language groups. The services provided by the MWRC include:
- a. family violence crises response, support and prevention;
 - b. a women's refuge;
 - c. a domestic violence legal advice unit that provides representation to women;
 - d. an early childhood centre and family centre; and
 - e. a social enterprise unit.
- 28 The evidence filed by MWRC predominantly relates to existing levels of harm in the Fitzroy Crossing community. Ultimately it was submitted by MWRC that the net result if the applications were granted is that mid-strength liquor will be consumed in greater quantities on top of the full-strength alcohol that is already available.

Other Objectors

29 The Commission has summarised the cases and evidence of objectors who appeared on the section 25 review hearing. The cases of the remaining objectors was summarised in the decision of the Delegate at first instance and the Commission relies upon that summary for the purposes of these reasons.⁶

Determination

30 As Senior Counsel for the applicants noted at the hearing of these applications, the real issue for consideration is one of cost-benefit analysis. In practical terms the issues are:

- a. Does the practice of sly grogging occur within both communities resulting in the introduction of full strength alcohol into both communities?
- b. Is there a black market for full-strength alcohol in both communities?
- c. Will the allowance of the sale of mid-strength alcohol divert some people who consume full-strength alcohol in both communities away from the practices referred to which result in levels of harm and ill-health within both communities?
- d. If the answer to the preceding question is in the affirmative, does that result in a conclusion that the granting of the applications is in the public interest?

31 The Commission accepts that there is a black market in both communities in which full strength alcohol is brought into the communities and sold and that persons living in those communities engage in sly grog runs, in which full strength alcohol is purchased in other towns in which such alcohol is available for sale and then bring the alcohol back into those communities. In this regard, the Commission accepts the evidence adduced by the applicants from persons who live in those communities and are directly aware of such practices.

32 An example of the evidence relied upon by the Commission in this regard is the witness statement of Selina Middleton, who is a member of the local Aboriginal community in Fitzroy Crossing who works in support services. She relevantly stated that:

*'Grog runs are now happening every weekend. People who have a car drive to towns without the same restrictions as Fitzroy Crossing such as Derby or Broome. They bulk buy alcohol and drive it back to Fitzroy Crossing.'*⁷

33 Ms Middleton went on to state that:

*'A lot of the sly grogging is local people selling to other local people. If someone does a grog run to Derby and buys 15 cartons of full strength beer, when they get back to town people will hear about it and ask them to sell some to them. Unfortunately many use this as an opportunity to make a quick profit.'*⁸

⁶ Paragraphs 51-58 and 66-75

⁷ Paragraph 14 of statement of Selina Middleton

⁸ *supra*, paragraph 20

- 34 The next issue for consideration, is whether the allowing of the sale of mid-strength alcohol in both communities will divert some of those who currently consume full-strength alcohol in both communities. The applicants properly do not submit that it will divert all people, but will divert some and therefore this would be in the public interest on the basis that it will:
- a. will reduce demand on the black market;
 - b. will reduce the amount of sly grog runs; and
 - c. will reduce consumption of full strength alcohol in both communities and therefore reduce the levels of harm and ill-health due to the use of liquor.
- 35 This is an extremely difficult issue to consider, particularly in the context of communities that already experience high levels of harm and ill-health due to the use of liquor. The written submissions on behalf of the applicants state that the evidence establishes that the variation on restrictions ‘may deter (hopefully) a significant portion of the community from engaging in these practices.’
- 36 The applicants have submitted a significant amount of evidence in support of a conclusion that the granting of the applications will have a positive impact on both communities. An example of this is the submission of the Shire of Halls Creek submission to the Standing Committee on Indigenous Affairs Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities. In that submission, the shire stated that:
- ‘[W]e consider that that the reintroduction of the sale of alcohol in the town in a responsible and controlled way as outlined in this submission will build on the positive things which came out of the current liquor restrictions, It is considered that the proposed strategy would reduce the harm currently being caused by alcohol such as binge drinking, excessive money spent on buying illegal alcohol and the use of drugs as an alternative to alcohol. It would control and monitor consumption in a moderate way rather than the extreme manner in which the current liquor restrictions operate. It would provide individuals with the choices most Australians have – that is to allow those who drink responsibly to do so whilst still retaining some control over those who cannot or will not do so.’*
- 37 Counterbalancing that argument is the opinion of Professor Alan Clough of the School of Public Health, Tropical Medicine and Rehabilitation Services at James Cook University who referenced his own experience in the Pormpuraaw Indigenous Community in Queensland. He stated that mid-strength alcohol was available for sale in that community, however sly grogging remained a problem. He further stated that there is no evidence that relaxing restrictions on the sale of alcohol would reverse the prevalence of sly grogging.
- 38 Having considered all of the relevant evidence and the opinions of those who reside and work in both communities, the Commission is not persuaded on balance that the granting of the applications would impact the practice of sly grogging or the black market sale of full-strength alcohol to such an extent that it would be in the public interest to grant the applications. There is simply insufficient evidence to reach such a conclusion. The Commission does accept that there may be some impact on the black market and sly grogging if mid-strength alcohol were available for sale in Fitzroy Crossing and Halls Creek, but not to such an extent that the Commission could conclude that the applicants had discharged the onus prescribed by the Act.

39 The other difficulty for the applicants in this matter is that there is a preponderance of evidence that establishes that the imposition of restrictions has had a positive impact in both communities. An example of this is the statement of Cheryl Durrans, the East Coordinator of the Kimberley Alcohol and Drug Service. She has been involved in the region since 2003. Her statement details the many positive changes within Halls Creek including:

- a. noticeable decrease in clients seeking assistance for alcohol dependency issues;
- b. visibly less children on the streets; and
- c. visible change in the amenity of the town.

40 Jane Bean, the Prevention Officer at the Halls Creek Kimberley Community Alcohol and Drug Service stated that:

'There are also many examples of how restrictions have helped individuals in the community in a positive way. For example, through my community consultation, I am aware of community members who, prior to the restrictions were involved in alcohol-related violence and who spent some time in jail in Broome or in Perth. Now these community members are reformed and leading prevention work in their respective communities. These community members have commented to me that the restrictions have provided a supportive environment for them to change their drinking behaviours, and are adamant that the restrictions should not be weakened.'

41 Dr James Fitzpatrick stated:

'The only impacts of the liquor restrictions in Fitzroy Valley and Halls Creek that I have observed as a medical practitioner, and also through living in these communities, is positive. The positive impacts on health, policing, and social cohesion have been well documented by the Notre Dame (Fitzroy Valley) Drug and Alcohol Office (Halls Creek) reports.'

42 Notwithstanding the positive impacts, the levels of existing harm and ill-health due to the use of liquor remains high. This is evidenced by:

- a. the fact that the total alcohol related hospitalisation rate for the Derby-West Kimberley statistical area (which includes Fitzroy Crossing and Halls Creek) remains significantly above the state rate;
- b. the existence and prevalence of Foetal Alcohol Spectrum Disorders (FASD) within both communities;
- c. crime data statistics in Fitzroy Crossing between 1 January 2004 and 30 June 2016 which reveal that the total rates:
 - i. of alcohol related offences are 26.6 times the State of WA rate per 1000 persons, 13.1 times the regional WA rate per 1000 persons and 37.7 times the metropolitan WA rate per 1000 persons;

- ii. of alcohol related domestic assaults are 42.1 times the State of WA rate per 1000 persons, 18.7 times the regional WA rate per 100 persons and 65.6 times the metropolitan WA rate per 100 persons; and
 - iii. of alcohol related non-domestic assaults are 12.4 times the State of WA rate per 1000 persons, 7.1 times the regional WA rate per 1000 persons and 15.9 times the metropolitan rate per 100 persons.
 - d. crime data statistics in Halls Creek between 1 January 2004 and 30 June 2016 which reveal that the total rates:
 - i. of alcohol related offences are 23 times the State of WA rate per 1000 persons, 11.3 times the regional WA rate per 1000 persons and 32.8 times the metropolitan WA rate per 1000 persons;
 - ii. of alcohol related domestic assaults are 33.2 times the State of WA rate per 1000 persons, 14.6 times the regional WA rate per 100 persons and 53.5 times the metropolitan WA rate per 100 persons; and
 - iii. of alcohol related non-domestic assaults are 14.5 times the State of WA rate per 1000 persons, 8.1 times the regional WA rate per 1000 persons and 18.6 times the metropolitan rate per 100 persons.
- 43 In submissions dated 16 May 2017, the applicants accepted that the delegate was ‘in a position to make a finding that there is an existing high level of alcohol related harm or ill-health due to the use of liquor occurring in both the Halls Creek and Fitzroy Crossing localities. It follows that the applicants make the same concession before the Commission. However, this should not be taken as a concession that the current levels of harm or ill-health are the same as they were approximately 10 years ago.’
- 44 Based on the totality of the evidence, the Commission finds that there are high levels of harm and ill-health due to the use of liquor in Fitzroy Crossing and Halls Creek.
- 45 The Commission then needs to consider the likely degree of harm that would result from the granting of the applications. The purported benefits submitted by the applicants have already been outlined in these reasons. However, there is evidence to suggest that there would be further harm occasioned within both communities if the applications were granted including:
- a. the impact on FASD cases outlined in Dr Fitzpatrick’s statement;
 - b. the potential and anticipated consequences for the Halls Creek Hospital outlined in the joint statement of Dr James Harris, Senior Medical Officer at Halls Creek Hospital and Robyn Cottrell, Director of Nursing at Halls Creek Hospital;
 - c. the potential adverse consequences within Halls Creek outlined in the statement of Cheryl Durrans;
 - d. the potential adverse consequences within Halls Creek outlined in the statement of Jane Bean;

- e. the opinion set out in the statement of Dr Gary Fisher, District Medical Officer at the Fitzroy Crossing Hospital;
- f. the concerns set out in the statement of Deborah Carter, Community Drug Service worker at the Kimberley Community Alcohol and Drug Service in Fitzroy Crossing; and
- g. the opinion set out in the statement of Dr Roger Brown, Senior Medical Officer at the Fitzroy Crossing and Derby Hospitals.

46 As Ipp J noted in *Executive Director of Health v Lily Creek International Pty Ltd & Others*⁹:

'[W]hether harm or ill-health will in fact be caused to people, or any group of people, due to the use of liquor is a matter for the future and ... is essentially a matter for prediction. The Licensing Authority will only be able to determine the likelihood of harm or ill-health occurring by reference to a degree of probability.'

47 The effect of granting the application would be that packaged liquor 30% stronger than that which is already sold being available. In those circumstances and having regard to the evidence as to the likely consequences of such an increase, the Commission finds that there is high likelihood that there would be an increase in harm in the two communities if the applications were granted.

48 In reaching this conclusion, the Commission has placed significant weight on the evidence of:

- a. medical practitioners who are at the coal face of dealing with issues related to alcohol abuse;
- b. the police data which shows the impact on offending relating to alcohol usage in both communities; and
- c. the service providers who deal with members of both communities and are acutely aware of the devastating impact that alcohol abuse has had within both communities.

49 The Commission is then obliged to assess the likely degree of harm to result from the grant of the application against the existing levels of harm.

50 As Edelman J noted in *Liquorland (Australia) Pty Ltd v Executive Director of Public Health*¹⁰:

*'In assessing the overall question of whether granting the application is in the public interest it is relevant to consider the baseline level of risk and, in that context, the effect of an increase in risk from the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated. Similarly, it is relevant that there are existing 'at risk' persons who might be further affected.'*¹¹

51 The Commission is of the opinion that any increase in harm or potential of increase in harm in locations that already suffer from high levels of harm and ill-health due to the use of liquor is unacceptable. Both Fitzroy Crossing and Halls Creek are locations in which liquor

⁹ (2000) 22 WAR 510

¹⁰ [2013] WASC 51

¹¹ *supra*, at [57]

restrictions have had a positive impact in many different areas. To place those locations at risk of an increase in harm, in any way, would run contrary to the public interest.

- 52 Finally, the Commission is obliged to weigh the likely degree of harm against other relevant factors.
- 53 In this case, the positive factors are the potential impact on sly grogging and the black market. By making higher purity alcohol available within the communities, it is argued that those who consume full-strength alcohol purchased from outside the communities may choose the mid-strength alcohol that is available in town and sold at a lesser price than on the black market. It is also said that this may impact on the number of road accidents and have other positive impacts.
- 54 Weighing against that, are the negative impacts that are outlined in much of the evidence relied upon by the CHO and police. This evidence has already been referred to in these reasons.
- 55 Ultimately, the Commission considers that the negative aspects outweigh the positive impacts and that the granting of the applications is not in the public interest. The Commission has placed significant weight on the evidence of medical practitioners and service providers in both communities in reaching this conclusion.

Conclusion

- 56 Notwithstanding the potential positive aspects of these applications, the applicants have failed to discharge the onus of establishing that the granting of the application is in the public interest as required by section 38(2) of the Act. The basis for that determination is:
- a. based on the totality of evidence there is a significant level of pre-existing harm and ill-health occasioned by the use of liquor in Fitzroy Crossing and Halls Creek. This is reflected by the crime statistics, the health statistics and the other evidence put before the Commission;
 - b. the granting of the application, which would lead to an increase in the pure alcohol content of liquor available in Fitzroy Crossing and Halls Creek would likely increase the level of harm and ill-health occasioned by the use of liquor in those communities; and
 - c. even a small increase in the level of harm or ill-health occasioned by the use of liquor in Fitzroy Crossing and Halls Creek could not be tolerated, given the already significant levels that already exist.
- 57 The risks associated with granting the applications in locations that suffer significant levels of harm and ill-health associated with alcohol use is simply too great. Whilst the granting of the applications may impact on the black market and sly grogging, it would not be to such an extent that would outweigh the likely negative impacts referred to in these reasons.
- 58 In the final analysis the social harms that are caused within both communities as a result of sly grogging and the existence of a black market in which full strength alcohol is sold are

matters that ought be properly dealt with by the police in conjunction with members of both communities.

- 59 The Commission is also positively satisfied that the CHO and police have discharged their onus in establishing on balance that the granting of the applications is not in the public interest. The evidence provided by the medical practitioners, police, service providers and experts is compelling in leading to a conclusion that it would simply be too dangerous and the ramifications too severe in the respective communities if the applications were granted.
- 60 Accordingly, the decision of the Delegate at first instance is affirmed pursuant to section 25(4)(a) of the Act and the applications pursuant to section 64 are refused.



SEAMUS RAFFERTY
CHAIRPERSON