

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Entrepreneur West Pty Ltd
(represented by Mr Peter Fraser of Dwyer Durack Lawyers)
- Interveners:** Commissioner of Police

Executive Director of Public Health

(both represented by Ms Caitlyn Rice of State Solicitor's Office)
- Commission:** Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Member)
Mr Michael Egan (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the delegate of the Director of Liquor Licensing to refuse an extended trading permit to trade on Friday and Saturday evenings from 12:00am-1:00am.
- Premises:** Crown Hotel, 113 Throssell Street, Collie
- Date of hearing:** 24 July 2014
- Date of Determination:** 21 August 2014
- Determination:** The decision of the delegate of the Director of Liquor Licensing is quashed and the application for an extended trading permit pursuant to section 60(4)(g) of the *Liquor Control Act 1988* is granted for a period of two years subject to conditions.

Authorities referred in the determination:

- *Director of Liquor Licensing v Kordister Pty Ltd* [2012] VSCA 325
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 25

Background

1. This matter comes before the Liquor Commission (“the Commission”) by way of an application to review a decision of the delegate of the Director of Liquor Licensing (“the Director”) to refuse an application for an extended trading permit made pursuant to section 60(4)(g) of the *Liquor Control Act 1988* (“the Act”) by Entrepreneur West Pty Ltd in respect of premises known as the Crown Hotel in Collie to trade on Friday and Saturday from midnight to 1:00am.
2. The Commissioner of Police (“the Police”) and Executive Director of Public Health (“the EDPH”), collectively called “interveners”, intervened under section 69(6)(c)(ii) and (iv) and section 69(8a)(b) respectively of the Act in the proceedings before the Director.
3. In decision A223479, dated 12 March 2014, the Director accepted that there is a demonstrable requirement of consumers in Collie for the additional trading hours, however, due to the existing levels of harm and ill-health already apparent in Collie and a real likelihood that the increased hours would result in an increase in that harm, the Director was not persuaded that the applicant had established that the granting of the application was in the public interest. The application was refused.
4. On 11 April 2014, an application for a review of the decision by the Director was lodged on the basis that the Director erred in finding that:
 - *the applicant had not satisfied its onus under section 38(2) of the Act; and*
 - *the grant of the application is not in the public interest.*
5. Further submissions were lodged by the interveners on 10 July 2014 with a submission lodged by the applicant on the same date before the Commission.
6. On 17 July 2014, responsive submissions to the applicant’s submissions were lodged by the interveners.
7. A hearing was held before the Commission on 24 July 2014.

Submissions by the Applicant

8. Since acquiring the Crown Hotel in October 2011, the applicant has invested extensively in improving the amenity of the premises and the quality of the entertainment provided to both local members of the community and visitors to the town of Collie.
9. The applicant lodged a detailed Public Interest Assessment (“the PIA”) with its application, including a petition signed by 257 patrons of the Crown Hotel, 9 letters of support and 14 “proofs of evidence” from various community members from a range of professions, musicians and patrons, as well as a further 109 consumer requirement surveys.
10. The applicant consulted widely within the Collie community to garner support for the additional trading hours.

11. The applicant has reported in the PIA that the local Collie Police were consulted prior to the lodgement of the application and agreed that the licensed premises in the town are well patronised with very few anti-social issues. The PIA also reports that in the opinion of the Collie Police, the hotels are very well managed throughout the town of Collie.
12. The PIA is accompanied by evidence of 18 "one off" extend trading permits granted between July 2012 and August 2013 for special events. These events were popular and conducted without incident. The success of the events and desire of patrons for the type of entertainment during the events, such as live original music, prompted the application under review.
13. In further submissions, the applicant acknowledges that there is a level of harm in the Shire of Collie attributable to the use of alcohol, but contends the levels are within a reasonable range and are not disproportionate to what can be expected in any given locality.
14. The applicant also submits that the State average or rate of alcohol related harm and ill-health referred to in the statistical data is merely an average and is not a benchmark or an appropriate gauge of whether the existing level of harm in Collie is acceptable or unacceptable. Further, as Collie has a relatively small population, the applicant submits that statistics should be treated with caution as the actual number of alcohol related non-domestic assaults equates to one assault only on a Saturday night per month and one assault only on a Friday night every three months.
15. As the Police and EDPH statistics and data do not detail the nature or kind of assaults or the extent to which the alcohol related harm and ill-health can be attributed to the licensed premises of the type operated by the applicant, the applicant further submits that little weight should be given to this evidence.
16. In relation to the general research evidence submitted by the EDPH, the applicant highlighted aspects of the research in support of the proposition that high quality premises, such as those of the applicant, are less likely to attract anti-social behaviour or aggressive patrons.

Submission by the Interveners

17. The Police and the EDPH intervened under section 69(6)(c)(ii) and (iv) and section 69(8a)(b) respectively.
18. The Police intervened on the ground that if the application was granted and/or conditions not imposed, public disorder or disturbance would be likely to result, or as to any other matter relevant to the public interest. Specifically, the Police expressed concerns regarding:
 - the status of Collie as a high risk alcohol consumption town;
 - the current manner of trade; and
 - the applicant's history of non-compliance with the Act.
19. The Police specified a number of conditions intended to mitigate the risk of harm or ill-health should the application be granted.

20. The grounds of intervention lodged by the EDPH are based on the following grounds:
- a. Collie experiences alcohol-related harm above the State rate, specifically:
 - (i) alcohol-related hospitalisations;
 - (ii) alcohol-related assaults;
 - b. the conditions associated with alcohol-related hospitalisations for Collie indicate alcohol is being consumed at levels that are associated with both short term (from a single drinking occasion) and long term (regular drinking above recommended levels) harm;
 - c. alcohol-related assault offences are highest during the night time trading hours of licensed premises – there is the potential for this to increase, if this application is granted;
 - d. due to the level of harm occurring, significant investment is being made locally to minimise alcohol-related harm in the Collie community;
 - e. research demonstrates that late night trading can facilitate increased consumption and alcohol-related harm; and
 - f. it is important to consider the local context within which the premises is operating and the impact of this ETP that could facilitate increased consumption of alcohol in a community where high risk drinking is already occurring.

21. In response to the applicant's submissions, the EDPH submitted that for comparative purposes the State average of harm and ill-health provides a useful starting point and that the data also highlights the existing actual harm and ill-health in the community which clearly shows alcohol is a regular and key feature of certain alcohol related harm occurring in Collie.

22. The EDPH also stated its position in response to the applicant's submission that limited or no weight should be given to the general data, by reference to comments by Justice Bell in addressing the object of the minimisation of harm in the decision making process that general as well as specific evidence is relevant and must be given due consideration (*Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 at [273]).

Determination

23. Pursuant to section 25(2c) of the Act, the Commission is required to undertake a review of the Director's decision on its merits and may have regard only to the material that was before the Director (refer *Hancock v Executive Director of Public Health* [2008] WASC 224).

24. Under section 38(2) of the Act, the Commission must be satisfied that the grant of an application for an extended trading permit under section 60(4)(b) for a period exceeding 3 weeks is in the public interest.

25. In determining whether the grant of an application is in the public interest consideration must be given to the primary and secondary objects of the Act (sections 5(1) and 5(2)).

26. The objects with particular relevance to the application under review are:

Primary objects:

- a. *5(1)(b): to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor;*
- b. *5(1)(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; and*

Secondary object:

- c. *5(2)(a): to facilitate the use and development of licensed facilities, including their use and development for the performance of live music, reflecting the diversity of the requirements of consumers in the State.*

27. In the event of any inconsistency between the primary and secondary objects, the primary objects take precedence (section 5(3)).

28. The resolution of a conflict between the object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor and the other objects is a “weighing and balancing exercise”, the outcome of which will depend upon the degree of importance that is attributed to each of the relevant factors in the particular circumstances (refer *Executive Director of Public Health v Lily Creek* [2000] WASCA 25).

29. In determining whether granting an application is in the public interest, the Commission may have regard to the matters set out in section 38(4) of the Act, specifically:

- (a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and*
- (b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and*
- (c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises.*

30. The trading experience of the licensee over the past twelve months, in particular on those occasions when an extended trading permit was in place, demonstrates a consumer requirement for the services, the subject of this application. Expressions of support accompanying the PIA appear to be broad based and representative of wide endorsement of the application at a community level.

31. The Commission also acknowledges the commitment of the applicant to present live original music and quality entertainment on Friday and Saturday nights, which is the basis for seeking extended trading hours to accommodate music bands and other acts travelling from Perth and elsewhere to Collie to perform.
32. The grant of the extended trading hours and the provision of more live original music and a greater diversity of entertainment will provide a number of benefits for Collie, particularly with regard to the potential for discouraging local people, particularly young people, from travelling to other destinations, such as Bunbury, for alternative entertainment options.
33. Therefore, the Commission is satisfied, as the Director found, that the grant of the application under review would be in accordance with, and would advance, sections 5(1)(c) and 5(2)(a) of the Act.
34. Notwithstanding the positive aspects of the application, the Commission must also have regard to the potential for an increase in harm or ill-health if the application is granted.
35. As was reported in the intervention submitted by the Police, alcohol related harm in the community of Collie has been recognised as a concern. Collie was identified by the Drug and Alcohol Office of the Department of Health of Western Australia as a “high risk” town for alcohol related harm.
36. As a result of this concern, the Collie Alcohol Management (**CAM**) project was established. The CAM project includes a broad range of participants including: Shire of Collie, WA Country Health Services, School Education and Road Aware, Drug and Alcohol Office, Department of Education, St John of God (Community Drug Service Team), WA Police, Roadwise, Collie Aboriginal Health and The Smith Family Foundation.
37. One of the priority areas identified for the CAM project is liquor industry venues.
38. The applicant submitted at the review hearing that as none of the participants in the CAM project had lodged an objection, the Commission should find that the application is not of concern to the various stakeholders or that body. The Commission does not accept that the absence of an objection necessarily means the governing body of the CAM project is not concerned about the application. However, the Commission notes that a number of the participants in the CAM project were consulted by the applicant (and provided positive commentary) to assist in the preparation of the PIA.
39. Collie has 23 licensed venues including five hotels, a tavern, a number of sporting and community clubs, two liquor stores and number of restaurants.
40. One of the licensed premises, the Victoria Hotel, has an extended trading permit to operate on Friday and Saturday nights from midnight to 2:00am and 1:00am respectively, although, according to the evidence before the Commission, the extended trading permit is rarely relied upon on Saturday night.

41. Further evidence of existing alcohol related harm and ill-health was presented by the EDPH to support the grounds of intervention (referred to earlier). These statistics are referred to by the Director in the reasons for his decision and may be summarised briefly as follows:

- adult males are more likely to drink at risky levels for short term harm (the relevant statistics for adult males are: 38.3% for Collie versus 22.0% for the State – additionally, the corresponding statistics for the total population are 27.7% for Collie and 15.3% for the State);
- alcohol related hospitalisations are significantly above the State average (which for comparison purposes is taken to be “1”):
 - a. all alcohol related conditions: 1.38;
 - b. alcoholism: 1.32;
 - c. other alcohol related disease: 1.84;
 - d. road injuries: 2.09;
 - e. falls: 1.28;
- WA Police data shows that alcohol is a contributing factor in many assault offences with almost half (46%) of all assaults in Collie recorded as alcohol related and the rate of alcohol related assaults in Collie per 1000 persons almost double the State average; and
- the highest number of alcohol related, non-domestic assaults for the period 2009 to 2012 occurred on Fridays and Saturdays with the highest number occurring at, or around, 1:00 am.

42. Additionally, the research evidence presented by the EDPH may be summarised as representing the following general propositions:

- a. *late night trading can facilitate increased consumption and thus contribute to alcohol related harm, not only inside a venue but once patrons leave (the premises);*
- b. *late night trading hours can increase consumption of liquor;*
- c. *drinking during late night hours is more likely to be excessive because of the nature of alcohol, the “high risk” time at which alcohol is consumed, the previous drinking that has occurred and the impact of the alcohol consumed on the cognitive function and capacity to make rational judgments; and*
- d. *drinkers already at high-risk of alcohol related harm (e.g. young people and in particular young men) are more likely to take advantage of the increased trading hours and are not inclined, or less able to regulate their drinking.*

43. Extensive submissions, both written and oral, were made by the applicant and the interveners about the relevance, probity and weight to be given to this general statistical and research evidence.

44. The evidence presented by the EDPH was of probative value to the Commission and, in the Commission’s view, is indicative of the level of harm

and ill-health for the Shire and the Town of Collie. As was submitted by the EDPH, over 80% of the population of the Shire resides in the town of Collie.

45. The applicant has indicated in the PIA that the extra hour of trading would increase custom at the Crown Hotel and thus increase turnover.
46. The extent to which existing and new or additional customers increase the level of their individual consumption of liquor after midnight will, to an extent, be governed by the responsible service of alcohol practices of the licensee.
47. In this sense, it is relevant that the applicant has traded beyond midnight on many occasions without incident. The evidence also suggests that the licensee has acted responsibly and ensured that customers do not consume alcohol after midnight irresponsibly. Examples of this evidence include reports in the PIA:
 - a. *The present Officer in Charge (OIC) at the Collie Police Station was consulted about the application and the applicant reported that the OIC acknowledged the great job the Hotel was doing in reducing alcohol related harm.*
 - b. *The previous OIC was also consulted and the applicant reported that he supported the application and that it was the practice of the Hotel to work closely with local police in reducing harm or ill-health to any person in the community and to the community itself.*
 - c. *The Collie Soccer Club Vice President in his letter of support noted the licensee “does not tolerate bad behaviour.”*
 - d. *A number of those who submitted proofs of evidence in support of the application commented to the effect that the hotel licensee is an advocate of serving liquor responsibly and enforcing a zero tolerance to anti-social behaviour.*
48. Although the Commission must exercise caution in relying on indirect evidence, no evidence was presented to dispute or cast doubt on the comments.
49. Whilst the general research evidence presented by the EDPH points to a risk of increased alcohol consumption during late night trading hours, in the Commission’s view, this evidence should be viewed in light of the circumstances and environmental factors relevant to the particular application under consideration.
50. Collie has 23 licensed venues. As a consequence, alcohol is readily available and there is no evidence to suggest that late night trading at the Crown Hotel, when it has been permitted, has resulted in any anti-social behaviour of significance, or at all.
51. The Commission agrees with the Director that the two infringement notices identified in the intervention of the Police were relatively minor matters which occurred very early in the applicant’s tenure as licensee of the Crown Hotel and the operation of the hotel by the present licensee has been without incident and of a high standard.

52. The task of the Commission in predicting the likelihood of harm or ill-health is assisted by the practices and performance of the applicant in trading beyond midnight over the past 12 months in a similar or identical manner to that proposed if the application is granted.
53. The evidence in respect of the incidence of drink driving in the Shire of Collie is also limited. Although the Commission cannot be definitive about these matters in the absence of direct and more current evidence, the evidence that is available supports an inference that the late night trading conducted pursuant to the extended trading permits granted over the past 12 months has not resulted in an increase in alcohol related road trauma. Against this background, it is, in the Commission's view, reasonable to conclude that the risk of the grant of the application increasing the incidence of alcohol related road accidents is also low.
54. As with any decision involving considerations of a predictive nature, the assessment of the risk of, and the potential for, harm or ill-health resulting from the grant of an application to permit additional trading hours for the sale and consumption of liquor is not an exact science and cannot be determined with certainty.
55. The Commission is persuaded, that on the balance of probabilities, the benefits to be derived by the community of Collie and the liquor, tourism and entertainment industries from the additional trading hours and entertainment proposed under the applied for extended trading permit far outweigh the potential for an increase in harm and ill-health as a result of the granting of this application.
56. The application is therefore granted for an initial period of two years subject to the following conditions:

TRADING CONDITIONS - ETP - ONGOING HOURS

Pursuant to section 60(4)(g) of the Liquor Control Act 1988 the licensee is authorised to sell and supply liquor, for consumption on the premises only, during the following hours when live entertainment is being provided:-

- Friday evening from: 12:00 midnight to 1:00am
- Saturday evening from: 12:00 midnight to 1:00am

GENERAL CONDITIONS

1. No trading is permitted on Christmas Day, Good Friday or before noon on ANZAC Day.
2. There is to be no liquor discounting or advertising of cheap liquor during the operation of the permit.
3. The sale of packaged liquor during the hours covered by this permit is prohibited.
4. From 12:00 midnight until the close of trading, no liquor is to be sold or supplied for consumption on the premises in any of the following ways:

- (a) in any vessels with a measurement capacity exceeding 750ml, except vessels containing premixed drinks (e.g. RTDs) which shall not exceed 375ml;
- (b) in non-standard measures of spirits (i.e. no more than 50ml of spirits is permitted in any vessel).
5. The licensee is prohibited from selling and supplying beverages in such a way that would encourage rapid consumption of liquor (eg, but not limited to, unadulterated spirit or liqueur in a shot glass); or drinks known as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters' or 'bombs' or any other emotive titles.
6. No liquor is to be supplied with energy drinks. For the purposes of this condition 'energy drinks' has the same meaning as formulated caffeinated beverage within Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.
7. Patrons (other than an "authorised person") are prohibited from entering or re-entering the licensed premises 30 minutes prior to the close of trading prescribed on the permit.
8. It is a condition of this permit that the permit is effective from 29 August 2014 to 29 August 2016.

If there is an inconsistency between these conditions and any other condition to which the licence or permit is subject, the condition that is more onerous for the licensee prevails.

SECURITY REQUIREMENTS

- Crowd controllers, licensed under the *Securities and Related Activities (Control) Act 1996*, are to be employed at a ratio of one (1) crowd controller for the first 100 patrons on Friday and Saturday nights after 9.00pm with an additional approved manager or licensed crowd controller per one hundred (100) patrons thereafter.
- An approved manager may perform the role of a crowd controller, but another approved manager must be present at all times inside the venue if the other approved manager(s) is positioned at the entry to the premises performing crowd control activities.
- The additional manager(s) engaged under the security condition are to be easily identified by way of increased visibility attire.

COMMENTS IN RELATION TO SECURITY REQUIREMENT

In the interest of procedural fairness, the Commission invited submissions at the review hearing from the applicant about the need for crowd controllers, if the application were to be granted. The applicant expressed a concern about engaging external crowd controllers due to the difficulty in sourcing experienced and good quality professional personnel.

The applicant also submitted that many of the hotel customers are known to the licensee and approved managers, and submitted that the permanent placement of an approved manager rather than licensed crowd controllers on the entry to the premises would be as, if not more, effective.

The Commission notes that under section 6 of the *Security and Related Activities (Control) Act 1996* a specified class of person or persons may be exempted from the requirement to hold a crowd controller's licence and regulation 4 of the *Security and Related Activities (Control) Regulations 1997* provides: "A natural person who is the licensee or the manager of licensed premises is exempt from section 37 to the extent that he or she performs crowd control activities on those premises in compliance with the *Liquor Control Act 1988*."

The applicant accepted the proposal put forward by counsel for the Police that if this submission was accepted by the Commission the approved manager should wear high visibility jackets/vests/shirts.

The Commission accepts the above submissions from the parties and modifies the condition recommended by the Police concerning crowd controllers so that an approved manager wearing high visibility jackets/vests/shirts shall be required to be permanently located at the front entry to the premises for the first one hundred (100) patrons on Friday and Saturday after 9.00pm with an additional approved manager or licensed crowd controller per one hundred (100) patrons thereafter.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', with a stylized flourish at the end.

JIM FREEMANTLE
CHAIRPERSON