

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

Applicant: Australian Leisure and Hospitality Group Limited
(represented by Mr Gavin Crocket of GD Crocket and Co)

Interveners: Executive Director Public Health
(represented by Mr Sam Nunn of the State Solicitor's Office)

and

Director of Liquor Licensing

Objector: Salmon Point Holdings Pty Ltd

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling
Ms Helen Cogan

Date of Hearing: 11 August 2010

Date of Determination: 2 September 2010

Matter: Application for an extended trading permit pursuant to section 60(4)(g) of the *Liquor Control Act 1988*

Determination: Application is granted subject to conditions imposed on the permit

Authorities cited in decision:

Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241

Executive Director of Health -v- Lily Creek International Pty Ltd & Ors [2000] WASCA 258

Malec v JC Hutton Pty Ltd (1990) 169 CLR

Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356

Re Gull Liquor, Gingers' Roadhouse, Upper Swan (1999) 20 SR (WA) 321

Introduction

- 1 On 2 December 2009 an application was lodged by Australian Leisure and Hospitality Group Limited (“the applicant”) for the grant of an extended trading permit pursuant to section 60(4)(g) of the *Liquor Control Act 1988* (“the Act”) for premises known as The Brass Monkey and located at 209 William Street, Northbridge.
- 2 The applicant is seeking the grant of a permit, for a period in excess of three weeks, to authorise trading on Wednesday and Thursday nights from 12 midnight to 1.00am and on Friday and Saturday nights from 12 midnight to 2.00am.
- 3 The application was advertised to the public in accordance with instructions issued by the Director of Liquor Licensing. The Executive Director Public Health lodged a Notice of Intervention pursuant to section 69(8a) of the Act and an objection to the application under section 73 of the Act was lodged by Salmon Point Holdings Pty Ltd (licensee of the Rise Nightclub).
- 4 On 18 February 2010 the Director of Liquor Licensing referred the application to the Commission for determination pursuant to section 24 of the Act. The Director of Liquor Licensing also intervened in the application, pursuant to section 69(11) of the Act.
- 5 A hearing to determine the application was conducted by the Commission on 11 August 2010.

Preliminary Issue

- 6 Prior to the hearing of the substantive application, the Director of Liquor Licensing wrote to the Commission on 30 April 2010 questioning whether the Commission is empowered to grant the application given the failure of the applicant to comply with section 38(3)(b) of the Act and submitted that such failure renders *ultra vires* any purported grant of an extended trading permit.
- 7 On 14 May 2010 the Commission heard argument on this preliminary issue and determined that the Commission was empowered to hear and determine the substantive application. The Commission indicated that it would publish its reasons for such a finding in the determination of the substantive application and the following are those reasons.
- 8 In essence, the Director of Liquor Licensing argued that section 38(2) of the Act provides that an applicant must satisfy the licensing authority that granting the application is in the public interest. Section 38(3)(b) then provides that for the purposes of subsection (2), an applicant must provide “any other document or information reasonably required by the licensing authority”. The information provided by the applicant did not address the requirements set out in the Director’s policy guideline “Public Interest Assessment”, which is located on the Department of Racing, Gaming and Liquor’s website. The applicant’s Public Interest Assessment submitted in support of the application did not address the requirement that ‘at risk’ groups within the vicinity of the licensed premises

be identified. It was the Director's opinion that the requirement to provide such information is reasonably requested, so as to make it possible to assess whether the grant of an application would be in the public interest. The applicant has therefore failed to provide information reasonably requested by the Director in accordance with section 38(3)(b) of the Act and consequently the Commission is precluded from granting the application.

- 9 The Commission is of the opinion that the Director's submission in this regard is ill-conceived for the following reasons:
- a) While the Commission may have regard to the Director's policies, the Commission is not bound by those policies;
 - b) Once the Director referred the matter to the Commission for determination under section 24 of the Act, the determination of the application falls within the jurisdiction of the Commission. Pursuant to section 13(4) of the Act, the Director may only determine applications and matters under the Act that are not subject to the jurisdiction of the Commission. The Commission did not require or request the applicant to provide the information in question or address particular "at risk" groups, therefore the contention that the applicant failed to provide information reasonably requested by the licensing authority is without foundation;
 - c) Notwithstanding the above, the Director's policy on lodging a "Public Interest Assessment" clearly indicates that "The purpose of the policy is to provide guidance on the possible content of the Public Interest Assessment (PIA) submissions" and "while it is up to the applicant to determine how much information to include in the PIA, the licensing authority may request further information from the applicant should it be determined that specific aspects of the PIA need more consideration". Clearly, on the proper construction of the policy, where an application is before the Director for determination, the Director can request additional information from an applicant in order to properly consider the merits of an application, if the Director is of the opinion that a PIA is lacking critical information.
 - d) Since the determination of this application is within the jurisdiction of the Commission, it is a matter for the Commission to exercise the discretion under section 38(3)(b) of the Act. In any event, the applicant is at liberty to supplement its current PIA with any additional information that it considers necessary in order to discharge its onus under section 38(2) of the Act.
- 10 For these reasons, the Commission is of the view that it is not fettered in the determination of the application, which should proceed to be considered on its merits.

Submissions on behalf of the applicant

- 11 According to the applicant, The Brass Monkey is one of the oldest licensed premises in Northbridge and of historic importance. Strategically located at the gateway to

Northbridge, visitors to the Brass Monkey can experience a range of services and facilities, including late night trading.

- 12 The Brass Monkey has operated with post midnight trading under an extended trading permit for the past 15 years. The current permit was granted in 2006 for a period of three years, and this application is merely seeking to continue the way the premises have traded for many years.
- 13 The venue comprises six main sections, being:
 - a sports bar where sports fans can enjoy their favourite sport in a public lounge room complete with high pitched ceilings, Chesterfield lounges and 50” plasma screens linked to Bose surround sound speakers;
 - a courtyard fitted out with palms, plasma screens and stainless steel furniture. It offers a number of beers on tap including various international and specialty hand crafted beers;
 - the Grapeskin, which is an award winning wine bar, lounge and restaurant offering 35 wines by the glass and a further 250 by the bottle. The Grapeskin has a sophisticated setting featuring stainless steel, a polished marble bar, Italian leather couches and mood lighting with live jazz or DJ’s. A modern contemporary cuisine and cocktails are also available.
 - the bottle shop, which stocks a range of spirits, beers and boutique wines as well as old favourites. The bottle shop, being one of only two bottle shops in Northbridge, is open until midnight and does not market any bulk casks or offer significantly discounted products;
 - function rooms to suit any style of private function; and
 - the BrassGrill Chargrill restaurant, located upstairs at the venue where patrons can choose from a complete a la carte menu and dine inside or on the federation balcony.
- 14 The patron mix includes both males and females (usually close to 50-50 on Fridays and Saturdays and 60-40 on other days) and young and older people. Approximately 30 per cent of the venue’s patronage consists of tourists.
- 15 The Brass Monkey has won AHA wine list awards in 2002 and 2003 and awards for the BrassGrill in 2005 and 2006. The Brass Monkey was also a finalist for the “Best Hotel/Tavern Wine List Award” at the 2009 AHA Aon Hotel Awards for Excellence.
- 16 Hotels and taverns cater to a different section of the public to those attracted to nightclubs. The Brass Monkey is an iconic hotel which is distinctly different from the other premises in Northbridge as it:

- is the only multi-faceted, non-themed pub in Northbridge;
- provides a safe, enjoyable environment for all ages and interests;
- has a good reputation;
- is centrally located and is a meeting place that is easy to find;
- provides an “old-world” ambience and a warm inviting atmosphere (in heritage listed premises);
- provides an extensive variety of meals;
- maintains an emphasis on quality, boutique products including boutique beer and premium wines which attract a more responsible patron to the premises;
- offers different areas/bars/rooms for different interests;
- has function services and facilities;
- is clean, well-lit and does not have smoke;
- has ambient background music rather than live bands (so patrons can converse)
- does not have queues (to enter), entrance fees, a dance floor or overcrowding (it is not claustrophobic);has friendly, efficient, courteous and well-trained staff; is situated across the road form a supervised taxi rank and close to a train station, bus station and public car parks; and
- creates an environment for the responsible service and consumption of liquor.

17 The applicant’s PIA addressed the matters set out in section 38(4) of the Act and the applicant provided a range of supporting evidence including various witness statements and a summary of a patron survey.

18 Finally, it was submitted that the grant of the application is in the public interest because:

- The Brass Monkey is a well managed tavern with a sound history of compliance with the provisions of the Act and the licensing authority’s policy requirements in its day to day operation including the additional hours of trade. The history of late night trading at the venue demonstrates that the applicant has evolved sound and proper host responsibility policies which minimise the potential for alcohol-related harm to occur;
- the tavern provides an alternative style of venue from the nightclubs in the area and caters to a different section of the community who enjoy late night entertainment in the precinct. The Brass Monkey is an iconic hotel which is significantly different from other hotels and clubs in Northbridge;

- the applicant is committed to the responsible service of alcohol and won the 'Best Responsible Service of Alcohol Award' for The Vic at the 2009 AHA Aon Hotel Awards for Excellence. The Applicant's responsible service of alcohol practices are adhered to in all its licensed premises, including The Brass Monkey;
- the premises have been granted extended trading permits on the same or similar terms since 1994 because the licensing authority has historically found that there is a requirement for extended trading hours at The Brass Monkey and all the reasons which led to the numerous previous permits being granted are still current;
- The Brass Monkey is a very popular tourist destination with approximately 30 per cent of its patrons being tourists. It provides facilities which cater for and enhance the tourism industry in WA in accordance with section 5(1)(c) of the Act.
- a survey of patrons found that 97 per cent wanted the premises to remain open for trade until 2.00am. This survey also indicated that patrons believe the premises have a good atmosphere, are a safe place and are a preferred venue rather than a nightclub;
- the provision of facilities and services post midnight at the venue outweigh any negative factors caused by the consumption of liquor in Northbridge by an irresponsible minority group; and
- the operation of the Brass Monkey post midnight makes a positive contribution to the amenity of Northbridge. In the past 15 years that the premises have traded late, there has not been any significant adverse activity at the venue, with the premises creating a safe haven in Northbridge.

Submissions on behalf of the Salmon Point Holdings Pty Ltd

- 19 The ground of objection relied upon by the objector is that the grant of the application would not be in the public interest (section 74(1)(a) of the Act).
- 20 According to the objector, Northbridge already experiences excessive alcohol-related harm, which is linked to extended trading hours. The objector opined that research evidence indicates that extended trading at hotels leads to higher consumption of alcohol, increased levels of intoxication with the inevitable consequence of a greater incidence of alcohol-related harm, including increased violence.
- 21 In April 2009 the Western Australian Police released a research report titled "Is Your House in Order? Re-visiting liquor licensing practices and the establishment of an entertainment precinct in Northbridge". It was submitted that this report identified that harm in Northbridge peaks between 11.00pm and 3.00am and correlated increased trading hours by hotels and taverns in the area with increase levels of harm.

Submissions on behalf of the Executive Director Public Health (EDPH)

- 22 The purpose of the intervention from the EDPH was to bring to the Commission's attention a number of high risk public interest aspects associated with the application, including:
- high levels of violence and alcohol-related problems in the locality of the premises, particularly during late night trading times;
 - existing levels of drink driving in Northbridge; and
 - the association between late night trading, licence type and increased rates of alcohol-related harm such as violence, road trauma and related injury.
- 23 It was submitted that harm does not have to be occurring inside the venue itself for the consumption of alcohol at the premises to contribute to harm in the locality. Many of the problems in the locality peak during late night trading times and are particularly problematic at 2.00am, when many hotels/taverns with extended trading hours close.
- 24 The EDPH provided data highlighting the existing harm in the locality, including:
- in the 12 months ending March 2009 there were 3,727 alcohol-related incidents recorded in Northbridge, of which 89 per cent occurred between 8.00pm Friday and 8.00am Sunday;
 - in the 12 months ending March 2009 there were 1,022 selected offences (assault, sexual assault, threatening behaviour and robbery) against the person and 1,377 disorderly conduct offences in Northbridge;
 - more recent WA Police assault data for Northbridge which shows that between January and October 2009 there were 374 alcohol-related assaults, accounting for 72.3 per cent of all assaults in Northbridge during this time period. This equates to an average of approximately 37.4 alcohol-related assaults per month in Northbridge in 2009 (January –October), compared to 34.25 per month in 2008 and 26.75 per month in 2005;
 - of the total disorderly conduct offences in Northbridge, in the 12 months ending March 2009, 91 per cent occurred between 8.00pm Friday to 8.00am Sunday;
 - between 2004/05 and 2007/08 there has been a general increasing trend in assault presentations to the Royal Perth Hospital Emergency Department on Saturdays and Sundays in the early hours of the morning; and
 - in the 10 month period between June 2007 and March 2008 there were a total of 316 drink driving charges where Northbridge was recorded as the drinking suburb.

- 25 The limited amount of public transport available in Northbridge/Perth in the early hours of the morning raises concerns about the ability of patrons on the premises to return home safely after leaving the premises at 2.00am.
- 26 The EDPH referred to research data linking late night trading, high density outlet and increases in alcohol-related harm.
- 27 Finally, it was submitted by the EDPH that given the problems occurring in Northbridge, particularly during the hours of the proposed extended trading permit, the granting of the application is of concern.

Determination

- 28 This is an application for an extended trading permit under section 60(4)(g) of the Act to authorise trading for a period exceeding three weeks. Consequently, pursuant to Regulation 9F(b) of the *Liquor Control Regulations 1989* and sections 38(1)(b) and 38(2) of the Act, the applicant must satisfy the licensing authority that granting the application is in the public interest.
- 29 Pursuant to section 33(1), the licensing authority has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers in the public interest; the discretion being confined only by the scope and purpose of the Act (refer *Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241*).
- 30 When considering the public interest, advancing the objects of the Act, as set out in section 5, is a relevant consideration. In respect of this application, the objects set out in sections 5(1)(b) and (c) and 5(2)(a) are particularly relevant.
- 31 It may often be the case that tension may arise between the object of minimising harm caused to people due to the use of liquor and certain other objects contained in section 5. When this conflict arises, the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health -v- Lily Creek International Pty Ltd & Ors [2000] WASCA 258*).
- 32 As observed by Ipp J (in *Lily Creek supra*), it is significant that the primary object in section 5(1)(b) is to “minimize” harm or ill-health, not to prevent harm or ill-health absolutely. The word “minimize” is consistent with the need to weigh and balance all relevant considerations. The Commission therefore needs to consider the level of alcohol-related harm, due to the use of liquor, which is likely to result from the grant of the application and whether the possibility of harm or ill-health is of a such a serious nature to be sufficient for the licensing authority to impose stringent conditions on a permit or refuse the grant absolutely.
- 33 The outcome will turn on the facts and particular circumstances in each case. It should be noted however, that whether such harm or ill-health would arise in a particular case

requires an element of predicting the future (refer *Malec v JC Hutton Pty Ltd (1990) 169 CLR* as cited in *Lily Creek supra*).

- 34 The uncontroverted evidence presented in this case is that The Brass Monkey is a unique, multi-faceted and well managed venue which has operated with extended trading hours under a permit for the past 15 years. The premises are a popular tourist destination which, consistent with object 5(1)(c) of the Act, are a premises which enhances the tourism industry of WA. Existing patrons of the premises clearly prefer the facilities and services post midnight at this venue rather than what is offered at other late night venues in Northbridge. The Brass Monkey has a history of compliance with its legislative obligations and has in place sound management practices to create a safe drinking and recreational environment for its patrons.
- 35 These positives aspects of granting the application must be balanced against the existing levels of alcohol-related harm in the area. The Commission, in recent decisions, has acknowledged that the locality of Northbridge experiences high levels of alcohol-related harm (refer for example LC 29/2010, LC 15/2010 and LC 07/2010) and maintains a cautious and considered approach to granting applications in the area.
- 36 The objector, Salmon Point Holdings Pty Ltd (licensee of the Rise Nightclub), lodged written submissions with its Notice of Objection; however it did not participate in the hearing or lodge any further submissions in support of its ground of objection. Although the Act does not preclude existing licensees from objecting to applications, it is difficult not to question whether the motives of this objector are driven by a real concern for the alleged problems in Northbridge or merely to maintain market share and restrict competition. However, having considered the evidence presented, the Commission is of the view that this objector has not established the validity of its objection as required under section 73(10) of the Act.
- 37 The evidence from the EDPH is similar to evidence presented in other recent applications before the Commission in Northbridge (refer to paragraph 35 above). However, in LC 29/2010 (Northbridge Brewing Company) evidence was presented of more recent police data which indicates that for the 12 month period ending 27 June 2010, there has been a 22.3 per cent decline in total offences in Northbridge. As observed in that case, whilst crime and anti-social behaviour may be on the decline, it is still unacceptably high.
- 38 Ultimately, the only question is whether, having regard to all the circumstances and the legislative intention, an extended trading permit is justified. In answering that question the Commission has a wide discretion. It is a matter for it to decide what weight to give to the competing interests and other relevant considerations (refer *Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356*).
- 39 When regard is had to all the evidence, the Commission is of the view that the public interest is best served by granting the application. In weighing and balancing the

competing interests in this case, the Commission is satisfied that the positive aspects of the application outweigh the potential impact that the grant of the application may have on existing levels of harm in the area. Consequently, the Commission is satisfied that the applicant has discharged its onus under section 38(2) of the Act.

40 It was submitted on behalf of the applicant that if the application is granted, the permit should not be subject to onerous conditions such as a “lockout” condition. Consequently, any new permit should be issued with conditions similar to those that exist on the current permit.

41 Although the premises may be well managed, the impact that the grant of the application may have in the context of the public interest consideration extends beyond what may be occurring just within the premises itself. The harm considerations contemplated by the Act are not restricted to consumers of alcohol at the premises, but includes harm caused to people other than the consumer of liquor (refer *Re Gull Liquor, Gingers’ Roadhouse, Upper Swan (1999) 20 SR (WA) 321*). Much of the alcohol-related harm occurring in Northbridge occurs on the streets, not just in licensed venues and is occurring between the hours of 11.00pm and 3.00am, when this permit would operate and patrons of the premises would be exiting onto the streets.

42 It was noted at paragraph 37 that crime and anti-social behaviour in Northbridge has declined in recent times, and whilst there are perhaps many factors contributing to this decline, the imposition of conditions on licences in the locality may be one of those factors. Also, consistency of conditions on licensed premises in the area helps to educate the drinking public, particularly in respect of behaviour and the responsible consumption of liquor.

43 The Commission is of the view that alcohol-related harm in Northbridge remains a significant concern, and consequently it is appropriate that the grant of the extended trading permit is subject to stringent conditions to help mitigate against any potential negative impact that the grant of the application may have on the locality. This approach is consistent with the words of Ipp J in *Lily Creek* supra (refer paragraph 31).

44 Therefore, pursuant to section 60(4)(g) of the Act an extended trading permit is granted to the applicant subject to the following conditions:

- 1) The permitted trading hours under the permit are:
 - Wednesday evening from 12 midnight to 1.00am the following morning;
 - Thursday evening from 12 midnight to 1.00am the following morning;
 - Friday evening from 12 midnight to 2.00am the following morning; and
 - Saturday evening from 12 midnight to 2.00am the following morning.

- 2) No trading is permitted on Good Friday, Christmas Day or before noon on ANZAC Day.
- 3) The area to which the permit relates is that area outlined in yellow on the plans dated 3 November 2000.
- 4) The sale of packaged liquor for consumption off the premises is prohibited during the hours covered by the permit.
- 5) The permit is effective for a period of five years commencing 8 September 2010.
- 6) There is to be no discounting or advertising of cheap liquor during the operation of the permit.
- 7) No liquor is to be sold or supplied for consumption on the premises in any of the following ways:-
 - (a) in any vessel with a measurement capacity exceeding 750ml and no spirits or spirit based beverages are to be supplied in vessels with a measurement capacity exceeding 375ml.
 - (b) in either –
 - (i) any non-standard measures; or
 - (ii) presented in such a way that would encourage the rapid consumption of liquor (for example, but not limited to, unadulterated spirit or liqueur in a shot glass); or
 - (iii) by virtue of their emotive title, such as ‘laybacks’, ‘shots’, ‘shooters’, ‘test tubes’, ‘jelly shots’, ‘blaster’ or ‘bombs’; or
 - (c) with energy drinks.

(for the purpose 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.)
- 8) Unless already in operation, the licensee will, within 12 months of the commencement of this permit, install and operate a CCTV system in accordance with the policy of the Director of Liquor Licensing.
- 9) Security Requirements
 - (i) crowd controllers, licensed under the Securities and Related Activities (Control) Act 1996, are to be employed at a ratio of two (2) crowd controllers for the first 100 patrons, and one crowd controller for each additional 100 patrons or part thereof.

- (ii) security personnel and crowd controllers (licensed under the Securities and Related Activities (Control) Act 1996), are to be present to monitor the licensed premises and the behaviour of patrons arriving and departing the premises from 8 pm (or the time of opening of the premises if after 8 pm), until one (1) hour after trading ceases. While these personnel have no authority over the patrons when they are away from the licensed premises, their presence may assist in the orderly dissipation of patrons once they leave the premises.

45 Consistent with the Commission's approach in other similar applications, the Commission also imposes a 'lockout' condition on the permit whereby patrons are prohibited from entering or re-entering the premises after 12 midnight. In light of the evidence presented by the applicant at the hearing before the Commission, this condition should not have a negative impact on the licensee.



JIM FREEMANTLE

CHAIRPERSON