

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicants:** Sunseasons Pty Ltd (AN 070 489 495)
(represented by Mr Jarrod Ryan of Ryan & Durey Solicitors)
- Delta Point Holdings Pty Ltd (ACN 009 351 455)
(represented by Mr Jarrod Ryan of Ryan & Durey Solicitors)
- Bushfalls Pty Ltd (ACN 071 171 821)
(represented by Mr Jarrod Ryan of Ryan & Durey Solicitors)
- Sonsan Pty Ltd (ACN 085 132 476)
(represented by Mr Jarrod Ryan of Ryan & Durey Solicitors)
- Walkabout Holdings Pty Ltd (ACN 616 051 640)
(represented by Mr Jarrod Ryan of Ryan & Durey Solicitors)
- Hotel Newman Pty Ltd
(represented by Mr Jarrod Ryan of Ryan & Durey Solicitors)
- Iron Bark WA Pty Ltd
(represented by Mr Jarrod Ryan of Ryan & Durey Solicitors)
- Regional Property Custodian Pty Ltd (ACN 626 322 629)
(represented by Ms Katherine Sierakowski of MGM O'Connor Lawyers)
- Ringthane Pty Ltd (ACN 009 372 990)
(represented by Ms Katherine Sierakowski of MGM O'Connor Lawyers)
- Rampearl Pty Ltd (ACN 081 413 673)
(represented by Ms Katherine Sierakowski of MGM O'Connor Lawyers)
- Redsands Nominees Pty Ltd (ACN 153 316 075)
(represented by Ms Katherine Sierakowski of MGM O'Connor Lawyers)
- Raminea Pty Ltd (ACN 008 883 994)
(represented by Ms Katherine Sierakowski of MGM O'Connor Lawyers)

Haybar Pty Ltd (ACN 154 717 610)
(represented by Ms Katherine Sierakowski of MGM O'Connor Lawyers)

Rum Holdings Pty Ltd (ACN 009 289 785)
(represented by Ms Katherine Sierakowski of MGM O'Connor Lawyers)

Mark Carlson
(represented by Ms Katherine Sierakowski of MGM O'Connor Lawyers)

Woolworths Group Limited (ACN 000 014 675)
(represented by Mr Marcus Solomon SC, instructed by Ms Susan Nicholson of Cullen Macleod Lawyers)

Drumstar Pty Ltd
(represented by Mr Marcus Solomon SC, instructed by Ms Susan Nicholson of Cullen Macleod Lawyers)

Liquorland (Australia) Pty Ltd
(represented by Mr Steve Standing of Herbert Smith Freehills Lawyers)

Interveners: Director of Liquor Licensing
(represented by Ms Patricia Aloj of State Solicitor's Office)

Commissioner of Police
(represented by Mr John Carroll of State Solicitor's Office)

Chief Health Officer
(represented by Mr John Carroll of State Solicitor's Office)

Commission: Mr Seamus Rafferty (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Ms Wendy Hughes (Member)

Matter: Applications for review of decisions of the Director of Liquor Licencing, pursuant to section 25 of the *Liquor Control Act 1988* in relation to the imposition of conditions upon 23 licences in the Pilbara Region pursuant to section 64 of the *Liquor Control Act 1988* (WA).

Date of Hearing: 27 June 2019

Date of Determination: 19 August 2019

Determination:

The Commission being satisfied that there are levels of such harm and ill health that make it appropriate to exercise its powers pursuant to section 64 of the *Liquor Control Act 1988*, imposes the following conditions in relation to the licensees who operate the premises known as Hedland Ibis, BWS Port Hedland, North West Liquor Supplies, South Hedland Liquor Supplies, Last Chance Tavern, Walkabout Tavern, Liquorland South Hedland:

1. The permitted hours for the sale and supply of packaged liquor on a day other than a Sunday, Good Friday or Christmas Day is from 12 noon to 8 pm.
2. The sale of packaged liquor on a Sunday is prohibited.
3. The sale and supply of liquor for consumption on the premises is prohibited before 11 am except where it is sold ancillary to a meal or to a lodger.
4. The sale of cask wine is prohibited.
5. The sale of beer in glass bottles of 750mls or more is prohibited.
6. Packaged liquor may only be sold or supplied knowingly by a licensee in the following quantities:
 - a) low alcohol liquor where the liquor contains less than 3.6 per cent concentration of ethanol at 20 degrees Celsius in any quantity is unrestricted;
 - b) where the liquor contains from 3.6 per cent to 7 per cent concentration of ethanol at 20 degrees Celsius a maximum cumulative quantity of 12 litres per customer per day, e.g. one carton of 30 cans at 375mls each;
 - c) where the liquor contains greater than 7 per cent but no more than 19.9 per cent concentration of ethanol at 20 degrees Celsius a maximum

cumulative quantity of 2.25 litres per customer per day, e.g. three bottles of wine at 750mls each;

- d) where the liquor contains greater than or equal to 20 per cent concentration of ethanol at 20 degrees Celsius, a maximum cumulative quantity of one litre per customer per day;
- e) in the case of fortified wine nothing below a \$25 price point.

A person may purchase liquor in more than one category provided the limit for each category is not exceeded.

7. A licensee of premises with a drive through facility must not sell packaged liquor to operators of taxis or buses who are purchasing packaged liquor on behalf of the passengers in the vehicle operated by the taxi driver or bus driver.
8. A licensee must not knowingly sell packaged liquor to operators of taxis or buses who are purchasing the packaged liquor on behalf of passengers in the vehicle.
9. The licensee is prohibited from and shall not authorise any external promotion which advertises the price of full strength mainstream packaged beers, that is regular beer with over 3.5 per cent ethanol by volume, RTDs or spirits whether the price is discounted or not. The licensee is also prohibited from any external promotion which links the purchase of full strength mainstream packaged beer, RTDs or spirits with any prize, contest or other customer incentive. Brands of mainstream packaged beer affected include, but not limited to, Victoria Bitter, Fosters, Emu Export, Emu Bitter, Swan Draught, XXXX, Hahn and Tooheys. Bottled wine or low alcohol beers, 3.5 per cent ethanol by volume, and premium craft beers are excluded from this condition.

Exemption 1

1. The sale and supply of packaged liquor is only permitted to a person who is present at the time of purchase on the licensed premises conducting the sale unless the person is:
 - a) the liquor merchant;
 - b) the station owner, pastoralist, person operating a remote work site or seafarers. The sale can be to an employee that places and/or collects the order on behalf of the business and only on the conditions that:
 - i) the person confirms that the liquor is to be consumed at a station, the pastoral property, remote work site or on a ship;
 - ii) the licensee maintains on the licensed premises a register of purchase which must be made for inspection at the request of an authorised officer; and
 - iii) the register contains the following information in relation to the person, name, address, address to which the liquor is being delivered/taken, description and quantity of liquor ordered.
 - c) a person who has pre-ordered the liquor at least three days in advance of pick-up and delivery and only on the conditions that:
 - i) the person has personally completed and signed a bulk purchase order form. A bulk purchase order is any order above that is allowed to be purchased under clause 6;
 - ii) the bulk purchase order form contains the following information in relation to bulk purchase; name of purchaser, address and phone number of purchaser, address to which the liquor is being delivered/taken, description and quantity of liquor ordered and the reason for the bulk purchase, purchaser's signature; and
 - iii) the bulk purchase order form is retained by the licensee for six months and made available for inspection at the licensed premises at the request of an authorised officer within 48 hours and a copy is provided to the local police within 48 hours of receipt.

The sale of liquor under this exemption is not subject to the quantity restriction set out above.

Exemption 2

2. The quantity restrictions set out above do not apply to the sale and supply of packaged liquor to a person whom the licensee reasonably believes to be a bona fide tourist. The licensee must record the following information where a sale is made under this exemption:
 - a) name of purchaser;
 - b) the local address or residential address and phone number of the purchaser;
 - c) the vehicle registration of the purchaser;
 - d) the address/location at which the liquor is being taken to;
 - e) the description and quantity of liquor ordered;
 - f) the purchaser's signature.

This information is to be provided to the local police within 24 hours and retained by the licensee for six months for inspection at request of an authorised officer.

- In respect of the remaining applications that relate to sixteen licensed premises in the Pilbara region that operate outside of South Hedland and Port Hedland, the decision of the Director of Liquor Licensing is quashed.

Authorities referred to in Determination

- *McKinnon v Secretary, Department of Treasury*
- *Commissioner of Police v Liquor Commission of Western Australia*

BACKGROUND

1. On 20 January 2017, a delegate of the Commissioner of Police (“COP”) wrote to the Director of Liquor Licensing advising that due to, ‘recent incidents of alcohol related disorder, violence and harm in South Hedland... there is a need for further restrictions to be imposed in South Hedland and also Port Hedland due to its close proximity to South Hedland.’¹ The Director was invited to exercise the powers conferred pursuant to section 64 of the *Liquor Control Act 1988* (“the Act”) and impose additional further conditions on licensed premises in Port Hedland and South Hedland. The term “further” was used as restrictions were imposed on licensed premises operating in South Hedland and Port Hedland in 2004 and in the Pilbara region as a whole (with the exception of Port Hedland and some licensed premises in Newman) in 2012.
2. The Delegate (“the Delegate”) of the Director of Liquor Licensing (“DLL”) subsequently commenced an inquiry to determine whether to exercise the power conferred by section 64 of the Act and consulted various different parties as permitted by section 64(1)(c) of the Act. The purpose of that inquiry was to seek ‘information on the extent and impact of alcohol-related harm in Port Hedland.’² For the purpose of his reasons, the Delegate stated that any reference to Port Hedland included South Hedland unless otherwise distinguished.
3. On 13 September 2017, the Delegate of the COP again wrote to the DLL, advising that, ‘should it be considered appropriate to impose restrictions on the sale of packaged liquor in Port Hedland and South Hedland, I request that such restrictions be imposed across the entire Pilbara or other towns/ locations within the Pilbara as considered appropriate.’³ The basis upon which it was contended that further restrictive conditions should be imposed on the entire Pilbara region was to the effect that, ‘though some other towns throughout the Pilbara are significantly further from Port and South Hedland, it is their proximity to the above towns that illustrates the need for Pilbara wide restrictions. This would negate the argument of displacement and increase the effectiveness of any restrictions.’⁴

¹ Letter of Detective Superintendent JM Migro, dated 20 January 2017, document 105 of materials

² Decision of Director of Liquor Licensing dated 11 January 2019, para.7

³ Letter of Detective Superintendent JM Migro, dated 13 September 2017, document 65 of materials

⁴ *supra*

4. Licensees of ninety-one premises within the Pilbara region were given the opportunity to show cause to the licensing authority as to why further conditions should not be imposed on their licences. A number of these licensees provided responses as to why further restrictions should not be imposed.
5. A significant amount of evidence and submissions were received from various parties which were summarised in the decision of the Delegate at first instance.⁵ The summary accurately reflects the position of the various parties that made representations to the DLL and there is no need to further summarise the evidence and submissions for the purpose of these reasons.
6. The Delegate concluded that he was satisfied that the levels of harm and ill-health occasioned by the use of liquor in the Pilbara region were, 'such that additional restrictions on the sale and supply of liquor in the region, is both necessary and appropriate.'⁶ The following conditions were imposed on the 91 licences within the Pilbara region as a whole, they being:
 1. *The permitted hours for the sale and supply of packaged liquor on a day other than a Sunday, Good Friday or Christmas Day – from 12 noon to 8pm;*
 2. *The sale of packaged liquor on a Sunday is prohibited;*
 3. *The sale and supply of liquor for consumption on the premises is prohibited before 11am except where it is sold ancillary to a meal or to a lodger;*
 4. *The sale of cask wine is prohibited;*
 5. *The sale of beer in glass bottles of 750mls or more is prohibited;*
 6. *Packaged liquor may only be sold or supplied in the following quantities:*
 - a) *Low alcohol liquor where the liquor contains less than 2.7% concentration of ethanol at 20 degrees Celsius in any quantity;*
 - b) *Where the liquor contains greater than 2.7% but no more than 7% concentration of ethanol at 20 degrees Celsius a maximum cumulative*

⁵ Decision of the Director of Liquor Licensing dated 11 January 2019, paras.11-122

⁶ *supra*, para.140

quantity of 11.25 litres per customer per day (eg 1 carton of 30 cans @ 375ml each);

- c) Where the liquor contains greater than 7% but no more than 15% concentration of ethanol at 20 degrees Celsius a maximum cumulative quantity of 2.25 litres per day (e.g. 3 bottles of wine @ 750ml each); and*
- d) Where the liquor contains greater than 15% concentration of ethanol at 20 degrees Celsius a maximum cumulative quantity of one litre per customer per day. In the case of fortified wine, nothing below \$25 price point.*

A person may purchase liquor in quantities provided for by either (b) or (c) or (d) or a combination of (b) and (c).

- 7. Operators of taxis or buses are not to be sold packaged liquor on behalf of persons in the vehicle;*
- 8. Occupants of taxis or buses must exit the vehicle to purchase packaged liquor to allow for a thorough responsible service of alcohol assessment by staff;*
- 9. Licensees are required to submit returns of alcohol sales data, by product type and quantity, to the Director of Liquor Licensing for each financial year by 31 August. The return must contain the following information:*
 - a) Total amount paid or payable to the licensee and the quantity supplied in respect of:*
 - i) Low alcohol liquor (2.7% ethanol by volume or less);*
 - ii) Mid strength alcohol liquor (2.8% to 3.5% ethanol by volume);*
 - iii) Full strength alcohol liquor (3.6% ethanol by volume or more)*
 - b) The information is to be provided under the headings of the following product types: wine, beer and spirits (as defined in section 3 of the Act), pre-packaged pre-mixed alcoholic beverages generally known as 'ready-to-drinks' (RTDs)*
- 10. The licensee is prohibited from, and shall not authorise, any external promotion which advertises the price of full strength "mainstream" packaged beers (ie regular beer with over 3.5% ethanol by volume); RTDs; or spirits, whether the price is discounted or not. The licensee is also prohibited from any external promotion which links the purchase of full strength "mainstream" packaged beer, RTDs, or spirits with any prize, contest or other customer incentive. The brands of "mainstream" packaged beer affected include, but not limited to: Victorian*

Bitter, Fosters, emu Export, Emu Bitter, Swan Draught, XXXX, Hahn and Tooheys. Bottled wine, low alcohol beers (3.5% ethanol by volume) and premium/craft beers are excluded from this condition.

Exemptions

1. *The sale and supply of packaged liquor is only permitted to a person who is present at the time of purchase on the licensed premises conducting the sale, unless that person is:*
 - a) *A liquor merchant;*
 - b) *A station owner, pastoralist, persons operating a remote work site or seafarers (the sale can be to an employee that places and/or collects the order on behalf of the business) and only on the conditions that:*
 - i) *The liquor is to be consumed at a remote work site or on a ship; and*
 - ii) *The licensee maintains on the licensed premises, a register of purchases, which must be made available for inspection at the request of an authorised officer; and*
 - iii) *The register contains the following information in relation to the station owner or pastoralist:*
 - *Name;*
 - *Address;*
 - *Address to which the liquor is being delivered/taken;*
 - *Description and quantity of liquor ordered;*
 - c) *A person who has pre-ordered the liquor at least 3 days in advance of pick-up/delivery and only on the conditions that:*
 - i) *That person has personally completed and signed a Bulk Purchase Order form; and*
 - ii) *The Bulk Purchase Order form contains the following information in relation to the bulk purchase:*
 - *Name of purchaser;*
 - *Address and phone number of purchaser;*
 - *Address to which the liquor is being delivered/taken;*

- *Description and quantity of liquor ordered and the reason for the bulk purchase;*
- *Purchaser's signature; and*
- *The Bulk Purchase Order form is retained by the licensee and made available for inspection at the request of an authorised officer and a copy is provided to the local police within 24 hours.*

The sale of liquor under this exemption is not subject to the quantity restrictions set out above.

2. *The quantity restrictions set out above do not apply to the sale and supply of packaged liquor to a bona fide tourist (this does not include a person who flies in on a regular basis to work in the area – for example a FIFO worker), travelling through the Pilbara or Kimberley region, and who normally resides outside the Pilbara or Kimberley region and the liquor is consumed out of town. The licensee must record the following information where a sale is made under this exemption:*

- *Name of purchaser;*
- *Address and phone number of purchaser;*
- *Vehicle registration;*
- *Address/location to which the liquor is being taken;*
- *Description and quantity of liquor ordered; and*
- *Purchaser's signature.*

This information is to be provided to the local police within 24 hours and retained by the licensee for inspection at the request of an authorised officer.

7. By way of applications pursuant to section 25 of the Act, the licensees of twenty-three premises operating in the Pilbara region sought review of the decision to impose further conditions by the Liquor Commission of Western Australia (“the Commission”).

8. The Commission conducted a public hearing on 27 June 2019 to determine each of the section 25 applications and afford each of the parties the opportunity to make submissions. At the conclusion of the hearing the Chairperson delivered ex

temporae reasons for decision. These are the detailed reasons for the ultimate orders made by the Commission.

9. The twenty-three applications have been dealt with together on the basis of the overlap of issues in respect to each individual application. However, for the purposes of the determination, where a decision has been made to impose restrictions, regard has been had to the tenor of each individual licence as required by section 64 of the Act.

STATUTORY FRAMEWORK

10. Pursuant to section 25(2)(b) of the Act, the Commission may only have regard to the material that was before the DLL when making the decision at first instance. Further, there is no requirement for the Commission to find error at first instance in the event that a determination is made to vary or quash a decision pursuant to the power conferred by section 25(4)(a) of the Act. An application pursuant to section 25 of the Act is a hearing *de novo* based on a consideration of the materials before the DLL at first instance. Effectively, the Commission is conducting its own inquiry as to whether further liquor restrictions should be imposed in the Pilbara region. Whilst the Commission may have conducted the inquiry in an entirely different manner than the DLL, for instance by visiting the region and making its own assessments or conducting public hearings in the region, the Commission is constrained in its determination of these applications for review by assessing the materials that were before the DLL at first instance.
11. In this case, those primary objects set out in section 5(1) of the Act are to be given full effect in determining each application. Full weight is also to be given to the secondary objects of the Act set out in section 5(2) of the Act. In this case, the primary matter for consideration is the object to minimise harm or ill-health caused to people or any group of people, due to the use of liquor. It was that aspect that was highlighted by the delegate of the COP in his correspondence to the DLL dated 20 January 2017 and 13 September 2017 as being the basis for the need further restrictions and which underpinned the reasons for decision at first instance.

12. Pursuant to section 64(3) of the Act, the Commission may impose conditions which it considers to be in the public interest or which it considers to be desirable in order to achieve any of the matters set out in section 64(3)(a)-(m) of the Act.

13. The term “public interest” is not defined in the Act, albeit section 38(4) of the Act sets out matters which the Commission may have regard to in determining whether something is in the public interest. In *McKinnon v Secretary, Department of Treasury*⁷ Tamberlin J relevantly stated that:

‘the expression ‘in the public interest’ directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public...and its content will depend on each particular set of circumstances.’

14. In *Commissioner of Police v Liquor Commission of Western Australia*⁸ Archer J stated that:

‘the plain meaning of section 64 is that the licensing authority has the power to impose conditions on a particular licence. Each time the licensing authority exercises that power, it is a decision to impose conditions on that particular licence. No doubt, the licensing authority may give reasons for exercising this power in relation to multiple licences in a single set of reasons. However, each exercise of power in relation to each licence is a separate decision under the Act.

*Further, the plain meaning of section 64 is that the licensing authority does not have the power to impose conditions on licenses within a geographical area or some other classification.*⁹

15. Given the interpretation of section 64 of the Act set out in the decision of Archer J, the task of the Commission in an application of this nature is to:

- a) consider the levels of harm and ill-health caused by liquor in the towns of Port Hedland, South Hedland, Karratha, Newman, Tom Price, Dampier, Wickham and Paraburdoo, they being the towns in which the various licenses the subject of these proceedings operate from;

⁷ [2005] FCAFC 142

⁸ [2019] WASC 165

⁹ *supra*, at [52]-[53]

- b) if satisfied that there are levels of harm or ill-health caused by liquor, determine whether it is appropriate to exercise discretion to impose further conditions on a licence having regard to the tenor of the licence and the circumstances in relation to which the licensing authority intends that it should operate;
- c) if satisfied that conditions should be imposed, determine what conditions should be imposed in order to achieve the relevant purpose(s) set out in section 64(3) of the Act.

POSITION OF THE PARTIES

16. The parties that have sought a review of the original decision of the DLL pursuant to section 25 of the Act are:

| Licensee Name | Premises | Location |
|-------------------------------------|-------------------------------|-----------------|
| Sunseasons Pty Ltd | Cellarbrations Newman | Newman |
| Delta Point Holdings | North West Liquor Supplies | South Hedland |
| Bushfalls Pty Ltd | South Hedland Liquor Supplies | Port Hedland |
| Sonsan Pty Ptd | Last Chance Tavern | South Hedland |
| Walkabout Holdings Pty Ltd | Walkabout Tavern | Port Hedland |
| Hotel Newman Pty Ltd | Newman Hotel Motel | Newman |
| Iron Bark WA Pty Ltd | Paraburdoo Inn | Paraburdoo |
| Regional Property Custodian Pty Ltd | Hedland Ibis | Port Hedland |
| Regional Property Custodian Pty Ltd | Karratha Ibis | Karratha |
| Ringthane Pty Ltd | Karratha International Hotel | Bulgarrá |
| Mark Carlson | Latitude 20 | Nickol |
| Mark Carlson | Tambrey Tavern | Pegs Creek |
| Mark Carlson | Karratha Tavern | Point Samson |
| Rempearl Pty Ltd | Samson Beach Tavern | Newman |
| Redsands Nominees Pty Ltd | Red Sands Tavern | Tom Price |
| Raminea Pty Ltd | Tom Price Hotel Motel | Karratha |
| Haybar Pty Ltd | Blanche Bar Group | Dampier |
| Rum Holdings Pty Ltd | Dampier Mermaid Hotel | Karratha |
| Woolworths Group Limited | BWS Wickham | Wickham |
| Woolworths Group Limited | BWS Karratha | Karratha |
| Drumstar Pty Ltd | BWS Port Hedland | Port Hedland |
| Liquorland Australia Pty Ltd | Liquorland South Hedland | South Hedland |
| Liquorland Australia Pty Ltd | Liquorland Tom Price | Tom Price |

17. The various parties to the proceedings before the Commission can be divided into the following groups:

- a) the Intervenor: COP, DLL and Chief Health Officer (“CHO”);
- b) applicants represented by MGM O’Connor Lawyers (relating to eleven licenses operating in the Pilbara region);
- c) applicants represented by Cullen McLeod Lawyers (relating to three licenses operating in the Pilbara region);
- d) applicants represented by Ryan Durey, Barristers & Solicitors (relating to seven licenses operating in the Pilbara region);
- e) applicants represented by Herbert Smith Freehills (relating to two licenses operating in the Pilbara region).

18. Counsel for the COP and CHO submitted that:

- a) evidence of the nature and extent of harm and ill-health in the Pilbara due to the use of liquor is overwhelming;
- b) the evidence established that alcohol is a factor in the majority of offending in the Pilbara;
- c) alcohol was a major cause of violence, self-harm and long term physical and mental health conditions;
- d) that the imposition of conditions has had a positive impact in reducing harm and ill-health due to the use of liquor in other locations;
- e) that unless conditions were imposed in a uniform and consistent manner, there is a potential to undermine the purpose of imposing conditions in a particular location;
- f) that the decision of the DLL at first instance should be affirmed.

19. Counsel for the DLL largely adopted the submissions made on behalf of the CHO & COP. It was suggested that a consistent approach was required across the Pilbara region and that to vary or quash the original decision would create a two-tiered licensing system as only twenty-three out of the ninety-one licenses that operated in the Pilbara and that were the subject of the original proceedings, were parties to the proceedings before the Commission.

20. With some exceptions, counsel for the various applicants generally agreed that:

- a) levels of harm and ill-health due to the use of liquor in South Hedland and Port Hedland warranted the imposition of further conditions relating to the sale of packaged liquor;
- b) the conditions on licensed premises that sold packaged liquor in South Hedland and Port Hedland should be modified from those imposed by the DLL at first instance;
- c) there was no proper basis to impose conditions on licences outside of South Hedland and Port Hedland and that to this effect the decision of the DLL relating to the sixteen licensed premises outside of those two towns should be quashed.

21. The Commission was provided with all of the materials before the DLL at first instance, the original reasons for decision and written submissions from all parties. The Commission has considered all of these materials and the fact that something has not been referred to in these reasons should not be construed as a failure to consider the relevant material.

DETERMINATION

22. There is absolutely no dispute that there are high levels of harm and ill-health due to the use of liquor in South Hedland and Port Hedland. Those levels are of an unacceptable level and require some form of intervention in an attempt to reduce those levels. In reaching this position the Commission has had regard to the materials before the DLL at first instance, with particular weight given to:

- a) the statistics incorporated in the letter from Detective Superintendent Migro to the DLL dated 20 January 2017;
- b) the contents of the statement of Senior Sergeant Dean Snashall, Officer in Charge of the South Hedland Police Station;
- c) other attachments to the letter dated 20 January 2017.

23. There is absolutely no doubt that further conditions on the sale of packaged liquor are required in South Hedland and Port Hedland to promote the relevant objectives set out in section 64(3) of the Act and to give full effect to the primary object of the act set out in section 5(1)(b) of the Act. A number of the applicants accepted this premise and made submissions as to the conditions that should be imposed.
24. The real issue is whether conditions are required in the Pilbara region as a whole so as to promote consistency and to avoid the potential of undermining any conditions to be imposed in South Hedland and Port Hedland. Further, to determine whether the levels of harm and ill-health caused due to liquor are such that further restrictions on the sale of liquor in the towns of Newman, Paraburdoo, Karratha, Tom Price, Dampier and Wickham are required. Those towns are of relevance as they are the towns in which some of the licensed premises the subject of these section 25 applications operate in.
25. In written submissions dated 19 June 2019, counsel for COP and CHO (which were adopted by counsel for DLL) submitted that, 'evidence of the nature and extent of harm and ill-health in the Pilbara due to the use of liquor is overwhelming.'¹⁰ In making that submission, reference was made to certain evidence that was before the Delegate at first instance. However, as is shown in the following analysis, the evidence did not support the assertion made by counsel for the two intervenors, which was adopted by the third intervenor:
- a) As to the submission that there was 'evidence that alcohol is a factor in the majority of offending in the Pilbara'¹¹, this was based solely on the anecdotal assertions of the Superintendent of Roebourne Regional Prison and the Manager of Pilbara Adult Community Corrections. Obviously both of these people would be in a position to give an opinion as to the factors that impact on offending behaviour in the Pilbara and some weight is given to their opinions, however the actual data provided by police, which is referred to later in these reasons, provides a better basis to reach a considered position as to the levels of offending in a particular town, what underpins such offending behaviour and determining whether the levels are such that further restrictions are required;

¹⁰ Submissions dated 19 June 2019, para.36

¹¹ *supra*, para.36(a)

- b) As to the submission that there were, 'significantly higher rates of alcohol-related domestic and non-domestic assaults, including at rates seven times the corresponding State rate'¹², the actual data provided by the police showed that the locations where the relevant rates were at their highest was South Hedland and Port Hedland.¹³ Further, at the hearing of the applications, counsel for COP and CHO conceded that the submission at paragraph 36(b) of his submissions only related to South Hedland and Port Hedland, not the Pilbara region as a whole.¹⁴
- c) As to the submission that there were, 'significantly higher rates of alcohol-related threatening behaviour, including at rates seven times the corresponding State rate'¹⁵, counsel for COP and CHO conceded that the figures that he was referring to only related to South Hedland and Port Hedland.¹⁶
- d) As to the submission that there were, 'instances of the rates of alcohol-related domestic and non-domestic assaults doubling and trebling in the space of a year'¹⁷, counsel for COP and CHO conceded that the figures he was referring to only related to South Hedland and Port Hedland.¹⁸
- e) As to the submission that there was 'corresponding evidence from local service providers that identify alcohol use as being at the forefront of the problems presenting to them on a daily basis, such as the number of domestic violence incidents referred to the Pilbara Community Legal Services increasing by a factor of two in a one year period'¹⁹, the material referenced in support of the submission primarily related to South Hedland and Port Hedland, as it was attached to the original correspondence from the delegate of COP, dated 20 January 2017.²⁰
- f) As to the submission that, 'reports that alcohol-related harm *in the Pilbara* [emphasis added] is amongst the worst in the State'²¹, counsel for COP and CHO referenced document 94 of the materials, which was a letter from Mr Chad Stewart, Director, Regional Services Reform Unit. At the hearing of the

¹² Submissions dated 19 June 2019, para.36(b)

¹³ See documents 65 and 105

¹⁴ Transcript of proceedings 27 June 2019, pp.7-8

¹⁵ Submissions dated 19 June 2019, para.36(c)

¹⁶ Transcript of proceedings 27 June 2019, pp.7-8

¹⁷ Submissions dated 19 June 2019, para.36(d)

¹⁸ Transcript of proceedings 27 June 2019, pp.7-8

¹⁹ Submissions dated 19 June 2019, para.36(f)

²⁰ See document 105

²¹ Submissions dated 19 June 2019, para.36(g)

applications, counsel conceded that, 'this document is only referring to Port Hedland and South Hedland, so yes.'²²

- g) As to the submission that, 'alcohol is a factor in a significantly higher proportion of suicides in the region in comparison to the State rate'²³, reference was made to submissions from the Mental Health Commission²⁴ which only related to South Hedland and Port Hedland and as counsel was forced to concede at the hearing, there was no data provided as to how many suicides occurred in the relevant localities and how many such incidents had a relationship with the consumption of alcohol.²⁵
- h) As to the submission that there were, 'hospitalisation rates for "alcohol related conditions" that are significantly higher than the corresponding State rate, reference was made to documents 58 and 77 of the materials which were submissions by the Department of Health, Chief Health Officer. Counsel for COP and CHO properly conceded at the hearing that in relation to Karratha and surrounds, the data relating to alcohol related hospitalisations was not nearly as bad as in South Hedland and Port Hedland.'²⁶

26. It is difficult to place weight on or give credence to submissions made by the Intervenor as to the Pilbara region as a whole, where much of the evidence referred to solely relates to South Hedland and Port Hedland or the evidence referred to did not have sufficient information for significant weight to be given to such evidence. Broad assertions as to alleged facts are of no assistance to the Commission. The most that the Intervenor could point to as an evidentiary basis for region wide restrictions was:

- a) rates of alcohol-related offences in the Roebourne sub-district increased by 65% between 2014 and 2016,²⁷ however counsel could not assist in advising the Commission which area this encompassed;
- b) St John Ambulance statistics from Karratha that indicated that drug and alcohol-related incidents constitute 33% of all cases²⁸, which is higher than the rates in Port Hedland and South Hedland, however there was nothing before the

²² Transcript of proceedings 27 June 2019, p.9

²³ Submissions dated 19 June 2019, para36(h)

²⁴ See document 76

²⁵ Transcript of proceedings 27 June 2019, p.10

²⁶ *supra*

²⁷ Submissions dated 19 June 2019, para.67(a)

²⁸ See document 65

Commission which was capable of establishing how many incidents related to alcohol use as opposed to drug consumption;

- c) hospitalisation rates for alcohol-related conditions for Karratha residents were higher than the State rate between 2011 and 2014.²⁹ This assertion was correct for the 'total hospitalisation age-standardised rates for all alcohol-related conditions' in the relevant period, however as was noted by the CHO in his submission dated 8 December 2017, 'overall, for the period 1 January 2011 to 31 December 2015, the total hospitalisation rate for all alcohol-related conditions for residents of Karratha SA2 was similar to the corresponding State rate, with the exception of 2012 where the rate was significantly higher (1.44 times);'³⁰
- d) hospitalisation rates for alcohol-related conditions for Roebourne residents were significantly higher than the State rate (1.4 times) between 2011 and 2015. It is accepted that these are concerning figures, however it should be noted that there is no place to purchase liquor in Roebourne and that there is no evidence before the Commission capable of establishing where those who reside in Roebourne purchase their alcohol;
- e) raw data of the number of incidents of assaults and threatening behaviour in which alcohol was an attributing factor between 2015 and 2017 occurred at more than 1.5 times the rate of non-alcohol related incidents in Onslow, Roebourne and Tom Price; at more than double the rate in Marble Bar and Newman; and at more than triple and quadruple the rate in Paraburdoo and Nullagine, respectively. This submission however ignores what the actual raw data was for the relevant period between 1 January 2015 and 31 August 2017, which was as follows:
- Onslow: 119 incidents of either domestic assaults/non-domestic assaults/threatening behaviour over a period of 973 days, of which 70 were alcohol related;
 - Roebourne (also including Wickham): 617 incidents of either domestic assault/non-domestic assaults/threatening behaviour over a period of 973 days, of which 382 were alcohol related;
 - Tom Price: 124 incidents of either domestic assaults/non-domestic assaults/threatening behaviour over a period of 973 days, of which 76 were alcohol related;

²⁹ See document 58

³⁰ See document 58, p.13

- Marble Bar: 55 incidents of either domestic assaults/non-domestic assaults/threatening behaviour over a period of 973 days, of which 37 were alcohol related;
- Newman: 600 incidents of either domestic assaults/non-domestic assaults/threatening behaviour over a period of 973 days, of which 429 were alcohol related;
- Paraburdoo: 22 incidents of either domestic assaults/non-domestic assaults/threatening behaviour over a period of 973 days, of which 17 were alcohol related;
- Nullagine: 67 incidents of either domestic assaults/non-domestic assaults/threatening behaviour over a period of 973 days, of which 55 were alcohol related.

Whilst any incidence of alcohol related harm or ill-health of itself will be concerning, these figures do not demonstrate on their own or in combination with other evidence, that further alcohol restrictions over and above those which already exist in the Pilbara (excluding South Hedland and Port Hedland) are required. The Act requires the minimisation of harm and ill-health as a primary object, not the eradication of harm and ill-health.

Further, an analysis of the alcohol related offending in Dampier, Karratha, Newman, Paraburdoo and Tom Price for the period between 1 January 2015 and 31 August 2017 shows that such offending exists, but not at levels that would suggest that some form of intervention is required:

| <u>TOWN</u> | <u>2015</u> | <u>2016</u> | <u>Up to 31/8/2017</u> |
|--------------------|--------------------|--------------------|-------------------------------|
| Dampier | 7 | 7 | 1 |
| Karratha | 108 | 199 | 120 |
| Newman | 126 | 186 | 117 |
| Paraburdoo | 12 | 4 | 1 |
| Tom Price | 26 | 31 | 19 |

27. The final arguments in favour of region wide restrictions was the potential for consumers to seek to circumvent any liquor restrictions imposed in South Hedland and Port Hedland and the need for uniformity. Based on a consideration of all of the

evidence, the Commission does not consider that there is a potential for people to seek to circumvent the conditions imposed in Port Hedland and South Hedland on the basis that full-strength liquor will still be available to purchase in both towns based on the conditions that will be imposed. This is not akin to the situation in Halls Creek or Fitzroy Crossing where only low-strength alcohol is available for purchase and the practice of sly-grogging is practised and people drive to other towns such as Broome, to purchase full-strength alcohol.

28. As to the issue of uniformity of licensing conditions in the Pilbara, were the Commission to quash the decision of the DLL at first instance in respect to the sixteen licenses the subject of these proceedings, which are outside South Hedland and Port Hedland that would mean that there are sixty-eight licenses which are not the subject to these proceedings, to which the original conditions imposed by the DLL would apply.
29. The issue of consistency or uniformity would be entirely a matter for the DLL. Having regard to the evidentiary findings made by the Commission and the observations of Archer J in *Commissioner of Police v Liquor Commission of Western Australia* as to the application of section 64 of the Act, one would expect that the DLL would rethink whether to impose the original conditions on the sixty-eight licensed premises not the subject of these proceedings. It is apparent that no real consideration was given at first instance to the tenor of each licence that was the subject of these proceedings, that being a mandatory requirement of the Act and that there was no proper consideration of the inter-relationship between the operation of each individual licence and the harm and ill-health that was found to exist in the region. In other words, there was no finding that a particular licence contributed to the harm and ill-health that existed in the region. Whether the DLL reconsiders the original decision of his delegate is entirely a matter for the DLL, however it should be made clear that notwithstanding the observations in this paragraph, the Commission has acted in accordance with the requirements of section 25 of the Act by:
- a) considering the totality of the evidence that was before the DLL;
 - b) not needing to find or actually finding error at first instance;
 - c) coming to a decision that is based on applying the primary and secondary objects of the Act, taking into account the public interest in reaching its decision and basing the decisions made solely on evidentiary findings made.

30. Having regard to the totality of the evidence before the Commission, the following evidentiary findings are made:

- a) There are levels of harm and ill-health caused due to the use of liquor in South Hedland and Port Hedland that are at levels that make it appropriate to exercise the power conferred by section 64 of the Act in the public interest and to achieve the ends set out in section 64(3)(c),(cc),(d)&(e) of the Act.
- b) The seven licensed premises that operate in South Hedland and Port Hedland contribute to the levels of harm and ill-health due to the use of liquor, based on the fact that they currently sell full-strength packaged liquor without any limitations on the volume of such liquor that can be sold.
- c) Restrictions on the sale of packaged liquor are a useful tool in reducing levels of harm and ill-health.
- d) There are levels of harm and ill-health due to the use of liquor in the remainder of the Pilbara region outside South Hedland and Port Hedland.
- e) The levels of harm and ill-health due to the use of liquor in towns within the Pilbara outside South Hedland and Port Hedland are not at such levels that require further conditions to be imposed pursuant to the power conferred by section 64 of the Act.
- f) There is no requirement to impose uniform conditions within the Pilbara region to alleviate concerns that the conditions that will be imposed in South Hedland and Port Hedland will be circumvented, as the conditions that will be imposed are of such a nature, that the risk of such an occurrence is almost non-existent based on the fact that full-strength alcohol will still be available in South Hedland and Port Hedland.
- g) The fact that the DLL may still impose the conditions that were to be imposed at first instance is not a sufficient basis to impose region wide conditions.

31. The conditions that the Commission will impose on the seven licensed premises in South Hedland and Port Hedland the subject of these proceedings strikes a balance between the need to minimise harm and ill-health by restricting the volume of particular types of alcohol that can be purchased by consumers on a daily basis and the ability of licensees to properly and efficiently operate their businesses. The conditions should not impact on those many people who live in the relevant locations

who responsibly consume alcohol and the conditions are designed to reduce harm and ill-health in the relevant locations. By way of example, the original clause (9) of the conditions imposed by the DLL at first instance has not taken into consideration the fact that the keeping of such information by licensees is extremely onerous and the highest that the Intervenors could suggest that there was a requirement for such a condition was to allow research to be conducted as to the effectiveness of the imposition of conditions.³¹ The Commission sees no need for this type of condition and if organisations wish to conduct research in relation to liquor related matters, that is entirely a matter for them and not a burden to be placed on licensees.

32. Finally, it should be recognised that the imposition of restrictions is only one factor that can be used to minimise harm and ill-health due to the use of liquor. The observations of the Hon Jacqui Boyde MLC in her submission dated 27 June 2018 to the effect that ‘there needs to be a targeted approach to those who abuse alcohol rather than a region wide restriction, which will impact the entire community’³² and the Mayor of the City of Karratha in his submissions dated 28 May 2018 to the effect that ‘council believes that additional resources for social support services need to be considered concurrently with the discussions regarding potential liquor restrictions’³³ are sensible submissions that reflect that more needs to be done to address the issues of alcohol related harm in the Pilbara community other than the mere imposition of restrictions.

ORDERS OF THE COMMISSION

33. The Commission makes the following orders:

- a) In respect to the applications for review pursuant to section 25 of the Act made by Sunseasons Pty Ltd, Hotel Newman Pty Ltd, Iron Bark WA Pty Ltd, Regional Property Custodian Pty Ltd as licensee of the Karratha Ibis, Ringthane Pty Ltd, Mark Carlson, Rempearl Pty Ltd, Redsands Nominees Pty Ltd, Raminea Pty Ltd, Haybar Pty Ltd, Rum Holdings Pty Ltd, Woolworths Group Limited and Liquorland Australia Pty Ltd, the decision of the DLL at first instance is quashed pursuant to section 25(4) of the Act and the conditions of each licence remain as in force as at the date of publication of these reasons.

³¹ Transcript of proceedings 27 June 2019, p.24

³² See document 32

³³ See document 42

b) In respect to the applications for review pursuant to section 25 of the Act made by Delta Point Holdings as licensee for North West Liquor Supplies, Bushfalls Pty Ltd as licensee for South Hedland Liquor Supplies, Sonsan Pty Ltd as licensee for Last Chance Tavern, Walkabout Holdings Pty Ltd as licensee for Walkabout Tavern, Regional Property Custodian Pty Ltd as licensee for the Hedland Ibis, Woolworths Group Limited as licensee for BWS Port Hedland and Liquorland Australia Pty Ltd as licensee for Liquorland South Hedland, the decision of the DLL at first instance is varied to the extent that the following conditions on each licence shall apply from 27 September 2019, they being:

1. The permitted hours for the sale and supply of packaged liquor on a day other than a Sunday, Good Friday or Christmas Day is from 12 noon to 8 pm.
2. The sale of packaged liquor on a Sunday is prohibited.
3. The sale and supply of liquor for consumption on the premises is prohibited before 11 am except where it is sold ancillary to a meal or to a lodger.
4. The sale of cask wine is prohibited.
5. The sale of beer in glass bottles of 750mls or more is prohibited.
6. Packaged liquor may only be sold or supplied knowingly by a licensee in the following quantities:
 - a) low alcohol liquor where the liquor contains less than 3.6 per cent concentration of ethanol at 20 degrees Celsius in any quantity is unrestricted;
 - b) where the liquor contains from 3.6 per cent to 7 per cent concentration of ethanol at 20 degrees Celsius a maximum cumulative quantity of 12 litres per customer per day, e.g. one carton of 30 cans at 375mls each;
 - c) where the liquor contains greater than 7 per cent but no more than 19.9 per cent concentration of ethanol at 20 degrees Celsius a maximum cumulative quantity of 2.25 litres per customer per day, e.g. three bottles of wine at 750mls each;

- d) where the liquor contains greater than or equal to 20 per cent concentration of ethanol at 20 degrees Celsius, a maximum cumulative quantity of one litre per customer per day;
- e) in the case of fortified wine nothing below a \$25 price point.

A person may purchase liquor in more than one category provided the limit for each category is not exceeded.

- 7. A licensee of premises with a drive through facility must not sell packaged liquor to operators of taxis or buses who are purchasing packaged liquor on behalf of the passengers in the vehicle operated by the taxi driver or bus driver.
- 8. A licensee must not knowingly sell packaged liquor to operators of taxis or buses who are purchasing the packaged liquor on behalf of passengers in the vehicle.
- 9. The licensee is prohibited from and shall not authorise any external promotion which advertises the price of full strength mainstream packaged beers, that is regular beer with over 3.5 per cent ethanol by volume, RTDs or spirits whether the price is discounted or not. The licensee is also prohibited from any external promotion which links the purchase of full strength mainstream packaged beer, RTDs or spirits with any prize, contest or other customer incentive. Brands of mainstream packaged beer affected include, but not limited to, Victoria Bitter, Fosters, Emu Export, Emu Bitter, Swan Draught, XXXX, Hahn and Tooheys. Bottled wine or low alcohol beers, 3.5 per cent ethanol by volume, and premium craft beers are excluded from this condition.

Exemption 1

- 1. The sale and supply of packaged liquor is only permitted to a person who is present at the time of purchase on the licensed premises conducting the sale unless the person is:
 - a) the liquor merchant;

- b) the station owner, pastoralist, person operating a remote work site or seafarers. The sale can be to an employee that places and/or collects the order on behalf of the business and only on the conditions that:
- i) the person confirms that the liquor is to be consumed at a station, the pastoral property, remote work site or on a ship;
 - ii) the licensee maintains on the licensed premises a register of purchase which must be made for inspection at the request of an authorised officer; and
 - iii) the register contains the following information in relation to the person, name, address, address to which the liquor is being delivered/taken, description and quantity of liquor ordered.
- c) a person who has pre-ordered the liquor at least three days in advance of pick-up and delivery and only on the conditions that:
- i) the person has personally completed and signed a bulk purchase order form. A bulk purchase order is any order above that is allowed to be purchased under clause 6;
 - ii) the bulk purchase order form contains the following information in relation to bulk purchase; name of purchaser, address and phone number of purchaser, address to which the liquor is being delivered/taken, description and quantity of liquor ordered and the reason for the bulk purchase, purchaser's signature; and
 - iii) the bulk purchase order form is retained by the licensee for six months and made available for inspection at the licensed premises at the request of an authorised officer within 48 hours and a copy is provided to the local police within 48 hours of receipt.

The sale of liquor under this exemption is not subject to the quantity restriction set out above.

Exemption 2

2. The quantity restrictions set out above do not apply to the sale and supply of packaged liquor to a person whom the licensee reasonably believes to be a bonafide

tourist. The licensee must record the following information where a sale is made under this exemption:

- a) name of purchaser;
- b) the local address or residential address and phone number of the purchaser;
- c) the vehicle registration of the purchaser;
- d) the address/location at which the liquor is being taken to;
- e) the description and quantity of liquor ordered;
- f) the purchaser's signature.

This information is to be provided to the local police within 24 hours and retained by the licensee for six months for inspection at request of an authorised officer.



SEAMUS RAFFERTY
CHAIRPERSON