

DECISION OF THE DIRECTOR OF LIQUOR LICENSING

APPLICATION REF: A000190134
APPLICANT: FILIGREE HOLDINGS PTY LTD
PREMISES: THE EXCHANGE HOTEL
PREMISES ADDRESS: 135 HANNAN STREET, KALGOORLIE
LICENCE NO.: 6010126319
NATURE OF APPLICATION: VARIATION OF LICENCE CONDITIONS
DATE OF DETERMINATION: 17 JUNE 2016

Introduction and background

1. Filigree Holdings Pty Ltd ("the Applicant") is the holder of hotel licence number 6010126319, issued in respect of premises known as *The Exchange Hotel* and situated at 135 Hannan Street, Kalgoorlie ("the licensed premises").
2. In April 2011¹, the Liquor Commission granted an extended trading permit, pursuant to s 60(4)(g) of the *Liquor Control Act 1988* ("the Act") to Trinity Flame Pty Ltd ("the former licensee"), subject to a number of conditions, including:
 - (a) a condition prohibiting patrons from entering or re-entering the licensed premises after 12 midnight ("the lockout condition"); and
 - (b) a condition requiring that Security Personnel/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 p.m. (or the time of opening the premises if after 8 p.m.), until one hour after trading ceases.
3. On 31 January 2013, the licence was transferred to the Applicant and on 28 March 2014, I granted a subsequent permit to the Applicant, (permit number 0200682615) subject to the same terms and conditions as those approved by the Liquor Commission. On 11 November 2015, the current application was made, pursuant to s 64 of the Act, to vary the permit by:
 - (c) cancelling the lockout condition; and
 - (d) varying the condition requiring that Security Personal/Crowd Controllers are to be present to monitor the behaviour of patrons departing the premises until one hour after trading ceases ("the security condition"), so that approved managers

¹ See *Trinity Flame Pty Ltd v Director of Liquor Licensing* [LC10/2011]. In these proceedings before the Liquor Commission, it was accepted that *The Exchange Hotel* is a multi-faceted hotel which contains two of the most popular bars in Kalgoorlie, namely the Wildwest Saloon and Paddy's Ale House.

will be able to monitor the behaviour of departing patrons for a period of 30 minutes after trading ceases.

4. On 1 December 2015, following receipt of the application, this authority wrote to the Applicant and advised it that the Director of Liquor Licensing ("the Director") had determined, pursuant to the provisions of s 38(1)(c) of the Act, that the application would be subject to a requirement to satisfy the licensing authority that the grant of the application is in the public interest (refer s 38(2) of the Act).
5. The application was subsequently advertised in accordance with instructions issued by the Director, which resulted in the lodgement of a notice of intervention² by the Commissioner of Police ("the Commissioner") and notices of objection by *Sylvester Pty Ltd*, the licensee of premises known as *Palace Hotel* and *The Gold Bar Kalgoorlie* and Mr Paul Browning, a local businessman.
6. Pursuant to ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, which have been summarised below.

The application

7. The Applicant submitted that the hospitality landscape in Kalgoorlie has changed substantially from the time when the lockout condition was first imposed, at which time *Lot 35* (formally *De Bernales*), *The Gold Bar Kalgoorlie*, *Sylvester's Night Club Cabaret* and Paddy's Ale House at *The Exchange Hotel* were effectively competing with each other for the post midnight "nightclub" trade. This scenario was then contrasted with the present situation, where the Applicant submitted that there are effectively only two premises; *The Gold Bar Kalgoorlie* and *The Exchange Hotel*, who are catering to the post midnight "nightclub" trade in Kalgoorlie.
8. In support of the above contention, the Applicant submitted that this situation has come about because *Sylvester's Night Club Cabaret* had closed its doors and is unlikely to re-open as a nightclub and *Lot 35* has now been re-branded with more of a focus on food.
9. Accordingly, the Applicant submitted that the reasons for the imposition of the lockout condition no longer exist (i.e. customers migrating between the four licensed premises and resulting in a significant number of people milling around on Hannan Street after midnight.)
10. Additionally, the Applicant also submitted that the premises' style of operation has significantly improved since 2010 when the lockout condition was originally imposed and that its management of the premises is better than that of the former licensee. To illustrate this fact, the Applicant submitted that after taking over the premises in January 2013, it closed Paddy's Ale House and completely refurbished it at a cost of close to \$400,000, reopening it as a food focused bar/restaurant facility.

² In relation to the representations made in the notice of intervention, it should be noted that as an intervener the Commissioner carries no burden of proof (see *Greaves J, Re Gull Liquor* (1999) 20 SR (WA) 321).

11. The Applicant also submitted a table showing a comparison of liquor sales and food sales in Paddy's from 2009/10 when the business was operated by the former licensee and 2014/15 while operated by the Applicant, which shows a sales growth in food of 154.8%.
12. The Applicant also argued that the lockout condition:
 - (a) is deeply unpopular with customers who frequent licensed venues after midnight;
 - (b) actually encourages the very movement on the streets which it was supposed to deter; and
 - (c) discriminates against the more mature patrons who prefer live bands to DJ music, and the hotel environment over the younger crowd in the nightclub.
13. Other information lodged by the Applicant included:
 - (a) background information on the purpose of lockouts; including how they have been implemented throughout Western Australia and Australia and their effectiveness; with the Applicant concluding that lockouts only achieve limited success when imposed at the same time across all licence types and when implemented as part of a suite of other measures;
 - (b) an analysis of post-midnight trading in Kalgoorlie, particularly a comparison of the operations of *The Gold Bar Kalgoorlie* and *The Exchange Hotel*; and
 - (c) submissions that:
 - (i) there are many reasons why people who intend to stay at *The Exchange Hotel* after midnight get caught and inconvenienced by the lockout, such as when they leave the licensed premises because:
 - (1) they want fresh air;
 - (2) they have to make or answer a phone call;
 - (3) their friends arrive late into town;
 - (4) they want to smoke a cigarette; or
 - (5) they have to walk their friend to the taxi rank;
 - (ii) queues form outside the *Gold Bar Kalgoorlie* after midnight and queues are known places where harm/violent behaviour can occur
 - (iii) the two post-midnight venues are very different from each other and attract very different patronage, or occasionally the same patronage (although on these occasions patrons are looking for a different style of night out);
 - (iv) the local public who require post-midnight licensed services are not homogenous and vary considerably in age and therefore do not comfortably mix in one confined space/environment; and

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- (v) in the Wildwest Saloon, people are broken up into smaller groups by the layout of the venue, whereas at the *Gold Bar Kalgoorlie*, they are accommodated in three large rooms, and therefore in three groups of large numbers of people.
14. To demonstrate the opinion of the local community to the lockout condition, the Applicant conducted:
- (a) an off premises' intercept survey from 11.30 p.m. on Saturday, 12 September 2015 to 1.30 a.m. on Sunday, 13 September 2015;
 - (b) an off premises questionnaire conducted by a third party consultant, which distributed questionnaires to:
 - (i) people walking along Hannan Street;
 - (ii) local businesses; and
 - (iii) the consultant's database of local residents; and
 - (c) an on premises' questionnaire handed out to patrons of the hotel by staff, both in the Wildwest Saloon and Paddy's Ale House, during the period from August to October 2015.
15. Additionally, the Applicant asserted that there has been a gradual relaxation of the lockout condition since it was first imposed, following a number of one-off approvals by the licensing authority in connection with significant local events, such as the annual Diggers and Dealers Conference and Kalgoorlie Race Round.
16. The Applicant's PIA also referred to the fact that the Wildwest Saloon offers live bands on most weekends, FOX Sports, a digital jukebox and pool tables.
17. Above all else, the Applicant submitted that it has demonstrated that consumers in Kalgoorlie are looking for a choice of venues after midnight, not just the one nightclub and that both the *Gold Bar Kalgoorlie* and *The Exchange Hotel* are good venues for different reasons, with the Applicant seeking to satisfy that segment of the population who prefer the offering of *The Exchange Hotel*.
18. In relation to the variation sought to the security condition, the Applicant noted that the security condition on its current permit has been varied to permit approved managers to undertake some crowd control functions and submitted that it "has shown over an extended period of time that it is an excellent manager of a licensed premises in Kalgoorlie, and has used approved managers to perform crowd control functions very successfully for some time."
19. The Applicant's PIA also addressed those matters prescribed in s 38(4) of the Act and considered how the grant of the application will further the Act's objects, as set out in s 5.

The intervention

20. In relation to the application as a whole, the Commissioner indicated less concern with that part of the application relating to changes to the security condition, but expressed serious concerns over the removal of the lockout condition.
21. Accordingly, the representations of the Commissioner, which are made pursuant to s 69(6) of the Act, were concerned that the cancellation of the lockout condition may result in public disorder or disturbance. The Commissioner also submitted that the Applicant had failed to consider the permitted hours of other licensed premises in the locality that are also authorised to trade after midnight.
22. Furthermore, the Commissioner submitted that:
 - (a) evidence before the Liquor Commission had necessitated the imposition of the lockout condition; and
 - (b) the Applicant's assertion that the condition is no longer needed, should be taken as proof that the lockout condition is working well and minimising alcohol related harm and disturbances at; and in the vicinity of, the licensed premises.
23. Accordingly, the Commissioner submitted that:

"The fact that the condition is effective is not a logical argument to remove it. This condition assists crowd controllers and management insofar as they do not have the issue of drunken patrons gaining access to the venue after midnight and allows for better RSA practices inside the venue during those high risk hours of the ETP."
24. Additionally, the Commissioner submitted that there was no evidence provided by the Applicant to establish that patrons who queued for entrance to the *Gold Bar Kalgoorlie* were:
 - (a) not there because they specifically wanted to attend that premises, having gone directly there or purposefully having left *The Exchange Hotel*; or
 - (b) lining up out of necessity, after being turned away from *The Exchange Hotel*.
25. It was also submitted by the Commissioner that it is a well known fact that nightclubs are inherently well patronised after midnight and therefore evidence of patron lines at the premises is not necessarily indicative of any issue relating to the lockout condition at *The Exchange Hotel*, but rather to the exercise of consumer choice, with patrons making a conscious decision to migrate to *The Gold Bar Kalgoorlie* prior to the lockout coming into effect.
26. Additionally, the Commissioner also submitted that of the 32 survey questionnaires lodged with the application, all but one respondent were aware of the lockout condition, which lead the Commissioner to conclude that the lockout condition is well-known amongst the Applicant's patrons.

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27. The Commissioner also rejected the Applicant's claims that in order for a lockdown to be effective, it would 'need to come into force at the same time for all licensed premises within the locality' and instead submitted that the lockdown allows staff (both general and security) to better monitor the behaviour of patrons and stem the influx of patrons post-midnight, which in a high-risk locality, enables staff to better monitor and respond to the increase risk of alcohol-related disorder, disturbance and harm.
28. The Commissioner also submitted that there has been no evidence submitted by the Applicant to establish:
- (a) its assertion that approval of the current application "may assist in reducing people movements on the streets in the early hours of the morning thereby reducing the potential for harm", given that the Applicant does not intend to cease trading at midnight and patrons wishing to frequent the premises with the intent of a quiet night can already do so before the lockdown comes into effect; or
 - (b) a causal link between the lockdown condition and the purported influx of patrons onto the streets in the early hours of the morning as suggested by the Applicant.
29. In relation to the Applicant's argument about the hospitality landscape changing in Kalgoorlie since the lockdown condition was first imposed, the Commissioner submitted that:
- (a) *Lot 35* operates under a special facility licence with permitted trading from 10 a.m. to midnight on Mondays and Tuesdays and from 10 a.m. to 3 a.m. the following morning, on Wednesday to Saturday;
 - (b) *Sylvester's Night Club Cabaret* operates under a nightclub licence and is permitted to trade from 6 p.m. to midnight and then to 4 a.m. the next morning, other than on a Sunday; and
 - (c) the *Gold Bar Kalgoorlie*, which is subject to a lockdown 90 minutes prior to the close of trading prescribed on the licence, also operates under a nightclub licence, with the same permitted trading as *Sylvester's Night Club Cabaret*.
30. Accordingly, the Commissioner submitted that as there are three premises in addition to *The Exchange Hotel* that can all trade beyond 12 midnight and therefore the hospitality landscape does not appear to have 'substantially changed', a factor that undermines the Applicant's principal assertion for the cancellation of the lockdown condition.
31. More importantly, the Commissioner submitted that despite any "purported change in [the] hospitality landscape since the imposition of the lockdown condition", the level of alcohol-related offending in the locality remains consistently high.
32. In relation to crime incidents that have been recorded as occurring in the locality and at the premises, the Commissioner advised that a search of police databases demonstrated that:

- (a) for the suburb of Kalgoorlie, from 2011 to 2015, the following numbers represent logged police attendances³:
 - (i) 2011: 2,613;
 - (ii) 2012: 2,362;
 - (iii) 2013: 2,300;
 - (iv) 2014: 2,368; and
 - (v) 2015: 2,552;
 - (b) the requirement for police attendances in Kalgoorlie and for police resourcing have remained constant, although there is an increased requirement for police assistance from 10 p.m. to 2 a.m. the following morning on Fridays and Saturdays; which demonstrates that the locality remains vulnerable during those hours that coincide with the Applicant's lock out time;
 - (c) there was a total of 219 police attendances at the licensed premises for the five years from 2011⁴;
 - (d) police attendance figures also demonstrate instances of disturbances or anti-social behaviour increasing from 5 p.m. to 1 a.m., which also correspond with the latter hours of trade when problems are occurring; and
 - (e) the gradual decrease in the requirement for police to attend the licensed premises from 2011 (45 instances) to 2015 (30 instances), which according to the Commissioner, indicates that the lockout condition is working as intended.
33. Further data provided by the Commissioner⁵ sought to demonstrate that the types of offending reported at licensed premises (where non-domestic offences are more prominent) are normally associated with pub fights occurring between patrons and/or bystanders, either inside or outside of licensed premises⁶.
34. The Commissioner also submitted that overall the relevant data demonstrates that the locality of Kalgoorlie has a significantly higher proportion of alcohol related offences per 1000 people (54.2) compared to that of Regional Western Australia (19.2) and the State (9.1). Even after consideration of data for the Metropolitan area (6.2), Kalgoorlie stands out as having a high level of alcohol related harm.
35. In relation to the Applicant's submissions regarding the occasional relaxation of the lockout condition, the Commissioner submitted that:
- (a) patrons attending these events are of a significantly different demographic than the normal local crowd;

³ These offences were further broken down into offences by hour of the day in Table 1 at page 4 of the Commissioner's submissions, dated 25 April 2016.

⁴ As shown in Table 2 of the Commissioner's submissions, dated 25 April 2016.

⁵ As shown in Table 3 of the Commissioner's submissions, dated 25 April 2016.

⁶ NB: The Commissioner also submitted that an analysis of the reported offences established that the lockout condition played no part in any of these pub fight incidents.

- (b) when such events are on in Kalgoorlie, there are significantly more policing resources required and rostered to work, associated with the influx of people into Kalgoorlie; and
 - (c) licensed premises tend to be more proactive in their management because of the increased crowds and the increased police presence.
36. The Commissioner also submitted that the Applicant's evidence and the rationale provided to remove the lockout condition is not compelling and that it is in the public interest to maintain the condition in its entirety.

The objections

Sylvester Pty Ltd

37. Sylvester Pty Ltd ("the licensee objector") confirmed that it operates:
- (a) the *Palace Hotel*, pursuant to a hotel licence, which has two separate bars (with a total capacity of 300 persons) and 80 hotel rooms;
 - (b) *The Gold Bar Kalgoorlie*, pursuant to a nightclub licence (with a total capacity of 484 persons) and three separate bars;
 - (c) *Sylvester's Night Club*, pursuant to a nightclub licence (with a total capacity of 650 persons) and three separate bars; and
 - (d) the unlicensed *Australia Hotel*, which has 30 accommodation rooms.
38. It was also confirmed that the objection proceeded on the following grounds:
- (a) that the grant of the application would not be in the public interest (see s 74(1)(a) of the Act);
 - (b) that if the application were granted, undue offence, annoyance, disturbance or inconvenience would be likely to occur to persons who work in the vicinity (see s 74(1)(g)(i) of the Act); and
 - (c) that if the application were granted the amenity, quiet or good order of the locality in which the premises or proposed premises are situated would in some other way be lessened (see s 74(1)(g)(ii) of the Act.)
39. The licensee objector also contended that removing the lockout condition is likely to negatively impact on persons who seek accommodation at the *Palace Hotel* and the *Australia Hotel* (purchased in 2011), which are both located in the Kalgoorlie CBD and in close proximity to *The Exchange Hotel* and submitted that:

"Since the midnight lockout was imposed at the Exchange Hotel we have had a reduced amount of complaints post midnight. The current lockout at midnight seems to be acceptable to our hotel guests."

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40. In this regard, the objection also referenced the findings of the Liquor Commission in *Trinity Flame Pty Ltd*, supra, regarding the objection of the former owner of the *Australia Hotel* (which at the relevant time was used as student accommodation), in which the Commission accepted that “excessive noise from patrons of *The Exchange Hotel* who smoke outside the hotel, who are ejected from the hotel, or when departing the premises later in the evening create undue offence, annoyance, disturbance and inconvenience for students staying at the *Australia Hotel*”.
41. The licensee objector further submitted that the same situation that related to the previous owners in 2010 applies today and if the lockout condition is cancelled, it is very concerned for its hotel accommodation businesses, as a result of a number of concerns, which included:
- (a) noise associated with patrons of *The Exchange Hotel* congregating outside to smoke cigarettes resulting in disturbances past midnight, which would also be detrimental to the hotel accommodation business, which has been providing accommodation for over 100 years in the Kalgoorlie CBD; and
 - (b) undue offence, disturbance or inconvenience being caused to guests who reside at the *Palace Hotel* and *Australia Hotel*.
42. It was further submitted that there was real concern that the cancellation of the lockout condition would affect the amenity of the location to such an extent that it would cause irreparable damage to the licensee objector’s accommodation businesses and to patrons of the *Palace Hotel* and the *Australia Hotel*:
- “There is no doubt if the lockout is removed, patrons who wish to smoke, or go outside for fresh air will congregate outside the entrance of the venue. This was the case prior to 2010 when the lockout was imposed. It should be note[d] that the Wild West Salon does not have a smoking area. Prior to 2010 this resulted in undue offence, annoyance, disturbance or inconvenience as was stated by objectors particularly Mossiberg Pty Ltd in liquor commission [sic] of Western Australia Case LC 10/2011.”
43. The licensee objector also asserted that the Applicant’s submissions regarding the current hospitality landscape in Kalgoorlie were not factual and omitted relevant information and stated its contrary view that as at February 2016 there were still four late night venues operating in Kalgoorlie, namely:
- (a) *Lot 35*, which operates under a special facility licence with permitted trading until 3 a.m., with a capacity of 320 people and “has been open with entertainment till the early hours of the morning”;
 - (b) *Sylvester’s Night Club Cabaret*, which has in fact not closed, with a capacity of 650 people and is presently open every Sunday night from 8 p.m. to 2 a.m., with bookings for concerts by live bands for Friday/Saturday nights in the following months;

- (c) the *Gold Bar Kalgoorlie*, which has a patron capacity of 484 people and can trade until 4 a.m. on Monday to Saturday and 2 a.m. on a Sunday, with four different areas and three bars; and
 - (d) *The Exchange Hotel*, which has an extended trading permit.
44. Furthermore, while accepting that a patron queue does form outside of the *Gold Bar Kalgoorlie*, the licensee objector submitted that this results from the use of ID system scanners, which photograph every person going into the premises and therefore takes time to process.
45. The licensee objector also submitted that the Diggers and Dealers event attracts a business seminar crowd who are unlikely to be involved in any antisocial behaviour because of their status in relation to their employment and that “Diggers and Dealers is not relevant to a normal night.”

Mr Paul Browning

46. Mr Browning, who operates a business and works in the vicinity of the licensed premises, objected on the grounds that:
- (a) the grant of the application would not be in the public interest;
 - (b) if the application were granted, undue offence, annoyance, disturbance or inconvenience would be likely to occur to persons who work in the vicinity;
 - (c) if the application were granted the amenity, quiet or good order of the locality in which the premises or proposed premises are situated would in some other way be lessened; and
 - (d) the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor (see s 74(1)(b) of the Act).
47. In support of the grounds of objection, Mr Browning submitted that it was disingenuous for the Applicant to claim that things are much better than they were in 2010 and that the reason things are presently better in the locality is due to the lockout restriction.
48. Mr Browning further submitted that:
- “We endured years of smashed windows, resorting to 6mm laminated glass which they still managed to damage, windows and/or entry doors covered in vomit, excrement and other filth, cars damaged in the street, etc, until these restrictions were imposed.
- We know what happens without these restrictions and it is not rocket science to be able to foresee what will happen again.”

Determination

49. For the benefit of the parties, before proceeding to my determination, I will briefly state the statutory obligations imposed on the licensing authority when determining whether

an application is 'in the public interest', as required under the Act. In relation to this particular application, as I have previously noted, the Director has already determined that the Applicant must satisfy the licensing authority that the grant of this application is in the public interest (refer ss 38(1)(c) and 38(2) of the Act) and the Applicant was informed of this fact on 1 December 2015, when instructed to lodge a PIA.

50. The power of the licensing authority to grant applications 'in the public interest' is found in ss 33 and 38(2) of the Act. In this regard, s 33 of the Act provides an absolute discretion to grant or refuse an application on any ground or for any reason considered to be in the public interest, provided that applications are dealt with on their own merits (refer Western Australian Supreme Court decisions in *Woolworths v Director of Liquor Licensing* [2012] WASC 384 and *Palace Securities v Director of Liquor Licensing* (1992) 7 WAR).
51. Therefore, when determining whether the grant of an application is 'in the public interest', I am required to exercise a discretionary value judgment confined only by the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210; *Palace Securities Pty Ltd v Director of Liquor Licensing* [1992] 7 WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175), which can be ascertained from the objects of the Act.
52. Accordingly, the factual matters that I am bound to take into account when determining whether the grant of an application is 'in the public interest' are those relevant to the primary and secondary objects of the Act as set out in s 5. The primary objects of the Act, as set out in s 5(1) are:
 - (a) to regulate the sale, supply and consumption of liquor (s 5(1)(a));
 - (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor (s 5 (1)(b)); and
 - (c) to cater for the requirements of consumers for liquor and related services, with regard to the proper development of, relevantly, the liquor industry in the State (s 5(1)(c)).
53. The secondary objects of the Act are:
 - (a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State;
 - (b) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - (c) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.

54. Accordingly, advancing the objects of the Act is always a relevant public interest consideration and one that the licensing authority must take into consideration when determining applications. Additionally, without confining the scope or meaning of the public interest in s 38(2) of the Act, s 38(4) further prescribes a number of discretionary factors that may also be taken into consideration in such a determination.

55. Furthermore, in considering the public interest, the licensing authority needs to consider both the positive and negative social, economic and health impacts that the grant of the application will have on the community (refer section 19 of the *Interpretation Act 1994* and *Parliamentary Debates*, WA Parliament, Vol 409, p 6342). In *Harold Thomas James Blakely v Director of Liquor Licensing* [LC 44/2010]), the Liquor Commission also observed that:

“The private interests of an applicant should not be confused with the public interest. Such an approach would not be consistent with the Act or the objects of the Act (refer s 5 which includes minimizing alcohol-related harm and having regard to the proper development of the liquor industry).”

56. While the rules of evidence do not apply to proceedings before the licensing authority (refer section 16(7) of the Act), decisions of the authority must be made on the balance of probabilities and be based on the evidence before it. Furthermore, notwithstanding that s 5(2)(e) of the Act requires the licensing authority to provide as little formality or technicality as may be practicable, the evidence of the parties needs to be relevant, reliable and logically probative to assist the authority to assess the probability of the existence of the facts asserted in each case (refer Liquor Commission of Western Australia decision in *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17 of 2010)).

57. In considering the application, I note that the licensing authority, regardless of whether constituted by the Director or Commission, has a long established view that it is not sufficient for an applicant to merely express opinions and make assertions about the perceived benefits of an application.

58. As a starting point, while I accept some of the Applicant's evidence, particularly its submissions that some of its patrons are sometimes inconvenienced by the lockdown condition when they (or their friends) arrive late into town or when they choose to leave *The Exchange Hotel* because they:

- (a) want fresh air;
- (b) have to make or answer a phone call;
- (c) want to smoke a cigarette; or
- (d) have to walk their friend to the taxi rank,

I consider this evidence to be significantly diminished by the fact that the lockdown condition has been operational at the licensed premises since 2010 and, as asserted by the Commissioner's representations and demonstrated by the Applicant's consumer evidence, is well known to the Applicant's patrons.

59. However, I am not persuaded by the Applicant's evidence about the supposed "substantial" change to the hospitality landscape in Kalgoorlie. In my view, the evidence clearly establishes that, despite fluctuations in the local liquor market which may result in a particular licensee sometimes electing not to trade its full scope of permitted trading hours, there are still four functional licensed premises that are able to trade beyond midnight in the locality to meet the requirements of the public for post-midnight trade. Accordingly, I concur with the observations of the Commissioner and licensee objector and I consider that this finding undermines one of the Applicant's major contentions for the cancellation of the lockout condition.
60. Furthermore, while the Applicant has produced evidence to support its questioning of the efficacy of lockouts and its assertion that they have a detrimental impact on licensed premises, I note that lockouts have been used in most jurisdictions throughout Australia for many years, albeit with varying degrees of success. In Western Australia, lockouts have been imposed by the licensing authority (i.e. both the Director and Liquor Commission) on a number of premises, normally as part of an approval for post midnight trading under an extended trading permit, primarily as a result of the strong correlation between extended trading hours, high density of licensed premises and alcohol-related harm; factors which are all present in the current application.
61. I also consider that the evidence of the Commissioner directly connects the lockout condition to the circumstances of the locality surrounding the premises, with the importance of such evidence observed by Bell J in *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207, where His Honour noted that:
- "...by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and admissible, for it may, depending on the circumstances, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the 'particular local, social, demographic and geographic circumstances' of the given case. Any other approach to the consideration of such evidence would defeat the statutory objects."
62. Such relevant evidence establishes that:
- (a) the locality of Kalgoorlie has a significantly higher proportion of alcohol related offences per 1000 people (54.2) compared to that of Regional Western Australia (19.2) and the State (9.1);
 - (b) Kalgoorlie stands out above comparative figures for other areas, including the Metropolitan Area (6.2), as having a high level of alcohol related harm; and
 - (c) the locality remains vulnerable to alcohol related harm and antisocial behaviour during the trading hours under the Applicant's extended trading permit and lockout time.

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63. I therefore accept the Commissioner's representation that the gradual decrease in the requirement for police to attend the licensed premises from 2011 to 2015 is clear evidence that the lockout condition is in fact working as intended.
64. Accordingly, I find that the evidence presented by the Commissioner is not only reliable, relevant and specific to the locality, but also clearly depicts the environment in which the premises and the extended trading permit operate and I concur with the Commissioner that alcohol-related harm and ill-health is already apparent in Kalgoorlie.
65. I have also considered the Applicant's vast array of consumer evidence in light of the observations of the Liquor Commission in *Commissioner of Police v Champagne Alley Pty Ltd* [LC08/2015], where the Commission concluded that the test of whether an application is in the public interest does not necessarily depend upon a consideration of the number of respondents to a survey (although recognising this would be an important consideration), but noted that the more important consideration relates to the relevance, substance and probative value of the supporting evidence.
66. In this regard, I note that the majority of respondents to the Applicant's intercept survey stated that they were either not inconvenienced by the lockout condition or otherwise found the lockout condition as being "not applicable" to their individual circumstances.
67. Furthermore, in relation to the on-premises questionnaire, I have noted that many respondents indicated that they would like to be able to enter or re-enter *The Exchange Hotel* after midnight, without providing any logically probative reason as to why, even though the questionnaire specifically sought this information. However, based on those responses given, I consider the following responses to be fairly representational:
- (a) the respondents were smokers who leave the premises to smoke and then are unable to re-enter;
 - (b) the respondents were shift workers who are sometimes disadvantaged by the lockout condition, depending upon when their shift ends;
 - (c) the respondents were persons coming into town after attending private parties or other similar functions, who are sometimes unable to enter *The Exchange Hotel* after arriving in town post midnight; and
 - (d) the respondents indicated that they want "to enjoy it [The Exchange Hotel] longer"; "to be with my mates longer" or "to meet more people."
68. Furthermore, given the amount of consumer evidence lodged by the Applicant, I consider that the value of the Applicant's consumer evidence is diminished by the ill-informed or unhelpful comments of some respondents, as typified by the evidence of Ricky Farrell that:
- (a) the *Gold Bar Kalgoorlie* has "too many gay people"; or

- (b) the lockout condition is “fucked”; or
 - (c) consumers would like to enter or reenter *The Exchange Hotel*, because “that’s the shit”; and
 - (d) have not otherwise been properly completed or signed by the respondent.
69. In *Springbok Foods Pty Ltd v Director of Liquor Licensing and Others* [LC26/2014], the Commission observed that questions in witness petitions about the public interest and minimising harm or ill-health have limited value when there is no evidence that the petitioners were aware of the importance of these terms, within the context of the Act. Similarly, I have previously advised the Applicant in my decision of 28 March 2014, that I did not consider members of the public to be well versed to comment on complex harm minimisation issues, such as the imposition of a lockout condition. In the current application, I have likewise noted that there is nothing in the Applicant’s evidence to suggest that survey respondents were given any relevant information on what might constitute the public interest and/or harm minimisation concerns *in the context of the Act* [emphasis added]; which is another reason why I consider the Applicant’s consumer evidence to be of little value.
70. Furthermore, also in relation to the Applicant’s on-premises survey, I have also noted that in *Paul Jacobus Van Den Berg and Una Van Den Berg v Commissioner of Police & Others* [LC 10/2016] the Liquor Commission concluded that while it is understandable and not unexpected that customers would express support for an expansion of liquor services, the Applicant must demonstrate the grant of the application is in the public interest, not simply that it may satisfy their customers’ needs or preferences⁷.
71. Finally, contrary to the claims of the Applicant that it had “canvassed widely *amongst people who have a requirement for post-midnight hospitality services in the locality* [emphasis added]”, I have noted that the evidence associated with its off-premises questionnaire revealed that some consumers were unaware of the lockout condition, chiefly because they did not have any requirement for post-midnight hospitality services in the locality.
72. The sale and supply of liquor in Western Australia is regulated by the Act, which establishes a system of licence categorisation, complete with prescribed trading hours for different licence types, to meet the requirements of consumers for liquor and related services. Therefore, by its very nature, such regulation will invariably impact on the ability of consumers to access licensed premises or liquor sales. Accordingly, while the views of consumers are important, it is not the views of individuals who are sometimes inconvenienced by trading hours or the lockout condition (or any other condition of a liquor licence) that should prevail, but rather the public interest. When read together, ss 5 and 38 of the Act recognise that the sale, supply and consumption of liquor should be undertaken in a manner that positively contributes to the amenity of community life and encourages a culture of the responsible consumption of alcohol.

⁷ While this determination related to an application for the grant of a liquor store licence and not an application for variation of licence conditions, the principle is nonetheless relevant to the evidence lodged in support of the present application.

It therefore follows that the notion of harm minimisation is not simply one of limiting the supply of alcohol, but rather is more concerned with regulating the sale and supply of alcohol so as to ensure, as far as practicable, a net community benefit (see *Kordister Pty Ltd v Director of Liquor Licensing & Anor* [2012] VSCA 325 (19 December 2012)).

73. In my view, the evidence of the Commissioner and the objectors establish that there is a community benefit associated with the lockout condition, which should be continued.
74. In arriving at this view, I have particularly noted the Applicant's submissions:
 - (a) regarding changes to Paddy's Ale House and its management of the licensed premises; and
 - (b) that consumers in Kalgoorlie are looking for a choice of venues after midnight, not just the one nightclub and that both the *Gold Bar Kalgoorlie* and *The Exchange Hotel* are good venues for different reasons.
75. Accordingly, I consider that this is really the crux of the application and that the Applicant is seeking the cancellation of the lockout condition, not in connection with catering to the requirements of patrons who are already present on the licensed premises at midnight, but rather so that it can compete with the *Gold Bar Kalgoorlie* in the post midnight trade and allow new patrons to enter and remain on the licensed premises or to leave and return to the licensed premises between the hours of midnight and 1 a.m. or 2 a.m., depending on the day.
76. Contrary to the submissions of the Applicant, I think it is reasonable to conclude, on the evidence and on the balance of probabilities, that the cancellation of the lockout condition will not reduce people movement on the street after midnight. By its own evidence, the Applicant acknowledges that patrons leave the licensed premises for many reasons, including wanting fresh air, having to make or receive a phone call and wanting a cigarette, despite in most cases, the patron's prior knowledge that the lockout condition will prohibit their re-entry.
77. Additionally, I consider that it is likely that patrons will move between the *Gold Bar Kalgoorlie* and *The Exchange Hotel* and any other licensed premises operating beyond midnight, as evidenced in the off-premises witness questionnaire completed by Nicole Munro, who gave evidence that she would like to be able to leave *The Exchange Hotel* and go to the *Gold Bar Kalgoorlie*, to enjoy its happy hour promotions and then return to *The Exchange Hotel*.
78. These scenarios will effectively mean that the situation will revert to how it was prior to the imposition of the lockout condition, where the operation of the extended trading permit had a negative impact on the local community. As such, I consider that the grounds of objection by both objectors have been made out.
79. The private business interest of the Applicant in wanting to compete in the post midnight trade against the *Gold Bar Kalgoorlie* or other licensed premises does not equate to the public interest.

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80. In this regard, it is an undeniable fact that the Applicant holds a hotel licence, with prescribed trading hours in s 98 of the Act that cease at midnight on every day of the week, whereas the *Gold Bar Kalgoorlie* operates pursuant to a nightclub licence, with trading hours specified in s 98A of the Act; which provide for trade through to 5 a.m. on Monday to Friday and to midnight on Sunday nights. Therefore, notwithstanding the grant of the extended trading permit, the Applicant cannot realistically expect to be able to compete against the *Gold Bar Kalgoorlie* on equal terms.
81. Similarly, while I have also noted that much of the Applicant's submissions deal with its "excellent track record" in its management of the premises and the implication that it should somehow be rewarded for this, I would remind the Applicant that it is the expectation that every licensed premises it is well managed in accordance with the Act and the Director's policies. Furthermore, whilst a particular licensee's track record may be relevant in some circumstances, it cannot of itself justify the grant of an application in the public interest.
82. Also, while I note that the Applicant has sought to rely upon a number of one-off variations to the lockout condition (which were approved in each case by the licensing authority in connection with special events in Kalgoorlie) as a means of furthering its case for cancellation of the lockout condition, I consider that those applications are not synonymous with the current application, which does not seek to vary the lockout condition, but to cancel it.
83. Furthermore, in my decision of 28 March 2014, in which I granted the Applicant the current extended trading permit, I had already advised the Applicant that its submissions regarding the temporary variations of the lockout condition did not relate to its normal day to day trade under the licence and nothing in the Applicant's evidence in relation to the present application have persuaded me differently.
84. At the time of granting the current permit to the Applicant, I accepted that the imposition of a lock out condition on the extended trading permit was appropriate, would assist in the minimisation of alcohol-related harm in Kalgoorlie-Boulder and should form part of an appropriately conditioned extended trading permit. At that time, I also advised that Applicant that, in my view, the variation of the lock out condition may increase the risk of existing levels of alcohol-related harm in Kalgoorlie-Boulder to a level that would be unacceptable; which lead me to conclude that "the grant of a permit *would only be in the public interest and justified if the current lockout condition is reimposed in connection with post midnight trading* [emphasis added]" and that in my view, "the imposition of the lock out condition, in its current form, best serves the advancement of the interest or welfare of the public of Kalgoorlie-Boulder."
85. The Applicant appears to have missed the point that I would not have granted the current extended trading permit without the lockout condition and has therefore neglected to offer any strategies to mitigate the potential risk of disorder, disturbance, amenity or other alcohol-related harm that will likely result should the current application be successful.

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86. In relation to the variation of the security condition, I note that the only evidence presented by the Applicant was "that it has shown over an extended period of time that it is an excellent manager of a licensed premises in Kalgoorlie, and has used approved managers to perform crowd control functions very successfully for some time." While noting that this part of the application was not contested, I fail to appreciate how the Applicant's submissions in respect of this matter can be seen to be a justification, in the public interest, as to why the condition should be varied.
87. Accordingly, the application is refused.
88. Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
89. This matter has been determined by me under delegation pursuant to s 15 of the Act.



Brett Snell
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING