

DECISION OF THE DIRECTOR OF LIQUOR LICENSING

APPLICANT: BB Investments (WA) Pty Ltd
(Represented by Hospitality Total Services (Aus) Pty Ltd)

INTERVENOR: Chief Health Officer

PREMISES: *Benny's Bar & Cafe*
10-12 South Terrace, Fremantle

LICENCE NO.: 6360006841

APPLICATION NO.: A525974081

NATURE OF MATTER: **REASONS FOR DECISION**

DECISION OF: Brett Snell, Deputy Director Liquor Control and Arbitration

DATE OF DETERMINATION: 20 August 2021

Background

1. On 7 January 2021, an application was made by BB Investments (WA) Pty Ltd (Applicant) for the variation of special facility licence number 6360006841 (licence), issued in respect of licensed premises known as *Benny's Bar & Café* and situated at 10-12 South Terrace, Fremantle (premises).
2. The application was made pursuant to the provisions of s 64 of the *Liquor Control Act 1988* (Act) and sought to vary the specified trading hours on the licence to authorise trading until 2 a.m. on Friday and Saturday nights.
3. The application was advertised in accordance with instructions issued by the Director of Liquor Licensing (Director), which resulted in the lodgement of a notice of intervention by the Chief Health Officer (Intervenor), pursuant to s 69 of the Act. Additionally, pursuant to ss 38(1)(c) and 38(2) of the Act, the Applicant was required to demonstrate that the grant of the application was in the public interest.
4. On 3 June 2021, under delegation pursuant to s 15 of the Act, I refused the application on the grounds that the Applicant had failed to discharge its onus under s 38(2) of the Act and issued a notice of decision to that effect, pursuant to s18AA of the Act.
5. The Applicant has requested written reasons for my decision, pursuant to s 18AA(3) of the Act. These are those reasons.
6. All the evidence tendered by the parties was considered in the determination of the application and the fact that a piece of evidence has not been specifically referenced in these written reasons does not mean that it was not considered.

The Application

7. The notice of application was accompanied by a *Public Interest Assessment* (PIA), which sought to address the provisions of s 38(2) of the Act and advance the application on a number of grounds, including:

Benny's Bar & Cafe

- (a) providing an alternative, late night licensed premises in the Fremantle Entertainment Precinct after 1 a.m.;
 - (b) diversifying the late-night offering in Fremantle, consistent with the requirements of consumers, as evidenced by the results of a Consumer Questionnaire, together with a number of letters of support;
 - (c) meeting the expectations of tourism visitors, who are accustomed to late night venues available across the state, interstate and internationally;
 - (d) aiding the development of the liquor, hospitality and tourism industry, by offering a safe dining and entertainment premises that is not a nightclub, until 2 a.m. on Friday and Saturday nights; and
 - (e) staggering the leaving of patrons from licensed premises in the Fremantle Entertainment Precinct, thereby making it easier for consumers to access ride share services and public transport.
8. Acknowledging that there are potential risks associated with late night trading, the Applicant also proposed some harm minimisation initiatives to address these risks, such as a lockout at 1 a.m. and the availability of food.
9. The locality for the purposes of s 38 of the Act was a two-kilometre radius of the premises, which encompassed Fremantle, South Fremantle and parts of North Fremantle, Beaconsfield, White Gum Valley and East Fremantle.
10. The Applicant also submitted that the locality included the area of Fremantle colloquially known as the 'cappuccino strip', which has been deemed by Tourism WA as a recognised 'Entertainment Precinct' and that that Fremantle is well-known as a popular tourism destination, listing many of the tourism amenities that attract visitors to Fremantle.
11. A consumer requirement for late-night trading at the premises until 2 a.m. on Friday and Saturday nights was identified by the Applicant, based on the results of 228 Consumer Questionnaires, together with a number of letters of support. The Consumer Questionnaire asked respondents the following relevant questions:
- (a) Whether they worked in, lived in or visited the Fremantle Entertainment Precinct?
 - (b) What were the main features they looked for in a licensed premises operating after 1 a.m. on Friday and Saturday evening in Fremantle?
 - (c) What other aspects appealed to them when looking for a licensed premises operating after 1 a.m. on Friday and Saturday evenings?
 - (d) Whether they supported the application to trade until 2 a.m. on Friday and Saturday nights in the public interest?
 - (e) Respondents who answered 'Yes' to the previous question, were also asked to provide reasons why they supported the application.

Benny's Bar & Cafe

12. Accordingly, the Applicant submitted that the Consumer Questionnaire responses show strong support for the application. Additionally, the Applicant also submitted that it was important to note that almost 85% of the questionnaire respondents were over the age of 25 and are therefore not considered to be 'young' or 'at-risk' patrons.
13. The Applicant also undertook patron counts on Friday and Saturday nights over a period of two weeks to establish what time patrons were leaving the premises. According to the Applicant, the patron count established that a number of patrons departed the premises before closing time to gain entry into another licensed premises that was open later than 12 midnight and that these alternative premises were often located in the Perth CBD or Northbridge and had higher cover charges (entry fee) after 12 midnight.
14. Accordingly, the Applicant submitted that *Benny's*, trading until 2 a.m. on Friday and Saturday nights would have the ability to provide a complementary, entertainment, food and beverage amenity in the Fremantle City Centre, and cater to those resorting to Fremantle to visit any one of the tourist attractions.
15. Further, the Applicant also submitted that the ability to remain longer at a reputable licensed premises, such as *Benny's*, would permit more consumers to stay longer in Fremantle and provide an economic benefit to the hospitality, tourism and liquor industry in the locality.

The Intervention

16. The intervention by the Chief Health Officer (Intervenor) introduced evidence and made representations in relation to the harm or ill-health caused to people, or any group of people, due to the use of liquor in Fremantle, and the minimisation of that harm or ill-health.
17. The harm data relied upon by the Intervenor is set out in the notice of intervention and need not be repeated in detail here. Briefly, the Intervenor submitted that there is potential for the present application to contribute to increased levels of harm by providing additional drinking time, at a high-risk time for alcohol-related harm, in an entertainment precinct that already experiences alcohol-related harm.
18. Evidence in support of this position included:
 - (a) that alcohol-related hospitalisations for the Fremantle Statistical Area (SA2) show that both short term (resulting in acute problems, such as violence and injury) and long term (resulting in chronic disease) conditions caused by harmful drinking patterns are occurring;
 - (b) Department of Health data for the period of 2015-2019 established that:
 - (i) the total alcohol-related hospitalisations for all residents of Fremantle SA2 were significantly higher (1.5 times) than the corresponding State rate;
 - (ii) alcohol-related hospitalisation for all persons were consistently significantly higher than the State; and
 - (iii) the following specific alcohol-related conditions were significantly higher in Fremantle SA2 residents than the State rate for all persons:

Benny's Bar & Cafe

- (1) alcoholic liver disease (2.5 times);
- (2) alcoholic mental and neurological disorders (2.8 times);
- (3) self-inflicted injuries (2.3 times);
- (4) falls (1.2 times); and
- (5) poisoning (1.8 times).

19. In conclusion, the Intervenor submitted that not only has the grant of the application have the potential to increase levels of harm and ill-health, but to also reduce the current protective factor that exists in Fremantle regarding a limited number of venues trading past 1 a.m.

Determination

20. As already noted, the Applicant bears the onus of demonstrating that the grant of the application is in the public interest. That onus cannot be discharged by mere assertion and any assertion or opinion must be supported by an appropriate level of evidence.¹

21. In determining whether the Applicant has discharged that onus, I must have regard to the primary objects in s 5(1) and the secondary objects in s 5(2). The primary objects of the Act are:

- (a) to regulate the sale, supply and consumption of liquor; and
- (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
- (c) to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

22. Section 38(4) of the Act also prescribes a number of criteria to which regard may be had when considering whether the granting of an application is in the public interest, including the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor.

23. In *Woolworths v Director of Liquor Licensing*², the Court of Appeal provided guidance as to how the licensing authority should discharge its role of determining whether an application is in the public interest. The Court held that, in determining whether an application is in the public interest, the authority:

- (a) is obliged to evaluate the evidence, make findings and draw conclusions from the evidence;
- (b) is bound to have regard to the factual matters (the evidence, factual findings and conclusions reached) relevant to the objects of the Act as set out in s 5; and
- (c) may have regard to factual matters (the evidence, factual findings and conclusions reached) relevant to the matters set out in s 38(4).

¹ Refer *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC 16/2015)

² [2013] WASCA 227

Benny's Bar & Cafe

24. In ***Executive Director of Health v Lily Creek International Pty Ltd***³, Ipp J found it significant that the primary object in s 5(1)(b) is to 'minimise' harm or ill-health, not to prevent harm or ill-health absolutely and observed that the word 'minimise' is consistent with the need to weigh and balance all relevant considerations.
25. Further guidance was also provided by Allanson J in ***Carnegies Reality Pty Ltd v Director of Liquor Licensing***⁴, where His Honour outlined a four-step process to be applied by the licensing authority when addressing questions about alcohol related harm and ill-health.
26. As a starting point, both the Applicant and the Intervenor acknowledged that there is existing alcohol-related harm in the locality, evident through alcohol-related hospitalisations for Fremantle SA2 residents being consistently higher than the corresponding State rate.
27. After reviewing the evidence, I accepted that the premises provides an attractive late-night venue for consumers and meets the requirement of object 5(1)(c). However, when determining whether granting the present application is in the public interest, it is necessary for me to consider the existing level of harm or ill-health due to the use of liquor in the locality, pursuant to ss 5(1)(b) and 38(4)(a) of the Act and to follow the steps outlined in ***Carnegies***.
28. In this regard, the evidence before me includes the alcohol-related hospitalisation data provided by the Intervenor, which covers the Fremantle Statistical Area 2 (SA2) for the years 2015-2019, which show that the total alcohol-related hospitalisation rates for all residents of Fremantle SA2 were significantly higher (1.5 times) than the corresponding State rate and that alcohol-related hospitalisations for all residents of Fremantle SA2 were consistently higher than the State rate for every year between 2015 and 2019.
29. The statistics also showed that there were five specific alcohol-related conditions that were specifically higher in the Fremantle SA2 than the State rate for all persons, namely:
 - (a) alcoholic liver disease (2.5 times);
 - (b) alcoholic mental and neurological disorders (2.8 times);
 - (c) self-inflicted injuries (2.3 times);
 - (d) falls (1.2 times); and
 - (e) poisoning (1.8 times).
30. Accordingly, I find that there is a high level of existing harm and ill-health in the locality of the proposed premises due to the use of liquor.
31. I am also required to determine whether the grant of the application is reasonably likely to result in increased harm or ill-health to people, or any group of people, in the locality due to the use of alcohol.

³ [2000] WASCA 258; (2000) 22 WAR 510 (***Lily Creek***)

⁴ [2015] WASC 208 (***Carnegies***)

Benny's Bar & Cafe

32. In the context of the Applicant's submissions that 'almost 85% of the questionnaire respondents are over the age of 25, and therefore the majority of respondents are not considered 'young' or 'at-risk' patrons', I noted the Intervenor's submissions that it is not just young people that are at risk of alcohol-related harm and that the *2019 National Drug Strategy Household Survey* found that persons in the 25-29 year age group were more likely than any other age group to have consumed alcohol at-risk of harm on a single drinking occasion at some time in the previous year. The survey demonstrated over two in five (41.5%) persons aged 25-29 years reported consumption that placed them at-risk of injury on a single drinking occasion.
33. Additionally, as can be seen in the following Table (which shows the proportion of the population aged 18 years and over at-risk of injury on a single occasion of drinking, by age, Western Australia 2019) the 18-24 age group had a lower proportion of the population at-risk of harm in the short term than the 25-29 cohort, with 39.6% of this age group in Western Australia at risk of single occasion harm:

Age	Percentage
18-24	39.6
25-29	41.5
30-39	30.9
40-49	28.4
50-59	30.5
60+	13.5
Total 18+	27.4

34. Further:
- (a) almost one in three (30.9%) of those aged 30-39 and more than one in four (28.4%) aged 40-49 also reported drinking at-risk of injury on a single occasion of drinking; and
 - (b) all groups aged between 18 to 59 years drink at-risk of harm over the State rate.
35. Therefore, the Intervenor submitted that 'patrons attending at Benny's Bar may already drink at-risk of harm, which is of concern, given research shows that late night trading can lead to increased alcohol consumption and related harm' and also noted that an environment that is supportive of long drinking sessions increases the risk of harm to individuals and others.
36. As discussed earlier, the Applicant proposes to extend trade from 1 a.m. on Friday and Saturday nights, to 2 a.m. the following mornings. Therefore, in my view, the likely degree of harm to result from the grant of the application would arise from:
- (a) an increase in the availability of liquor in the locality at a 'high-risk' time for alcohol-related harm and ill-health;⁵
 - (b) alcohol being classified as a 'depressant' drug, which slows down the central nervous system;

⁵ This time is 'high-risk' because patrons making use of late-night trading hours are already likely to have been drinking for a number of hours (either in private or licensed settings)

Benny's Bar & Cafe

- (c) consumption of alcohol over a number of hours can raise the Blood Alcohol Concentration of a person to levels that affect cognitive function, such as rational thought, decision-making and the ability to respond appropriately to circumstances; and
 - (d) a reduced cognitive capacity to limit the amount of alcohol consumed, excessive consumption is more likely to occur, which increases the risk of harm.
37. Additionally, I note and concur with the representations of the Intervenor that existing extended trading in the locality (other than nightclubs) has not extended beyond 1 a.m. as a harm minimisation initiative, given the characteristics of the locality as an area that experiences high levels of alcohol-related harm.
38. I also accept and recognise that there is a substantial body of evidence outlined in the notice of intervention which establishes that late night trading is associated with increased harm or ill-health, both to consumers of alcohol and others impacted by alcohol use.
39. In this regard, it was submitted by the Intervenor that the increased accessibility of alcohol may impact on drinking behaviours, such as frequency and volume of consumption, with harm, safety and wellbeing implications and I find those submissions persuasive, particularly where a Western Australian Road Safety report on drink-driving offences and place of last drink showed that licensed premises accounted for most drink-driving offences from 10 p.m. to around 4 a.m.
40. The Intervenor also referenced research that indicates an additional one hour of trade can result in a 16% increase in violent crime. In the present case, I accept that limiting late night trading is a protective factor for harm. I therefore accept that the research cited by the Intervenor establishes that extended late night trading hours are associated with increased consumption of alcohol and alcohol-related harms.
41. In my view, the risk of harm includes contributing to alcohol-related harm, not only inside a venue, but once patrons leave, with short-term consequences including:
- (a) impaired thinking;
 - (b) decreased coordination;
 - (c) involvement in risk-taking behaviour resulting in injury, trauma or death; and
 - (d) involvement in anti-social behaviour, such as physical or verbal abuse, violence and vandalism.
42. Therefore, having regard to all the evidence before me, I find that the grant of the application would reasonably result in an increase in alcohol-related ill-health and harm in the locality and that the increase in the level of harm would arise by virtue of the proposed extended trading to 2 a.m.
43. Further, the hospitalisation rates reveal that there is already a high level of alcohol-related harm and ill-health in the locality. It is against those statistics that the significance of the research cited by the Intervenor becomes particularly relevant, particularly where they indicate that the harms associated with extended trading in high-risk hours can also occur

Benny's Bar & Cafe

away from the licensed premises, and at a later time and place, irrespective of a licensee's ability to maintain and adhere to regulatory requirements at the point of sale.

44. The onus is on the Applicant to demonstrate that the grant of the application is in the public interest. The task before me is to balance the objectives of the Act set out in ss 5(1) and 5(2) and determine if the Applicant has discharged that onus.
45. Therefore, in balancing the relevant factors, it is important to consider whether the Applicant has demonstrated a sufficient demand for the provision of trading until 2 a.m. at the proposed premises and I have some concerns about whether the evidence presented by the Applicant persuasively establishes that there is a demand for the proposed extended hours.
46. In my view, the nature of Question 4 of the Consumer Questionnaire, which asked respondents whether they supported the application 'in the public interest' is of limited value as there is no evidence that the respondents were aware of the importance of this term in the context of the Act.
47. Moreover, I consider that a web-based Consumer Questionnaire, which does not establish whether the respondents:
 - (a) are actually customers of the premises and if so, whether they patronise the premises during the current post-midnight trading hours; or
 - (b) visit or remain in Fremantle after midnight,
 is of limited evidentiary value in establishing a consumer requirement for the additional trading hours sought by the Applicant on Friday and Saturday nights.
48. Further, the licensing authority has stated, on numerous occasions, that 'Irrespective of the number of questionnaires or number of signatures (to say) a petition or survey, it is the probative value of this evidence that is the issue not the numbers. Among other things this will depend on how the questionnaires were framed, by whom collected and collated, whether there was any culling of opposing views and how they were obtained. In ***Woolworths Ltd v Commissioner of Police*** (LC12/2013) the Commission observed that: Historically, the Commission has tended to treat petitions with some caution...'⁶
49. Accordingly, for the reasons outlined above, I have also decided to treat the Applicant's Customer Questionnaire with caution.
50. Further, I do not agree with the Applicant's interpretation of the patron count. In my view, the patron count, as illustrated below, generally shows the number of patrons increasing in the premises from 10 p.m. to midnight, with a decline of ten patrons between midnight and 1 a.m. on 27 November 2020 and only two patrons on 4 December 2020.

PATRON COUNTS				
Date	10.00pm	11.00 pm	Midnight	1.00 am
Friday 27 November 2020	178	195	220	210
Saturday 28 November 2020	188	220	220	220
Friday 4 December 2020	162	201	220	198
Saturday 5 December 2020	205	220	220	220

⁶ Refer ***Upper Reach Pty Ltd v Director of Liquor Licensing and Another*** (LC 29/2014)

Benny's Bar & Cafe

51. Further, I concur with the observations of the Intervenor that it is unclear how the Applicant concluded that patrons were departing the premises before closing time to gain entry into another licensed premises that was open later than 12 midnight, from merely conducting a patron count, particularly given that the Consumer Questionnaire did not specifically ask patrons why they left the premises.
52. I also noted that the Applicant's assertion about extended trading from 1 a.m. to 2 a.m. catering to the expectations of tourists was unsubstantiated by any evidence and find it difficult to quantify the extent of patronage expected to be tourists from the material supplied by the Applicant.
53. Further, I do not agree with the Applicant's assertion that there is limited licensed hospitality services available after midnight in the locality, given that:
 - (a) the premises itself trades to 1 a.m. on Thursday, Friday and Saturday nights;
 - (b) there are six extended trading permits authorising trade to 1 a.m. (*Bar Orient, The Federal Boutique Hotel, Sail & Anchor Tavern, Ronnie Nights, Newport Hotel and The National Hotel*); and
 - (c) three nightclub licences (*189, Hugos Club and Metropolis Fremantle*), already operating in the locality and providing for post-midnight trading.
54. Given the above, I also find it difficult to accept the Applicant's assertion that a 2 a.m. closing time would have any appreciable effect on the staggering of patrons leaving the Fremantle Entertainment Precinct, which I consider is already achieved by way of post-midnight trading at the above premises, which staggers the number of patrons leaving hotels and taverns at midnight (i.e., when hotels and taverns are generally required to close in accordance with s 98 of the Act).
55. In relation to the Applicant's assertion that the ability of consumers to remain longer at the premises would permit more consumers to stay longer in Fremantle and provide an economic benefit to the hospitality, tourism and liquor industry in the locality, I consider, similar to the observations of the Liquor Commission in ***Carnegies Reality Pty Ltd v Commissioner of Police and Others***⁷, there is a likelihood that the granting of the application would result in a redistribution of patrons from other licensed premises in the locality to the Applicant's premises instead, which would essentially provide an economic benefit to the Applicant, rather than to the greater hospitality, tourism and liquor industries in the locality.
56. In my view, the consumer benefits associated with the application were marginal and insufficient to outweigh the public interest in minimising the risk of increased alcohol-related ill-health and harm if approval was granted to trade to 2 a.m. in the locality. Therefore, when I weighed and balanced all of the competing factors, I was not satisfied that the Applicant had discharged its onus of establishing that the grant of extended trading at the premises to 2 a.m. on Friday and Saturday nights was in the public interest.
57. Further, the decision of the Liquor Commission in LC28/2015 also made the following relevant observations:

Benny's Bar & Cafe

- (a) the possibility of extending trading at the Applicant's premises beyond the trading hours available at other similar venues in Fremantle (i.e., beyond 1 a.m.) leading to problems with patrons migrating from other like premises, both before and after 1 a.m., even if lockout provisions were imposed; and
 - (b) there was a very real risk that extended trading to 2 a.m. may result in an unacceptable escalation of harm and ill-health issues due to the fact that the Applicant's premises would be the only hotel/tavern trading to this time, a time which has clearly been shown to present a higher likelihood of harm. Further, whilst lockout provisions may mitigate the risk of harm from migration from other premises, even with lockout provisions the grant of the application may expose the premises to a mix of clientele more inclined to be associated with the negative aspects of alcohol consumption.
58. In this regard, the application in those proceedings before the Commission, which also sought trading to 2 a.m. on Friday and Saturday nights, was only part granted to 1 a.m. on the relevant nights due to the Commission:
- (a) not being persuaded that there was a strong requirement on the part of local consumers of liquor, if there was any requirement at all, within the meaning of s 5(1)(c) of the Act, for the additional hour of trading from 1 a.m. to 2 a.m.; and
 - (b) noting the evidence of harm that was currently being experienced after midnight and during the hours for which the extended trading hours had been sought and observing that 'there was a strong likelihood that allowing trading beyond 1 a.m. will result in an increase in that harm, which would be not only not beneficial, but would in fact be detrimental, to the liquor, tourism and hospitality industries in the State.'
59. Although I note that the Applicant's premises is not a hotel or tavern, it is nonetheless an equivalent licence, a fact that was recognised by the Applicant in its submissions addressing s 46A of the Act. As such, I would have expected the Applicant to address these findings of the Commission, rather than simply seeking to ventilate the issues anew.
60. 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.


DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

⁷ (LC28/2015)