

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: BALLINGARRY PTY LTD
PREMISES: SUBIACO HOTEL
PREMISES ADDRESS: 465 HAY STREET, SUBIACO
LICENCE NO.: 6020056606
NATURE OF MATTER: APPLICATION FOR APPROVAL OF ALTERATION /
REDEFINITION OF LICENSED PREMISES

Introduction

1. On 11 August 2014 an application was made by Ballingarry Pty Ltd ("the Applicant"), pursuant to s 77(4) of the *Liquor Control Act 1988* ("the Act"), for approval to alter/redefine the licensed premises situated at 465 Hay Street, Subiaco and known as *Subiaco Hotel*.
2. The background to this application is that the Applicant has undertaken a significant redevelopment to the licensed premises, comprising of:
 - (a) refurbishment of the premises' restaurant;
 - (b) enclosing the premises' courtyard, removal of a toilet block therein and construction of a stairway, an elevator and a new bar facility;
 - (c) construction of a new stairway in the premises' front bar;
 - (d) construction of a mezzanine level, with new and centrally located toilets;
 - (e) refurbishment of the premises' existing function area into a new cocktail bar to be known as the Stellar Lounge; and
 - (f) reconfiguration of the premises' kitchen layout; and
 - (g) construction of a new Roof Deck Bar, designed primarily to be used as a break-out area for smokers, with capacity for 71 persons and with five speakers for the playing of amplified music.
3. For the purposes of s 77(3) of the Act, the Applicant submitted that the following works are deemed to be alterations that require the prior approval of the licensing authority:
 - (a) the addition of the mezzanine level area and new toilet block;
 - (b) the enlargement of the function area into the Stellar Lounge and the proposed dual use of this area as an additional bar and function area; and
 - (c) the addition of the Roof Deck Bar.

4. The Director of Liquor Licensing ("the Director") determined, pursuant to s 38(1)(c) of the Act, that the provisions of s 38(2) would apply to this application. Furthermore, in accordance with instructions issued by the Director, the application was also required to be advertised, which resulted in the Commissioner of Police lodging a notice of intervention, pursuant to the provisions of s 69 of the Act and Ms Ines Janca, a resident of the locality, lodging an objection pursuant to the provisions of s 73 (2) of the Act.
5. In order to give effect to the provisions of s 16 of the Act, a document exchange was initiated between the parties in order to ensure that each party was given a reasonable opportunity to present its case.
6. Pursuant to the provisions of ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, which are summarised below.

Submissions of the Applicant

7. To support the application and discharge its onus under s 38(2) of the Act, the Applicant lodged a Public Interest Assessment (PIA), in which it was submitted that the hotel has provided the local community with a key meeting place and leisure facility for over a century. The Applicant further submitted that the building itself is a significant building, being listed on the State's Heritage List and recognised as having considerable heritage significance, due to its construction in the Federation Filigree style, with distinctive corner turret and ornate external flourishes.
8. As a result of the architectural significance of the premises, the Applicant further submitted that the design of the refurbishment had to embrace the building's heritage appeal, while also incorporating modern elements of design and new technology into the building, in order to modernise the premises and provide for further functionality.
9. As a result of the refurbishment, the Applicant submitted that:
 - (a) a broad range of beverages will continue to be provided at the hotel;
 - (b) the hotel will continue to offer fine dining, with the renovations transforming the hotel into a stylish, contemporary venue to complement and improve patrons' dining experiences, with the restaurant open seven days a week, from 7 a.m. until late;
 - (c) a range of live music will be provided on the weekends, covering a broad spectrum of musical styles, with entertainment provided in both the restaurant/courtyard and the front bar; and
 - (d) the redevelopment of the first floor function area has transformed the hotel's basic function area into a stylish, user-friendly function room, which will also double as an upmarket cocktail bar on Friday and Saturday nights.

10. The Applicant's PIA also addressed those matters prescribed in s 38(4) of the Act and submitted that the renovations further object 5(1)(c) of the Act by providing a hotel with both upgraded and new facilities that will cater to the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry and other related industries in Western Australia.
11. In this regard, the Applicant submitted that the redevelopment of the premises to reflect contemporary standards is "entirely consistent with the proper development of the liquor industry" which "necessarily involves licensees expending money to ensure that their premises present at a high standard."
12. In conclusion, the Applicant submitted that the grant of the application would be in the public interest because it would:
 - (a) contribute positively to the hospitality facilities for tourists visiting Perth and thereby assist in the development of the Western Australian tourism industry;
 - (b) be highly unlikely to cause harm or ill-health to any person or group of persons;
 - (c) be highly unlikely to cause noise, disturbance, offence or inconvenience; and
 - (d) contribute positively to the amenity of the locality.

Representations of the Commissioner of Police

13. The notice of intervention made representations that if the application was granted without the imposition of conditions on the licence, public disorder or disturbance would be likely to occur and on other matters relevant to the public interest.
14. The Commissioner also noted that the application seeks retrospective approval of unauthorised alterations to enable the Applicant to commence trading in the relevant areas.
15. The Commissioner therefore submitted that given that the Applicant completed renovation works prior to seeking any formal approval by the licensing authority:
 - (a) the alteration has resulted in an increase in patron capacity, which necessitates harm minimisation strategies;
 - (b) the Commissioner was impeded from making representations and/or introducing evidence prior to the works being undertaken;
 - (c) the Commissioner is, for all intents and purposes, prevented from objecting to the application by virtue of:
 - (i) the fact that the relevant works having already been completed;

- (ii) the premises having a significant historical value and the Applicant's investment of a considerable amount of finances in renovating the premises; and
- (iii) perceived potential criticism from the Applicant and the public,

the Applicant should either offer up, or concede to the imposition of, relevant trading conditions that are in the public interest in order to ensure that the premises will not negatively impact on the amenity of the locality and to minimise any potential harm that may arise from approval of the application.

16. In this regard, the Commissioner submitted that conditions relating to:
- (a) security at the licensed premises, with particular reference to maintaining a CCTV system and employing or engaging crowd controllers'; and
 - (b) specification of the premises' maximum accommodation number, reflecting the increased capacity of the premises due to the alterations:
 - (i) in order to require the Applicant to count or otherwise actively monitor the number of patrons admitted to the premises or discrete parts of the premises; and
 - (ii) as a harm minimisation initiative to minimise the potential for recognised aggression hotspots within licensed premises,
- should be imposed on the licence on the grant of the application.

Submissions of the objector

17. The objection by Ms Ines Janca related to her concerns over the potential of the Roof Deck Bar to cause noise and disturbance to residents in the locality. However, Ms Janca also questioned why the application was being made, when the work had already been undertaken and the Roof Deck Bar had already been built.
18. As such, I have taken Ms Janca's objection to be based primarily on the ground of objection permitted by s 74(1)(g) of the Act, i.e. that if the application were granted undue offence, annoyance, disturbance or inconvenience to persons who reside in the vicinity would be likely to occur, although other issues were raised by Ms Janca relating to concerns that due process was not being followed and that relevant material pertaining to the application were not available for inspection at the licensed premises.
19. In regard to details of the application, Ms Janca submitted that she met with Mr Monaghan "the owner of the Subiaco Hotel" on 14 November 2014, who:
- "...was kind enough to show me to the roof top area... allegedly for private functions only. The area was referred to in previous correspondence as 'rooftop bar', but Mr Monaghan denied that it will be a bar, rather the 'mezzanine floor housing all the toilet facilities and a small breakout area on

the laneway facing south'... When I asked how frequent private functions would be held he said it was irrelevant, because there would be no noise, and I can trust his word."

20. Ms Janca further submitted that when she requested to see the documentation relating to the application to obtain a better understanding of the application, Mr Monaghan informed her that there were no documents on site and "it's irrelevant because its only plans, and I can trust him that Catherine Street will get no noise at all."
21. In conclusion, Ms Janca submitted that while she understood that businesses want to maximise their profits, when they operate within in a residential area, consideration must be given to those residential neighbours, who have occupied their homes prior to the construction of Roof Deck Bar and should rightly be considered before any change of use is approved.

Responsive submissions

The Applicant's responsive submissions

22. In submissions dated 21 October 2014, the Applicant responded to the Commissioner's notice of intervention and noted that the Commissioner is seeking the imposition of restrictive conditions on the licence. In this regard, the Applicant submitted that the intervener has not presented any evidence that would provide an evidentiary foundation for the imposition of the recommended conditions.
23. The Applicant further submitted that the decision of the Liquor Licensing Court in *Bename Pty Limited* requires the licensing authority to ascertain whether, in the absence of the condition proposed, the harm proposed by the Police will occur and, if so, whether harm will occur at an unacceptable level.
24. Furthermore, the Applicant submitted that the Supreme Court decision in *Northbridge Enterprises Pty Ltd v Commissioner of Police* [2014] WASC 135 is clear authority for the proposition that, in the absence of an evidentiary foundation for the imposition of a condition and a causal link between the condition to be imposed and the mischief sought to be addressed, it is an error at law to impose a restrictive condition.
25. In respect to the Commissioner's representations regarding the imposition of conditions relating to maintaining a CCTV system and employing or engaging crowd controllers and specification on the licence of the premises' maximum accommodation numbers, the Applicant submitted that the police are actually seeking to circumvent the express provisions of the *Health Act 1911* and the *Criminal Investigation Act 2006* and further submitted that it is not in the public interest to circumvent the express intent of Parliament through the imposition of restrictive conditions upon a liquor licence.
26. In relation to the notice of objection, the Applicant submitted that:
 - (a) Ms Janca lives at 24 Catherine Street, approximately 200 metres away from the Subiaco Hotel;

- (b) none of the residents located within the Churchill Avenue apartments have lodged an objection to the present application;
 - (c) none of the residents located within Churchill Avenue, nor any other resident or business owner, has ever complained of disturbance as a result of noise emanating from the Subiaco Hotel; and
 - (d) while not expressly stated, it would appear that Ms Janca is concerned that residents will be disturbed due to noise being emitted from the Roof Deck Bar.
27. The Applicant further submitted:
- “To put these concerns in their proper context, it is necessary to not only consider the operation of the Roof Deck but to consider the previous operation of the courtyard.”
28. In advancing this proposition, the Applicant noted that:
- (a) prior to the redevelopment of the Subiaco Hotel the courtyard was previously an open air courtyard;
 - (b) previously, the “open air” courtyard was utilised by smokers, members of the general public and, on occasions, for the purpose of private functions; and
 - (c) the motivation behind the construction of the roof deck was to replace the loss of the “open air” aspect of the courtyard, primarily to cater to the requirements of smokers and for the purpose of hosting private function.
29. Therefore, the Applicant submitted that the addition of the roof deck bar merely represents a maintenance of the status quo with respect to the provision of open air facilities by the Applicant at the Subiaco Hotel. It was further submitted by the Applicant that “when considering the possible impact of the operation of the Roof Deck upon some residents, it is relevant to consider whether or not historically the operation of the courtyard as an open air facility adversely affected residents... due to noise emissions.”
30. In this regard, it was submitted that in the near four decades that the Applicant has operated the open air courtyard, it has never received a complaint, whether informally or a complaint pursuant to the provisions of s 117, regarding the operation of the courtyard. The Applicant further submitted that a comparison of the two areas establishes that:
- (a) the courtyard had a capacity of 130 patrons, whereas the Roof Deck Bar only has a capacity of 70; and
 - (b) entertainment was provided within the courtyard by way of pre-recorded ambient background music, as it is intended to be within the Roof Deck Bar.

31. Accordingly, the Applicant submitted that given that the Roof Deck Bar is replacing a larger open air courtyard, its operations are likely to result in lesser noise emissions than would have occurred in the open air courtyard.
32. The Applicant also submitted that given the lack of concerns previously raised by residents with respect to the operation of the open air courtyard, it is unsurprising that no concerns have been raised by nearby residents who are those most likely to be affected by the operation of the proposed Roof Deck Bar.
33. In relation to Ms Janca's objection, the Applicant further submitted that the Subiaco Hotel is located at the epicentre of the Subiaco entertainment and commercial district, which cannot be characterised as a residential area, as suggested by Ms Janca, but rather as an area subject to mixed uses, with a concentration of liquor and hospitality services, against which any noise associated with the operation of the Roof Deck Bar must be assessed for the purposes of determining whether it could be characterised as "undue". In this regard, the Applicant submitted that Ms Janca has failed to introduce any evidence to substantiate her concerns.

The Commissioner's responsive submissions

34. In submissions dated 27 November 2014, the Commissioner noted that the Applicant's responsive submissions provided a commentary on s 64 of the Act and how the licensing authority is required to have evidence prior to imposing restrictive conditions and how such evidence must provide a basis to establish a causal link between the harm and/or loss of amenity.
35. However, the Commissioner further submitted that in order for a condition to be considered restrictive, there must be some form of realistic burden placed on the licensee, such as inhibiting the manner of trade at the premises or areas of trade, whereas the conditions sought in the notice of intervention are already being performed by the Applicant on a voluntary basis and would therefore add no additional burden on the Applicant.
36. The Commissioner submitted that the imposition of the relevant conditions would be in the public interest given that the Applicant has already demonstrated noncompliance with the Act by commencing work on the licensed premises without the requisite approval of the licensing authority.
37. As such, the Commissioner submitted that the imposition of the relevant conditions on the licence will:
 - (a) ensure that the Applicant will be held to running the premises in the manner in which they have indicated that they currently operate; and
 - (b) lead to greater clarity and less ambiguity for the licensee and staff.

38. The Commissioner also submitted that:

“It is a notorious fact that alcohol is a significant contributing factor in violent incidents at licensed premises, this is not something the Applicant is immune from, regardless of the type or style of venue or management practices.

Crowd controllers and CCTV assist greatly in the prevention of incidents of anti-social behaviour and violence at a venue.”

39. In relation to the proposed condition regarding accommodation figures being imposed on the licence, the Commissioner submitted that police are constantly dealing with licensed premises that are inadvertently or deliberately overcrowded and while noting that enforcement of the *Health Act 1911* rests with local government authorities, the Commissioner submitted that generally local shires rarely, if ever, deal with such offences.
40. In conclusion, the Commissioner submitted that having the relevant accommodation figure imposed on the licence would not be a prosecution measure *per se*, but rather about assisting management, staff and police with clarity on the exact number of patrons that can be accommodated in the venue, or any part of the venue, at any one time, as a harm minimisation measure.

The Objector's responsive submissions

41. The objector did not avail herself of the opportunity to lodge further submissions to substantiate her concerns and, for all intents and purposes, relegated her objection to only concerns about:
- (a) all nearby residents having been consulted regarding noise pollution, particularly those whose bedrooms look straight into the roof deck bar; and
 - (b) proper procedures being followed in the application.

Determination

42. Section 77(1) of the Act provides that, subject to s 77(3), an owner, occupier or licensee of licensed premises, shall not, without prior approval of the Director, make any alteration of any licensed premises, with a prescribed penalty of a fine of \$10,000 applicable for non-compliance. For the purposes of s 77(3), an alteration shall be deemed to be made if it comprises or consists of a change to the use of any premises, accommodation or facilities or an addition to, or reduction in the area of, the premises.
43. Section 77(2) further provides that where the Director determines that an alteration has been made which may be in contravention of s 77(1), directions may be given in relation to that alteration. Accordingly, on 9 July 2014, following an inspection of the Subiaco Hotel by an Inspector of Licensed Premises established that unauthorised alterations had been undertaken; the Applicant was served with directions to lodge a

- completed application for alteration/redefinition of licensed premises, in order to address the issue of the unauthorised alterations.
44. The Applicant was also served with Infringement Notice number 243457, dated 9 July 2014, for unauthorised alterations to licensed premises, for the amount of \$1,000, which was subsequently paid on 1 August 2014.
 45. For the purposes of s 77(3) of the Act, the Applicant acknowledged that the following works are alterations that would have required the prior approval of the Director:
 - (a) the addition of the mezzanine level area including the new toilet block;
 - (b) the enlargement and refurbishing of the function into the Stellar Lounge and its proposed dual use as an additional bar and a function area; and
 - (c) the addition of the Roof Deck Bar.
 46. The Applicant's PIA submits that the directors of Ballingarry Pty Ltd are Michael Monaghan and Judy Monaghan, who have many years of experience gained over many decades of successfully owning and operating licensed venues both in Western Australia and interstate. The Applicant further submitted that Mr Monaghan was formerly the president of the WA Hotels Association, the National Hotels Association and has been an active participant in WA Tourism.
 47. However, despite this apparent wealth of knowledge and experience in the liquor industry, as far as I can ascertain, the Applicant has offered up no reason why it undertook the unauthorised alterations to the licensed premises, which is of real concern to me. Without any relevant explanation, I cannot determine whether this experienced licensee simply made an error of oversight or has knowingly set out on a deliberate course of action in order to achieve the desired alterations, regardless of the law; the interests of the locality or nearby residents.
 48. In this regard, I concur with the concerns expressed by the Commissioner that by undertaking the works and investing considerable finances in the renovations prior to obtaining approval, the Applicant has effectively impeded the ability of interested persons from making representations or introducing evidence before the significant works were undertaken.
 49. In my view, this uncertainty is referenced in Ms Janca's concerns about why an application was being made after the work had already been undertaken and I consider it likely that if one resident was perplexed by the order in which the works were undertaken and their right to object, it is likely that other residents were equally puzzled.
 50. Pursuant to ss 33 and 38(1)(c) of the Act, the Applicant must satisfy the licensing authority that granting the application is in the public interest. In this regard, the licensing authority has an absolute discretion to grant or refuse an application on any

- ground, or for any reason, that it considers in the public interest (see *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384).
51. In so doing, 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] 74 WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASC 175).
52. Furthermore, I must come to a determination that best serves the interests of the public within the scope and purpose of the Act (see Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142). This means that I must consider those matters that are relevant to the primary and secondary objects of the Act, as prescribed in s 5.
53. In *Woolworths Ltd v Director of Liquor Licensing* [2013] WASC 227, Buss J noted that:
- “By s 5(2), in carrying out its functions under the Act, the ‘licensing authority’...shall have regard to the primary objects of the Act and to certain secondary objects. The secondary objects include facilitating the use and development of licensed facilities, reflecting the diversity of the requirements of consumers in the State (par (a)).
- By s 5(3), if, in carrying out any of its functions under the Act, the licensing authority considers that there is any inconsistency between the primary objects and the secondary objects, the primary objects take precedence.”
54. The primary objects of the Act, as set out in s 5(1) are to regulate the sale, supply and consumption of liquor (par (a)); to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor (par (b)); and 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 (par (c)).
55. Section 38(2) of the Act is clear in its imposition of an affirmative or positive obligation on an applicant. Additionally, without confining the scope or meaning of the public interest in section 38(2), section 38(4) prescribes a number of factors that might be considered in determining whether or not the grant of an application is in the public interest. However, while the licensing authority is entitled to take into account those matters set out in s 38(4) as part of its public interest considerations; it is not bound to do so.
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 licensing 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. Accordingly, submissions have been lodged by each of the parties to these proceedings in order to advance their respective positions. In this regard, it is important to note that an intervener carries no onus to establish their assertions of fact or opinion (refer *Re Gull Liquor* (1999) 20 SR (WA) 321).

The alterations relating to the Mezzanine Level area and the Stellar Lounge

58. As a starting point and aside from their unauthorised construction, I have no other concerns with those parts of the application relating to the renovations associated with the:
- (a) addition of the mezzanine level area and new toilet block; and
 - (b) enlargement and refurbishment of the former function room into the Stellar Lounge and its proposed dual use as an additional bar and a function area.
59. In regard to the notice of intervention, I note that the imposition of conditions sought relate to a requirement for specified security at the licensed premises, with particular reference to maintaining a CCTV system and employing or engaging crowd controllers' and specification of the premises' maximum accommodation number, reflecting the increased capacity of the premises due to the alterations.
60. In regard to these conditions, the Applicant submitted that:
- (a) the Supreme Court has provided clear authority for the proposition that, in the absence of any evidentiary foundation for the imposition of a condition and, in the absence of a causal link between the condition to be imposed and the mischief sought to be addressed, it is an error at law to impose a restrictive condition on a liquor licence; and
 - (b) it is not in the public interest to circumvent the express intent of Parliament in other legislature through the imposition of restrictive conditions upon a liquor licence.
61. Firstly, I would like to address the Applicant's submission that it is not in the public interest to impose restrictive conditions on a licence, notwithstanding that such conditions may be subject to separate regulation by other Acts of Parliament. It is my view that s 64(3)(c) of the Act specifically provides for the licensing authority to impose conditions, which it considers in the public interest or otherwise desirable, in order to ensure that the safety, health or welfare of persons who may resort to the licensed premises is not at risk. In my view, these provisions could likely capture the imposition of a condition to prohibit overcrowding at a particular licensed premises, regardless of any other regulatory regime. Accordingly, I give little or no weight to the Applicant's submissions in respect of this matter.

62. However, I have noted the Applicant's submission that there needs to be both an evidentiary foundation for the imposition of a restrictive condition and a causal link between the condition to be imposed and the mischief sought to be addressed.
63. While not expressly stated, I consider that the Commissioner views the Applicant's actions in undertaking unauthorised alterations as cause in itself for the imposition of the conditions proposed, however, I note that no other evidence is before me to establish that there are problems at the licensed premises that would require a specific conditions to be imposed on the licence requiring specified numbers of security at the licensed premises or in relation to the maintenance of a CCTV system and employing or engaging crowd controllers' or that the licensed premises is subject to overcrowding.
64. Furthermore, I consider that the Commissioner's submissions are somewhat punitive in nature, which I do not think is appropriate for these proceedings, which should be concerned with the merits of the application.
65. In terms of punitive measures, I note that s 95(4)(c)(iii) of the Act provides that there shall be proper cause for disciplinary action if the licensed premises have been altered without the prior approval of the Director. While I note, in the current matter, that the Applicant has already been issued with and paid a \$1000 modified penalty in respect of the unauthorised alterations, I also note that s 95(4)(fa) further provides that there is proper cause for disciplinary action where the licensee has been given an infringement notice and the modified penalty has been paid, as is the case in this matter.
66. Therefore, it is my view that any further punitive action against the licensee arising from the unauthorised alterations should be pursued separately, pursuant to a s 95 complaint.
67. Accordingly, I am of the view that the representations of the Commissioner do not warrant the imposition of the conditions recommended in the intervention.
68. Ultimately, I consider that these parts of the renovation will cater to the requirements of consumers for liquor and related services (refer s 5(1)(c)) and facilitate the use and development of licensed facilities in a way that reflects the diversity of the requirements of consumers (refer s 5(2)(a)), a view which is supported by a voluminous number of customer surveys lodged by the Applicant.
69. As a result of this view, I was not opposed to the Applicant's request for a temporary redefinition of the licensed premises to include the abovementioned areas, which issued on 13 February 2015.

Alterations relating to the Roof Deck Bar

70. I hold serious concerns over the construction of the Roof Deck Bar and given the unusual circumstances of the application, I find it difficult to accept the Applicant's assertion that a lack of objections by nearby residents, necessarily equates to a lack of concerns.
71. As I have already noted, I accept that there was confusion by Ms Janca over the retrospective nature of the application and, on the balance of probabilities, I find that if one resident was perplexed by the order in which the works were undertaken and how this affected their right to object, it is probable that other residents were likewise puzzled.
72. In this regard, I accept that Ms Janca's concerns regarding the potential of the operation of the Roof Deck Bar to adversely affect neighbours to be a relevant consideration. Although unrelated, I have also noted the difficulty encountered by Ms Janca in obtaining relevant information about the application from the Applicant at the licensed premises, which I find surprising, particularly given that the Applicant did not dispute Ms Janca's relevant claims and that the advertising requirements specified in relation to the application required the Applicant to make the PIA available at the licensed premises during the advertising period(s).
73. However, in relation to the notice of objection, s 73(10) of the Act provides that the burden of establishing the validity of any objection lies on the objector. While I have found some information in Ms Janca's objection to be helpful in informing myself of the level of confusion residents may have experience in relation to the application, I nonetheless note that Ms Janca has failed to introduce any evidence to substantiate her concerns and has, in her responsive submissions, effectively repudiated her objection. Therefore, I can do little but find that Ms Janca has failed to establish the validity of her objection.
74. Following enquiries from an Inspector of Licensed Premises, the Applicant advised on 10 September 2014 that it had prepared a noise management plan as part of its "proactive measures" to ensure that the amenity of the area was not affected by the changes to the premises. However, the Applicant further submitted that the local government authority had apparently concluded that "the operation of the noise management plan would be sufficient to deal with any matters concerning noise and that no further action was required." As such, the Applicant further submitted that as a result of the local government authority:
- (a) being the relevant authority for enforcement of the *Environmental Protection (Noise) Regulations 1997*; and
 - (b) raising no relevant concerns,
- it did not believe that an acoustic report was necessary for the purposes of the application.

75. However, notwithstanding this view, a copy of the relevant acoustic report was requested by the Inspector on 18 September 2014, with the report required to include information relating to the provision of music or entertainment to the Roof Deck Bar and internal areas when the area's bi-fold doors are both open and closed.
76. Subsequently, on 14 October 2014, the Applicant lodged a copy of a document called *Acoustic Assessment of the Rooftop Balcony by Herring Storer Acoustics* ("the Acoustic Report"), which notes that:
- "Noise levels associated with the proposed balcony area, have been calculated to comply with the *Environmental Protection (Noise) Regulations 1997* at neighbouring premises at all times if the bi-fold doors remain closed and an additional 1m barrier is constructed around the balcony.
- Noise emissions also comply during all times, with the exception of the night time period if no additional barrier is constructed. Additionally, no music is to be played at the Subiaco Hotel Rooftop Balcony at times of operation."
77. Therefore, in my view, the Applicant has lodged clear evidence which demonstrates to me that without strict compliance with the recommendations of the Acoustic Report, the proposed operation of Roof Deck Bar will not comply with the provisions of the *Environmental Protection (Noise) Regulations 1997* at neighbouring premises. I particularly note that part of that compliance includes that music is not to be played at the Roof Deck Bar at any time.
78. However, seemingly ignoring the expert evidence contained within the Acoustic Report, the Applicant:
- (a) entered into convoluted submissions alleging that the addition of the Roof Deck Bar merely represents a maintenance of the status quo with respect to the premises' previous provision of open air facilities in the courtyard;
 - (b) suggested that the operations of the Roof Deck Bar will be commensurate with the operations of courtyard; and
 - (c) proposed that entertainment be provided on the Roof Deck Bar by way of pre-recorded ambient background music.
79. However, in light of the conclusions of the Acoustic Report, I cannot accept the Applicant's submission that the historical operation of the courtyard has any correlation to how the Roof Deck Bar will operate. The facts of the matter are that if the recommendations of the Acoustic Report are not followed, the operation of the Roof Deck Bar will adversely affect residents. The Acoustic Report clearly confirms this fact.
80. Therefore, by way of a letter dated 13 January 2015, I requested the Applicant to make submissions on whether it proposes to implement the strategies recommended in the Acoustic Report and what trading conditions might be relevant for imposition on the

licence to ensure that the operation of the Roof Deck Bar does not cause offence, annoyance, disturbance or inconvenience to people who reside in the vicinity of the licensed premises.

81. By way of submissions dated 27 January 2015, the Applicant replied that:

“As indicated during the course of the letter, the Applicant will be constructing the additional one metre barrier recommended during the course of the report.

It is the position of the Applicant, however, that no further conditions need to be attached to the operation of the deck.”

82. The Acoustic Report notes that the allowable noise level at the surrounding locales is prescribed by the *Environmental Protection (Noise) Regulations 1997* and in particular that r 7 and r 8 stipulate maximum allowable external noise levels that are determined by a prescribed calculation. Furthermore r 5(1) further prescribes that noise emitted in contravention of a standard prescribed under r 7 or r 11 is to be taken to be unreasonable.
83. Therefore, it is my view, based on the evidence before me, that the unhindered operations of the Roof Deck Bar will result in “unreasonable” noise emissions being experienced at neighbouring premises and that offence, annoyance, disturbance or inconvenience will be caused to people who reside in the vicinity of the licensed premises.
84. In my view, the relevant objects of the Act are to regulate the sale, supply and consumption of liquor (s 5(1)(a)), 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 (s 5(1)(c)) and to facilitate the use and development of licensed facilities, including their use and development for the performance of original live music, reflecting the diversity of the requirements of consumers in the State (s 5(2)(a)).
85. By s 5(3), where the licensing authority considers there is inconsistency between the primary objects of the Act referred to in s 5(1) and the secondary objects referred to in s 5(2), the primary objects take precedence.
86. I am likewise guided by s 37(3) of the Act, the provisions of which prevent the licensing authority from granting an application where satisfied that an undue degree of offence, annoyance, disturbance or inconvenience would be likely to occur to persons who reside or work in the vicinity of the premises to which the application relates.
87. Given that this application seeks approval of unauthorised alterations, I consider that the Act’s primary object to regulate the sale, supply and consumption of liquor is also a very relevant factor given that, regardless of the reason, the Applicant undertook unauthorised works at the licensed premises and effectively extricated itself from the regulatory regime imposed by the Act. In my view, this is in itself a very serious

- matter, which is made even more serious by the extensive experience and knowledge of the Applicant.
88. Similarly, while the creation of the Roof Deck Bar would appear cater for the requirements of consumers for liquor and related services, the object expressed at s 5(1)(c) of the Act must be considered in its totality, with relevant consideration also being given to the proper development of the liquor industry in Western Australia. In my view, it would be the antithesis of the proper development of the liquor industry for the licensing authority to condone unauthorised alterations where those alterations are likely to have a detrimental effect on nearby residents.
89. Nothing in the Applicant's evidence suggests that trading in the Roof Deck Bar will cease at 10 p.m. and the Acoustic Report indicates that in order for the Roof Deck Bar to comply at all times with the Environmental Protection (Noise) Regulations at neighbouring premises music is not to be played in the Roof Deck Bar at any time, doors are to remain closed and an additional one metre acoustic barrier is constructed around the balcony.

Conclusion

90. The alterations to the Mezzanine Level and the Stellar Lounge are approved, consistent with the temporary approval granted to the Applicant on 13 February 2015 and the Applicant is formally authorised to operate the licensed premises in the area outlined in red on the floor plan dated 13 February 2015.
91. The alterations to the Roof Deck Bar are approved, subject to:
- (a) construction of an additional one metre sound barrier around the balcony; and
 - (b) the alterations being completed on or before 13 May 2015;
 - (c) full compliance with the *Local Government (Miscellaneous Provisions) Act 1960*, *Local Government Act 1995*, *Health Act 1911* and any written law relating to the sewerage and drainage of those premises;
 - (d) the Schedule of Requirements of the Inspector of Licensed Premises being incorporated in the work;
 - (e) compliance with plans and specifications lodged on 11 August 2014 with no variation unless specifically required or approved by the Director;
 - (f) written notification of the completion of the approved alterations at least 14 days prior to the date on which the Applicant wishes to commence trading in the relevant area; and
 - (g) imposition of the following conditions on the licence:
 - (i) the use of the Roof Deck Bar is subject to all doors, including bi-fold doors, being closed at all times; and

- (ii) the playing of music on the Roof Deck Bar will be prohibited at any time.
92. Consistent with the above condition, I would also require the Applicant to confirm its removal of the speakers from the Roof Deck Bar.
93. The Applicant is also cautioned that failure to advise the licensing authority that the approved alterations are completed, as required above, may result in approval to use the premises not being granted.
94. 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.
95. 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

5 March 2015