

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: NUMBER TEN HIGH STREET PTY LTD

OTHER PARTIES: 58 OBJECTORS (REFER ATTACHMENT A)
CHIEF HEALTH OFFICER (INTERVENOR)
COMMISSIONER OF POLICE (INTERVENOR)

PREMISES: HIGH STREET BAR

PREMISES ADDRESS: 10 HIGH STREET FREMANTLE WA 6160

APPLICATION ID: A000227132

MATTER: APPLICATION FOR CONDITIONAL GRANT OF A SMALL
BAR LICENCE

DECISION OF: PETER MINCHIN
DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 14 FEBRUARY 2018

Introduction

- 1 Number Ten High Street Pty Ltd (the applicant) has lodged an application for the conditional grant of a small bar licence for premises to be known as the High Street Bar and located at 10 High Street, Fremantle. The application is made pursuant to ss 41 and 62 of *the Liquor Control Act 1988* (the Act).
- 2 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. Pursuant to ss 73 and 74 of the Act, 58 objections were lodged to the grant of the application (refer Attachment A) (the objectors), while the Chief Health Officer (CHO) and the Commissioner of Police (the Commissioner) intervened in the application as permitted under s 69 of the Act.
- 3 The application will be determined on the written submissions of the parties as permitted under ss 13 and 16 of the Act. Further, this decision has been prepared, and should be read, in the context of a high-volume liquor jurisdiction which is to act as speedily and with as little formality and technicality as is practicable.¹ The evidence and submissions of the parties are briefly summarised as follows.

The applicant's proposal

- 4 In accordance with the requirements of the Director of Liquor Licensing, the applicant lodged a Public Interest Assessment (PIA) to support its application. The following overview has been taken from that PIA.

¹ Refer s 16(7) of the Act.

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- 5 According to the applicant, the proposed small bar will be located on the ground floor of a heritage building at 10 High Street, Fremantle, which is in the heart of Fremantle's historic West End. It was submitted by the applicant that it considered the premises to be ideal due to the following features:
- proximity to numerous cafes, restaurants, art galleries, live music venues, cinemas and other cultural and dining facilities in central Fremantle;
 - proximity to numerous public transport options, public car parks and taxi ranks;
 - located in a recognised tourist precinct which attracts significant numbers of tourists seeking licensed food and beverage facilities and a variety of nightlife, leisure and hospitality options;
 - located at the quiet end of High Street (near the Roundhouse) which has the convenience of a central Fremantle address whilst being far enough away from the South Street entertainment precinct to enable it to operate independently from the licensed venues clustered on the South Street "Cappuccino strip";
 - unique charm of a heritage building situated in Fremantle's historic West End precinct;
 - small size to facilitate an intimate hospitality experience for patrons; and
 - proximity to "Strange Company" (an existing premise related to the applicant) to allow synergies and efficiencies between the two venues.
- 6 In respect of the intended manner of operation of the venue, the applicant stated that it aims to create an intimate, sophisticated late-night venue that combines genuine 'Freo' charm with the high quality, contemporary facilities and features demanded by the target demographic. Dining services will be available at all times together with a good range and quality of beverage service. The venue will have a maximum capacity of approximately 70 persons.
- 7 According to the applicant, the venue will be a place where patrons can meet and enjoy lively conversation, good food and drinks and 'low key' entertainment in a safe and relaxed environment. It is expected that the premises will cater to persons living and working in Fremantle, visitors to the area and regional, interstate and international tourists visiting Fremantle.
- 8 In respect of trading hours, it is proposed that the venue will open at 4 p.m. to cater to the 'after work' patrons and trade to 12 midnight each day in order to provide services to people who may wish to finish off the night out in central Fremantle with a "nightcap" and supper following a movie, concert, art exhibition or restaurant meal.
- 9 The applicant engaged LMBC consultants to undertake an independent consumer survey to assess the attitudes of the public in Fremantle to the proposed venue. A total of 100 completed surveys were collected. Ninety per cent of respondents indicated a desire for a greater range and diversity of quality hospitality venues in Fremantle and 84% of respondents indicated they are likely to patronise the premises. The applicant also provided various letters of support from members of the community.

- 10 It was submitted that Fremantle is one of the State's key tourism precincts attracting people from all over the metropolitan area for day trips, as well as intrastate, interstate and international visitors. Central Fremantle constitutes a major hospitality, entertainment and nightlife precinct and contains a large number of hospitality venues and cultural facilities.
- 11 In terms of the impact on 'at-risk' persons in the area, the applicant stated that it is unlikely that any 'at-risk' group would form a significant proportion of its patronage and that the grant of the application would be unlikely to contribute to the level of alcohol-related harm or ill-health in the locality given:
 - the size and layout of the premises;
 - the quality and standard of fit out of the premises;
 - the experience, professionalism and responsibility of persons associated with the applicant;
 - the intended low risk patron profile; and
 - the proposed manner of operation of the venue.
- 12 The applicant proposed a number of trading conditions for the licence in order to mitigate the risks associated with the operation of the premises. These conditions include a requirement for food to be available at the premises; minimum seating requirements; a maximum capacity of 70 persons; a prohibition on the sale of packaged liquor; CCTV and responsible server practices.

The objections

- 13 There were 58 objections to the grant of the application. Many of the objectors were health professionals and the main issue arising from the objections was the location of the proposed bar next door to an existing facility which provides mental health services to people experiencing alcohol and drug problems.
- 14 Dr Kevin O'Daly, one of the objectors to the application, operates a multi-disciplinary psychiatry and drug and alcohol treatment facility at 8 High Street, Fremantle.
- 15 By way of background, Dr O'Daly worked in the public health service at Fremantle Hospital Emergency Department of Psychiatry Triage for 12 years from 2002 to 2014, as the Consultant Psychiatrist and team leader. When Fremantle Hospital Emergency Department transitioned to Fiona Stanley Hospital Dr O'Daly remained in Fremantle. In addition to his full-time public work, in 2011 Dr O'Daly established an afterhours and weekend private practice at 21 Pakenham Street, Fremantle. Dr O'Daly was then and remains, the only private practising psychiatrist in Fremantle, specialising in drug and alcohol rehabilitation and counselling.
- 16 Dr O'Daly had been practising at 21 Pakenham Street for approximately two and half years when an application was made for a small bar licence next door to his practice. According to Dr O'Daly, the small bar operation rendered the location of his treatment rooms untenable due to the negative impact the bar had on the amenity of the area and

the incompatibility of the psychiatric consulting rooms and a drinking establishment. Consequently, Dr O'Daly was forced to move his practice from 21 Pakenham Street to his current location at 8 High Street in 2014.

- 17 It was submitted that Dr O'Daly's practice currently treats over 2,000 patients, including people suffering from:
- alcohol and drug addiction;
 - psychosis and schizophrenia;
 - psychotic disorders;
 - suicidality;
 - post-traumatic stress disorder;
 - severe depression;
 - severe anxiety; and
 - other personality disorders.
- 18 According to Dr O'Daly, a high proportion of patients attending his practice at 8 High Street are at high risk of suicide, self-harm, psychosis and are often critically ill. For many of his patients, drug and alcohol dependence is a significant cause of their psychological issues and many patients are at imminent risk of relapse into the misuse of alcohol or illicit substances. Given the nature of the practice, Dr O'Daly's services are offered on weekdays, weekends and after hours.
- 19 It was also submitted in Dr O'Daly's objection that Fremantle currently experiences high levels of pre-existing alcohol-related harm and ill-health, with alcohol-related hospitalisations in Fremantle at 1.36 times the State rate.

The interventions

The Chief Health Officer

- 20 The CHO intervened in the application to make representations regarding the potential for the grant of the application to cause harm or ill-health to people, or any group of people, due to the use of liquor.
- 21 Submissions by the CHO were made on the following:
- the small bar is proposed to be located adjacent to an existing private psychiatry and drug and alcohol treatment service;
 - community based alcohol and other drug treatment services report that the environment, including the location of licensed premises, can impact on those accessing treatment for their alcohol use and lead to compromised treatment outcomes;
 - according to research, alcohol use elevates the risk of a range of mental health problems and people with, or at risk of, a mental health condition are more likely to use alcohol than those without; and

- limiting the availability of alcohol has been found to result in positive health outcomes for the community, including at-risk groups.

The Commissioner

- 22 The Commissioner intervened to highlight the potential risks associated with the grant of the application. In particular, the Commissioner noted that there is a medical practice in the adjoining building to the proposed small bar. The Commissioner detailed the nature of that practice and submitted that the grant of the application will provide a vulnerable group of people, who are already suffering alcohol-related harm, with convenient and easy access to liquor.
- 23 The Commissioner also provided general crime data for the locality which indicates that reported alcohol-related domestic assaults, non-domestic assaults and threatening behaviour for the suburb of Fremantle from 2015 to 2016, when calculated per 1,000 persons, have consistently remained significantly higher than the corresponding metropolitan and State levels. Of particular concern to the Commissioner is that disturbance and public disorder offences for Fremantle for the 2016 calendar year was seven times higher than the metropolitan rate and five times higher than the State rate for the same period.

Legislative and legal framework

- 24 In determining this application, I have been guided by the following legal principles.
- 25 An applicant for the grant of a licence must satisfy the licensing authority that the grant of the application is in the public interest.² An applicant must therefore adduce sufficient evidence to discharge this burden.
- 26 In 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.³
- 27 An intervenor carries no onus to establish their assertions of fact or opinion⁴, however, pursuant to s 73(10) of the Act the burden of establishing the validity of any objections lies on the objector.
- 28 The factual matters which I am bound to consider 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 5.⁵
- 29 The primary objects of the Act are:
- to regulate the sale, supply and consumption of liquor;

² Refer s 38(2) of the Act.

³ ***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] 7WAR 241; and ***Re Minister for Resources: ex parte Cazaly Iron Pty Ltd*** (2007) WASCA 175.

⁴ ***Re Gull Liquor*** (1999) 20 SR (WA) 321.

⁵ ***Woolworths v Director of Liquor Licensing*** [2013] WASCA 227.

- to minimise harm caused to people, or any group of people, due to the use of liquor; and
 - 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.
- 30 The secondary objects of the Act are:
- 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;
 - to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
- 31 The licensing authority is also entitled (but not bound) to consider the factual matters set out in s 38(4) of the Act as part of the public interest considerations.⁶
- 32 In the conduct of proceedings under the Act, the licensing authority is to act according to equity, good conscience and the substantial merits of the case. The licensing authority should also act without undue formality, is not bound by the rules of evidence and makes its determination on the balance of probabilities.⁷
- 33 Where conflict arises in promoting the objects of the Act, the licensing authority must weigh and balance the competing interests in each case.⁸ However, it is a matter for the licensing authority to decide what weight to give to the competing interests and other relevant considerations.⁹
- 34 Section 33(1) provides that the licensing authority has an absolute discretion to grant or refuse an application on any ground, or for any reason, that the licensing authority considers in the public interest.

Determination

- 35 There is no presumption in favour of the grant of an application for a small bar licence under the Act. The applicant must satisfy the licensing authority that the grant of the application is in the public interest and the factual inquiry is directed to those matters relevant to the primary and secondary objects of the Act.
- 36 The applicant seeks to establish a small bar at 10 High Street, Fremantle. The proposed premises will cater to about 70 patrons at any one time and will be, according to the applicant, a place where patrons can meet and enjoy lively conversation, good food and drinks and 'low key' entertainment in a safe and relaxed environment. To support its

⁶ *Woolworths supra*.

⁷ Refer s 16 of the Act

⁸ *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).

⁹ *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASC 356.

application, the applicant commissioned a consumer survey to gauge public support for the application and likely patronage of the venue. Eighty-four per cent of respondents to the survey indicated they are likely to attend the venue. The applicant also submitted numerous letters of support for the grant of the licence. This evidence, together with other evidence submitted by the applicant in its PIA, supports a conclusion that the grant of the application would promote objects 5(1)(c) and 5(2)(a) of the Act.

37 However this conclusion is not, in itself, determinative of the application. The application must also be considered in the context of the other objects of the Act, one of which is to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor.

38 In this regard, Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208 held that where object 5(1)(b) was relevant to the determination of an application there are four steps to be undertaken, namely:

- make findings that specifically identified the existing level of harm and ill-health in the relevant area due to the use of liquor;
- make findings about the likely degree of harm to result from the grant of the application;
- assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
- weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether the applicant has satisfied the licensing authority that it is in the public interest to grant the application.

39 The evidence from Dr O'Daly is that his practice currently treats over 2,000 patients and a high proportion of his patients are at risk of suicide, self-harm and psychosis. Further, Dr O'Daly submitted that for many of his patients, drug and alcohol dependence is a significant cause of psychological issues and many patients are at imminent risk of relapse into the misuse of alcohol and illicit substances.

40 It was submitted that Fremantle and the South Metropolitan area in general, has poorer access to mental health resources relative to areas north of the river and in that respect, the clinic is a rare resource available to the local community. The clinic has clients that include both young people and those suffering addictions. Both groups are under-serviced and difficult to engage. The clinic is well established in its current location and has been positioned in the community to provide ease of access and to dispel stigma.

41 In response, the applicant submitted that there are existing licensed premises in the area and consequently, Dr O'Daly's patients would already pass by or be exposed to persons consuming liquor. It was argued that a small bar next to Dr O'Daly's clinic would not present any significant additional risk to those patients.

42 The applicant also submitted that many of the health experts who objected to the application may not be aware of the specific details of the application other than the location of the venue and the category of licence. According to the applicant, the bulk of

the objections are expressed in terms of general principle only and therefore little weight should be given to the opinions of these parties. The applicant provided evidence from Dr Clark, a psychiatrist, who assessed the details of the proposed venue and was of the opinion that in light of the specific nature of the venue and its intended manner of trade, the operation of the venue posed no significant risk to the health and wellbeing of Dr O'Daly's patients. Similar views came from Joshua Hawes, Principle Psychologist, and Drs Robertson and Adams, who are General Practitioners.

- 43 By contrast, Dr O'Daly's professional medical opinion was corroborated by approximately 50 other medical professionals, including Dr Nathan Gibson, Chief Psychiatrist of Western Australia; Andrew Peters, CEO, The Royal Australian and New Zealand College of Psychiatrists; Dr Timothy Marr, Psychiatry Registrar at Sir Charles Gardiner Hospital; Dr Matt Coleman, Consultant Psychiatrist WA Country Health Service; Dr Lawrence Blumberg, Consultant Psychiatrist, specialist in drug and alcohol psychiatric care at Perth Clinic; Dr D C Senaratne, Psychiatrist specialising in general drug and alcohol psychiatric care; and Dr John Laugharne, Psychiatrist and Clinical Senior Lecturer at the University of Western Australia.
- 44 Evidence was provided by the CHO which demonstrates a comorbid relationship between alcohol use and mental health issues, such as depression and anxiety.
- 45 The Commissioner provided evidence that the locality surrounding the proposed premises experiences rates of alcohol-related harm at levels significantly higher than the corresponding metropolitan and State levels. Based on this evidence, I find that there is a high rate of pre-existing alcohol-related harm and ill-health in the locality surrounding the proposed small bar.
- 46 I accept that Dr O'Daly is an expert in his field and I accept his evidence in respect of the general profile of his patients and the risks they may be exposed to if the application is granted. Dr O'Daly's evidence was supported by numerous medical experts, whose collective evidence I prefer over the evidence of the applicant's health professionals. I therefore find that there are at-risk persons in the immediate proximity of the proposed licensed premises who may be impacted by the grant of the application.
- 47 The likely impact on at-risk persons in the locality is clearly a matter for consideration in determining whether the grant of the application is in the public interest. Edelman J in *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC 51) observed that:

'In assessing the overall question of whether granting the application is in the public interest it is relevant to consider the baseline level of risk and, in that context, the effect of an increase in risk from the baseline level. It may be that where an existing level of risk is greater, a small increase in risk is less likely to be tolerated. Similarly, it is relevant that there are existing 'at risk' persons who might be further affected.'

- 48 Assessing the likely harm to result from the grant of the application is, by necessity, a matter of prediction, however, in making such an assessment I am not required to find as a fact that harm *will* occur because of the grant of the application, or to find a causal link.¹⁰ Determinations under the Act are made on the balance of probability.
- 49 Although the characteristics of a small bar can be lower risk for alcohol-related harm, in the circumstances of this case, where the proposed bar will be located immediately next door to an established clinic which provides services to people experiencing a range of mental health issues, including alcohol and drug addiction, I find, on the balance of probability, that the grant of the application is likely to compromise the treatment outcomes of Dr O'Daly's patients, some of whom are at risk of suicide, self-harm and psychosis and may relapse into the misuse of alcohol or illicit drugs. The physical environment is an important contributing factor to patient treatment.
- 50 I am of the view that even a small increase in the risk to the well-being to Dr O'Daly's patients is unacceptable. Dr O'Daly provides services at all hours of the day and on weekends and I do not believe that the applicant's proposed trading hours or conditions will sufficiently mitigate the risks.
- 51 Where conflict arises in promoting the objects of the Act, the licensing authority must weigh and balance the competing interests in each case.¹¹ However, it is a matter for the licensing authority to decide what weight to give to the competing interests and other relevant considerations.¹²
- 52 In this case, I give greater weight to the welfare of the at-risk persons attending Dr O'Daly's clinic over the requirement for some members of the community to access liquor at the applicant's proposed small bar. I note that there are many existing licensed facilities in the surrounding locality to cater to the requirements of consumers for liquor and related services.
- 53 Based on the evidence presented, I am of the view that the applicant has not been able to demonstrate that the overall social impact of granting the application would not be detrimental to the well-being of at-risk persons undergoing treatment at Dr O'Daly's clinic. In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 Tamberlin J said:
- "The expression "in the public interest" directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the publicand its content will depend on each particular set of circumstances."*
- 54 I therefore find that the applicant has failed to discharge its onus under s 38(2) and satisfy me that the grant of the application is in the public interest and accordingly, the application is refused.

¹⁰ *Lily Creek supra*

¹¹ *Lily Creek supra.*

¹² *Hermal supra.*

- 55 One final matter. Programming orders were set for the parties in respect of the timeframes for lodging of their respective evidence and submissions, with all evidence to be relied upon by the parties being lodged by 23 November 2017. Both the applicant and Dr O'Daly lodged new evidence outside the timeframes set under the programming orders. This evidence has not been taken into consideration in determining this application because of procedural fairness issues.
- 56 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.
- 57 This matter has been determined by me under delegation pursuant to s 15 of the Act.



Peter Minchin
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING