

DECISION OF DIRECTOR OF LIQUOR LICENSING

NATURE OF APPLICATION: CONDITIONAL GRANT OF A TAVERN LICENCE

APPLICATION REF: A000238281

APPLICANT: NU WINES PTY LTD

OTHER PARTY: COMMISSIONER OF POLICE

PREMISES: WINES OF WHILE
458 WILLIAM STREET, PERTH

DELEGATE: B. SNELL
DEPUTY DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 31 JANUARY 2018

Preliminary

1. On 2 June 2017, an application was made to the Director of Liquor Licensing (the Director) by Nu Wines Pty Ltd (the Applicant) for the conditional grant of a tavern licence in respect of premises to be known as *Wines of While* and situated at 458 William Street, Perth (the premises).
2. The application was made pursuant to ss 41 and 62 of the *Liquor Control Act 1988* ("the Act") and was advertised in accordance with instructions issued by the Director, which lead to the lodgement of the notice of intervention by the Commissioner of Police (the Intervenor).
3. Pursuant to ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties.
4. As this is an administrative decision, rather than referring in detail to the entirety of the evidence before me, I will set out what I consider to be the relevant material facts. I will also outline the process of my reasoning from consideration of those material facts to conclusion, setting out the differing positions advanced by parties. Where there has been conflict in submissions that has been significant to the outcome, I will provide reasons why I have preferred one position over another.

Submissions of the parties

5. The application was supported by a Public Interest Assessment (PIA), which explained that:
 - (a) the Applicant considered that a tavern licence is the most appropriate licence type for the Applicant's proposed manner of trade, which will have a focus on the sale of packaged liquor as well as the sale of liquor for consumption on the premises;

- (b) *Wines of While* will be a premises of small patronage, focusing on natural/minimal intervention wine in both a dine-in and takeaway capacity, that will not reflect the existing preconceptions of a tavern;
 - (c) the premises is suitable for a maximum of 22 persons at any one time;
 - (d) the premises is intended to provide the local community with an unprecedented venue akin to the *enotecas* of Italy and the *caves à manger* of France (dine-in wine stores) and bring vitality and a sense of community to the most northern end of William Street;
 - (e) these types of premises describe a casual yet educational relationship between the customer and shopkeeper, providing access to local and international wines and contributing to the landscape of relaxing meeting places for local people; and
 - (f) the food to be offered at the premises will be designed and curated to match the wines on offer, with a focus on buying and supporting local producers.
6. The PIA also explained that minimal intervention or natural wine describes an agricultural and viticultural practice of growing grapes organically or biodynamically and making wine in the cellar without the addition of commercial yeast, tannins, acids, fining agents or excessive filtering methods and without the addition of Sulphur-dioxide in excess of 100mg/L, a method of wine production that is a return to traditional practices (dating back to 8000 years ago in Georgia). The Applicant also submitted that minimal and natural wine is a growing industry with exemplary venues operating internationally and in Melbourne, Sydney and Adelaide.
7. The Applicant further submitted that it undertook a survey of 256 people between 9 April 2017 and 9 May 2017, which demonstrates that consumers are interested in natural and minimal intervention wines and believe that the premises will have a positive impact on the amenity of the locality, with 86% of respondents indicating that they would visit the premises.
8. In relation to existing licensed premises in the locality, the Applicant noted that the nearest premises do not concentrate on the service of natural or minimal intervention wines.
9. The Applicant's PIA also provided information on the surrounding locality, demographics of the locality; outlet density and generally addressed those matters prescribed in ss 5 and 38(4) of the Act.
10. In the notice of intervention, dated 20 July 2017 and supplemented by submissions dated 12 September 2017, the Intervenor:
- (a) referred to two applications¹ for the grant of liquor store licences in the locality which were refused by the Director, on the basis that the grant of each of the applications posed an unacceptable risk of alcohol-related harm and ill-health; and

¹ An application by TDMAC Pty Ltd for premises to be known as *Cellarbrations At Northbridge* and situated at 342 William Street, Perth (App ID: A0002005322) and an application by VHT Perth Pty Ltd, for premises to be known as *VHT Perth Pty Ltd* and situated at 412 William Street, Perth (APP ID: A000223363)

- (b) suggested *prima facie* that the premises presents as a *de facto* liquor store, given its diminutive size and significant focus on packaged liquor sales.
11. The Intervenor also made representations on:
- (a) the numbers and types of persons at risk of alcohol-related harm in the locality, including that information provided by “Operation Safe Place”, a partnership between the WA Police and Mission Australia, which involves identifying at-risk and unsupervised underage youths roaming the streets of Perth and Northbridge and removing them from the streets to a supervised facility. The Commissioner advised that from 8 April 2016 to July 2016, 168 youths were identified and taken to the facility: 126 of those youths (77%) were indigenous and 102 were identified as being at-risk (as defined in s 41 of the *Children and Community Services Act 2004*);
 - (b) the significant number of service provides in the locality for persons at risk of alcohol-related harm;
 - (c) crime statistics and instances of alcohol-related criminal behaviour in the locality, sourced from Police Databases (i.e. the Incident Management System and Computer Aided Dispatcher System), including offences for damage, disorderly behaviour, stealing, non-domestic assault; threatening behaviour, domestic assault and the numbers of move on notices issued, which noted that the rate of alcohol related domestic assaults for the Perth and Northbridge areas were considerably higher than the corresponding offence numbers for the metropolitan and State levels and data for police assistance involving disturbance and public disorder are significantly elevated in Perth and Northbridge when compared to the metropolitan and State rates; and
 - (d) the number and nature of existing licensed premises within the locality.
12. However, the Intervenor did not oppose the application and made representations regarding the imposition of trading conditions to minimise potential alcohol-related harms arising from the operation of the premises, should the licence be granted.
13. In the Applicant’s further submissions, dated 28 November 2017, it was submitted that notwithstanding the seeking of a tavern licence, which are commonly recognised as high-risk premises², the proposed premises should be considered as a low-risk venue, given that it will only cater to a small number of patrons on-site and offer an extremely limited range of packaged liquor. The Applicant also noted the difference between its application and those referred to by the Intervenor, placing significant emphasis on the fact that none of the following organisations had indicated any concern with the grant of the present application:
- (a) Major Paul Hatery, Corps Officer Perth Fortress of the Salvation Army;
 - (b) Beverley Wilson, Manager of the Salvation Army Homeless Services Network;
 - (c) Kiamh Kielly, Passages Centre Northbridge (a referral Service for Homeless or street present youths between the ages of 12 and 25);

² Note: the Director’s *Public Interest Assessment* policy includes tavern licences as more complex applications.

- (d) Kathleen Agnew of RUAH community centre in Northbridge; and
 - (e) Suzanne Carol, Area Manager of Youth Services Mission Australia, which provides alcohol and other drug services to young people and their families.
14. The Applicant also outlined a number of proposed trading conditions to alleviate concerns about it seeking to create a *de-facto* liquor store, while reiterating that the sale of packaged liquor will only be one service provided under the licence and not the sole service.
15. The Intervenor's further submissions noted that in the Applicant's dealings with the organisations referred to in paragraph 13 above, it failed to inform the service providers that it would be selling beer below the \$20 price point, which resulted in a marked shift in the support for the application by the service providers, who effectively withdrew their support.
16. As a result, the Intervenor raised concerns regarding the Applicant's proposal to sell takeaway beer products and questioned the Applicant's motivation in omitting to fully inform the service providers of its intended manner of trade.
17. The Applicant's closing submissions subsequently noted that the Intervenor's evidence "has crystallised the concerns held by the Police and service providers with respect to the present application, namely the supply of 'takeaway beer'" and conceded that it had failed to inform the health care providers of its intention to sell a limited number of beer products as packaged liquor. Accordingly, the submission also proposed further restrictions on the proposed range of packaged wine products to be available from the premises, as well as the range of takeaway wine product to be displayed at the premises. The Applicant also submitted that the proposed premises will be distinguishable from a traditional packaged liquor outlet in several ways, including:
- (a) its focus on "natural" and "minimal intervention" wines and related services; and
 - (b) the offering and/or conducting of:
 - (i) tastings and educational sessions of "natural" and "minimal intervention" wine products from time to time;
 - (ii) events where wine will be matched with food;
 - (iii) a range of take-away food items to complement its packaged liquor sales;
 - (iv) dine-in food options at all times; and
 - (v) non-alcoholic drinks.
18. Therefore, the full range of conditions proposed or agreed to by the Applicant included:
- (a) the licensee would be required to provide a range of "natural wines" and/or "minimal intervention wines" for consumption on the premises and as packaged liquor;
 - (b) the sale of packaged liquor would be restricted to bottles of wine with a retail value of at least \$20 per bottle;
 - (c) the sale of beer as packaged liquor would be prohibited;

- (d) liquor would not be supplied in jugs;
 - (e) a reasonable range of non-alcoholic and low-alcohol liquor products will be provided during all trading hours;
 - (f) there would be no promotion, advertisement or use of incentives to encourage the excessive consumption of liquor;
 - (g) food would be available for consumption on the premises during trading hours;
 - (h) a retail food service offering take-away food items to complement the sale of packaged liquor would be available during all trading hours, except for pre-arranged functions or special events;
 - (i) seating for a minimum of 22 patrons would be provided, except for pre-arranged functions or special events;
 - (j) a video surveillance system would be in place and operational;
 - (k) a maximum accommodation number of not more than 22 persons at any one time; and
 - (l) a prohibition from causing, suffering or permitting any person to enter and remain on the licensed premises wearing a jacket or any other clothing or accessory, or any clearly visible body marking, bearing the patch or insignia of any Outlaw Motor Cycle Gangs.
19. Accordingly, the Applicant submitted that its intended manner of trade will combine a packaged liquor service with onsite tasting, education, dining and drinking, in a premises that offers a dedicated service for on-site consumption and packaged liquor sales for “natural” and “minimal intervention” wines not currently offered by any single venue in Western Australia.

Legislative and legal framework

20. Section 30A(1) of the Act provides that applications under the Act are determined by the licensing authority.
21. Further, there is no presumption in favour of the grant of the application, rather the opposite applies and the Applicant must adduce sufficient evidence to satisfy the licensing authority that the grant of the application is in the public interest³. The Courts have also found that applications under the Act cannot proceed on the expectation that the commercial interests of an application will coincide with the public interest. To this end, Tamberlin J observed⁴ that:

“The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.”

³ *Liquor Control Act 1988*: s 38(2)

⁴ Refer *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142

22. In proceedings such as these, an Intervenor carries no onus to establish their assertions of fact or opinion⁵.
23. In determining the application, the licensing authority must consider both the positive and negative social, economic and health impacts on the community and satisfy itself that the grant of the liquor licence is in the public interest. Further, a determination such as this requires the exercise of a discretionary value judgment confined only by the scope and purpose of the Act⁶.
24. As such, the factual matters that I am bound to take into account when undertaking such a value judgment are those relevant to the primary and secondary objects of the Act, as set out in s 5⁷. The primary objects of the Act are:
 - (a) to regulate the sale, supply and consumption of liquor;
 - (b) to minimise harm 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.
25. The secondary objects of the Act are:
 - (a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State;
 - (b) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - (c) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
26. As stated by Banks-Smith J⁸, consideration of the matters under object 5(1)(c) does not diminish the role of the other objects of the Act, to which regard must be had.
27. The licensing authority is also entitled (but not bound) to take into account the factual matters set out in s 38(4) of the Act as part of the public interest considerations.
28. Section 16 of the Act provides that the licensing authority is to act according to equity, good conscience and the substantial merits of the case; should act without undue formality and is not bound by the rules of evidence.

⁵ Refer *Re Gull Liquor* (1999) 20 SR (WA) 321

⁶ 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] 7WAR 241; and *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd* (2007) WASCA 175

⁷ Refer *Woolworths v Director of Liquor Licensing* [2013] WASCA 227

⁸ Refer *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police & Ors* [2017] WASC 88

29. Where conflict arises in promoting the objects of the Act, the licensing authority must weigh and balance the competing interests in each case⁹.
30. Finally, s 33(1) of the Act provides that 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.

Reasons for determination

31. For the reasons which follow, and based upon the evidence presented, I am of the view that the Applicant has discharged its onus under s 38(2) of the Act and satisfied me that the grant of the application is in the public interest.
32. In this regard, I consider that the Applicant's intended manner of trade at the premises, subject to the conditions volunteered in its submissions, are sufficient to distinguish it from the proposed liquor stores in the locality that were refused by the Director, due to concerns about alcohol-related harm and ill-health.
33. I also accept the Applicant's submission, in the form of the statement by Dr Samuel Winfield, Managing Director of Nu Wines Pty Ltd, that the failure to inform service providers of the Applicant's intention to sell packaged beer was a careless omission and not a deliberate tactic to mislead.
34. Similarly, I accept the representations of the Intervenor, which highlight the existing levels of alcohol-related harm in the locality surrounding the proposed premises and the presence of at-risk persons in the locality and who are likely to be negatively impacted by the grant of the application. I find, therefore, that there is a high rate of pre-existing harm and ill-health caused by the use of liquor in the locality.
35. I also accept the Intervenor's evidence that there are at-risk persons who are vulnerable to alcohol abuse in the area and that the grant of a licence could be counterproductive to the work undertaken by the various service providers. Further, the grant of the licence will increase the physical availability of packaged liquor in the locality and I accept the representations of the Intervenor that there is evidence of a positive relationship between the availability of alcohol and the frequency and range of social and health problems, together with evidence that packaged liquor outlets are a contributor to violence.
36. Where object 5(1)(b) is relevant to the determination of an application, Allanson J held¹⁰ that there are four steps to be undertaken, namely:
 - (a) making findings that specifically identify the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - (b) making findings about the likely degree of harm to result from the grant of the application;

⁹ Refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258

¹⁰ Refer *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208

- (c) assessing the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - (d) weighing the likely degree of harm, so assessed, together with any other relevant factors, to determine whether an applicant can establish that it is in the public interest to grant the application.
37. It should be noted that in respect of the above, the factual finding is to “likely” alcohol related harm and ill-health and I am not required to find, as a fact, that particular harm will occur as a result of the grant or to find a causal link.
38. In relation to the relevance of existing levels of harm and ‘at risk’ persons to the public interest, Ipp J observed¹¹ that the possibility of harm or ill-health may be so remote or so insignificant that it should not be taken into account or may be of such a serious nature, that it is sufficient to cause the licensing authority to impose stringent conditions on a licence or refuse the grant absolutely.
39. In the particular circumstances of this case, I am satisfied that the threshold issue for the Intervenor and service providers is the sale of cheap and popular packaged liquor, which Kathleen Agnew at Ruah Community Services asserted “would not be a healthy or positive contribution to the local community.”
40. Therefore, to address this threshold issue and consistent with the trading conditions proposed by the Applicant, I intend to impose a condition on the tavern licence *inter alia* to specify that only wine, with a retail value of more than \$20 per bottle, may be sold as packaged liquor for consumption off the premises.
41. In my view, this condition will ameliorate the relevant harm concerns about cheap packaged liquor being purchased from the premises by ‘at-risk’ persons in the locality. Similarly, other conditions that were submitted by the Applicant are sufficient to satisfy me that the premises will operate as a genuine tavern and not a *de facto* liquor store.
42. Therefore, I have concluded that the grant of an appropriately conditioned licence will also 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 and also facilitate the use and development of licensed facilities, reflecting the diversity of the requirements of consumers in the State.
43. I am also satisfied that the Applicant has complied with all the necessary statutory criteria requirements and conditions precedent to the application being granted and that the grant of the application is in the public interest.
44. Accordingly, a tavern licence is conditionally granted to the Applicant for the premises, subject to the following conditions:
- (a) Certificates under ss 39 and 40 of the Act being lodged before the operation of the licence;

¹¹ Refer *Executive Director of Health -v- Lily Creek International Pty Ltd & Ors* [2000] WASCA 258

- (b) compliance with the *Local Government Act 1995, Health (Miscellaneous Provisions) Act 1911* and any written law relating to the sewerage and drainage of these premise;
 - (c) all work being completed within 12 months in accordance with the plans and specifications dated 2 June 2017;
 - (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements being satisfactorily completed and the Director being notified in writing, at least 21 days prior to Applicant wishing to trade under the licence;
 - (e) a final inspection by an Inspector of Licensed Premises being conducted to ensure that all requirements have been satisfactorily completed; and
 - (f) the Applicant seeking confirmation of the grant on or before 30 January 2019, pursuant to s 62(4)(c) of the Act.
45. The following conditions will be imposed on the issue of the licence:
- (a) Trading Hours:
 - (i) The permitted trading hours are those prescribed in s 98(1) of the Act for a hotel licence.
 - (b) Trading Conditions:
 - (i) The licensee is authorised to sell and supply liquor in accordance with the provisions of s 41 of the Act as it relates to a tavern licence.
 - (ii) During the permitted trading hours specified above, the licensee is authorised to sell and supply liquor for consumption on the licensed premises and as packaged liquor for consumption off the licensed premises.
 - (iii) The licensee is required to provide a range of “natural wines” and/or “minimal intervention wines” for consumption on the premises and as packaged liquor. For the purpose of this condition, “natural wines” and/or “minimal intervention wines” describes an agricultural and viticultural practice of growing grapes organically or biodynamically and making wine in the cellar without the addition of commercial yeast, tannins, acids, fining agents or excessive filtering methods and without the addition of Sulphur-dioxide in excess of 100mg/L.
 - (iv) The sale of packaged liquor is restricted to bottles of wine with a retail value of at least \$20 per bottle.
 - (v) No liquor is to be supplied in jugs.
 - (vi) The licensee is to provide a reasonable range of non-alcoholic and low-alcohol liquor products during all trading hours.

- (vii) The licensee shall not promote, advertise or employ incentives which encourage the excessive consumption of liquor by virtue of their 'emotive' titles such as (but not exclusive to) 'laybacks', 'shooters', 'slammers', 'test tubes' and 'blasters'.
 - (viii) Food must be available for consumption on the premises during trading hours.
 - (ix) A retail food service offering take-away food items to complement the sale of packaged liquor is to be available during all trading hours, except for pre-arranged functions or special events.
 - (x) Seating for a minimum of 22 patrons must be provided at all times, except for pre-arranged functions or special events.
 - (xi) A video surveillance system must be in place and operational. The system must comply with the minimum requirements identified and be maintained in accordance with the Director's *Safety and Security at Licensed Premises* policy.
 - (xii) A maximum accommodation number of not more than 22 persons at any one time, unless a lower accommodation number is issued by the relevant local government authority.
- (c) Outlaw Motorcycle Condition:
- (i) The licensee is prohibited from causing, suffering or permitting any person to enter and remain on the licensed premises wearing a jacket or any other clothing or accessory, or any clearly visible body marking, bearing the patch or insignia of any Outlaw Motor Cycle Gangs not limited to, but including, the following:
 - (1) Coffin Cheaters;
 - (2) Club Deroes;
 - (3) Gods Garbage;
 - (4) Gypsy Jokers;
 - (5) Outlaws;
 - (6) Finks;
 - (7) Rebels;
 - (8) Comancheroes;
 - (9) Hell's Angels;
 - (10) Rock Machine;
 - (11) Mongols;
 - (12) Lone Wolf;
 - (13) Bandidos; and
 - (14) Brothers 4 Life.
 - (ii) A notice is to be displayed at all entrance to the licensed area/event reflecting this condition.

(d) Entertainment Condition:

- (i) A person resorting to, or on the premises, including the licensee or manager, or an employee or agent of the licensee or manager, shall not:
 - (1) be immodestly or indecently dressed on the licensed premises; and/or
 - (2) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
- (ii) The licensee or manager, or an employee or agent of the licensee or manager, is prohibited from:
 - (1) exhibiting or showing, or causing, suffering or permitting to be exhibited or shown, on the licensed premises any "R 18+", "X 18+" or "RC" classified film or computer game or "Category 1 – Restricted" or "Category 2 – Restricted" publication, or extract therefrom; or
 - (2) causing, suffering or permitting any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises; or
 - (3) causing, suffering or permitting any person to take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
- (iii) In this condition "licensed premises" includes any premises, place or area:
 - (1) which is appurtenant to the licensed premises; or
 - (2) in respect of which an extended trading permit granted to the licensee is for the time being in force,

but does not include any part of the premises which is reserved for the private use of the licensee, manager or employees of the licensee and to which the public does not have access.

(e) Harm Minimisation:

- (i) The Licensee has lodged a copy of the House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Director's *Harm Minimisation* policy. These documents must be retained on the licensed premises and produced to any Authorised Officer if required.

General

46. Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.

47. The Applicant is reminded that trading **may not** commence without the prior written approval of the licensing authority.
48. For the purposes of clarity, I also note that the Applicant has sought the grant of an extended trading permit (App Ref: A000238286) pursuant to s 60(4)(h) of the Act, for approval to sell liquor in an area that would not otherwise be authorised. If granted, the permit would increase the premises' capacity by an additional 28 persons. However, this application is not presently ready to be determined. Notwithstanding this, I note that approval of the application will increase the capacity of the whole of the licensed premises to 50 persons, which on confirmation of the licence and grant of the permit, may result in some alterations to the conditions imposed in this determination relating to the maximum occupancy of the premises.
49. 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.
50. This matter has been determined by me under delegation pursuant to s 15 of the Act.



DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING