

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: FILBURN PTY LTD

PREMISES: THE SANDBAR SCARBOROUGH BEACH

PREMISES ADDRESS: SHOPS 2 & 4, 1 SCARBOROUGH BEACH ROAD
SCARBOROUGH

APPLICATION ID: A000187404

NATURE OF APPLICATION: GRANT OF A TAVERN RESTRICTED LICENCE

DATE OF DETERMINATION: 21 MARCH 2016

Introduction

- 1 This is an application by Filburn Pty Ltd (the applicant) for the grant of a tavern restricted licence for premises to be known as The Sandbar Scarborough Beach and located at 1 Scarborough Beach Road, Scarborough. The application is made pursuant to s 41 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. There were no objections to the grant of the application, however, pursuant to s 69 of the Act, the Commissioner of Police (the Commissioner) and the Executive Director Public Health (EDPH) both lodged notices of intervention.
- 3 The application will be determined on the written materials lodged by the parties as permitted under ss 13 and 16 of the Act. The submissions and evidence of the parties are briefly summarised as follows.

The applicant's evidence and submissions

- 4 The applicant currently operates two adjacent licensed premises at the site related to this application. One premise is licensed under a restaurant licence (the Sandbar) and the other is licensed as a small bar (the Torch Bar). The applicant effectively seeks to merge these two businesses and operate under a single licence. The licences for the existing Sandbar Restaurant and the Torch Bar will be surrendered if this application is approved.
- 5 It was submitted by the applicant that the locality surrounding the proposed licensed premises is undergoing a multi-million dollar upgrade which will contribute to a large increase in the number of visitors to the area. Already, the Scarborough Beach foreshore is an attractive destination, very popular with tourists, day trippers from Perth and the local working and residential population. The proposed licensed premises will be strategically located on the Scarborough foreshore and through the amalgamation

of the two existing premises, a single, more vibrant hospitality venue, with an extensive al fresco area, will be created.

- 6 The applicant proposes to spend approximately \$1 million dollars renovating the new premises in order to provide hospitality services to visitors to the foreshore area. Food will be an important part of the business model for the new venue, with the kitchen open until 9 p.m. nightly. The proposed premises will also have an emphasis on local live music (solos, duos or trios), however, the music will be user friendly and appropriate for the patronage.
- 7 The applicant submitted a Public Interest Assessment (PIA) to support its application together with 149 witness questionnaires. The PIA provided information on the locality surrounding the proposed premises; the history of the site and motivation for the application; the proposed style of operation; and addressed the matters set out in s 38(4) of the Act.

The Commissioner's submissions and evidence

- 8 The Commissioner intervened in the application because of concerns regarding the impact of the premises on the amenity of the locality.
- 9 It was submitted by the Commissioner that it is in the public interest to ensure the premises trade in a manner which will minimise disturbance or public disorder, contributes positively to the amenity of the area and complements the primary objects of the Act. According to the Commissioner, a tavern poses a far greater risk than a restaurant or small bar and therefore, if the application is granted, it is appropriate to impose conditions on the licence to minimise the risks associated with the operation of the premises. In this regard, the Commissioner is mindful of the previous alcohol-related problems experienced in Scarborough and the conditions imposed on other licences recently granted in the area.
- 10 Consequently, the Commissioner recommended various conditions relating to security, entertainment, the provision of food and seating.

The EDPH's submissions and evidence

- 11 The EDPH intervened in the application to make representations regarding the risk of alcohol-related harm or ill-health specific to the application, and the minimisation of that harm or ill-health. Specifically, the EDPH made submissions, and provided supporting evidence, in respect of the following:
 - the applicant is seeking a tavern restricted licence and research has identified that tavern licences can be a higher risk licence type for harm;
 - should the application be granted, it will replace a restaurant and small bar licence, which generally present a lower risk of alcohol-related harm;

- there is a history of alcohol-related harm in the locality of Scarborough, where the premises is proposed to be located;
- the combination of risk factors that this application presents means there is potential for the granting of this application to cause harm or ill-health; and
- if the licence is granted, the imposition of conditions on the licence would be an important harm minimisation approach.

12 In view of the evidence submitted, the EDPH recommended that if the application is approved conditions be imposed on the licence relating to the availability of food; the provision of seating; restricting music at the premises; and limiting the promotion of certain types of drinks.

Determination

13 The law relating to the grant of an application for a liquor licence is well established. The following general principles apply:

- the Act imposes an onus on an applicant for the grant of a licence to satisfy the licensing authority that the grant of the application is in the public interest (s 38(2)), and the burden of persuasion imposed on the applicant must be satisfied by evidence adduced in any particular case;
- an intervener carries no onus to establish their assertions of fact or opinion (refer *Re Gull Liquor* (1999) 20 SR (WA) 321);
- 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 (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).
- the factual matters which the licensing authority is bound to take into account when determining whether the grant of an application is 'in the public interest' are those relevant to the primary and secondary objects of the Act as set out in s 5;
- the 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; and
- the licensing authority must deal with each application on its merits (s 33) but has an absolute discretion to grant or refuse an application for any reason that the licensing authority considers in the public interest (refer *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC; *Palace Securities v Director of Liquor Licensing* (1992) 7 WAR).

14 The primary objects of the Act are:

- to regulate the sale, supply and consumption of liquor;
- 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.

15 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.

16 The applicant currently operates two adjacent premises in Scarborough, one is a restaurant and the other is a small bar. The applicant seeks to amalgamate these two premises into a single premise and trade under a tavern restricted licence. The new premises will operate in a similar manner to the existing premises with a continuing focus on the provision of food.

17 I have considered the applicant's evidence and submissions, as briefly outlined above, and given weight to the trading history of the two existing premises and I am of the view that the grant of the application would be consistent with objects 5(1)(c) and 5(2)(a) of the Act. I therefore conclude that the applicant has discharged its onus under s 38(2) of the Act.

18 However, in view of the problematic history of Scarborough in terms of alcohol-related violence and considering the submissions and evidence from the interveners, I accept that it is appropriate to impose conditions on the licence in order to minimise the risks associated with the operation of the premises in this area. This is consistent with the approach adopted for other licences recently granted in Scarborough.

19 In determining the trading conditions of the licence, I have also been cognisant of the applicant's submissions in this regard.

20 Consequently, I am satisfied that the applicant has complied with all other statutory requirements and conditions precedent to the application being granted, subject to the following:

Trading hours

The permitted trading hours are those prescribed in s 98(1) of the Act for a hotel licence.

Trading conditions

- 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 restricted licence.
- The sale of packaged liquor for consumption off the premises is prohibited.
- Food must be available at all times during trading hours.
- The licensee is to have and maintain a CCTV system in accordance with the policies of the Director of Liquor Licensing.
- The maximum number of patrons permitted on the licensed premises (which include any area covered under an extended trading permit) at any one time shall not exceed 450 or such lesser number imposed by the local government authority.
- Seating is to be provided for a minimum of 317 patrons, except when hosting pre-arranged functions or events when the minimum seating requirement is 150.
- Any music played at the premises must be at a level that permits conversation to occur.
- the licensee shall not promote or sell drinks which offer liquor by virtue of their 'emotive' titles such as, but not limited to, 'laybacks', 'shooters', 'slammers', 'test tubes', and 'blasters'.
- Drink options that contain low alcohol liquor content as well as a range of non-alcoholic drink options must be available at all times.
- No liquor is to be supplied mixed with energy drinks. For the purposes of this condition "energy drink" has the same meaning as formulated caffeinated beverage within the Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.
- Crowd controllers (licensed under the *Securities and Related Activities (Control) Act 1996*) are to be employed at a ratio of two crowd controllers for the first 100 patrons, and one crowd controller for each additional 100 patrons or part thereof, from 7 p.m. (or the time of opening the premises if after 7 p.m.) each Friday and Saturday until 30 minutes after closing.

Work to be completed

- The bar extension, as depicted on the plans lodged dated 18 September 2015 is to be completed within 3 months of the grant of the licence and is to comply with items 1 and 2 of the schedule of requirements dated 7 October 2015.
- Toilets within the premises are to be upgraded to comply with item 3 of the schedule of requirements within three months of the grant of the licence.
- A section 39 certificate is required to be lodged at the completion of all works.

Dress standards – Outlaw Motorcycle Gangs

The following dress standard applies during the permitted trading hours:

Jackets or any other clothing or accessory, or any clearly visible body marking, bearing patches or insignia of any Outlaw Motor Cycle Gangs not limited to, but including, the following listed Outlaw Motor Cycle Gangs, are not permitted to be worn or to be visible on the licensed premises:

- (i) Coffin Cheaters;
- (ii) Club Deroes;
- (iii) Gods Garbage;
- (iv) Gypsy Jokers;
- (iv) Outlaws;
- (v) Finks;
- (vi) Rebels;
- (vii) Comancheroes;
- (ix) Hell's Angels;
- (x) Rock Machine; and
- (xi) Mongols.

A notice is to be displayed at all entrance to the licensed area/event reflecting this condition.

Entertainment Condition

- (a) 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:
 - (i) be immodestly or indecently dressed on the licensed premises, and/or

- (ii) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
- (b) The licensee or manager, or an employee or agent of the licensee or manager, is prohibited from:
- (i) exhibiting or showing, or causing, suffering or permitting to be exhibited or shown, on the licensed premises any classified “R 18+”, “X 18+” or “RC” classified publication, film or computer game or extract therefrom; or
- (ii) 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
- (iii) 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.
- (c) In this condition “licensed premises” includes any premises, place or area:
- (i) which is appurtenant to the licensed premises; or
- (ii) 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.

Compliance with harm minimisation policy

The licensee is to have a House Management Policy, Code of Conduct and Management Plan developed for these premises in accordance with the Harm Minimisation Policy. These documents must be retained on the licensed premises and produced to any Authorised Officer if required.

General

- Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence. This fee will be waived on the basis that the licensee has recently paid two licence fees in respect of the Torch Bar and The Sandbar.
- The licensed premises are defined as the area outlined in red on the plans attached and dated 11 March 2016. A copy of that plan is to be retained on the premises and produced to any authorised officer if required.
- Pursuant to s 116(3) of the Act, the premises’ trading name of “The Sandbar Scarborough Beach” is approved. The licensee shall not subsequently conduct

business at the licensed premises under any other trading name, without the prior approval of the Director of Liquor Licensing.

- The applicant must ensure that the signage required under s 116(5) of the Act is displayed on the licensed premises within 14 days of the date of this decision (i.e. on or before 4 April 2016).
- Additionally, pursuant to s 116(4) of the Act, the licensee must ensure a copy of the licence is displayed in a readily legible condition and in a conspicuous position in the licensed premises.

22 The applicant has also sought the grant of an extended trading permit, under s 60(4)(h) of the Act. This application is approved subject to the following:

- the permit area is the area outlined in **yellow** on plans dated 11 March 2016;
- the permit area is to be set up with tables and chairs;
- any music played in the permit area is to be background pre-recorded music at a level to allow normal conversation to occur; and
- any music in the permit area is to cease at 10 p.m. each night.

23 Licence No 6340133810 in respect of premises known as the Torch Bar and licence No 6060043901 in respect of premises known as the Sandbar are surrendered effective from the date of this decision.

24 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.

25 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