

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: KENLY (WA) PTY LTD

OTHER PARTIES: CHIEF HEALTH OFFICER (INTERVENER)
COMMISSIONER OF POLICE (INTERVENER)

PREMISES: VAT 116

PREMISES ADDRESS: 2 KENT STREET ROCKINGHAM

APPLICATION ID: A000222504

MATTER: APPLICATION FOR CONDITIONAL GRANT OF A TAVERN
RESTRICTED LICENCE

DECISION OF: PETER MINCHIN
DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 31 JULY 2017

Introduction

- 1 This is an application by Kenly WA Pty Ltd (the applicant) for the conditional grant of a tavern restricted licence for premises to be known as Vat 116 and located at the corner of Railway Terrace and Kent Street, Rockingham. 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. There were no objections to the grant of the application, however, notices of intervention under s 69 of the Act were lodged by the Chief Health Officer (CHO) and the Commissioner of Police (the Commissioner).
- 3 The application will be determined based on the written material lodged by the parties as permitted under ss 13 and 16 of the Act. The evidence and submissions of the parties are briefly summarised as follows.

The applicant's proposal

- 4 According to the applicant, it proposes to establish a local dining and socialising venue that will offer a new and modern option for the Rockingham community and visitors to the area. Located at the top of the gateway to the Rockingham foreshore, the proposed venue will be a classic English style pub with an on-site kitchen to provide a premium pub style menu to support a boutique beer and wine offering.
- 5 Alcohol service will be from one main bar area only and there will be a variety of seating within the venue, including tabled seating, a communal table, lounge area and an alfresco area. The food and beverage trade will be supported by live entertainment such as acoustic guitar and vocals, screening of sporting events in the lounge area and other promotions that will support the activities of the local community.

- 6 According to the applicant, its target market will be:
- men and women in the 30 to 60-year-old age bracket;
 - local patrons who desire a gathering place for dining and socialising in an upmarket, contemporary lounge environment;
 - tourists and other visitors to the area who are staying in premium beachfront accommodation and who want to enjoy the Foreshore precinct and experience great food and boutique beverages not routinely available at other establishments; and
 - professional people looking for a relaxing and contemporary environment to entertain clients while highlighting the Rockingham Foreshore Precinct and local products and services.
- 7 The applicant submitted a Public Interest Assessment (PIA) to support its application. The PIA provided information on the proposed manner of trade, how the grant of the application will benefit the community, the nature and character of the local community, likely impact on the amenity of the area and existing outlet density.
- 8 It was submitted by the applicant that the grant of the application will support the aims of the City of Rockingham Economic Development Strategy to generate more revenue into the area, provide benefits to the community and play an important part in local tourism strategies.

The interventions

The Chief Health Officer

- 9 The CHO intervened in the application to make representations regarding potential harm or ill-health to people, or any group of people that may result from the grant of the application and how that harm may be minimised.
- 10 Specifically, the CHO made submissions on the following:
- the applicant is applying for a tavern licence, which research has demonstrated can be a higher risk licence type for alcohol-related harm;
 - there are existing levels of alcohol-related harm in the locality; and
 - if the licence is granted, conditions placed in the licence, in keeping with the way the licensee intends to trade, would be an important harm minimisation approach.
- 11 Consequently, the CHO recommended conditions for the licence relating to maximum patron numbers, seating, the availability of food and the responsible service of liquor.

The Commissioner of Police

- 12 The Commissioner intervened to provide information to assist the licensing authority in making an informed decision in respect of the application and recommend conditions that would minimise any negative impact that the operation of the premises may have on the local community.

- 13 The Commissioner provided evidence on the existing at-risk groups in the locality and general crime data. The crime data indicates that:
- alcohol-related domestic assaults for the suburb of Rockingham is 16.5% higher than the corresponding Rockingham sub-district;
 - there is an upward trend in alcohol-related domestic assaults for the suburb of Rockingham, increasing from 36 in 2014 to 53 in 2016;
 - there were 500 non-domestic assaults from 2014 to 2016, of which alcohol was a factor in 100 of these; and
 - Rockingham's alcohol-related non-domestic assaults were 119% higher than the Rockingham sub-district rate and 124% higher than the metropolitan rate.
- 14 It was submitted by the Commissioner that there is evidence of at-risk groups, existing harm, crime and disturbance within the locality and therefore careful consideration needs to be given to the trading conditions to mitigate the potential risks associated with the grant of the application. The Commissioner therefore recommended that conditions relating to the provision of food, seating, CCTV, security, drink standards and dress standards should be considered.

Legislative and legal framework for determining applications

- 15 In determining this application, I have been guided by the following legal principles.
- 16 An applicant for the grant of a licence must satisfy the licensing authority that the grant of the application is in the public interest.¹ An applicant must therefore adduce sufficient evidence to discharge this burden.
- 17 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.²
- 18 An intervener carries no onus to establish their assertions of fact or opinion.³
- 19 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 5.⁴
- 20 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

¹ Refer s 38(2) of the Act.

² ***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).

³ ***Re Gull Liquor*** (1999) 20 SR (WA) 321).

⁴ ***Woolworths v Director of Liquor Licensing*** [2013] WASCA 227).

- 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.

21 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.

22 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.⁵

23 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.⁶

24 Where conflict arises in promoting the objects of the Act, the licensing authority must weigh and balance the competing interests in each case.⁷ However, it is a matter of the licensing authority to decide what weight to give to the competing interests and other relevant considerations.⁸

25 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.

Reasons for determination

26 The applicant seeks to establish a new tavern (restricted) within the Rockingham Foreshore precinct. The proposed premises will be quite modest in size, catering to approximately 120 to 140 patrons. According to the applicant, the premises will be modelled on a classic English style pub, offering lunch and dinner for patrons together with a boutique range of beer and wine. Light entertainment will also be provided.

27 The applicant submitted that its clientele base will be:

- men and women in the 30 to 60-year-old age bracket;

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

⁶ Refer s 16 of the Act

⁷ *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258).

⁸ *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASC 356.

- local patrons who desire a gathering place for dining and socialising in an upmarket, contemporary lounge environment;
- tourists and other visitors to the area; and
- professional people looking for a relaxing and contemporary environment to entertain clients.

28 There were no objections to the grant of the application.

29 The interveners have provided evidence of the existing rate of alcohol-related harm occurring in the locality and highlighted the risks associated with the operation of a tavern in such an environment. The interveners have recommended various conditions for the licence to mitigate those risks.

30 The applicant submits that not all the conditions proposed the interveners are necessary or appropriate in the circumstances of this application, but is not otherwise opposed to the imposition of conditions to reflect the proposed manner of trade at the venue or to minimise the potential risks to the local community.

31 Assessing the likely degree of harm or ill-health to result from the grant of the application is essentially a matter of prediction.⁹ I am mindful of the existing alcohol-related harm occurring the locality, as evidenced by the crime and health data provided by the interveners, however, in my view, given the nature and scale of the business to be conducted under the licence and with appropriate conditions, the operation of the premises in this locality does not pose an unacceptable risk.

32 In consideration of the evidence presented, I find that the grant of the application would promote objects 5(1)(c) and 5(2)(a) of the Act. Object 5(1)(b) of the Act is to 'minimise' harm, not to prevent harm absolutely.¹⁰ In weighing and balancing the competing interests in terms of promoting the objects of the Act, I am persuaded that the grant of the application is in the public interest.

33 I therefore find that the applicant has discharged its onus under s 38(2) of the Act. Having complied with all the statutory requirements and conditions precedent to the application being granted, a tavern restricted licence is conditionally granted to the applicant subject to the following conditions:

- (a) a Certificate under s 39 of the Act being lodged before the operation of the licence;
- (b) compliance with the Local Government Act 1960, Health 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 15 December 2016;
- (d) the recommendations of the Inspector of Licensed Premises on the Schedule of Requirements being satisfactorily completed and the Director of Liquor Licensing being notified in writing at least 21 days prior to applicant wishing to trade under the licence;

⁹ *Lily Creek* supra.

¹⁰ *Lily Creek* supra.

- (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 July 2018** pursuant to s 62(4)(c) of the Act.

34 On confirmation of the conditional grant, the following conditions will be imposed on the licence:

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 premise is prohibited.
- Food must be available at all times during trading until 60 minutes before the end of trade.
- 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 will be set following receipt of the public building certificate from the local government authority.
- The premises are to be set up with seating and associated table/bench arrangements except during pre-booked functions and events.
- After 10 p.m. all windows/doors and swing doors are to be kept closed (except during access and egress).
- Any music or entertainment is to be low level live music or low amplification pre-recorded music, allowing normal levels of 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'.
- The sale of liquor in jugs is prohibited.
- Drink options that contain low alcohol liquor content as well as a range of non-alcoholic drink options must be available at all times.

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;
- (v) Outlaws;
- (vi) Finks;
- (vii) Rebels;
- (viii) Comancheroes;
- (ix) Hell's Angels;
- (x) Rock Machine;
- (xi) Mongols;
- (xii) Lone Wolf; and
- (xiii) Bandidos.

A notice is to be displayed at all entrances to the licensed areas 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.
- The applicant is reminded that trading may not commence without the prior written approval of the licensing authority.

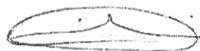
Extended trading permit

35 The applicant also lodged an application for an extended trading permit, pursuant to s 60(4)(h) of the Act to facilitate alfresco dining at the premises. This application is approved subject to the following:

- Submission of a copy of the City of Rockingham – Outdoor Eating Licence for the alfresco dining areas located on the council pavement and associated approved plan.
- Music in the permit area must cease at 10 p.m.
- When issued, the permit will be valid for a period of ten years, subject to the applicant having on-going consent from the City of Rockingham for use of the area and compliance with any conditions imposed by the City.

36 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.

37 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