

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: FLY BY NIGHT MUSICIANS CLUB LTD

PREMISES: FLY BY NIGHT MUSICIANS CLUB

PREMISES ADDRESS: 179 HIGH STREET FREMANTLE

APPLICATION ID: A000177980

NATURE OF APPLICATION: GRANT OF A SPECIAL FACILITY LICENCE

DATE OF DETERMINATION: 17 SEPTEMBER 2015

- 1 This is an application by the Fly By Night Musicians Club Limited (the applicant or the Club) for the grant of a special facility licence (theatre) for premises to be known as the Fly By Night Musicians Club and located at 179 High Street, Fremantle. The application is made pursuant to s 46 of the *Liquor Control Act 1988* (the Act).
- 2 Pursuant to s 13 and s 16 of the Act, the application will be determined on the written materials lodged.
- 3 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing (the Director). An objection to the application was lodged by Mr Richard Tay. Mr Tay is a resident and Strata Manager of the Gallery Suites, a residential complex at 185-187 High Street, Fremantle and is concerned that if the application is granted undue disturbance and annoyance will be caused to those who reside in the Gallery Suites.
- 4 In support of its application, the applicant submitted a Public Interest Assessment (PIA). According to the applicant, The Fly By Night Musicians Club is a not for profit member based community organisation founded in 1986 and has operated under a special facility licence at the Artillery Drill Hall in Fremantle for approximately 28 years. The club is moving to new premises a short distance away and seeks a liquor licence to continue its work as a community based arts organisation.
- 5 The law relating to the grant of a licence under the Act is well established. An applicant for the grant of a special facility licence must satisfy the licensing authority that:
 - the grant of the application is in the public interest (refer s 38(2));
 - the purpose for which the licence is sought is a prescribed purpose (refer s 46(1) and Regulation 9A); and
 - no other class of licence under the Act, with or without conditions, would achieve the purposes for which the special facility licence is sought.

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- 6 In determining whether the grant of an application in the public interest, I am required to exercise a discretionary value judgement 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).
- 7 The scope and purpose of the Act can be ascertained from its objects, which are set out in s 5. The primary objects of the Act are:
- to regulate the sale, supply and consumption of liquor;
 - to minimize 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.
- 8 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.
- 9 Having read the applicant's PIA and submissions, and giving weight to the fact that the club has operated for many years under a special facility licence at another venue nearby, I am satisfied that the grant of the application will be consistent with objects 5(1)(c) and 5(2)(a) of the Act. I am also satisfied that the proposed licence is for a prescribed purpose under the regulations and no other class of licence, with or without conditions, would achieve the purposes for which the special facility licence is sought.
- 10 In respect of the objection by Mr Tay, s 73(10) of the Act imposes an obligation on an objector to establish the validity of their objection.
- 11 In this regard, Mr Tay provided a letter from John Reid, Executive Director of the Club, who undertook noise readings from the Gallery Suites when a rock band was playing at the proposed premises with a full PA system. Those readings indicated a noise level of 80db on the balcony of the top floor of the Gallery Suites. Mr Reid acknowledged that the proposed premises requires some acoustic treatment to ensure the operation of the Club does not disturb the quality of life of residents of the Gallery Suites and the Club will work with the local government authority to properly attenuate the building.

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- 12 Mr Tay indicated that he would only support the application once the work has been completed and confirmed as effective.
- 13 The applicant's evidence satisfies me that the grant of the application is in the public interest as required under the act, however the applicant has also acknowledged that the premises requires some attenuation work so that the operation of the premises does not unduly impact on tenants of the Gallery Suites. One of the grounds of objection under s 74 of the Act is that if the application were granted undue offence, annoyance, disturbance or inconvenience to persons who reside in the vicinity of the proposed premises would be likely to occur. I am satisfied this ground of objection has been established.
- 14 However, in my view, this matter can be resolved to the benefit of the parties by the licence being conditionally granted subject to the applicant providing an acoustic report by a suitably qualified acoustic consultant certifying the compliance of the premises and its uses with the *Environmental Protection (Noise) Regulations 1997*. Consequently, the applicant can move forward with the knowledge that it has a licence, but the premises would not be able to commence trading until the attenuation work has been undertaken and the subsequent acoustic report received. Section 33(1) of the Act provides an application may be granted even if a valid ground of objection is made out.
- 15 Notwithstanding, the applicant is reminded that under s 117 of the Act, a complaint may be lodged with the Director if the amenity, quiet or good order of the neighbourhood of the licensed premises is frequently unduly disturbed by reason of any activity occurring at the licensed premises. If the Director is satisfied that the complaint has been established, conditions can be imposed on the licence in order to remedy the complaint. It would therefore be in the applicant's best interest to work consultatively with the residents of the Gallery Suites.
- 16 Accordingly, a special facility licence (theatre) is conditionally granted to the applicant subject to the following:
- (1) Prior to the activation of the licence, the licensee shall submit an acoustic report, to the satisfaction of Director of Liquor Licensing, by a suitably qualified acoustic consultant, certifying the compliance of the premises and its uses with the *Environmental Protection (Noise) Regulations 1997*. The report shall include:
 - location(s) of all noise sensitive premises (site maps);
 - all calculations made on influencing factors and assumptions based on the manner of trade at the premises; and
 - modelling data.
 - (2) An executed lease being submitted.

(3) The applicant seeking confirmation of the grant within 12 months of the date of this decision as required under s 62(4)(c) of the Act.

17 When the licence commences operation it will be subject to the following conditions:

The licence is granted for the purposes of a theatre. Liquor may only be sold and supplied for consumption on the premises only to persons attending a live performance by musicians or other artists at the Club.

Liquor may not be sold for consumption off the licensed premises.

Trading hours

In accordance with s 98C of the Act, the following trading hours apply:

Monday to Saturday 5 p.m. to 12 midnight; and

Sunday 5 p.m. to 10 p.m.

No trading is permitted on Christmas Day, Good Friday or before 12 noon on ANZAC Day.

Profit sharing

Pursuant to s 104(3) of the Act, approval is given for profit sharing to occur between the licensee and third parties consisting of door charges associated with performances of live bands. However, in the event that concerns are raised over the suitability of any particular third party, the licensing authority reserves the right to conduct an investigation into the fitness of that person, pursuant to the provisions of s 37(1)(d) of the Act.

Entertainment condition

1. 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 –
 - (a) be immodestly or indecently dressed on the licensed premises, and/or
 - (b) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
2. The licensee or manager, or an employee or agent of the licensee or manager, is prohibited from -
 - (a) 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;
 - (b) 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

- (c) 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.
3. In this condition "licensed premises" includes any premises, place or area:-
- (a) which is appurtenant to the licensed premises, or
 - (b) 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 has lodged a copy of the 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.

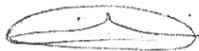
General

Pursuant to s 127(2) of the Act, the prescribed licence fee payable in respect of this licence is 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.

18 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.

19 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