

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: WRIGHT HOSPITALITY PTY LTD

PREMISES: THE LOCAL SHACK 2

PREMISES ADDRESS: 148 THE ESPLANADE SCARBOROUGH WA 6019

APPLICATION ID: A000057241

NATURE OF APPLICATION: APPLICATION FOR GRANT OF A TAVERN
RESTRICTED LICENCE AND EXTENDED TRADING
PERMIT

DATE OF DETERMINATION: 19 May 2015

Introduction

- 1 On 22 October 2014, an application was lodged by Wright Hospitality Pty Ltd (the applicant) for the grant of a tavern restricted licence in respect of premises to be known as The Local Shack 2 and located at Shop 13, 148 The Esplanade, Scarborough. The application is made pursuant to s 41 of the *Liquor Control Act 1988* (the Act). The applicant also seeks an extended trading permit (ETP), pursuant to s 60(4)(h) of the Act, for an alfresco area.
- 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 the Commissioner of Police (the Commissioner) lodged a Notice of Objection to the grant of the application while the Executive Director Public Health (EDPH), pursuant to s 69, lodged a Notice of Intervention.
- 3 Pursuant to ss 13 and 16 of the Act the application will be determined on the papers. The submissions and evidence of the parties are briefly summarised as follows.

The applicant's submissions

- 4 In December 2013, the applicant was granted a restaurant licence, authorising the sale and supply of liquor ancillary to a meal, in respect of the premises the subject of this application. The applicant now seeks the grant of a tavern restricted licence for the premises.
- 5 According to the applicant, the existing restaurant has proven popular with local residents and tourists visiting the Scarborough beachfront, however the existing restaurant licence does not provide the applicant with sufficient flexibility to provide hospitality services to meet the expectations of its customers, some of whom wish to consume liquor without the requirement to have a meal.

- 6 It was submitted that with the redevelopment and transformation of the Scarborough beachfront, the premises are ideally placed to provide food and liquor, in a relaxed beached themed environment, to the increasing number of visitors to the area. The Local Shack menu and ambiance is a unique and a much needed experience that is enjoyed by tourists and residents of Scarborough.
- 7 According to the applicant, there will be no significant change to the way the venue operates if the application is granted. The premises will remain set up with tables and chairs; food will be available during all hours of trade and remain a focus of the venue; table service will be provided and patrons will not be able to order liquor from the bar area. The premises has, and will maintain, a CCTV surveillance system.
- 8 The applicant submitted a relatively brief Public Interest Assessment (PIA) to support its application and address the matters set out in s 38(4) of the Act. Whilst acknowledging the problematic history of the Scarborough beachfront area in terms of anti-social behaviour, the applicant is of the view that the trading history of the venue; its proposed manner of trade if the application is granted; and its demonstrated management practices makes the proposed venue low risk and the operation of the premises will positively contribute to the amenity of the locality.
- 9 The applicant submitted a petition signed by its existing customers to support the change in licence from a restaurant to a tavern restricted.

The Commissioner's submissions

- 10 The Commissioner objected to the grant of the application on the following grounds under s 74(1) of the Act:
- the grant of the application would not be in the public interest;
 - if the application were granted, the amenity, quiet or good order of the locality would be lessened; and
 - the grant of the application would otherwise be contrary to the Act.
- 11 It was submitted by the Commissioner that in carrying out its functions under the Act, the licensing authority is required to have regard to the objects of the Act. To assist the licensing authority in considering the potential harm implications in granting the application, the Commissioner provided data on existing crime in the locality. In this regard it is noted that:
- between 1 January 2013 and 25 November 2014, there were 388 relevant offences, of which 50 were alcohol-related;
 - in 2012 there were 137 drink drivers detected in the suburb of Scarborough of which 50 recorded licensed premises as their last place of drink;

- in 2013 there were 105 drink drivers detected in the suburb of Scarborough of which 34 recorded licensed premises as their last place of drink; and
 - in 2014 (to 31 October) there were 82 drink drivers detected in the suburb of Scarborough of which 21 recorded licensed premises as their last place of drink.
- 12 According to the Commissioner, there is already a large number of licensed premises in the locality, including seven hotels (taverns and small bars) which can provide liquor to the public without the obligation to have a meal. The Commissioner asserts that the applicant has failed to show how the proposed premises offers any services that are different to the existing premises in the area and patrons who wish to consume liquor without a meal are already well catered for by those existing premises.
- 13 It was therefore submitted that if the application is granted it will create an over representation of tavern style premises in the area. Given this concentration of premises, where the primary focus is the sale of liquor, there is an increased risk that the amenity of the area may be negatively impacted and there may be an elevation in the existing levels of alcohol-related harm.
- 14 The Commissioner also noted that the applicant has been infringed for previous breaches of the Act, namely failing to have the approved signage and failing to produce plans.
- 15 Consequently, it was submitted by the Commissioner that the locality is already well serviced in terms of licensed premises and given the existing level of alcohol-related harm in the area and the applicant's less than compelling evidence, the application should be refused.

Submissions by the Executive Director Public Health

- 16 The EDPH intervened in the application to make representations regarding the risks associated with the grant of the application and the minimisation of those risks. The grounds for intervening were based on the following:
- the applicant is applying for a tavern restricted licence and research has identified that tavern licences can be a higher-risk licence type for harm;
 - there is a history of alcohol-related harm and anti-social behaviour in Scarborough associated with the operation of licensed premises;
 - there is a level of existing alcohol-related harm in the locality;
 - the combination of risk factors associated with the application 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, consistent with the applicant's intended manner of trade, would be an important harm minimisation approach.

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- 17 According to the EDPH, both the focus of alcohol at a venue and the characteristics of the environment affect how people consume alcohol, and can influence the potential for harm to occur. For example, the requirement to consume a meal under a restaurant licence makes it lower-risk for harm when compared to other licence types. Physiologically, this is because the consumption of food slows the absorption of alcohol, thereby reducing the potential for drunkenness and related problems. Also, the requirement to consume a meal at a restaurant means that the predominant visible feature of the venue is food, presenting a cultural message to patrons that alcohol is a lesser feature, potentially resulting in less consumption. In this case, the applicant is seeking to change from a restaurant licence to a tavern licence which increases the potential for alcohol-related harm to occur given the change in the manner in which liquor can be consumed at the premises.
- 18 It was submitted by the EDPH that the locality surrounding the premises is an important consideration when determining the potential harm or ill-health impacts associated with the application. In this regard, the foreshore/beach/carpark area of Scarborough has a history of alcohol-related harm and ill-health associated with the operation of licensed premises. A number of new licences have been granted in the area in recent times and the proposed premises will be operating in a higher-risk manner, in close proximity to multiple other licensed outlets, resulting in large numbers of people who have been consuming alcohol congregating and interacting in the area.
- 19 It is against this background that the EDPH submitted that if the application is granted, it is important for conditions to be imposed on the licence to mitigate the risks associated with the operation of the premises in this location. The EDPH subsequently recommended the following conditions, which, according to the EDPH, are consistent with the applicant's submissions and proposed manner of trade:
- food shall be available at the premises at all times when open to the general public;
 - the premises is to retain the seating configuration of the current restaurant licence, except for pre-arranged functions and events;
 - 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'; and
 - no energy drinks mixed with liquor may be sold. (For the purposes of this condition energy drinks has the same meaning as formulated caffeinated beverage within the Australian New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.)

Determination

- 20 The applicant currently operates a licensed restaurant from the premises and is seeking a tavern restricted licence to provide greater flexibility in terms of the services that can be provided to its patrons, particularly the ability to consume alcohol without the requirement to have a meal. However, food will remain a focus of the venue and the premises will be set up with tables and chairs to create a low risk drinking environment. The applicant submits that it is not seeking to change the general nature of its premises, but is merely seeking the ability to cater to the requirements of its customers in a manner which is not authorised under its restaurant licence.
- 21 An applicant for a tavern restricted licence must satisfy the licensing authority that the grant of the application is in the public interest (refer s 38(2)). The expression 'in the public interest' is not defined under the Act, but imports 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).
- 22 The factual matters which the licensing authority is bound to take into account in determining whether the grant of the application is 'in the public interest' are those relevant to the primary and secondary objects of the Act as set out in s 5 (refer *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227).
- 23 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.
- 24 The licensing authority is also entitled to take into account the matters set out in s 38(4) of the Act (refer *Woolworths supra*).
- 25 Where there is conflict between the statutory objects, the licensing authority must undertake a weighing and balancing exercise. Each decision will depend upon the particular circumstances of the case (refer *Executive Director of Public Health v Lily Creek International Pty Ltd* (2000) 22 WAR 510).
- 26 There is no onus on an intervener to establish their assertions of fact or opinion (refer *Re Gulf Liquor* (1999) 20 SR (WA) 321), however the burden of establishing the validity of any objection lies on the objector (refer s 73(10)).

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- 27 Consequently, the question is whether, having regard to all of the circumstances and the legislative intention, the grant of the application is justified. In answering this question the licensing authority has a wide discretion. It is a matter for it to decide what weight to give to the competing interests and other relevant considerations (refer *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356).
- 28 In *Woolworths* (supra) the Court noted that in considering whether the grant of an application is in the public interest the licensing authority needs to consider both the positive and negative aspects of the application and how the application will promote the objects of the Act.
- 29 From the applicant's evidence and submissions I discern the positive aspects of the application to be the following:
- the premises currently trade as a restaurant, on the beach front, providing food and liquor services to tourists and locals;
 - the current premises are well patronised;
 - notwithstanding some infringement notices for minor breaches of the Act, the premises would appear to be well managed in terms of levels of intoxication;
 - the grant of the application will be catering to the requirements of consumers for liquor and related services, consistent with object 5(1)(c) of the Act. Existing patrons of the restaurant have expressed a desire for the expanded services to be offered at the venue if the application is granted; and
 - there is no evidence before me to indicate that the operation of the premises, under its restaurant licence, has negatively impacted on the amenity of the area.
- 30 The negative aspects of the application as discerned from the evidence of the Commissioner and the EDPH are:
- the premises will operate under a tavern restricted licence which is a higher risk licence type;
 - the Scarborough beachfront has a history of alcohol-related problems;
 - there is evidence of existing alcohol-related problems in the area; and
 - a number of new applications have been approved in the locality increasing the likelihood of people who have been consuming alcohol congregating and interacting in the area.
- 31 To mitigate the risks associated with the grant of the application, and the subsequent operation of the premises, the EDPH recommended various conditions. The applicant has agreed to those conditions. The applicant is also proposing that there will be no sales of liquor across the bar, with patrons ordering their liquor from wait staff. In my

view, the imposition of these conditions is a positive harm minimisation strategy. Although the application, if approved, would authorise the provision of liquor without a meal, food will remain a strong focus of the venue and the physical set up of the premises will essentially remain unchanged. I am of the view that the risks associated with the grant of the application can be mitigated through the imposition of appropriate conditions.

- 32 As I have observed in other decisions, the Scarborough beachfront is undergoing significant transformation. The provision of hospitality services can contribute positively to the overall success of this redevelopment. Whilst the evidence establishes that there is some existing alcohol-related harm in the area, it does not currently appear to be at an unacceptable level in the terms considered by Wheeler J in *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2001] WASCA 410 (also bearing in mind that object 5(1)(c) was added as a primary object via amendments to the legislation after the *Lily Creek* decision). I note for example that drink driving offences in the locality would appear to be declining. It would of course be undesirable for the level of alcohol-related harm in the area to return the historic highs that beset the Scarborough beachfront in the past. Trends in rates of assault and anti-social behaviour in the area need to be monitored.
- 33 Although the applicant's PIA was relatively brief and the subject of some criticism by the Commissioner, I am nonetheless satisfied that it is sufficient for me to conclude that the grant of the application would be in the public interest. I accept that the proposed manner of trade, together with appropriate conditions can mitigate the risks associated with the operation of the premises in this particular locality and the premises can positively contribute to the amenity of the area and cater to the requirements of consumers for liquor and related services, consistent with object 5(1)(c) of the Act.
- 34 Consequently, in weighing and balancing the competing interests in this case, I believe the positive aspects of the application outweigh the potential risks associated with the grant of the application. I also give weight to the trading history of the premises, albeit under a restaurant licence, at this location. I am therefore satisfied that the applicant has discharged its onus under s 38(2) of the Act and the objection by the Commissioner has not been established as required under s 73(10).
- 35 Therefore, the application is granted and the licence is subject to the following conditions:

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 licensed premises is prohibited.
- during the permitted trading hours specified above, the licensee is authorised to sell and supply liquor for consumption on the licensed premises.
- food must be available during trading hours.
- the premises are to be set up with tables and chairs at all times, except for pre-arranged functions and events.
- any music played at the premises must be background in nature only, sufficient to allow normal conversation to occur.
- liquor can only be ordered from wait staff and cannot be purchased directly from the bar.
- 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 licensee is to have and maintain a CCTV system compliant with the policies of the Director of Liquor Licensing.
- 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.
- The toilet fit out, in accordance with the Schedule of Requirements dated 9 December 2014, must be completed within three months from the date of the issue of the licence.

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.

General

- Pursuant to s 127(2) of the Act, the prescribed licence fee will be payable prior to the operation of the licence.
- I am satisfied that the licence fee has been paid.
- The licensed premises are defined as the area outlined in red on the plans attached and dated 24 October 2014. 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 Local Shack 2" 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 2 June 2015).
- 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.

36 The application for the ETP is approved for a period of five years subject to the following:

- the licensee having consent from the relevant local government authority for use of the area;
- compliance with any conditions imposed by the local government authority;
- the permit area is to be set up with tables and chairs;
- no speakers are to be set up in the permit area; and
- the permit area is the area outlined in yellow on plans dated 24 October 2014.

37 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.

38 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