

DECISION OF DIRECTOR OF LIQUOR LICENSING

LICENSEE: REID GROUP PTY LTD

PREMISES: THE MATISSE BEACH CLUB

PREMISES ADDRESS: T1 AND T2, ESPLANADE LEVEL RENDEZVOUS HOTEL
(LOT 11), 148 THE ESPLANADE SCARBOROUGH

LICENCE NUMBER: 6380146986

APPLICATION ID: A000065070 & A000128881

NATURE OF APPLICATION: APPLICATION FOR GRANT OF AN EXTENDED
TRADING PERMIT – ONGOING HOURS AND
VARIATION OF TRADING CONDITIONS

DATE OF DETERMINATION: 8 JULY 2015

Background

- 1 On 1 November 2013, I conditionally granted a tavern restricted licence for the Matisse Beach Club located at 148 The Esplanade, Scarborough. In determining that application, evidence was presented relating to the existing level of alcohol-related harm and anti-social behaviour in the area and the high rates of alcohol-related problems that existed in the area when large licensed premises previously operated out of this site.
- 2 However, it was acknowledged that the redevelopment of the Scarborough beachfront was an important project and through capital investment and the introduction of new amenities and services to the public, cultural change can be facilitated and stagnating areas rejuvenated. There are significant benefits to the State, not only in terms of tourism, from the redevelopment of this precinct.
- 3 In order to mitigate the potential risks associated with the operation of the venue, the licence was subject to a number of conditions, including a condition restricting the number of patrons on the premises to no more than 750.
- 4 The licensee commenced trading at the premises on 2 April 2014.

Current applications

- 5 The licensee has lodged two applications for determination. The first application, pursuant to s 64 of the *Liquor Control Act 1988* (the Act), is to vary the number of patrons permitted on the premises from 750 to 1,000 and the second application is for an extended trading permit (ETP), under s 60(4)(g) of the Act, to authorise the following additional trading hours:

- between 12 midnight and 1 a.m. the following morning on Wednesday and Thursday evenings;
 - between 12 midnight and 2 a.m. the following morning on Friday and Saturday evenings; and
 - between 10 p.m. and 12 midnight on Sundays.
- 6 Both applications were advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing (the Director). Objections to the application to vary the patron numbers to 1,000 were lodged by:
- William Shaw
 - Zadnik Paul
 - Anne Paterson;
 - Kevin Gilbert and Yvonne Gilbert;
 - William Yeaman; and
 - Brian Roberts and Myree McGoldrick
- 7 Objections to the ETP application were lodged by:
- Helen Hadodo;
 - Geoff Cooke and Judy Cooke;
 - William Shaw;
 - Zadnik Paul;
 - Anne Paterson;
 - Kevin Gilbert and Yvonne Gilbert;
 - William Yeaman;
 - Brian Roberts and Myree McGoldrick; and
 - Lorraine Fraser
- 8 Pursuant to s 69 of the Act, the Commissioner of Police (the Commissioner) intervened in both applications, while the Executive Director Public Health (EDPH) intervened in the ETP application.
- 9 It is convenient to deal with the applications together, since there are common objectors and the matters raised by the objectors to both applications are similar. Pursuant to s 13 and s 16 of the Act, the applications will be determined on the basis of the written materials lodged. The evidence and submissions of the parties are briefly summarised as follows.

Submissions on behalf of the applicant

- 10 According to the applicant, history has shown the Scarborough foreshore to evolve and mature with time in keeping with modern public requirements, although since the late 1990's until recently very little happened and the area fell into ruin and significantly lost its appeal. In the last couple of years, however, due to government and private investment things have changed and are continuing to change. New dining, drinking

and socialising facilities have opened as well as other improvements. Despite these more recent positive changes, the applicant submits that the area still has not reached its full potential as a modern coastal hospitality precinct and later trading at Matisse will assist in this regard.

- 11 The applicant is of the view that the ETP application and the patron capacity variation are entirely consistent with the history of the precinct both in terms of evolving with the times but also in terms of providing essential licensed services for now and the future. The applications are a natural and logical progression, given the redevelopment of the area and the growing demand for Matisse's services and facilities.
- 12 According to the applicant, Matisse is a modern, multi faceted hospitality venue, which is styled and themed as a 'chic beach resort' with a holiday-hotel pool-side type atmosphere. Matisse is deliberately referred to as a "venue" and not a tavern, pub or bar. The licensee has carefully designed a style of operation that is totally unlike a traditional bar or pub. The new facility has been designed as a destination meeting place which has character, high standards and offers a sophisticated range of modern hospitality services. It is not merely a place to obtain liquor, but rather is designed to provide an experience. Food, liquor, entertainment, water features, unique fit-out and ocean views combine to provide a special mix of hospitality services at Matisse.
- 13 The applicant submitted that since the venue commenced trading, other than a couple of minor and innocuous items when the venue first opened, there is no record of incidents or non-compliance. This fact and the absence of any adverse trading records demonstrate that the licensee is more than capable of managing a large venue during extended trading hours. Matisse has won a number of AHA awards, including Best New Venue, Best Outdoor Venue and an award for excellence in Bar Service and Presentation. In addition, since opening, the licensee has obtained several one-off ETP's and licence variations for later trading and additional patron numbers, which have proven to be very successful and compliant, with no incidents or adverse consequences. The licensee also operates The Breakwater in Hillarys, which has a very long and enviable track record of compliance and success.
- 13 The applicant submitted a detailed Public Interest Assessment (PIA) to support its applications. The PIA provided information on the locality surrounding the premises, social health indicators for the area, the likely impact on the amenity of the locality and the applicant's harm minimisation strategies, which included the following conditions to be endorsed on the permit:
 - an identification scanning system be maintained to record identification of all patrons entering the premises;
 - persons other than an "authorised person" may not be permitted to enter or re-enter the premises after 1.30 a.m.; and

- at least one person licensed under the *Security and Related Activities (Control) Act 1996* be required to remain at the premises after closing, for up to 30 minutes.
- 14 According to the applicant, Matisse is helping to return some of Scarborough's positive history to the area through providing casual socialising and entertainment services which were once flourishing in Scarborough making the area a major attraction for people from around the metropolitan area and tourists.
- 15 The PIA included various letters of support, public questionnaires and survey forms. It was submitted that there is overwhelming support from the public, and the grant of the applications would be catering to the requirements of consumers for liquor and related services and supporting the tourist industry in the State.
- 16 In conclusion, it was submitted that the applicant is highly experienced, with a distinguished track record and is more than suitable to successfully operate the ETP and increased patron capacity. Matisse is an award-winning, first class facility which is very well patronised and if the applications are approved, it is unlikely that there will be any negative impact on the community.

Submissions by the objectors

- 17 The objectors submit that an increase in trading hours and patron numbers will lead to an increase in the consumption of alcohol by patrons of the venue, which will result in the same problems that previously existed in the area, when there were fights, vandalism and patrons of licensed premises negatively impacted the amenity of the area.
- 18 Many objectors claim they already experience offence and disturbance emanating from Matisse in the form of amplified music, patron noise and anti-social behaviour, which will only be exacerbated if these applications are granted. Whilst accepting that licensed venues in the area are necessary, it was submitted that an extension of trading hours is not necessary to attract the type of patron that creates a good social environment conducive to tourism and family interaction.

Submissions by the Commissioner of Police

- 19 It was submitted by the Commissioner that this venue is located in Scarborough on the beach side of the entertainment area. This area has a historical reputation for harm, disorder and disturbance as a result of licensed premises, which was acknowledged in the decision originally granting the licence for Matisse. Research has demonstrated a relationship between hotels which have extended trading hours and an increase in violence and assault rates.
- 20 Consequently, it was submitted by the Commissioner that if the applications are approved, it is important to impose conditions on the operation of the permit to minimise any potential negative impact on the amenity of the area. In addition to the conditions proposed by the applicant, the Commissioner suggested that a condition

relating to the provision of security should be imposed and a one hour lockout is more effective than the 30 minute lockout suggested by the applicant.

Submissions by the Executive Director Public Health

21 The EDPH intervened to make representations regarding the potential for the ETP application to cause harm or ill-health to people, or any group of people, due to the use of liquor and the minimisation of that harm. The intervention was based on the following:

- Western Australian Police (WAPOL) data show there are existing levels of alcohol-related harm occurring in the locality of Scarborough;
- research demonstrates that late night trading can facilitate increased consumption of alcohol and related harm, not only inside a venue, but once patrons leave;
- Scarborough has a history of alcohol-related harm and ill-health associated with late night trading by licensed premises; and
- to maintain the vision for the redevelopment of the Scarborough beachfront precinct, and to avoid the problems and harms associated with previous late night trading venues in Scarborough, it is suggested that, if the application is granted, trading only be permitted until 1 a.m. Friday and Saturdays.

22 According to the EDPH, it is well established that large venues can pose a greater risk of harm. A large patron capacity means greater numbers of people consuming alcohol in an area which can make it more difficult for staff to effectively monitor the consumption of alcohol by patrons to prevent risk factors for harm, such as drunkenness. Also, larger numbers of people increase the chances of accidental contact between patrons, with alcohol impairing their ability to respond appropriately.

23 The EDPH referenced various research literature which provides a correlation between late night trading and increased alcohol consumption and alcohol-related harm. An environment supportive of prolonged drinking sessions increases the risk to individuals, the effects of which can impact on others both inside the venue and once patrons leave. The EDPH also submitted that it is relevant to consider the experience of other entertainment precincts in the Perth metropolitan area, and national and international cities where late night trading has been introduced and associated with increased levels of harm during these times. This common experience relating to late night trading premises provides an indication that the granting of additional hours to Matisse may negatively impact on alcohol-related problems in the area.

24 The EDPH provided evidence of the level of alcohol-related harm in the locality. It was submitted that:

- Scarborough has a history of alcohol-related harm or ill-health associated with late night trading licensed premises;

- almost 1 and every 2 recorded non-domestic assault offences in Scarborough are alcohol-related;
 - nearly 2 in every 5 offences against the person in Scarborough are recorded as alcohol-related; and
 - the non-domestic assault offence rate has increased above the State rate in recent years (2001 – 2014) in the locality of Scarborough.
- 25 Although police data indicates alcohol-related assaults have decreased in recent years in the area, this was, according to the EDPH, as a result of numerous changes in the Scarborough area in the years leading up to 2007 and beyond. It was therefore submitted that, in relation to the ETP application, historic and current alcohol-related harm is a relevant consideration in determining the potential harm or ill-health associated with the introduction of up to 1,000 patrons during identified high-risk times for harm.
- 26 In view of these risk factors, the EDPH submitted that if the application is granted, extended trading should only be approved for Friday and Saturday nights to 1 a.m. and the conditions proposed by the applicant, together with a condition increasing the amount of seating provided for patrons, be imposed on the permit.

Determination

- 27 There are two applications for consideration. The first is to increase the number of patrons permitted on the licensed premises from 750 to 1,000 and the second application is to extend the permitted trading hours at the venue. There are objections and interventions to these applications. Each party to the proceedings must, where necessary, discharge its onus under the Act.
- 28 By virtue of s 38(1)(b) and r 9F(1)(b) of the *Liquor Control Regulations 1989*, an applicant for the grant of an extended trading permit under s 60(4)(g) of the Act, for a period in excess of three weeks, must satisfy the licensing authority that the grant of the application is in the public interest. The application for variation of patron numbers was not subject to the requirements of s 38(2), but is nonetheless subject to the discretion of the licensing authority as set out in s 33(1) of the Act.
- 29 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).
- 30 The factual matters which I am 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 (refer *Woolworths v Director of Liquor Licensing* [2013] WASCA 227).

31 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.

32 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.

33 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.

34 An objector must, by virtue of s 73(10) of the act, establish the validity of their objection. However, there is no onus on an intervener to establish their assertions of fact or opinion (refer *Re Gull Liquor* (1999) 20 SR (WA) 321).

35 It is convenient to first deal with the objections.

36 The objectors make general claims about what may occur if the applications are granted, and there is some allegation that they already experience offence and disturbance emanating from Matisse in the form of amplified music, patron noise and anti-social behaviour. In response to the matters raised by the objectors, the applicant submitted that they are highly speculative and there is a lack of evidence supporting the objectors' claims. It was also submitted that all of the objectors are situated closer to other licensed premises in Scarborough than they are to Matisse and it is reasonable and logical to conclude that any problems they may be experiencing are in fact related to those other premises and not Matisse.

37 Whilst I accept the applicant's submission that the objectors have provided no real evidence to support their contentions, particularly their assertion that the operation of the premises is currently negatively impacting on the amenity of the locality, I think it is

naive and dismissive of the applicant to merely blame other licensed premises in the area for the perceived problems experienced by some objectors. The licensee would be well advised to be cognisant of these issues moving forward, and to implement appropriate strategies to minimise this risk, and any negative impact the operation of the premises may have on neighbouring residents. Matisse is by far the single largest licensed premises in the area with a large open air courtyard. Section 37(3) of the Act provides that an application shall not be granted where the licensing authority is satisfied that an undue degree of offence, annoyance, disturbance or inconvenience to persons who reside in the vicinity of the premises would be likely to result. Furthermore, s 117 provides for complaints to be lodged with the Director where 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, or by patrons of the premises. Amongst the matters for consideration in such circumstances is who was in the neighbourhood first, the complainants or the licensed premises.

38 However, based on the information before me, I am of the view the objectors have failed to establish their grounds of objection, as required under s 73(10) of the Act. No evidence was presented to support the generalised statements of the objectors.

39 I will turn now to the merits of the applicant's case.

40 According to the applicant, it has been motivated since first developing the Matisse concept to contribute to changing the hospitality scene at the Scarborough beachfront precinct and creating a new image and reputation for licensed premises in the area. The applicant claims that Matisse is a first class facility and in its trading history so far, it has proven to be a stand-out venue in terms of popularity and compliance. It was also submitted that there is strong demand for the extended hours sought, as evidenced by the letters of support, public questionnaires and survey forms. Whilst acknowledging there is an existing level of crime in the locality and the operation of the ETP and additional patronage will have the potential to cause problems, the applicant submitted the existing level of crime is not a factor which should impede the grant of the application, because Matisse's style of operation will minimise any potential adverse effects.

41 The applicant also contends that much of the focus of the interventions is based on the historical problems in the locality and the research studies are unrelated to the present locality and premise's circumstances. The applicant claims it is entirely capable of operating successfully and compliantly in the manner proposed, just as its related entity had been doing for many years at the sister business The Breakwater. As an aside, I note The Breakwater only trades to 1 a.m. on Wednesday to Saturday nights and 11 p.m. on Sundays.

42 An examination of the applicant's questionnaires and survey forms indicate that this material only refers to Friday, Saturday and Sunday trading. There is no reference to late night trading on Wednesday or Thursday night. The applicant indicated that

because of the overwhelming nature and volume of support for the ETP in respect of Friday, Saturday and Sunday nights, Wednesday and Thursday nights were simply added to the proposal.

- 43 In contrast, the evidence of the interveners highlights the historical problems in this location due to late night trading by licensed premises and the existing level of alcohol-related harm in the area. The EDPH also referenced research which establishes a relationship between late night trading and increased harm in the community. In view of this, the interveners state that there are risk factors relevant to the applications which could result in an increase in alcohol-related harm in the locality.
- 44 Whether such harm or ill-health would arise requires an element of prediction (refer *Malec v JC Hutton Pty Ltd (1990) 169 CLR 638*).
- 45 I do not accept the applicant's contention that the research material referenced by the EDPH is of little relevance. Bell J in *Director of Liquor Licensing v Kordister Pty Ltd & Anor [2011] VSC 207*, observed:

"..... by its very nature, much evidence about harm minimisation will be general and expert in nature. It may be epidemiological or sociological, to name just two of the different disciplines which may be involved. It will not necessarily be evidence relating directly to the particular premises, neighbourhood or locality concerned. It may nonetheless be relevant and admissible, for it may, depending on the circumstance, assist in determining the likelihood that harm is occurring or will occur, the nature of that harm and what contribution can be made to minimising it. Such evidence may be especially important where it is connected by other evidence with the 'particular local, social, demographic and geographic circumstances' of the given case."

- 46 Also, in this context, Wheeler J in *Executive Director of Public Health v Lily Creek International & Ors [2001] WASCA 410* said:

"The Act directs attention to the minimisation of alcohol related harm generally (s 5(1)(b)). The relevant question for the Court, in that case, is the level of alcohol related harm, due to the use of liquor, which is likely to result from the grant of an application. This does not mean that only the increased harm which may result from the specific premises in question is to be considered; rather it seems to me that must necessarily be assessed against any existing harm or ill health so as to assess the overall level which is likely to result if a particular application is granted. Where, as occurs in probably the majority of cases, the existing level of alcohol related harm is no greater than that which appears to be commonly accepted in the community, the distinction is probably not significant. However, where there is already a very high and serious level of alcohol related harm in a community, it may be that the Court

would find a relatively small risk of increase in that level of harm to be unacceptable. In other words, it is not the "risk" of harm in some abstract sense which is relevant, but rather the risk having regard to the proved circumstances of the particular area in relation to which the application is made."

- 47 The evidence of the interveners established that this is a problematic area, with a history of high rates of alcohol-related harm due to late night trading at licensed premises. Although alcohol-related non-domestic assault rates in 2014 was lower than in 2003 in Scarborough, this decline is associated with the closure of some licensed premises and the consequential reduction in late night trading and changes to the local environment. Also, the current alcohol-related non-domestic assault rate is still slightly above the State rate.
- 48 Whilst minimising alcohol-related harm in the community is one of the objects of the Act, it is not the only object which must be considered.
- 48 Where there is a conflict in promoting the objects of the Act, I need to weigh and balance those competing interests ((refer *Executive Director Public Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258) and decide upon the degree of importance to be attributed to each of the relevant factors, as proven by the evidence in each case. It should, however, be noted that the harm minimisation object under the Act is not about preventing harm absolutely. Nonetheless, the potential for harm to occur is a powerful public interest consideration (refer Ipp J in *Lily Creek*).
- 49 Consequently, I need to consider whether the harm or ill-health which may result from the grant of the application is so serious, when balanced against the other objects of the Act, that the application should be refused or, if granted, stringent conditions are imposed on the permit. The decision in each case will depend on the particular circumstances.
- 50 Having considered the applicant's evidence, I am satisfied that the grant of the ETP application, in respect of Friday, Saturday and Sunday would be consistent with object 5(1)(c) and 5(2)(a) of the Act. However, there is little or no evidence to support late night trading on Wednesday and Thursday nights. Other factors weighing in favour of the application include the licensee's experience in operating late night trading at another venue, albeit to 1 a.m., the compliant trading history of Matisse to date and the overall redevelopment of the beachfront precinct.
- 51 Factors weighing against the grant of the ETP application include the history of alcohol-related harm in the area linked to late night trading, the current rate of alcohol-related non-domestic assaults in the area, the large size of the venue and the lack of transport options to move patrons away from the area after the premises close. In respect of transport options, the applicant submitted that it has not observed or experienced problems, and there is a constant stream of taxis at the designated taxi rank outside the premises. Although the applicant has indicated it will continue to work

with the various taxi companies, I am of the view that the increase in patron numbers combined with later trading hours would place additional pressures on patrons leaving the locality in an orderly and timely manner.

- 52 Another factor weighing against the ETP application is the possible negative impact on residents. A number of objectors claimed that the operation of Matisse is negatively impacting on them. Although I have found that each individual objector did not make out their respective objection, the cumulative effect of this evidence can still be given some weight.
- 53 In respect of the application to increase patron numbers, I note that the applicant has a public buildings certificate issued by the local government authority indicating that the premises can accommodate 1,000 patrons and the premises would appear to have been well managed and popular since it commenced trading. On this basis, I am prepared to approve the application to vary the condition of the licence restricting the number of patrons permitted to the licensed premises from 750 to 1,000.
- 54 In respect of the ETP application, in weighing and balancing the competing interests, I am of the view that it is in the public interest for trading from 12 midnight to 1 a.m. the following morning on Friday and Saturday nights and from 10 p.m. to 12 midnight on Sundays be approved. The permit will be granted for a period of two years which will allow the licensee and the police an opportunity to monitor the impact of late night trading at the premises.
- 55 Although the applicant submits that Matisse is different to the previous premises that operated at this site, any unacceptable increase in alcohol-related violence and anti-social behaviour in the area would, in my view, be counter-productive to the long term vision for the area and the goals of the State and local governments to be achieved through the redevelopment of the beachfront precinct.
- 56 In order to minimise the risks associated with the grant of the applications, the licensee will be required to have an identification scanning system in place from 8 p.m. on each night that the permit operates and security will be required until 30 minutes after closing to assist in patrons leaving the premises and the vicinity of the premises in an orderly manner. The permit will also be subject to a lockout one hour before closing, which will help reduce the number of people, who have been drinking at other venues in the area, migrating to Matisse after those venues close at 12 midnight. Amplified music after 12 midnight and 10 p.m. on Sundays will be restricted to background music, sufficient to allow normal conversation to occur. This will allow patrons to 'wind down' before leaving the venue and reduce the potential noise impacts on residents.
- 57 The licensee is reminded that the permit can be modified or withdrawn at short notice if it is found that the licence is being operated in a manner contrary to the public interest.
- 58 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.

59 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