

REASONS FOR DECISION

APPLICANT: SEAVIEW IMPORTS PTY LTD

OTHER PARTIES: COMMISSIONER OF POLICE (INTERVENOR)
CHIEF HEALTH OFFICER (INTERVENOR)
CITY OF MANDURAH (INTERVENOR)
MARNI INVESTMENTS P/L AND BROAD HORIZONS P/L
(OBJECTOR)

NATURE OF APPLICATION: VARIATION OF PERMIT CONDITIONS

APPLICATION ID: A724972574

PREMISES: MURPHY'S IRISH PUB
43-44 MANDURAH TERRACE, MANDURAH

LICENCE NUMBER: 0200685115

DECISION OF: BRETT SNELL
DEPUTY DIRECTOR LIQUOR CONTROL AND ARBITRATION

DATE OF DETERMINATION: 26 FEBRUARY 2019

1. On 16 January 2019, I published a notice of decision, pursuant to s 18AA of the *Liquor Control Act 1988* (the Act), in which I granted an application by Seaview Imports Pty Ltd (the Applicant) for variation of the trading conditions of extended trading permit number 0200685115, issued in respect of premises known as *Murphy's Irish Pub* and situated at 43-44 Mandurah Terrace, Mandurah.
2. That approval authorised trading on Friday and Saturday nights from 12 midnight until 2 a.m. the following morning. Prior to that determination, the permit only authorised trading until 1 a.m. on those days.
3. Other parties to those proceedings included:
 - (a) the Commissioner of Police (the First Intervenor), the Chief Health Officer (the Second Intervenor) and the City of Mandurah (the Third Intervenor), who each made representations pursuant to s 69 of the Act; and
 - (b) Marni Investments Pty Ltd and Broad Horizons Pty Ltd, who lodged a notice of objection, pursuant to s 73 of the Act.
4. On 4 February 2019, the First Intervenor requested written reasons for the notice, in accordance with s 18AA(4) of the Act. Accordingly, my written reasons are as follows.
5. The application was supported by a Public Interest Assessment (PIA) and other submissions, as well as letters of support and a survey of customers. The Applicant explained that it's premises has a history of non-problematic trading after midnight on

Fridays and Saturdays pursuant to its existing extended trading permit, which permitted the Applicant to trade until 1 a.m. on Fridays and Saturdays.

6. The Applicant further explained that the premises is located in the Mandurah CBD, which is the commercial, hospitality and entertainment precinct for Mandurah and offers a range of hospitality and entertainment services during the extended trading hours, which it submitted are popular with its patrons.
7. Accordingly, the Applicant adduced evidence that its patrons:
 - (a) have a desire and a requirement to be able to use the services provided by the Applicant at the premises later into the evening on Friday and Saturday evenings – until 2 a.m.;
 - (b) do not wish to use the Objector's nightclub premises, which is the only licensed venue operating in the locality (and in the whole of the City of Mandurah local government authority) after 1 a.m. on Friday and Saturday evenings;
 - (c) are drawn from within the locality and outside the locality, being persons residing in and visiting the locality;
 - (d) feel comfortable using the Applicant's premises and assert that the premises is safe and well-managed; and
 - (e) are generally of an older, mature age range, for whom the services provided by the Applicant after midnight hold a significant appeal.
8. The Applicant also submitted that the services offered at its premises '...are unique in the locality' and that:

'The locality has a population of 43,719 persons – and no choice of late-night licensed services within the locality – and this lack of services extends to the entire City of Mandurah local government authority area (approx. population of 80,813 persons).'
9. The First Intervenor expressed concern about the potential for harm or ill-health to increase in the locality if the Application is granted and made representations regarding the potential for alcohol-related harm.
10. The Second Intervenor also expressed concern about the potential for harm or ill-health to arise from the grant of the application and made representations, which included:
 - (a) that short-term harm risk levels arising from consumption of alcohol in the locality, including amongst older age groups;
 - (b) general risks of harm during late night trading hours, identified in various academic studies and writings; and

- (c) the continuance of the current lack of late-night tavern liquor and entertainment services in the locality, as a “protective factor” against alcohol-related harm or ill-health.
11. The Third Intervenor made representations about ensuring the Applicant’s financial support of the City’s Secured Night-Time Taxi Rank.
 12. The Objector, who is the licensee of premises known as *Norma Jeans Retro Bar*, also raised concerns about minimising harm and reducing risk, particularly with reference to the trading conditions imposed on its nightclub licence.
 13. Pursuant to s 38(1)(c) of the Act, the Applicant was required to satisfy the Director that granting the application was in the public interest, which included addressing both the positive and negative impacts that the grant of the application will have on the local community.
 14. Determining whether the grant of an application is ‘in the public interest’ required the exercise of a discretionary value judgement confined only by the subject matter and the scope and purpose of the legislation (refer *Re Minister for Resources: ex parte Cazaly Iron Pty Ltd*¹ and *Palace Securities Pty Ltd v Director of Liquor Licensing*.²)
 15. Further, in *McKinnon v Secretary, Department of Treasury*³, Tamberlin J observed that:

‘The reference to “the public interest” appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.’
 16. Section 33(1) of the Act gives the licensing authority an absolute discretion to grant or refuse an application on any ground or for any reason that is in the public interest. The scope of this discretion was considered by EM Heenan J in *Woolworths Ltd v Director of Liquor Licensing*⁴ as:

1 [2007] WACA 175

2 (1992) 7 WAR 241

3 [2005] FCAFC 142

4 [2012] WASC 384

‘...an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole. Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest to make those objects the exclusive consideration nor the sole determinants of the public interest.’

17. In this regard, the primary objects of the Act are:
- (a) to regulate the sale, supply and consumption of liquor; and
 - (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
 - (c) 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.
18. The secondary objects of the Act are:
- (a) 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; and
 - (b) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - (c) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act; and
 - (d) to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community.
19. Section 16 of the Act requires that each application is considered on its merits and determined on the balance of probabilities. However, it is often the case when determining the merits of an application that tension may arise between advancing the objects of the Act, particularly the objects of minimising alcohol-related harm and endeavouring to cater for the requirements of consumers for liquor and related services. When such circumstances arise, the licensing authority needs to weigh and balance those competing interests.⁵
20. Additionally, where harm and ill-health is a relevant factor, Allanson J explained⁶ that the licensing authority is required to:

⁵ Refer *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WACA 258

- (a) make findings that specifically identified the existing level of harm and ill-health in the relevant area due to the use of liquor;
 - (b) make findings about the likely degree of harm to result from the grant of the application;
 - (c) assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - (d) weigh the likely degree of harm, so assessed, together with any other relevant factors to determine whether the Applicant had established that it was in the public interest to grant the application.
21. After considering the submissions of all the parties, I formed the view that:
- (a) the risk of increased harm was not significant when regard was had to:
 - (i) the circumstances of the locality and the trading conditions offered by the Applicant;
 - (ii) the requirements of the Director of Liquor Licensing's *Safety and Security at Licensed Premises* policy; and
 - (iii) the assessment outlined by Allanson J in *Carnegies v DLL*;
 - (b) the likely degree of harm to result from the grant of the application was no greater than that which appears to be commonly accepted in the community; and
 - (c) the Objector had failed to establish the validity of its objections as required under s 73 of the Act.
22. In relation to the representations of the Intervenors, I noted that intervenors carry no burden of proof, but rather provide submissions to assist the licensing authority to make an informed decision.
23. I also formed the view that the variation sought would cater for the requirements of consumers for diversity in liquor and related services in Mandurah after 1 a.m. on Friday and Saturday nights and subject to the imposition of conditions on the permit consistent with the Director's *Safety and Security at licensed premises* policy, would further the objects of the Act prescribed at s 5(1)(c) and 5(2)(a) of the Act.
24. Accordingly, I found that the Applicant had discharged its onus under s 38(2) of the Act and approved the application.

⁶ Refer *Carnegies Realty Pty Ltd -v- Director of Liquor Licensing* [2015] WASC 208 (*Carnegies v DLL*)

25. This matter was determined by me under delegation pursuant to s 15 of the Act.

A handwritten signature in black ink, appearing to read 'Brett Snell', written in a cursive style.

Brett Snell
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING