

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: 33 SOUTH PTY LTD

PREMISES: MONK CRAFT BREWERY KITCHEN

PREMISES ADDRESS: 33 SOUTH TERRACE, FREMANTLE

APPLICATION ID: A000218689

NATURE OF APPLICATION: GRANT OF A TAVERN LICENCE

DATE OF DETERMINATION: 14 JUNE 2017

Introduction

- 1 33 South Pty Ltd (the applicant) seeks the grant of a tavern licence for premises to be known as The Monk and located at 33 South Terrace, Fremantle. 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 the Chief Health Officer (CHO) and the Commissioner of Police (the Commissioner) lodged notices of intervention in accordance with s 69 of the Act.
- 3 The application will be determined on the written material submitted 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 case for the applicant

- 4 The applicant currently trades under a restaurant licence with an extended trading permit to serve liquor without a meal at the subject premises. The applicant commenced trading at the site over six years ago and also operates a small-batch craft brewery at the premises, with the produced liquor sold exclusively to its restaurant patrons for consumption on the premises.
- 5 According to the applicant, it has struggled to balance the restrictions of operating a restaurant with its beer production and under its current licence it cannot sell its produce for off-site consumption. Further, the ability to hold beer tastings and conduct functions at the premises is significantly limited due to the current licensing arrangements.
- 6 It was submitted that over the years, the customer base and market appeal of The Monk has evolved to a broader, more wide-ranging demographic with the Monk's food and beverage offering now attracting both locals and national/international tourists

visiting Fremantle. With increasing patronage a further evolution of the premises is necessary and a change of liquor licence from a restaurant to a tavern is sought.

- 7 Despite the proposed change in licence type, the applicant submitted that it will maintain its current food and beverage offering but in a more flexible environment which will enable it to better cater to the requirements of its customers. It is intended that the kitchen will remain open during all hours of trade and the ground floor of the premises will be set up with tables and chairs (except during functions or events).
- 8 The applicant submitted a detailed Public Interest Assessment (PIA) to support its application. The PIA included information on the:
 - applicant's proposed manner of trade;
 - demographic profile of the surrounding locality;
 - likely impact on the amenity of the area;
 - significance of tourism to the area;
 - existing licensed premises in the area;
 - results of its market research and consumer surveys; and
 - harm minimisation strategies for the premises.
- 9 It was submitted by the applicant that the grant of the application will have minimal, if any, negative impact on the locality. Instead, according to the applicant, the grant of the application will result in an added benefit to the Fremantle locality, providing an enhanced and unique venue for patrons to enjoy Fremantle's only small-batch craft brewery. It was further submitted that the grant of the application will promote the objects of the Act by accommodating the diversity of consumer demand and by promoting responsible service of alcohol in a popular tourist and entertainment precinct.

The intervention by the Chief Health Officer

- 10 The CHO intervened in the application to make representations on the possible harm or ill-health that may result from the grant of the application and provided submissions and evidence on the following matters:
 - the applicant is applying for a tavern licence, which research has demonstrated can be a higher risk licence type for alcohol-related harm;
 - should the licence be granted, it will replace a restaurant licence and a Liquor Without a Meal Permit, which generally present a lower risk of alcohol-related harm;
 - the venue is proposing to trade with a large patron capacity, which can be a high-risk feature for harm; and
 - there is a history of alcohol-related harm occurring in the suburb of Fremantle.
- 11 According to the CHO, if the licence is granted it would be in the public interest to impose conditions on the licence to mitigate the risks associated with the operation of

the premises and ensure trade at the premises is consistent with the applicant's submissions. The CHO recommended various conditions for the licence.

The intervention by the Commissioner of Police

- 12 The Commissioner intervened to highlight the risks associated with the operation of a tavern licence in the locality. According to the Commissioner, Fremantle has historically experienced significant harm due to the use of liquor and as such, the Commissioner submitted it is appropriate to impose trading conditions to assist mitigate any potential alcohol-related harm from occurring as a result in the change in the class of licence.
- 13 The Commissioner provided relevant crime data which indicates that:
- rates of alcohol-related domestic violence in Fremantle has decreased from 2012 to 2015, however it is higher than the corresponding State rate; and
 - rates of non-domestic alcohol-related assaults in Fremantle has declined from 2012 to 2015, however it is considerably higher than the corresponding State rate.
- 14 The Commissioner also highlighted certain risk factors related to the premises:
- the applicant's current CCTV system is not adequate;
 - the applicant only proposes to have security on an "as needs" basis; and
 - the applicant proposes to have entertainment in the form of pre-recorded music, live bands and DJ's
- 15 The Commissioner therefore recommended that if the application is granted conditions to minimise the risks of the premises negatively impacting on the surrounding community should be imposed on the licence.

Legislative and legal framework

- 16 An applicant must satisfy the licensing authority that the grant of the application is in the public interest: s 38(2). There is a positive onus on an applicant to discharge this obligation (refer *Liquorland (Australia) Pty Ltd v Executive Director of Health* [2013] WASC 51; *Seoul Mart City Pty Ltd v Commissioner of Police* (LC27/2014).
- 17 It is therefore incumbent upon an applicant to adduce sufficient information to make it possible for the licensing authority to satisfy itself that the application is in the public interest. An applicant cannot do so by expressing assertions or opinions about the public interest; any assertion or opinion must be supported by appropriate evidence (refer *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC/2015; *Seoul Mart City Pty Ltd v Commissioner of Police* (LC 27/2014); *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17/2010).
- 18 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).

- 19 An intervener carries no onus to establish their assertions of fact or opinion (refer *Re Gull Liquor* (1999) 20 SR (WA) 321).
- 20 The factual matters that 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).
- 21 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.
- 22 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.
- 23 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.
- 24 Section 16 provides that 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 and is not bound by the rules of evidence.
- 25 In considering the public interest, tension may arise between the primary object of minimising harm or ill-health caused to people, or any group of people, due to the use of liquor, and other objects contained in s 5 of the Act. When such conflict arises, the licensing authority must undertake a weighing and balancing exercise. The decision will depend on the particular circumstances of the case (refer *Executive Director of Public Health v Lily Creek International Pty Ltd* [2000] WASCA 258).

- 26 It is significant that the primary object in s 5(1)(b) is to 'minimise' harm or ill-health, not to prevent harm or ill-health absolutely. The word 'minimise' is consistent with the need to weigh and balance all relevant considerations (refer *Lily Creek* supra). It is a matter for the licensing authority to decide what weight to give to the competing interest interests and other relevant considerations (refer *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356).
- 27 The harm contemplated by the Act is not confined to consumers of alcohol and extends to harm caused to the health and well-being of individuals, families and communities, as well as social, cultural and economic harm. This includes harm which may occur through an increase in anti-social or injurious behaviour due to the use of liquor and is not limited to physical harm (refer *Re Gull Liquor, Gingers' Roadhouse Upper Swan* (1999) 20 SR (WA) 321; *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207).
- 28 Whether harm or ill-health will, in fact, be caused to people, or any group of people, due to the use of liquor is essentially a matter of prediction. However, it is unnecessary to establish on the balance of probabilities that harm or ill-health will be caused to people, or any group of people, before the consideration can be taken into account (refer *Lily Creek* supra). The potential for harm or ill-health is to be taken into account by the licensing authority irrespective of whether the prospect is a possibility or a probability. It is a powerful public interest consideration (refer *Lily Creek* supra).
- 29 The question is whether, having regard to all 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* supra).
- 30 Finally, s 33(1) provides that 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. Further, s 33(2)(a) provides that an application may be refused, even if the applicant meets all the requirements of the Act. In *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384, EM Heenan J described the 'absolute discretion' provided for under s 33(1) in the following terms:

The 'absolute discretion' to grant or refuse an application of (sic) any ground or for any reason that the Commission considers in the public interest, s 33(1), is 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: Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA356 [6] - [7] (Wallwork J) and Palace Securities v Liquor Licensing(1992) 7 WAR 241, 249 - 250 (Malcolm CJ) and 263 (Wallwork J). 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 or make those objects the exclusive considerations nor the sole determinants of the public interest: Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 231; (2002) 25 WAR 511, [52] - [55]; O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210, 216 and Jericho Nominees Pty Ltd v Dileum Pty Ltd (1992) 6 WAR 380, 400.

Determination

- 31 The applicant has traded at the subject site for many years under a restaurant licence with an extended trading permit authorising the sale of liquor without the requirement for a meal. The applicant also operates a small-batch craft brewery at the premises and sells that liquor for consumption in the restaurant.
- 32 The applicant now seeks the grant of a tavern licence to allow greater flexibility so it can better cater to the requirements of its patrons and to sell liquor produced at its craft brewery directly to the public for consumption off the premises and to other liquor merchants. According to the applicant, the change in licence type will not significantly change how the premises has been operated and managed, with the provision of food still being a major focus of the venue.
- 33 The CHO and the Commissioner intervened in the application to highlight the risks associated with the operation of a tavern in the locality, which currently experiences alcohol-related harm at rates above the State rate. The interveners recommend that if the application is approved, it would be appropriate to impose various conditions on the operation of the licence to mitigate the potential risks and ensure the premises operates in the manner proposed by the applicant in its PIA.
- 34 The applicant is generally not opposed to the conditions recommended by the interveners.
- 35 In assessing the likely degree of harm or ill-health to result from granting the application, the following matters are relevant:
- the applicant's trading history at the site and there will not be a significant departure from the current manner of trade at the premises;
 - there is nothing in the evidence before me to suggest that the premises have not been well managed to date;
 - food will continue to be a focus of the venue;
 - the premises will generally be set up with seating and associated tables for patrons, with limited vertical drinking areas;
 - only liquor produced by the applicant will be sold as packaged liquor; and
 - trading conditions proposed by the interveners, and accepted by the applicant, will help mitigate the risk posed by the operation of a tavern in this locality.
- 36 In weighing and balancing the competing interests, I am of the view that the positive aspects of the application outweigh the potential risks. The change in licence type will

enable the applicant to meet consumer demand and expectations for contemporary food and beverage facilities with the necessary flexibility to suit its business model.

37 In consideration of the evidence presented, I find that the grant of the application would be consistent with objects 5(1)(c) and 5(2)(a) of the Act.

38 I therefore find that the applicant has discharged its onus under s 38(2) of the Act and the grant of the application is in the public interest. Having complied with all the statutory requirements and conditions precedent to the application being granted, a tavern licence is granted to the applicant 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 licence.
- Only liquor produced by the licensee at the premises can be sold as packaged liquor for consumption off the premises.
- Substantial food must be available at all times during trading hours.
- 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 ground floor of the premises shall not exceed 350 at any one time.
- The maximum number of patrons permitted on the first floor of the premises shall not exceed 200 at any one time.
- Seating and table arrangements for a minimum of 50% of patron capacity is to be set up throughout the premises, except during pre-arranged functions or events.
- The licensee is prohibited from moving tables and chairs to create and/or install a dancefloor area, except during pre-arranged functions or events.
- The sale of liquor in jugs is prohibited.
- 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'.
- 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;
- (iv) Outlaws;
- (v) Finks;
- (vi) Rebels;
- (vii) Comancheroes;
- (ix) Hell's Angels;
- (x) Rock Machine;
- (xi) Mongols;
- (xii) Lone Wolf;
- (xiii) Bandidos; and,
- (xiv) Brothers 4 Life.

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.

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.

- 39 Pursuant to s 127(2) of the Act, the prescribed licence fee is payable prior to the operation of the licence. I am satisfied that the licence fee has been paid.
- 40 The licensed premises are defined as the area outlined in red on the plans attached and dated 15 June 2017. A copy of that plan is to be retained on the premises and produced to any authorised officer if required.
- 41 Pursuant to s 116(3) of the Act, the trading name of The Monk Craft Brewery Kitchen 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.
- 42 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.
- 43 Additionally, pursuant to s 116(4) of the Act, the applicant must ensure a copy of the licence is displayed in a readily legible condition and in a conspicuous position in the licensed premises.

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- 44 Restaurant licence number 6060025536 is surrendered contemporaneously with the grant of this application and extended trading permit 0200271615 is cancelled.
- 45 The applicant cannot use the first floor of the premises until a certificate under s 39 of the Act has been lodged with this office and approval given by an inspector of licensed premises.
- 46 In respect of liquor that may be sold as packaged liquor, the applicant submitted in its PIA that it would not increase its brewing capacity and only wanted to sell liquor it has produced. I note in later submissions the applicant has somewhat contradicted its original submissions by indicating that it may in the future branch out its liquor range and consider collaborative liquor production. I will hold the applicant to spirit of its original submissions (and what was advertised to the public), and its claims of being a small-batch craft brewery, and restrict packaged liquor to only liquor produced by the applicant at the premises. This is a positive harm minimisation strategy given the harms associated with packaged liquor and current alcohol-related issues in the locality.
- 47 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