

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

Applicant: Harold Thomas James Blakeley
(represented by Mr Harold Blakeley and Mr Norm McNally)

Intervener: Director of Liquor Licensing
(represented by Ms Sarah Kavanagh of State Solicitor's Office)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Mr Greg Joyce

Date of Hearing: 9 November 2010

Date of Determination: 17 December 2010

Premises: Harry O's

Matter: Application for the conditional grant of a special facility licence

Determination: The application is refused

Authorities cited in determination:

Palace Securities Pty Ltd v Director of Liquor Licensing [1992] 7WAR 241

Hancock -v- Executive Director of Public Health [2008] WASC 224

Busswater Pty Ltd v Director of Liquor Licensing (LC 17/2010)

Introduction

- 1 On 17 March 2010 an application was lodged by Harold Thomas James Blakeley (“the applicant”) for the conditional grant of a special facility licence in respect of premises to be known as Harry O’s and located at 81 Mandurah Terrace, Mandurah.
- 2 The application was advertised to the general public in accordance with instructions issued by the Director of Liquor Licensing. Notices of Intervention were lodged by the Commissioner of Police and the Executive Director Public Health (“EDPH) while the City of Mandurah submitted comments in respect of the application. Objections to the application were lodged by Janette Robyn Lucas and Atrium Hotel Mandurah Pty Ltd, however Atrium Hotel Mandurah Pty Ltd subsequently withdrew their objection.
- 3 In decision A210692, dated 9 August 2010, the Director of Liquor Licensing refused the grant of the application.
- 4 On 1 September 2010 the applicant lodged an application for a review of the Director’s decision pursuant to s 25 of the *Liquor Control Act 1988* (“the Act”).
- 5 Pursuant to s 69(11) of the Act, the Director of Liquor Licensing lodged a Notice of Intervention in respect of the review application.
- 6 In conducting a review under s 25, the Commission is not constrained by a finding of error on the part of the Director of Liquor Licensing, but is to undertake a full review of the materials before the Director and make its own determination on the basis of those materials (refer *Hancock -v- Executive Director of Public Health [2008] WASC 224*).
- 7 A hearing before the Commission was held on 9 November 2010.

Submissions on behalf of the applicant

- 8 The applicant seeks a special facility licence for the prescribed purposes of tourism and foodhall (refer *Liquor Control Regulations 1989*: reg 9A(7) and reg 9A(12)).
- 9 According to the applicant’s Public Interest Assessment (“PIA”) Harry O’s will be predominantly a food orientated business providing bistro and market style services, catering for tourists, holiday makers and residents of Mandurah. Food serveries will be placed in strategic locations in the venue for ease of access and choice by customers, although table service will be available when requested.
- 10 The applicant states that the proposed premises will provide a good range of foodhall ready-to-eat products such as Indian, Chinese, Australian, burgers and a range of health foods (such as “Subway” type freshly made salad rolls) throughout the day and customers will be able to purchase liquor from either a bar or from a waiter. Liquor could be purchased for consumption on the premises with or without a meal and it is proposed to have limited package liquor sales featuring products from local or regional producers.

- 11 The applicant also describes the proposed business as being a piano bar type atmosphere which is family orientated with reasonable price structures. There will be no bands and the only amplified music will be the piano player's voice or alternative 'old time' background music. The premises will not be designed to attract large numbers of the younger generation, which are already catered for by existing facilities in Mandurah.
- 12 In respect of providing premises that will become an attraction for tourists or a facility that enhances the State's tourism industry (reg 9A (7)), the applicant states that his premises will provide a relaxed garden type atmosphere that can be enjoyed by the hundreds of visitors who arrive in Mandurah on a daily basis. According to the applicant, most visitors to Mandurah like to walk the foreshore and marina precincts and invariably, during their treks, many visitors will pass directly in front of Harry O's. After their walk, many of those visitors would like to find a place to relax in attractive, and comfortable non-congested surroundings. Harry O's will provide those facilities to tourists. Furthermore, many tour buses stop in the existing parking area opposite the applicant's proposed premises and the passengers disembark and immediately begin to look for a place to relax before walking around the foreshore and marina area. Harry O's will be the obvious place for tourists to relax before they commence their walk or relax before they commence the next stage of their tour-bus journey.
- 13 The applicant is the owner of a 'Canopus' boat which is undergoing a restoration program and will be displayed at the proposed premises. Also, the applicant, who is noted throughout Mandurah and elsewhere as being a competent artist, will display his work, and other paintings from various original artists at the premises. This will further attract tourists to the venue.
- 14 The applicant's PIA also addressed the matters set out in section 38(4) of the Act and provided a brief overview of existing licensed premises in the area and demographic data. The applicant contends that:
- none of the existing licensed premises in the area provide a continuous food service which he proposes;
 - the existing taverns are generally not popular with tourists; begin trading later in the day; and focus more on liquor sales than food service; and
 - most of the other licensed facilities in the locality, except the boat tour services, are not frequented by many, if any, tourists at all.
- 15 The applicant also indicated that the following operational guidelines would be adhered to by all managers and staff:
- licensed crowd controllers and other security staff as required by the licensee will be contracted to be available at certain times during Harry O's trading hours and for one hour thereafter;

- a CCTV system will be operational 24 hours a day;
- the foodhall style presentation with a range of food will be available for during all hours of trading;
- liquor will be provided by table service only during the hours specified by the licensee for each particular day. Bar service will be available to patrons outside of the particular hours however patrons will not be permitted to sit at the liquor service area to consume their drinks;
- at various times the licensee will limit the types of liquor available and the types of containers used for consumption;
- Harry O's will not participate in the advertising of liquor promotions except by using behind the servery posters and pricing signs;
- any amplification equipment used by entertainers will be noise limited by the licensee;
- the types of entertainment provided will be piano bar style music including limited amplified or acoustic guitar type music and piped background music. No heavily amplified bands will be permitted to perform at Harry O's;
- the premises layout design and separation of character areas will be retained for use by patrons at all times. All furniture will be maintained to the highest order of presentation and safety;
- lighting in and around the proposed premises will be maintained and fully operational at all times;
- all noise from the premises will be kept to the minimum level possible and managers will address noise complaints immediately;
- Harry O's will have a maximum accommodation number of 200 and security staff will be required to maintain a count of patron numbers at all times they are on duty.

Submissions on behalf of the Commissioner of Police

- 16 The Commissioner of Police intervened on the basis that if the application was granted and conditions not imposed on the licence, harm or ill-health may be caused to people or any group of people due to the use of liquor and this would be contrary to the public interest.
- 17 Essentially, the Commissioner of Police was seeking to have various conditions imposed on the licence, including the conditions outlined in paragraph 15 above, if the application was granted.

Submissions on behalf of the EDPH

- 18 The purpose of the intervention from the EDPH was to make representations regarding the high risk aspects of the application and to recommend harm minimisation conditions be imposed on the licence should the application be granted.
- 19 The EDPH outlined the risk aspects associated with the application, including:
- the existing liquor availability in the locality and surrounds;
 - the applicant proposed to attract tourists and research has shown that tourists are 'at-risk' groups for alcohol-related harm;
 - juveniles, young people and families, who are 'at-risk' groups, are likely to frequent the venue;
 - visible liquor consumption by patrons, while standing in the front deck and patio of the premises, may influence a local and tourist perception that the premises is a drinking focused venue; and
 - the layout of the premises and the ability to monitor patrons, including the two entrance and exits points.
- 20 Consequently, the EDPH recommended the following conditions to be imposed on the licence if granted:
- The premises must always be set up and presented for dining;
 - Liquor is only sold ancillary to a meal;
 - The area permitted to be licensed is limited to the:
 - Front deck and garden (garden setting alfresco);
 - Front patio and garden (veranda and garden setting alfresco);
 - Bay window area (internal dining and eating area); and
 - Galley area (elongated internal area).
 - Trading hours be limited to 7.00am – 10.00pm daily;
 - The sale of package liquor for consumption off the premises is prohibited;
 - The licensee must install video surveillance equipment to monitor the alfresco area of the premises;
 - Any music played at the premises must be at a level that permits conversation to occur.

Submissions on behalf of the objector

21 Ms Janet Lucas, a local resident, lodged a Notice of Objection to the grant of the application. Accompanying Ms Lucas' objection was a petition signed by 58 other concerned residents/ratepayers of the City of Mandurah who also oppose the application.

22 The grounds of objection relied upon the objector(s) are:

- increased road and people traffic;
- undue annoyance and disturbance to persons who reside in the area; and
- lessening of the amenity, quiet and order of the locality in which the premises is situated.

23 In support of their grounds of objection, the objector(s) assert that:

- as the parking and an entrance to Harry O's is off Sholl Street, there will be a significant increase in traffic due to patron's cars, delivery and garbage collection vehicles; and
- the consumption of alcohol inevitably brings with it undue offence, annoyance and disturbance to persons who reside in the vicinity. The consumption of alcohol would also be of concern to those travelling to and from the local primary school and child care centre. The entrance to the child care centre is less than 200 metres from the parking entrance to Harry O's. The residents, who are mainly over the age of 55 years, have chosen to reside in this locality because of the quiet and order. The serenity of the area will be lessened because of the anticipated increase in vehicular traffic and human disturbance.

24 The objector(s) claim that local residents already experience unacceptable disorderly conduct by passers-by who have consumed alcohol. The behaviour of these persons causes fear and trepidation to the residents. It is anticipated that this behaviour would only increase if a licence to sell alcohol at Harry O's was approved. Ms Lucas sought to introduce further evidence. However the Commission could not accept this pursuant to the restraints imposed by section 25(2c) of the Act.

Submissions on behalf of the City of Mandurah

25 Although not formally intervening in the application under s 69(8) of the Act, the City of Mandurah advised that it did not support the sale of packaged liquor from the premises

and was concerned about the potential negative impact on local residents if an outside walkway leading to the car park formed part of the licensed premises.

Submissions on behalf of the Director of Liquor Licensing

- 26 The Director of Liquor Licensing lodged a Notice of Intervention under s 69(11) of the act in respect of the review application.
- 27 The thrust of the Director's submission was that the applicant failed to discharge his onus under s 46 and s 38(2) of the Act. The Director submitted that the applicant's PIA was characterised by speculation and assertion and lacked supporting evidence.

Responsive submissions on behalf of the applicant

- 28 In response to the interventions and objection to the grant of a special facility licence, the applicant's submission included the following points:
- The sale of packaged liquor would be a minor component of the business and simply an extra service for patrons who have dined at the premises and may wish take away a particular beverage that they have tried.
 - The walkway area leading to the car park should form part of the licensed premises in order to facilitate the viewing of the historical and cultural attractions to be set up at the venue.
 - The issues raised by the resident objectors are largely planning matters that would have been extensively reviewed in the development application and process undertaken by the City of Mandurah before the City Centre Development zone was integrated as part of the Town Planning Scheme No 3.
 - The applicant is committed to the responsible service of liquor and security strategies and harm minimisation management systems would be implemented. The applicant would adhere to any conditions imposed on the licence if it was granted.

Determination

- 29 Pursuant to s 38(2) of the Act, an Applicant for the grant of a special facility licence must satisfy the licensing authority that granting the application is in the public interest, unless the discretion under s 46(6) is exercised.
- 30 Advancing the objects of the Act, as set out in s 5, is also relevant to the public interest considerations (refer *Palace Securities v Director of Liquor Licensing* [1992] 7WAR 241).
- 31 To discharge its onus under s 38(2) of the Act, an applicant must address both the positive and negative impacts that the grant of the application will have on the local community (refer Section 19 of the *Interpretation Act 1984* when read in conjunction with the *Second Reading Speech, Parliamentary Debates, WA Parliament, vol 409, p 6342*).

- 32 Furthermore, pursuant to s 46 of the Act, the licensing authority shall not grant a special facility licence:
- except for a prescribed purpose (s 46(1)); and
 - if granting or varying a licence of another class, or imposing, varying or cancelling a condition on a licence of another class would achieve the purposes for which the special facility licence is sought (s 46(2)).
- 33 Consequently, an applicant for a special facility licence must also address the matters set out in section 46 of the Act.
- 34 Although the procedures of the licensing authority are less formal than before a court (refer s16) and the rules of evidence do not apply (refer s 17(7)), decisions of the licensing authority, whilst determined on the balance of probabilities (refer s 16(1)(b)(ii)), must nonetheless be based on the evidence placed before it. The evidence needs to be relevant, reliable and logically probative to assist the licensing authority to assess the probability of the existence of the facts asserted in each case.
- 35 In respect of this application, the applicant seeks the grant of a special facility licence for the prescribed purposes of tourism and foodhall. It is proposed that liquor will be sold for consumption on the premises (with or without a meal) and a limited packaged liquor range will be available for patrons. There will be a strong emphasis on food, which will be available from different locations throughout the venue.
- 36 The food will be provided by a single operator who has leased the kitchen from the applicant. The kitchen does not form part of the proposed licensed premises notwithstanding that the applicant sought to be exempt from the application of s 37(5) of the Act in his original submissions.
- 37 The applicant submitted various data in support of his application including data to support the claim that Mandurah is a tourist destination. The Commission accepts that Mandurah is a tourist destination, but that does not automatically lead to a conclusion that the proposed venue will be an attraction for tourists. Merely because a venue may be located in a tourist area does not lead to an outcome that the venue will become an attraction for tourists or a facility that enhances the State's tourism industry. The onus is on the applicant to provide sufficient evidence to support this claim. In this regard, the applicant makes various assertions about the requirements of tourists who visit the vicinity of the premises; their attraction to the proposed venue; and how most of the other licensed facilities in the locality are not frequented by many, if any, tourists at all. There was no evidence to support these claims.
- 38 The applicant stated in his submissions that his description of:
- the proposed services to be provided at the venue;

- the persons likely to be attracted to the venue;
- the type and design of the physical premises; and
- the expected market patronage,

was based on many years of experience in the liquor industry and many years of living in Mandurah observing the coming and going of tourist business services. The applicant states that he is relying on evidence based on qualitative methods using a lifetime of experience living and working in the liquor industry and locality. However, the applicant does not give any detailed elaboration on his supposed “lifetime of experience” in the liquor and hospitality industry, although it is noted in the Harm Minimisation Management Plan submitted by the applicant he states that he has a Diploma in Hotel and Motel Management awarded in April 1969 from the International Correspondence Schools, Australia & New Zealand and he was the licensee, Hotel Peninsula Mandurah Pty Ltd from 1976 to 1990, which was some 20 years ago.

39 The Commission has previously observed that it is not sufficient for an applicant merely to express opinions and make assertions about the perceived benefits of their application. Such opinions and assertions must be supported by an appropriate level of evidence (refer *Busswater Pty Ltd v Director of Liquor Licensing LC 17/2010*).

40 An applicant must satisfy the licensing authority that the grant of the application is in the public interest. In fulfilling its statutory obligation under the Act, it is a matter for the Commission to determine what weight to give to the evidence presented. In this case the applicant has largely relied on what he terms ‘evidence based on qualitative methods using a lifetime of experience living and working in the liquor industry and locality’. Unfortunately, in the absence of other supporting evidence which is relevant, reliable and logically probative, the Commission finds that this applicant has failed to satisfy the Commission that the grant of the licence is in the public interest as required under s 38(2) of the Act.

41 Whilst the 2007 amendments to the *Liquor Control Act* were designed to encourage a diversity of premises and new, interesting and innovative businesses, an intended outcome of the amendments to the Act was not a proliferation of licences (refer *Parliamentary Debates, WA parliament, vol 409, p 6342*). Licences should not be granted simply because an applicant ‘has a good idea’ or would like to establish a business involving the sale and supply of liquor. The private interests of an applicant should not be confused with the public interest. Such an approach would not be consistent with the Act or the objects of the Act (refer s 5) which includes minimizing alcohol-related harm and having regard to the proper development of the liquor industry.

42 In addition, the evidence presented by the applicant does not satisfy the Commission of the matters set out in s 46(1) of the Act. It is not axiomatic that because the proposed venue is located in a tourist area that the venue itself will be an attraction for tourists or a

facility that enhances the State's tourism industry. The evidence presented by the applicant in this regard was less than persuasive. Also the provision of a variety of food by a single operator (the lessee of the kitchen) does not constitute a foodhall. Whilst 'foodhall' is not a defined term in the Act, it is commonly accepted that a foodhall facility is when a number of different food vendors, operating from individual stalls, provide a variety of food to be eaten in a common area. What is contemplated by the applicant is little more than buffet style food provided at different locations throughout the venue by the lessee of the kitchen.

- 43 Section 46(2) of the Act precludes the licensing authority from granting a special facility licence if a licence of another class would be suitable. In this regard, the Commission is of the view that a tavern licence would suit the purposes for which this special facility licence is sought. A tavern licence authorises the sale and supply of liquor for consumption on the premises, whether patrons partake of food or not, and may authorise the sale of a packaged liquor. At the hearing before the Commission, Mr Blakeley was asked why he did not apply for a tavern licence and his response was that there is a certain negative perception of the use of the word 'tavern' and he wanted to get away from the stigma attached to the operation of taverns.
- 44 Consequently, the Commission finds that the applicant has failed to discharge its burden under s 46 of the Act.
- 45 Although s 46B of the Act provides that the licensing authority may substitute the application for a special facility licence as a licence of another class, the Commission would not exercise its discretion under s 46B in favour of the applicant due to its finding that the applicant has not discharged its onus under section 38(2) of the Act.
- 46 In view of the above findings, it is not necessary for the Commission to consider the objection from Ms Lucas and the signatories to the petition. However, for the sake of completeness, the following comments are provided in respect of the objection.
- 47 Section 73(10) of the Act provides that the burden of establishing the validity of any objection lies on the objector. The objector(s) in this case have provided limited evidence to support their grounds of objection. Whilst residents are always fearful of having licensed premises operating within the vicinity of their homes, it is not enough to rely on the general proposition that the consumption of alcohol inevitably brings with it undue offence, annoyance and disturbance to persons who reside in the vicinity. Many licensed premises operate in harmony with the local community. Also, the objector(s) submitted that they already experience an unacceptable level of disorderly conduct by passers-by who have consumed alcohol, however no evidence was provided to support this claim. The Commission finds that the objector(s) have failed to establish their grounds of objection.
- 48 Finally, the applicant asserted that he was denied procedural fairness by the Director of Liquor Licensing because the Director should have requested further information from

the applicant before making his determination. Because the application was determined without a hearing it is claimed that the Director should have given notice to the applicant about his concerns of a lack of “objective evidence” so the applicant could address this issue. At the hearing before the Commission, Mr McNally, on behalf of the applicant, stated that the applicant has followed the policy guideline of the Director of Liquor Licensing in the preparation of the PIA and if any information was lacking the Director could have sought further information as indicated in the policy document. The applicant was always of the impression that he would be able to present oral submissions to the Director of Liquor Licensing before his application was determined. Mr McNally claimed that this was a denial of procedural fairness.

49 The Commission rejects this submission. The Act places no obligation on the Director to conduct a hearing although the licensing authority is to act according to the equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and as speedily and with as little formality as is practicable (refer s16). However, parties to proceedings are to be given a reasonable opportunity to present their case and in particular to inspect any document to which the licensing authority proposes to have regard in making a determination in the proceedings and to make submissions in relation to those documents (refer s16(11)). The Commission can see nothing in the processes adopted by the Director to indicate a denial of procedural fairness. Section 38(2) places an obligation on an applicant to satisfy the licensing authority that the grant of the application is in the public interest. It is not incumbent on the Director to determine what evidence an applicant should ultimately submit in order to discharge its obligation under s 38(2). The licensing authority, however constituted, cannot run an application, objection or intervention on behalf a particular party as this would place the licensing authority in an unsustainable position.

50 The application must therefore be refused.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

**JIM FREEMANTLE
CHAIRPERSON**