

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT:	COCKTAIL GASTRONOMY PTY LTD
PREMISES:	COCKTAIL GASTRONOMY
PREMISES ADDRESS:	288 HALE ROAD, WOODLANDS
APPLICATION NO:	15036
NATURE OF MATTER:	GRANT OF A SPECIAL FACILITY (CATERING) LICENCE

Introduction

1. This is an application by Cocktail Gastronomy Pty Ltd (“the Applicant”) for the grant of a special facility (catering) licence for premises to be known as Cocktail Gastronomy and situated at 288 Hale Road, Woodlands.
2. The application is made pursuant to s 46 of the *Liquor Control Act 1988* (“the Act”) and r 9A(13) of the *Liquor Control Regulations 1989* (“the regulations”) and seeks the grant of a special facility licence for the prescribed purpose of “catering”.
3. The application was advertised in accordance with instructions issued by the Director of Liquor Licensing (“the Director”) and while no objections were lodged, both the Commissioner of Police (“the Commissioner”) and the Executive Director Public Health (“the EDPH”) sought to intervene in these proceedings, pursuant to the provisions of s 69 of the Act.
4. To give effect to the provisions of s 16 of the Act, a document exchange process was initiated between the parties in order to ensure that each party was given a reasonable opportunity to present its case.
5. Pursuant to the provisions of ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, which I have summarised below.

Submissions of the Applicant

6. The Applicant submits that the grant of the application is in the public interest and to support this claim and discharge its onus under s 38(2) of the Act, a Public Interest Assessment (“PIA”) and other submissions were lodged.
7. The *Notice of Application* filed by the Applicant did not specify trading hours for the purposes of s 98C of the Act and instead sought unrestricted trading hours, as and when its business dictated. The PIA also outlined how the Applicant has been a successful unlicensed caterer for more than five years, with a proven history of food and beverage catering services, including the sale and supply of liquor, for consumption at corporate and private functions.

8. In terms of beverage catering, the Applicant further submitted that cocktail catering accounts for almost 70 per cent of its total sales, making cocktails an ever popular choice when choosing catering for an event as a stand-alone package for pre-dinner drinks or combining it with the Applicant's food service. However, the Applicant goes on to note that this practice is "...limited to very small functions that Cocktail Gastronomy can perform in the absence of a licence."
9. By way of its PIA, the Applicant submitted that:
 - (a) Cocktail Gastronomy creates distinctive "synergies" between food and cocktails to form a unique experience that distinguishes it from other caterers; and
 - (b) by promoting flavour matches between cocktails and cuisines, it represents an important niche in the WA hospitality industry that would be better served through the grant of the application.
10. The Applicant's PIA also sought to address those matters prescribed in s 38(4) of the Act, including submissions that:
 - (a) all functions will have at least one approved manager present;
 - (b) all customers will be encouraged to purchase a food menu (in addition to a beverage menu);
 - (c) no ready-to-drink (RDTs) or other pre-mixed spirits will be sold or supplied;
 - (d) low alcohol options will be available for all beer/wine/sparkling packages;
 - (e) "mocktail" (non-alcoholic cocktail style drinks) options made available for all cocktail packages;
 - (f) water will be made available at all events; and
 - (g) a large range of non-alcoholic options will be made available to customers to choose if they wish to include it in their package.
11. In relation to the quantifiable demand for its services, the Applicant submitted that:

"...there is a large and growing demand for this type of catering. This statement is evidenced by the growth of its own business and the amount of total catering services that are now solely based on cocktail services."
12. As a result of the Applicant being a mobile caterer and travelling to multiple locations each year across the State, the Applicant submitted that assessing a geographical area as its location of business was complex and decided that the appropriate locality was the Greater Perth Metropolitan Area ("the locality"), given that this area represents where the "vast majority of Cocktail Gastronomy's catering services are conducted."

13. The Applicant further submitted that:

“During the application process, Cocktail Gastronomy canvassed catering services consumers by distributing information on what was being proposed.

As a direct result from its community consultation efforts, Cocktail Gastronomy received an insight into the community’s expectations for licensed caterers.

Principally, all respondents believed that:

- there is a high demand for cocktail and cuisine matching; and
- bespoke cocktail services that delivered hand-crafted, atmospheric and uniquely crafted beverages were highly sought after and preferred over more traditional beverage services.”

14. In order to demonstrate that the grant of the licence will cater to the requirements of consumers for liquor and related services, the Applicant submitted:

(a) seven letters of support from:

- (i) Adam Ehlers, a recent client of the Applicant, who has engaged the Applicant as a caterer at his wedding and also for regular parties he hosts for his clients;
- (ii) Louise Allen-Arbuckle, an Event Specialist who runs and hosts “music soirees for the people of Perth and loves using Cocktail Gastronomy due to their flexibility”;
- (iii) Sally Lewis, a Director of Events and Beyond, who has worked with Cocktail Gastronomy on a number of ‘pop-up’ events in Perth with her company and supports Cocktail Gastronomy “because they have been very easy to deal with, especially for any ‘last minute’ event coordination”;
- (iv) Matthew Keogh, who has hosted a number of functions utilising the services of Cocktail Gastronomy and has been extremely happy with the quality of service and product they provide;
- (v) Annabel Keogh, a current client of Cocktail Gastronomy, who thinks it would be great to see them expand their operations to now include the supply of alcohol;
- (vi) Courtney Bruce, a Graphic Designer, who has used Cocktail Gastronomy to cater for both “personal and corporate soirees” and who enjoys how the Applicant “matches food and beverages to create great flavour sensations”; and

- (vii) Kristie Dempster, Marketing Manager Jones Lang LeSalle, who engages Cocktail Gastronomy primarily for their point of difference in the market, because “their synergy between cocktails and food is so unique”;
 - (b) requests for catering services from:
 - (i) Michael Punna; and
 - (ii) Tanya Stephenson, Marketing Coordinator – Claremont Quarter; and
 - (c) sample event menus.
15. In conclusion, the Applicant submitted that the grant of the application is in the public interest because:
- (a) the proposed manner of trade will not cause harm or ill-health due to the consumption of liquor;
 - (b) there will be no adverse impact upon the amenity of the area where catering services have been provided by the Applicant, rather the granting of the application will improve the delivery of services and be in line with progressive catering operators in Australia; and
 - (c) the grant of the licence will not result in any antisocial behaviour, noise or disturbance in its operations.

Submissions of the Commissioner

16. The notice of intervention by the Commissioner made representations that if the application was granted and conditions not imposed, public disorder or disturbance would be likely to result.
17. In this regard, particular concerns are raised concerning the duration of events and the sale and supply of liquor at events, as well as patron numbers; with the Commissioner submitting that:
- (a) the ability of the Applicant to trade for extended periods of time may lead to public disorder and/or disturbance due to the likelihood of patrons being able to consume liquor for long periods, resulting in drunkenness; and
 - (b) events with large numbers of patrons may create public disorder and disturbance if harm minimisation strategies, in the form of licence conditions, are not implemented.
18. Accordingly a number of conditions were recommended by the Commissioner for imposition on the licence, should it be granted.

Submissions from the EDPH

19. The notice of intervention by the EDPH made representations in order to minimise harm or ill-health to people, or any group of people, due to the use of liquor. The intervention is premised on the following grounds:
- (a) the potential for the Applicant to trade during high risk times for harm (e.g. during late night trading times) and for long periods of time if not specified on the licence;
 - (b) the mobile nature of the special facility (catering) licence would mean that monitoring the licence for compliance would be difficult, which is of particular concern in the context of unspecified trading hours; and
 - (c) the potential for the Applicant to cater for high-risk functions, given the Applicant's focus on beverage catering rather than food catering.
20. As a result of concerns regarding the Applicant seeking to trade without specified trading hours, the EDPH submitted that:
- “a representative of the delegate of the Executive Director, Public Health, telephoned the Applicant to seek clarification on the proposed hours of trade. The applicant provided the following information:
- The applicant would like to have the flexibility to provide liquor within the hours requested by their clients (the host of the function).
 - Approximate trading times for functions currently catered by Cocktail Gastronomy are 6:00pm to 10:00pm weeknights and weekend trading hours range between midday and 2am.
 - Approximately 90% of functions currently finish at midnight.”
21. The EDPH also noted that the Applicant operated a 'pop up bar' under an occasional licence at the Claremont Quarter 'Carnival Kitchen Night' in March 2014 and submitted that:
- (a) both the Applicant and its relevant approved manager were issued infringement notices for two identified breaches of the trading conditions of the licence, as well as numerous Police Cautions; and
 - (b) multiple management-related concerns at the event is indicative of some inadequacies in the management practices of the Applicant, which suggests a cautious approach is warranted in the determination of this application.
22. Accordingly, a number of harm minimisation conditions were recommended by the EDPH for imposition on the licence, should it be granted.

Responsive and Closing submissions

23. On 30 May 2014, the Applicant responded to the notices of intervention and suggested a number of harm minimisation conditions, which it submitted should adequately deal with the concerns raised by the interveners. The suggested conditions include a number of conditions that would ordinarily be imposed by the Act and regulations, as well as:
- (a) the provision of notice to the WA Police and licensing authority where the Applicant proposes to sell and supply liquor at an event where more than 500 patrons are proposed;
 - (b) proposed permitted trading hours of Monday to Saturday, from 10 a.m. to 2 a.m. the following morning and on Sunday, from 10 a.m. to 1 a.m. the following morning;
 - (c) a range of non-alcoholic drinks and low strength liquor will be available at all Cocktail Gastronomy functions for the duration of the event; and
 - (d) pre-mixed spirits served during any event will not exceed an alcohol content of five per cent and will be less than 375 ml in volume.
24. Both the Commissioner and EDPH, in submissions dated 22 July 2014 and 23 July 2014 respectively, lodged further submissions which advanced their representations about the high risk of alcohol-related harm associated with trading until 2 a.m. and about the type of notification to be required when the Applicant seeks to sell and supply liquor at functions where 500 or more patrons are likely to be present.
25. Additionally, the Commissioner sought further conditions relating to security requirements for post midnight trading.
26. The Applicant lodged further information on 28 July 2014 to support the application and, at my request, provided additional information on its trading history, pursuant to occasional licences and to the exemption for small occasional functions prescribed in r 8B of the *Liquor Control Regulations 1989*. In particular, the Applicant submitted that:
- (a) it has sought and been granted six occasional licences; and
 - (b) as a percentage of its business, the Applicant considers that in approximately 20 per cent of functions, it only served the host's liquor and in the remaining 80 per cent it sold and supplied the liquor, either pursuant to the exemption in r 8B or an occasional licence.

27. The Applicant also acknowledged the “uncharacteristic yet significant lapses in its RSA protocol occurred during its involvement in a pop up bar at Claremont Quarter on 20 March 2014”, which it attributed to poor staff briefings ahead of the event and poor leadership from “our approved managers”. The Applicant further submitted that:

“Cocktail Gastronomy has worked extensively with members of the LEU both during the event and subsequently to provide a full and frank account of what has happened, and more importantly, detail the steps taken by Cocktail Gastronomy Management to ensure there is no repeat of what occurred.”

28. Information was also provided on the difficulties the Applicant faces “in running a contemporary catering company in the absence of a licence and the untenable position of continuing to rely upon occasional licences or clients sourcing their own liquor.”

29. In relation to the responsive submissions of the interveners, the Applicant submitted that:

“Caterers, by their nature, only cater to the requested hours of clients and while some functions start earlier, some start later. In this way, and with reference to Cocktail Gastronomy’s trading history and previous functions conducted, most but not all functions finish before 1 a.m.

In this way, consumers have a requirement for functions during hours in a different manner to those in on-premise licensed environments.”

30. In relation to the demographics of its core customers, the Applicant submitted that “functions tend to be the congregation of a group of people who have a common connection...as such functions should be viewed as low risk of harm or ill-health or anti-social behaviour due to this distinguishing feature (i.e. at a function organised by an employer, employees who attend the function would automatically modify their behaviour due to the nature of the function).”

31. Submissions were also made regarding the low risk nature of functions and the interveners “attempting to impose restrictive conditions without causal evidence to support them”, with the Applicant citing the Supreme Court decision in *Northbridge Enterprises Pty Ltd v Commissioner of Police* [2014] WAS 135 (“the Deen Decision”) to assert that there must be a causal link between conditions imposed and the harm to be mitigated and that the evidence relied upon by the EDPH¹ makes no reference to caterers or the style of service being promoted by Cocktail Gastronomy, with the Applicant referring to the size, type and nature of functions it has previously conducted in an unlicensed capacity to emphasise the unnecessary nature of security guards at such events.

32. Attached to those submissions, the Applicant provided copies of quote forms for all the events it was contracted to cater during May 2014, in order to show that it does not “take on any events outside the parameters of what is allowed... in all of these

¹ A reference Dr Phil Hadfield’s Night-Time Economy Management in September 2011.

- examples, Cocktail Gastronomy was operating in accordance with the regulation provided in 8B of the Regulations.”
33. The Applicant concluded its submissions with the assertion that the original set of trading conditions it referred to in its responsive submissions are appropriate for the proposed licence.
34. In submissions dated 4 August 2014, the Commissioner reiterated that the intervention suggested conditions in relation to:
- (a) the Applicant’s proposed trading hours; and
 - (b) events where more than 500 patrons are proposed to attend.
35. In this regard, the Commissioner submitted that the Applicant failed to note the key elements of the Deen Decision and how that decision should be relevantly applied to applications, noting that the key elements of the decision related to issues of procedural fairness and to the nature of the evidence being relevant to the application and the imposition of conditions, with reasoning provided to justify conditions. The Commissioner concluded that:
- (a) in this case, relevant notice of conditions have been provided in the notice of intervention and the Commissioner’s further submissions, prior to the application being determined, thereby negating any issues relating to procedural fairness; and
 - (b) the use of crowd controllers and the imposition of such a condition on the licence, should it be granted, merely responds to the Applicant’s:
 - (i) desire to trade through to 2 a.m., particularly after noting the Applicant’s evidence that none of the occasional licences granted it traded beyond 9 p.m.², thereby demonstrating a lack of experience by the Applicant in late night trade; and
 - (ii) admissions that serious breaches occurred in March 2014 at a Claremont “pop-up bar” due to poor RSA practices and poor briefings by its approved managers, which in itself represents a failure to comply with licensing approvals on the part of the Applicant.
36. The Commissioner also noted the Applicant’s submissions that the licence is sought because it was excluded from being part of many festivals and events and submitted that the commercial interest of an Applicant is not a reason to grant a licence and does not form part of the Act’s objects.

² Although my own review of the licensing data base indicates that the Applicant was granted occasional licences with trading until midnight on at least two occasions.

37. In submissions dated 5 August 2014, the EDPH maintained previous submissions made in the notice of intervention and responsive submissions of 18 July 2014 and noted that:
- (a) the literature on late night trading hours and risk of harm presented within the intervention provides a guiding and contextual nexus to addressing the specific circumstances of the application;
 - (b) the literature presented in the intervention was part of the EDPH's submissions which considered specific features of the application and the risk of harm, including:
 - (i) a focus on high alcohol content beverages (e.g. cocktails);
 - (ii) the mobile nature of the business and the difficulty in monitoring its impact; and
 - (iii) the potential for the licence to serve alcohol at large events and associated risk of harm;
 - (c) the research presented in the intervention shows an association between longer trading hours, such as those sought by the Applicant and increased alcohol consumption and alcohol-related harms, with local and international studies on late night trading consistently finding that, across a range of circumstances, late night trading is associated with increased harm and that the key overarching principle of the literature (i.e. that longer trading hours can increase the amount of alcohol sold and resultant harm) is applicable to this application;
 - (d) the Applicant has underestimated the potential harm impact associated with the high-risk aspects of its application and that its response to the research presented is based on the Applicant's assumptions and opinions, rather than any evidence to demonstrate the research is not relevant or that there is research to the contrary;
 - (e) s 38(2) of the Act places an onus on the Applicant to satisfy the licensing authority that the grant of the application is in the public interest, with s 38(4) suggesting that harm or ill-health matters are a relevant consideration, with the EDPH further submitting that "it is insufficient for the applicant to simply disagree with the harm representations of the intervention without supporting evidence to make out their contrary argument"³;
 - (f) in response to the Applicant's citation of the Deen decision, the EDPH submitted that essentially this decision stands as an authority for the uncontroversial proposition that there must be a rational basis for the licensing authority's

³ Reference is made to Decision of Director of Liquor Licensing number A213857, where the Director found that statements made by an applicant, or mere critiques of data presented by interveners without evidence based rebuttals, cannot be considered factual, to support this approach.

decisions, with the EDPH submitting that on the basis of the evidence presented in the intervention, it is open for the licensing authority to conclude that:

- (i) granting the late night trading hours of this application is likely to result in alcohol-related harm or ill-health;
 - (ii) this alcohol-related harm and ill-health can be minimised through the imposition of restrictive trading conditions; and
 - (iii) one of the most effective methods of minimising alcohol-related harm and ill-health is the limitation on trading hours; and
- (g) in relation to the Applicant's comments regarding people attending functions having a common interest that automatically modifies their behaviour, the EDPH submitted that:
- (i) this view is based on the Applicant's own assumptions and opinions, with no supporting evidence lodged to demonstrate that such functions represent a lower-risk for harm; and
 - (ii) some of the events the Applicant seeks to be catering to will be available to the general public and not a distinct group with a 'common connection', with many festivals like the Fringe Festival, Pride Festival, Beaufort Street Festival and Angove Street Festival having the potential to attract large numbers of people from the general public.

Determination

38. Pursuant to s 30A(1) of the Act the licensing authority is empowered to grant licences.
39. Section 33 of the Act further provides that the licensing authority has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that it considers 'in the public interest', provided that applications are dealt with on their own merits.
40. 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. Furthermore, where a statute provides no positive indication of the considerations by which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily be confined only by the scope and purposes of the statute (refer *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227 ("the Woolworths decision") and *O'Sullivan v Farrer* (1989) 168 CLR 210, 216.

41. The factual matters which the licensing authority is bound to take into account in determining whether the grant of an application is in the public interest are those relevant to the primary and secondary objects of the Act (refer to the Woolworths decision).
42. The primary objects of the Act, as set out in s 5(1), are:
- (a) to regulate the sale, supply and consumption of liquor;
 - (b) to minimise harm or ill-health 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, relevantly, the liquor industry in the State.
43. The secondary objects, as set out in s 5(2), are:
- (a) to facilitate the use and development of licensed facilities, reflecting the diversity of the requirements of consumers in the State;
 - (b) to provide adequate controls over, and over the persons directly or indirectly involved in the sale, supply 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 the Act.
44. However, the concept of public interest is not limited to the express objects of the Act. In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 Tamberlin J said that the expression “in the public interest” directs attention to that determination which best serves the advancement of the interest or welfare of the public, society or the nation. Accordingly, the licensing authority is also entitled (but not bound) to take into consideration the factual matters set out in s 38(4) (refer also to the Woolworths decision).
45. Section 38(4) provides that, without limiting s 38(2), the matters the licensing authority may have regard to in determining whether granting an application is in the public interest include:
- (a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor;
 - (b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated;
 - (c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and

- (d) any other prescribed matter, although no 'other...matter' has yet been prescribed.
46. As such, while it is acknowledged that the level and degree of evidence submitted to establish that the grant of the application is in the public interest may vary, depending upon the facts and circumstances of each case, such evidence should include an analysis of the probable positive and negative social, economic and health impacts that the grant of the application may have on the relevant community. Furthermore, it should be noted that the courts have previously found that applications under the Act cannot proceed on the basis of any legal or factual presumption in favour of approval, or on the expectation that the commercial interests of an applicant will necessarily coincide with the public interest.
47. Ultimately, the question for determination 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 determine what weight to give to the competing interests and other relevant considerations (see *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 [37]).
48. As this is an application for the grant of a special facility licence pursuant to s 46 of the Act, the Applicant must satisfy the licensing authority:
- (a) pursuant to s 38(2) of the Act, that the granting of the application is in the public interest; and
 - (b) pursuant to s, 46(2b) of the Act, that the business to which the application relates meets the prescribed purposes for which a special facility licence may be granted.
49. Submissions have been lodged by each of the parties to these proceedings in order to advance their respective positions.
50. Conversely, it should be noted that as interveners, the EDPH and Commissioner carry no burden of proof (see Greaves J, *Re Gull Liquor* (1999) 20 SR (WA) 321), but rather provide submissions in order to assist the licensing authority in making an informed decision.
51. In reviewing the Applicant's evidence, I consider the application is somewhat motivated by the difficulty the Applicant experiences "in running a contemporary catering company in the absence of a relevant licence and the untenable position of continuing to rely on occasional licences or clients sourcing their own liquor." Relevantly, in *Harold Thomas James Blakely v Director of Liquor Licensing* (LC 44 of 2010), the Liquor Commission found that:

“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 minimising alcohol-related harm and having regard to the proper development of the liquor industry.”

52. While I understand the Applicant’s position regarding the conduct of its business, I am also firmly of the mind that this is clearly a private business concern of the Applicant and not a matter that falls within the scope of the public interest, as articulated by the Act.
53. In fact, given that the Director’s policy on *Exemptions to the Liquor Control Act 1988* suggests that the ‘small occasional functions’ exemption should not be used as the means by which an entity establishes a permanent business in the sale and supply of liquor, I consider the Applicant’s current dilemma stems from its business decisions to do so. In fact, so much of the Applicant’s evidence refers to the manner in which it has conducted its catering business under the ‘small occasional functions’ exemption prescribed in r 8B of the Act, that it is appropriate for me to examine the types of sales permitted under that exemption. Typically, exemptions from the Act involve small amounts of liquor supplied in controlled environments and in social situations where relatively few people are in attendance. Importantly, these prescribed situations are only considered to be exempt from the Act when the exact conditions of the exemptions, as stated in the regulations, are met.
54. In relation to ‘small social transactions’ of liquor, in order for the sale and supply of liquor to be exempt from the Act, the relevant function must commence after 6 a.m. and finish by 10 p.m. on the same day.
55. There is no provision under the exemption for liquor to be sold before 6 a.m. or beyond 10 p.m. on any relevant day. As such, I find the Applicant’s submissions regarding trading hours to be problematic, particularly where it refers to “...Cocktail Gastronomy’s trading history and previous functions conducted, most if not all functions finish before 1 a.m.”
56. Therefore, I have taken the Applicant’s comments about trading beyond 10 p.m. or before 6 a.m. to signify those times when it has not been engaged by its client to sell and supply liquor, but rather to supply wait staff and associated services. To do otherwise could only lead to the conclusion that the relevant exemption would not have applied at those times and the Applicant would have been selling and supplying liquor without a licence or any other approval, in breach of s 109 of the Act, which is a very serious matter.
57. In order to verify my understanding of the Applicant’s submissions and its compliance with the exemptions prescribed in r 8B, I requested inspectors to investigate a number of events for which the Applicant had indicated that it provided catering services.

While the results of the inspections included a number of apparent discrepancies that initially concerned me, it is my view, after considering the Applicant's submissions of 9 December 2014, that there were extenuating circumstances associated with those apparent discrepancies, which lead me to conclude that there have been no significant breaches of the regulations.

58. However, in relation to the conduct of business by the Applicant under occasional licences, I have noted that:
- (a) the Applicant has not been granted occasional licences beyond midnight and has only been granted trading to midnight on two occasions; and
 - (b) infringement notices were issued to the Applicant and its manager during the conduct of occasional licence number 218289 on 20 March 2014 on two counts of acting in a way that contravenes the Act or any term or condition of a licence or permit. While the Applicant has submitted that the offences occurred primarily as a result of "poor staff briefings ahead of the event and poor leadership from 'our approved managers'", I find this explanation less than adequate given that:
 - (i) s 100 of the Act provides that the conduct of business under a licence is always the responsibility of the licensee;
 - (ii) while vicarious liability is provided under s 165(1) the Act, no responsibility of the licensee is diminished by such liability⁴; and
 - (iii) the manager concerned, Daniel John Stephini, is both a director and shareholder of Cocktail Gastronomy Pty Ltd and therefore was a representative of the Applicant's body corporate at all relevant times.
59. I therefore give more weight to the submissions of the EDPH in this matter and consider that the infringement notices are indicative of inadequacies in the way the Applicant has conducted its catering business under a licence.
60. I am likewise concerned that there are specific features of the application and the Applicant's proposed manner of trade that pose specific risks of alcohol-related harm and, after weighing and balancing the submissions of the parties, I prefer the submissions of the EDPH and Commissioner in this matter and accept that the focus of the business on beverage catering, and particularly on the sale and supply of cocktails (beverages with a high alcohol content) represents a significant risk in terms of alcohol-related harm, especially without any requisite presence of mitigating factors, such as the supply of food with liquor. I have also noted that while the Applicant initially indicated in its PIA that it would not sell RTDs or other pre-mixed spirits as a harm minimisation initiative, it later moved away from this and subsequently indicated its intent to sell and supply pre-mixed spirits.

⁴ With the exception of the defence outlined s 165(3) of the Act.

61. As previously noted, the question for my determination is whether, having regard to all of the circumstances and the legislative intention, the grant of the application is in the public interest. Section 33 of the Act provides that in answering this question, I have a wide discretion and can weigh and balance the competing interests and other relevant considerations as I see fit. In this regard, I consider that there are specific features of the application and the Applicant's proposed manner of trade that pose specific risks of alcohol-related harm, which I think the Applicant has underestimated.

62. It is often the case when considering the merits of an application that conflict will arise in promoting the objects of the Act, particularly the object of minimising alcohol-related harm versus the object of catering to the requirements of consumers for liquor and related services. In such circumstances, I must 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. Accordingly, , Ipp J said (refer *Executive Director Public Health v Lily Creek International Pty Ltd & Ors*, supra):

“It follows that the mere fact that s 5(1)(b) is a primary object does not necessarily mean that where harm or ill-health may be caused to people by the grant of a licence, no licence should be granted. Where there is a prospect of harm or ill-health being caused by the grant of a licence, and that grant will advance s 5(2) objects, the resolution of the conflict that then arises will depend on the degree of importance that is to be attributed to each of the relevant factors in the particular circumstances (bearing in mind that the object under s 5(1)(b) is to be accorded primacy).

The Licensing Authority may decide that the possibility of harm or ill-health is so remote or so insignificant that it should not be taken into account. It may be that a possibility of harm or ill-health of a particular serious nature will be sufficient to cause the Licensing Authority to impose stringent conditions on a licence or refuse the grant absolutely. The decision in each case will depend on the particular circumstances.”

63. While I agree with the Applicant's submissions regarding the need for a causal link between conditions imposed and the harm to be mitigated, I also note that the evidence of the parties needs to be relevant, reliable and logically probative to assist the decision-maker to assess the probability of the existence of the facts asserted (refer *Liquor Commission of Western Australia decision in Busswater Pty Ltd v Director of Liquor Licensing* (LC 17 of 2010)). In this regard and for the reasons I have already given, I do not consider the evidence of the Applicant regarding its late night trading history to be reliable.

64. However, while I generally accept the intervener's representations, I also note that this does not necessarily lead to refusal of the application, because the object of minimising alcohol related harm is not to prevent harm absolutely, but rather to minimise it.

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65. Therefore, consistent with the observations of Ipp J, I am of the view that the evidence in these proceedings establishes that the grant of a special facility licence, for the prescribed purpose of catering, would only be in the public interest if the grant of the licence is subject to the imposition of a number of conditions consistent with the Act's harm minimisation object, as recommended by the interveners, in addition to those normally imposed by the Director on such licences.
66. I am satisfied that no other licence category could achieve the purposes for which the special facility licence is sought and that the applicant has also demonstrated that the proposed business to be conducted under the licence meets the purposes for which a special facility licence may be granted, particularly as a "caterer", as prescribed in r 9A(14A).
67. I am also satisfied, on the balance of probabilities, that the Applicant has discharged its onus under s 38(2) of the Act and the application is hereby approved, subject to the following conditions:
- (a) Trading Conditions:
- (i) Pursuant to s 46(3) of the Act and r 9A(13) and (13a) of the regulations, this licence is granted for the prescribed purpose of a caterer.
 - (ii) The licensee must primarily be in the business of providing food for consumption at functions (see definition of caterer in r 14 of the regulations) and must at all times have access to an approved food premises, as defined in s 246G of the *Health Act 1911*. In this regard, the licensee must maintain its access to the commercial kitchen located at Unit 2/356 Charles Street, North Perth.
 - (iii) The licensee is subject to the requirements of the Food Safety Standard 3.2.2, Clause 3(1) and must ensure that all prerequisite FoodSafe® Food Handler Training Program Certificates (or equivalent training or program) remain current.
 - (iv) During the permitted trading hours, the licensee is authorised to sell liquor for consumption at premises that are not subject to any other liquor licence and where the caterer has agreed with the person organising the function to provide a food and/or beverage service for a pre-arranged event, reception or function (as defined by s 3 of the Act), where no more than 200 people are expected to attend.
 - (v) Where the licensee proposes to sell and supply liquor at an event where the anticipated number of persons attending are greater than:
 - (1) 200 but not greater than 500, the licensee is required to lodge an application for variation of licence conditions with the Director not later than 14 days before the event; or
 - (2) 500 but not greater than 1000, the licensee is required to lodge an application for variation of licence conditions with the Director not later than 30 days before the event; or

- (3) 1,000 people, the licensee is required to lodge an application for variation of licence conditions with the Director no later than 60 days before the event.
 - (vi) The relevant application is required to be accompanied by the following:
 - (1) details of the date, start and finish time of the event;
 - (2) a map of the proposed venue or area outlined in red, at which liquor will be sold, supplied and consumed;
 - (3) a copy of the security plan and risk management plan for the event; and
 - (4) a copy of the approval given, and conditions imposed, by the relevant Local Government Authority.
 - (vii) The licensee shall ensure that the consent of the owner or occupier of the premises where liquor is to be supplied and consumed has been obtained.
 - (viii) The licensee may direct suppliers of liquor to deliver liquor to various venues where the licensee has agreed with the person organising the function to provide services in accordance with these conditions.
 - (ix) A range of non-alcoholic drinks and low strength liquor must be available at functions for the duration of the event.
 - (x) Pre-mixed spirits served during any function must not exceed an alcohol content of five per cent and must be less than 375 ml in volume.
 - (xi) The licensee is not authorised to sell packaged liquor for consumption away from the location where it has been engaged, hired or contracted to provide food and/or beverage catering.
- (b) Permitted Trading Hours:
- (i) Pursuant to s 98C of the Act, the following trading hours are those approved as permitted hours:
 - (1) Monday to Thursday, from 6 a.m. to 12 midnight;
 - (2) Friday and Saturday, from 6 a.m. until 1 a.m. the following morning;
 - (3) Sunday, from 10 a.m. to 10 p.m.; and
 - (4) trading is permitted on Christmas Day and Good Friday only where the liquor is sold and supplied ancillary to a meal (as defined by s 3 of the Act) supplied by the licensee. No trading is permitted before noon on ANZAC Day.
- (c) Entertainment Condition:
- (i) 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:
 - (1) be immodestly or indecently dressed on the licensed premises, and/or

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- (2) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
- (ii) The licensee or manager, or an employee or agent of the licensee or manager, is prohibited from:
- (1) 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;
- (2) 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
- (3) 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.
- (iii) In this condition "licensed premises" includes any premises, place or area:
- (1) which is appurtenant to the licensed premises, or
- (2) 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.
- (d) Compliance with Harm Minimisation Policy:

The licensee has lodged a copy of the 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.

General

68. Pursuant to s 127(2) of the Act, the prescribed licence fee payable in respect of this licence is payable prior to the grant of the licence. I am satisfied that the licence fee has been paid.
69. The licensed premises are defined as the area outlined in red on the plans attached and dated 17 April 2014. A copy of that plan is to be retained on the premises and produced to any authorised officer if required.
70. Pursuant to s 116(3) of the Act, the premises' trading name of *Cocktail Gastronomy* is approved. Therefore, 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.

71. 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.
72. 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.
73. 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.
74. This matter has been determined by me under delegation pursuant to s 15 of the Act.

Brett Snell
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

15 January 2015