

## **DECISION OF DIRECTOR OF LIQUOR LICENSING**

**APPLICANT:** SUNSURF PTY LTD

**PREMISES:** OCEAN ONE BAR

**PREMISES ADDRESS:** SHOP 4 & 5, ON THE BEACH CENTRE, 1 MANNING ROAD, SCARBOROUGH

**APPLICATION ID:** A000190755

**NATURE OF APPLICATION:** GRANT OF A TAVERN RESTRICTED LICENCE

**DATE OF DETERMINATION:** 1 July 2016

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### **Introduction**

1. On 23 November 2015, Sunsurf Pty Ltd (“the applicant”) lodged an application for the grant of a tavern restricted licence in respect of premises situated at Shops 4 & 5, On the Beach Centre, 1 Manning Road, Scarborough to be known as the Ocean One Bar.
2. The application is made pursuant to ss 41 and 68 of the *Liquor Control Act 1988* (“the Act”).
3. Pursuant to s 67 of the Act, the application was required to be advertised by way of a notice in *The West Australian* newspaper on or before 16 December 2015; by way of a notice on the site of the premises for a period of 28 days commencing on 16 December 2015; by way of a notice to residents and businesses located within a 200 metre radius of the premises; and a general notice to educational, health care and local and regional government institutions, as well as community and church groups, within the locality.
4. Pursuant to ss 73 and 74 of the Act, objections to the grant of the application were lodged by Graham Saxby; Peter McHardy; Geoffrey Joseph Cooke & Judith Blanche Cooke; Cynthia Anderson; S. Behrens & S Behrens; Frances Margaret Brand; Marguerite K Camerford; Dorothy May Campbell; Robin Costa; Barbara Ethel Edwards; Mark John Fleming; Michelle Heathcote Fowler; Julie Alexander Hoypoy; Neville Bruce Hoypoy; Rod Lane & Margaret Lane; Frank & Marcia Lazenby; Myree Catherine McGoldrick; Rory O'Rourke & Robyn O'Rourke; Dr Anne Lorrae Paterson; John Quinlivan; Brian High Roberts; Logan Roberts; Chris Stacey; John Paul Zadnik; Anne Teresa Taylor; Dr George W. Taylor; and Barry Cornford.
5. Also, the Commissioner of Police (“the Commissioner”) pursuant to s 69 of the Act lodged a notice of intervention.
6. Pursuant to ss 13 and 16 of the Act, the application will be determined on the papers and by me under delegation pursuant to s 15 of the Act.

### **Background**

7. On 24 March 2009, the Director of Liquor Licensing (“the Director”) conditionally granted to Claudio Holdings Pty Ltd a small bar licence for premises to be known as Caffe Spiaggia and to be situated at Shop 3, On the Beach Centre, 1 Manning Road, Scarborough (Decision A192413). The small bar licence was granted subject to specific trading conditions and Claudio Holdings Pty Ltd sought a review of those conditions before the Liquor Commission of Western Australia (“the Commission”).

8. The Commission in its decision dated 1 October 2009 number LC22/2009, by consent of the parties to proceedings varied and substituted the trading conditions as imposed by the Director.
9. On 7 January 2010, the small bar licence was transferred from Claudius Holdings Pty Ltd to the applicant; the conditional grant was confirmed, the licensed premises defined on plans dated 18 December 2009; and the small bar licence was issued subject to the Director's normal conditions including:
  - 1) The applicant is permitted to sell and supply liquor in accordance with the provisions of s 41 of the Act as it relates to Small Bar licences.
  - 2) The sale of packaged liquor for consumption off the licensed premises is prohibited.
  - 3) The maximum number of patrons permitted to be within the area marked on the plan as "Alfresco" and hatched in Red (but excluding the area marked on the plan as "Entrance" and hatched in Green) must not exceed 60 at any time.
  - 4) At all times the premises must be set up with tables and chairs for dining and hot and cold food is to be available.
  - 5) Neat Casual dress at all times. Footwear must be worn at all times and no thongs to be worn in the premises after 7 p.m. No singlets, ripped clothing or torn clothing to be worn at any time in the premises.
  - 6) Alcohol may only be consumed by persons within the area marked on the plan as "Entrance" and delineated in Green whilst they are seated at tables.
  - 7) The sale of liquor in jugs and the sale of shooters in shots are to cease 30 minutes prior to closing.
  - 8) A video surveillance (CCTV) system must be in place and operational. The system must comply with the minimum requirements identified in the "*Minimum Standards – Closed Circuit Television (CCTV) Security System*" Policy or with the requirements otherwise approved by the licensing authority. The system is to provide cameras at the locations depicted on the CCTV Plan dated 7 January 2010 and is to record continuous images of all coverage areas depicted in Black shading on the CCTV plan of the premises during all trading times and until 1 hour after trading ceases. Images recorded via the video surveillance system must be retained for a minimum of 30 days, and must be made available for viewing for removal by a member of the Police Force or other patrons (sic) by the Director.
- 9) Entertainment Conditions:
  - i) No live rock bands are to perform at the premises at any time.
  - ii) Other live music into the categories of either:-
    - a. A folk jazz, blues or other band that is not a rock band (within a maximum of 6 (including singers), with no more than 4 being musicians),
    - b. Acoustic guitar and/or singer(s)(with a maximum of 3),

Is permissible subject to the condition that any noise created/emitted should not exceed the *assigned Noise Levels* relating to the locality as set by the City of Stirling Council (which may be amended from time to time) under the *Environmental Protection (Noise) Regulations 1997* (or any other superseding statutory instrument).

- iii) Pre recorded low-level background music is permissible subject to the condition that any noise created/emitted should not exceed the *assigned Noise Levels* relating to the locality as set by the City of Stirling Council (which may be amended from time to time) under the *Environmental Protection (Noise) Regulations 1997* (or any other superseding statutory instrument).
  - iv) The projection of speakers playing music directly into the two alfresco areas marked as "Alfresco" (hatched in Red) and "Entrance" (hatched in Green) is restricted to low-level background music only.
- 10) Condition 9 does not apply to the premises for the purposes of participation in the Summerset Festival or other community event conducted by the City of Stirling to the extent that compliance with this condition is relaxed in writing by the City of Stirling.
10. The applicant's current small bar licence number 6340123613 dated 10 February 2015 sets out the trading conditions (other than the normal conditions) of the licence, as follows:
- 1) The licensee is permitted to sell and supply liquor in accordance with the provisions of s 41 of the Act.
  - 2) The sale of packaged liquor for consumption off the licensed premises is prohibited.
  - 3) No more than 120 persons may be on the licensed premises at any one time.
  - 4) The maximum number of patrons permitted to be within the area marked on the plan as "Alfresco" and hatched in Red must not exceed 60 at any time.
  - 5) At all times the premises must be set up with tables and chairs for dining and hot and cold food is to be available.
  - 6) Neat Casual dress at all times. Footwear must be worn at all times. No ripped or torn clothing to be worn at any time in the premises, no men's singlets on the premises after 7 p.m.
  - 7) The sale of liquor in jugs and the sale of shooters in shots are to cease 30 minutes prior to closing.
  - 8) A video surveillance (CCTV) system must be in place and operational. The system must comply with the minimum requirements identified in the "*Minimum Standards – Closed Circuit Television (CCTV) Security System*" Policy or with the requirements otherwise approved by the licensing authority. The system is to provide cameras at the locations depicted on the CCTV Plan dated 7 January 2010 and is to record continuous images of all coverage areas depicted in Black shading on the CCTV plan of the premises during all trading times and until 1 hour after trading ceases. Images recorded via the video surveillance system must be retained for a minimum of 30 days, and must be made available for viewing for removal by a member of the Police Force or other persons authorised by the Director.
  - 9) Entertainment Conditions:
    - i) No live rock bands are to perform at the premises at any time.
    - ii) Other live music into the categories of either:-
      - a. A folk jazz, blues or other band that is not a rock band (within a maximum of 6 (including singers), with no more than 4 being musicians),
      - b. Acoustic guitar and/or singer(s)(with a maximum of 3),

Is permissible subject to the condition that any noise created/emitted should not exceed the *assigned Noise Levels* relating to the locality as set by the City of Stirling Council (which may be amended from time to time) under the *Environmental Protection (Noise) Regulations 1997* (or any other superseding statutory instrument).

- iii) Pre recorded low-level background music is permissible subject to the condition that any noise created/emitted should not exceed the *assigned Noise Levels* relating to the locality as set by the City of Stirling Council (which may be amended from time to time) under the *Environmental Protection (Noise) Regulations 1997* (or any other superseding statutory instrument).
  - iv) The projection of speakers playing music directly into the two alfresco areas is restricted to low-level background music only.
- 10) Condition number 9 does not apply to the premises for the purposes of participation in the Summerset Festival or other community event conducted by the City of Stirling to the extent that compliance with this condition is relaxed in writing by the City of Stirling.
11. The licensed premises were altered and redefined in 2014; and the applicant's small bar licence, No 6340123613, currently relates to the licensed premises as defined on the floor plan dated 10 February 2014.
12. The applicant is also currently the holder of an extended trading (area) permit No 42751 (0200470315) which is valid until 21 February 2020.
13. In accordance with the extended trading permit No 42751, issued under s 60(4)(h) of the Act, the licensee is authorised sell and supply liquor to a person within the area outlined in yellow on the plan dated 13 January 2014, for consumption in that area, only while seated at a table, subject to the following conditions:
- 1. The use of the alfresco dining area is subject to the conditions set out in the Licence to Set Up and Conduct an Eating Area issued by the City of Stirling and any subsequent issue of that licence.
  - 2. The permit is valid from 22 February 2015 and it will remain in force until 21 February 2020 provided the Licence to Set Up and Conduct an Eating Area or other approval from the City of Stirling for the alfresco area remains current.

#### **Submissions on behalf of the applicant**

14. The applicant seeks the grant of a tavern restricted licence for the proposed premises to be located at Shops 4 & 5, On the Beach Centre, 1 Manning Road, Scarborough.
15. The proposed licensed premises are currently the subject of a small bar licence as defined on the plans dated 10 February 2014; and the proposed licensed premises of the tavern restricted licence will comprise the same licensed area as that defined under the small bar licence.
16. The proposed premises comprises approximately 445m<sup>2</sup>, being the same premises as the small bar, and includes:
- 1) bar/function area of approximately 88m<sup>2</sup>;
  - 2) main bar area of approximately 109m<sup>2</sup>;
  - 3) alfresco area (including ETP area) of approximately 110m<sup>2</sup>;
  - 4) kitchen of approximately 52m<sup>2</sup>; and

- 5) other relevant facilities such as toilets, office, cool rooms & etc.
17. The applicant submitted that it seeks the grant of a tavern restricted licence because it wishes to increase the number of patrons that may be accommodated on the licensed premises to which its small bar licence relates which currently restricts the number of persons that may be accommodated on the licensed premises, at any time, to no more than 120 persons. In this regard, the applicant seeks to accommodate up to 150 patrons, at any time, under the tavern restricted licence.
18. According to the applicant, the additional capacity will enable it to accommodate a growing customer base as the Scarborough Beachfront Redevelopment Area takes shape; improve the versatility and use of the premises by enabling parts of the licensed premises to be used for private functions and events; increase the services it can offer to its patrons; and better accommodate its patrons who are frustrated at having to wait in line, off the licensed premises, for entry to the premises.
19. It was submitted that the licensed premises enjoys a prime location fronting Scarborough Esplanade at the corner where it meets Manning Road. It boasts extensive ocean views from both internally and externally, with unimpeded views west to the Indian Ocean.
20. According to the applicant, the licensed premises has been specifically designed to celebrate culture, surfing and the history of Scarborough as an iconic beachside location; and there will be no significant change to the manner that the business is currently conducted at the licensed premises under its small bar licence, such as:
  - live music being played in summer and the busier season for the premises on Wednesday, Thursday, Friday, Saturday and Sunday;
  - open mic nights – held on Thursday during winter;
  - a regular original band – playing every Saturday night throughout the year;
  - the annual Miss Ocean One Calendar Girl competition, held over 13 weeks during summer;
  - a ping pong competition – running all year round;
  - a DJ – playing every Sunday during winter; and
  - an original band – playing every Sunday during summer.
21. It was submitted by the applicant that the premises has the capacity to accommodate up to 362 persons, at any one time; and that the internal toilet facilities could accommodate up to 250 persons.
22. The applicant also submitted that fundamentally, the operations of the premises will not change and does not seek to vary or delete the majority of the trading conditions of its small bar licence other than to vary conditions number 3 and 5 as contained in paragraph 11 above, as follows:
  - Condition 3 to "*No more than 150 patrons may be on the licensed premises at any one time*"; and
  - Condition 5 to "*At all times the premises must be set up with tables and chairs for dining and hot and cold food is to be available until 9:30 p.m.*"
23. In respect of any potential impact on the amenity of the locality and the residents in close proximity of the premises, the applicant referred to a report from sound and acoustic experts, Lloyd George Acoustics dated 10 September 2013 ("the Report") which was relied

upon when the applicant applied to alter and redefine the licensed premises of its small bar licence which increased the licensed area to its current size and the number of persons that may be accommodated on the licensed premises increased from 100 to 120 persons. The 120 persons was the maximum number of persons that may be accommodated on the licensed premises trading under a small bar licence irrespective of the fact that the premises could accommodate more than 120 persons. Given the Report, the applicant submitted that it would continue to adhere to the recommendations contained in the Report; is able to close the glass alfresco doors to minimise the transfer of noise while bands play; has a sound monitoring device for the use by managers; and has a sound engineer on staff that sets up bands' volume to ensure compliance with the Report.

24. Additionally, the applicant submitted that while the addition of 30 patrons on the licensed premises would likely increase the level of crowd noise emanating from the premises, its management practices and adherence to recommendations contained in the Report, the overall level of noise emanating from the vicinity of the premises may decrease, due to patrons being inside the premises, instead of lining up on the foot path outside the premises.
25. In support of the application, the applicant lodged a Public Interest Assessment (PIA) which outlined the background to the application, its intended manner of trade, the applicant's intended customer base, and addressed the matters contained in s 38(4) of the Act. The PIA, was supported by many things including:
  - 1) approvals from the Metropolitan Redevelopment Authority;
  - 2) the Report dated 10 September 2013 prepared by Lloyd George Acoustics;
  - 3) letters of support;
  - 4) emails of support;
  - 5) witness questionnaires; and
  - 6) a petition signed by patrons.

#### **Submissions of the objectors**

26. The resident objectors raised similar general concerns and expressed the view that if the application was granted:
  - 1) undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity would be likely to result; or
  - 2) the amenity, quiet, or good order of the locality in which the premises are to be situated would be lessened.
27. Mr Graham Saxby in support of his grounds of objection included:

*"In regards to the current application from Ocean One Bar on the corner of The Esplanade and Manning Street to change their current bar license (sic) to a Tavern to increase their allowed number of patrons and thus their alcohol sales.*

*We have been suffering from this bar for a number of years now, particularly excessive noise from loud music and problems from drunken patrons after closing time, particularly around Manning St, Esplanade and Esplanade car park.*

*Most of us love a social drink and laugh, but currently in Scarborough there are 28 venues selling Alcohol in some form?*

*Anti-social behaviour and violence are on a steady increase, in fact Scarborough is already touted as one of the worst crime areas in Perth. (from Current Police 2016)*

<https://www.police.wa.gov.au/Crime/Statistics?locality=Scarborough&startYear=2014&startMonth=1&endYear=2016&endMonth=12>

*As a resident close to the forthcoming MRA redevelopment, we understand that there will but (sic) much change on the famous Scarborough Beach, but it (sic) all new business ventures do not have to be about increasing drinking venues. The State Government and Council prides itself on this beach being one of the best assets of WA which all locals agree. Therefore the new redevelopment will require diversity in the types of new projects.*

*I believe that this particular business which has brought so much good to the area, is at its capacity and additional growth will just compound on the current problems experienced with this particular establishment.*

*Based on the above, my wife and I, owners of our home in Observation Rise object to the proposed increase in this particular venue.”*

28. Mr Geoffrey Joseph Cooke and Judith Blanche Cooke in support of their objection included as reasons:

*“The original license (sic) was not granted to cater for the types of patronage which we know to frequent this bar – we were originally led to believe that the types of music would be mainly folk and that style of music.*

*The venue is completely unsuited for large crowd occupancy and their lack of sound control measures has clearly been demonstrated.*

*Over many years, the bar has shown by the behaviour and yelling and general noise caused by the unsavoury crowd, their general poor vigilance and regard for their protocols of Responsible Service of Alcohol. We live across Manning Street in Observation Rise and are constantly disturbed by noisy, unruly patrons spilling onto the street at all hours.”*

29. M/s Barbara Ethel Edwards submitted:

*“At present the Anti-Social Behaviour is not acceptable. There is already a high level of anti-social behaviour in the immediate vicinity of the bars and restaurants; of which there are already 28 licensed premises in the area. This will increase to an even more unacceptable level. Foul language, late night noise, vehicles are ROARING off from the Esplanade Car Park after leaving Bars and Restaurants late at night. This creates danger of accident and a huge amount of noise.*

*It disturbs the local residents and affects the sleeping of local residents who should have the right not to be disturbed.*

*There are many families in the area and the increase in the alcohol sales would adversely affect the family environment. It has the potential for increased violence resulting from alcohol consumption.”*

30. M/s Julie Alexander Hoypoy, among other things submitted:

*“...the Observation Rise apartment residents are already severely affected by Bar One. This building was never built as a bar/tavern, it has no sound deadening walls ceilings etc. It has a canvas roof for the outside area. Cramped conditions, patrons sitting right on the footpath smoking, it should never been granted a license (sic) for a Bar with music in the first place. Many OR residents have complained about the noise, anti-social behaviour and the general disturbance to enjoying their home and lives to the council, liquor commission*

*and local state member, with little success. The police have to regularly monitor it, particularly late at night.*

*OR residents (mostly families and mature people) are subject to a 10.30 curfew on loud music and noise, so everyone can have quiet enjoyment of their home. For a lot of residents this has been disturbed greatly by the loud thumping music from Bar One, the yelling, swearing and anti-social behaviour as the nights gets later. Increasing the patronage/hours will only exacerbate this situation.”*

31. Mr and Mrs Lane in their objection raised the question of the suitability of the licensed premises to conduct the type of business of the applicant namely, as a live music venue. In this regard, these objectors stated:

*“Our main concern is the noise (base of music) which can be heard behind closed doors in our residence about 200 metre away – near Reserve St. (Note: the Matisse is some 300 metre away & it can also be heard on many occasions. A point to note is that any approvals of their arrangements should not be used as a precedent because their noise management is not functioning & is unacceptable.)*

*Unless the tavern as proposed by Ocean One Bar **confines its “music” & other loud noise to within the doors, walls, windows and roof;** then it should not be approved.*

*Further, the nearest residential premises imposes a noise (of 10.00pm) on its residents & guests, in line with most Strata properties. Accordingly, there is no justification for a tavern so close to such a residential property to play loud music, without the same restrictions on time, volume & other controls.”*

32. Mr Brian Roberts in his objection referred to the former use of the licensed premises when it traded under a restaurant licence as being a quiet restaurant. Mr Roberts also attached a photograph to his notice of objection taken on 8 January 2016 which appeared to show the *“Banner”* advertising this application being displayed within the licensed premises. In this regard, Mr Roberts stated:

*“I passed the bar several times before I could locate the notice which is positioned approximately 4 metres from the closed alfresco area. You would not see the notice unless specifically looking for it.”*

### **Submissions of the Commissioner**

33. The Commissioner, in his notice of intervention dated 12 January 2016, made representations that the grant of the application would result in public disorder and/or disturbance, if conditions are not imposed on the licence; and on other matters relevant to the public interest.
34. The Commissioner's representations included an analysis of the applicant's PIA and intended manner of trade; and the particulars raised in the intervention included patrons numbers and seating; food/meals to be provided; dress standards; crowd controllers; and drink standards.
35. The Commissioner highlighted a number of recent decisions of the licensing authority wherein, in granting liquor licences in the locality, conditions were imposed to minimise the impact that such licences would have in Scarborough in an effort to reduce the likelihood of the locality reverting back to the high levels of alcohol related harms experienced, in the past, in Scarborough which required drastic action from the licensing authority and the Police.

36. It was submitted, that police data for the locality, since the re-emergence of liquor licences, indicated an increase in police attendances for serious incidents in the locality of Scarborough; an increase in domestic assaults where alcohol was a factor; an increase in alcohol related non-domestic assaults; and a significant increase in crime and police tasking because of the increase in the number of higher risk licences in the locality.
37. In conclusion, the Commissioner submitted possible trading conditions which should be considered and imposed, if the application was granted, to mitigate the potential for public disorder or disturbance in the locality.

#### **Responsive submissions of the applicant**

38. The applicant lodged individual responsive submissions addressing the concerns of each objector; and in such submissions included:

*"A little about me, I am a former resident of Observation Rise, have lived in Scarborough for more than 30 years with 10 of those years living on The Esplanade. I am sympathetic towards your concerns and those of your fellow residents and we at Ocean One endeavour to be good neighbours.*

*With the current selection of licensed venues in the locality many patrons will frequent multiple venues in Scarborough during a night out and in general we find the mood to be upbeat and respectful with a sense of community.*

*Tavern Restricted Licenses (sic) and Small Bar Licenses (sic) are both forms of Hotel Licenses (sic) and except for capacity are virtually identical in the nature of trade. When Ocean One was granted its liquor licence in 2009 a Tavern Restricted Licence type did not exist and the only viable option was a Small Bar Licence. Small Bar licenses (sic) by definition only allow 120 persons onsite at any one time which with the current costs to run a business at Scarborough make it unviable. This application is for an increase in patron numbers with virtually all the current trading conditions to remain, except we have requested a change in operating hours of our kitchen. We feel this increase in capacity will have no effect to the amenity of the locality as the increase in numbers will allow immediate access to those patrons whom would otherwise be standing in line and we do not see more people being attracted to Scarborough because our capacity is increased.*

*The City of Stirling unbeknown to Ocean One Management conducted a sound monitoring test in an Observation Rise, Manning St resident's apartment. The test showed the noise emitted (decibel reading) from the premises was within statutory guidelines. We have in-house procedures in place to reduce noise and take our responsibility as a neighbour very seriously. We feel that by allowing additional patrons into the Ocean One Bar premises, lines will stop forming outside the premise which will take people off the street and should actually reduce noise.*

*I would like to take this opportunity to offer my personal mobile number and should you encounter any future issues with the way in which Ocean One Bar is trading please call or text me (after 5pm),*

*Kind Regards Anthony Hilton Director Sunsurf Pty Ltd."*

39. The applicant in responding to the objectors' claims that noise emanating from the licensed premises would adversely impact on them, also submitted an opinion dated 11 March 2016 by Mr Terry George, Lloyd George Acoustics; and a letter dated 15 March 2016 from Mr David Coulter, a resident living in an apartment approximately 75 metre from the licensed premises.

40. In responding to the Commissioner's intervention the applicant, included:

*"Since lodging the application the applicant has been inundated with requests for large group functions which it has been unable to accept.*

*The applicant requests a cap of 200 persons on site at any one time which would closer align the premises with other venues in the locality and create more conformity in the locality.*

*We feel that to avoid confusion when counting numbers of people on-site and to be in-line with other venues in the locality it may be best to not define between patrons and staff when placing a maximum capacity condition on the licence and include the two groups under one single combined number.*

*The applicant request the capacity condition be amended to a maximum of; **A maximum of 200 persons on the premises at any one time.***

*Staff will include; bar, kitchen, floor, security, artistic performer's, musician's roadies, lighting and sound engineers and management and during shift changes a total of up to 50 staff could be onsite at any one time.*

*Granting of the extra capacity will only go towards satisfying demand during busy weekend periods and will not encourage more people to come to the venue or the locality.*

*The extra capacity will actually keep people of (sic) the street, waiting in line and create a safer, quieter environment and add to the amenity of the locality."*

41. The applicant also compared the proposed licensed premises against other recently granted licences in the locality, namely Squires Fortune, Scarborough Beach Bar and El Grotto and Taqueria; and submitted that its premises has substantially more available space per patron than those other venues.

42. The applicant further submitted:

*"The sustainability and viability of a premises are in direct correlation to the numbers of patrons permitted onsite.*

*Scarborough is a seasonal location with numbers in winter 40% less than that in Summer.*

*The business must capitalise on the busy times so as to be able to cover costs during the slow trading periods.*

*Ocean One Bar was the first and is the longest trading of the Tavern Restricted, Small Bar licenses (sic) in the locality.*

*Due to the new venues in the locality the rental rate charged to the applicant has been substantially increased.*

*Compared to Scarborough Beach Bar, Ocean One Bar pays a higher psm rental rate, (ground floor tenancy compared to level 1 tenancy), is a larger premise, pays more in building outgoing's due to its larger size but is requesting only 70% of its total capacity.*

*The applicant's premises are so large it can accommodate seating for all its current patrons and has no objection to providing seating for 50% of its maximum capacity of patrons to keep it in line with other venues in the locality."*

43. The applicant addressed the concerns raised by the Commissioner in particular the data regarding calls to police; and in conclusion agreed to the imposition of trading conditions as follows:

*"1. Trading Hours – as those prescribed in the Act.*

2. *The applicant would ask the Director to consider a revised patron condition of A maximum of 200 Persons on the premises at any one time.*
3. *CCTV – The current licence has a satisfactory CCTV condition and we see no need to change than condition.*
4. *Entertainment – as per current licence.*
5. *Food – we are happy to continue with our current licence which states ‘hot and cold food to be available at all times’ and modify it to ‘At all times the premises must be set up with tables and chairs for dining and hot and cold food available until 1 hour before closing’*
6. *Seating – to be 50% of the maximum patron number permitted on the premises at any one time except for ‘one off’ function’s.*
7. *General Conditions to remain as per the current Small Bar Licence.*
8. *Crowd Controllers to be to be (sic) on duty Friday and Saturday after 8pm and Sunday’s after 6pm until 30 minutes after closing.*
9. *Dress Standards to include the Compliance with the Director’s Dress Standards Policy.”*

### **Determination**

44. The applicant is currently the holder of a small bar licence in respect of the proposed premises to which this application relates; and seeks the grant of a tavern restricted licence so as to be able to accommodate up to 150 patrons on the licensed premises, at any one time.
45. In accordance with s 38 of the Act, the onus is on the applicant to satisfy the licensing authority that the grant of the application is in the public interest. In this regard, the licensing authority, however constituted, makes its determination on the balance of probabilities.
46. In determining whether an application should be granted “in the public interest” the licensing authority, is required to exercise a discretionary value judgement within 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; and *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241. That is, consideration must be given to the objects of the Act as specified in s 5 and regard may be given to the matters prescribed in s 38(4) of the Act.
47. In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 Tamberlin J said:

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

*The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.*

48. Pursuant to s 33 of the Act the licensing authority has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest, provided that the application is dealt with on its merits within the scope of the Act (refer *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC; and *Palace Securities v Director of Liquor Licensing* (1992) 7 WAR).
49. The primary objects of the Act, as set out in s 5 are:
  - 1) to regulate the sale, supply and consumption of liquor;
  - 2) to minimize harm caused to people, or any group of people, due to the use of liquor; and
  - 3) 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.
50. The secondary objects as set out in s 5(2) 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 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.
51. In this case, the applicant seeks a tavern restricted licence in place of its small bar licence for premises which, prior to 2009, traded under a restaurant licence known as “*Caffe Spiaggia*” (Licence No 6060038745).
52. The licensed premises of “*Caffe Spiaggia*” were redefined on 24 March 2009 with the conditional grant of a small bar licence for part of the licensed premises (Decision No A129413 of the Director of Liquor Licensing). This resulted in two liquor licences namely a small bar licence (Licence No 6340123613) and the restaurant licence for “*Caffe Spiaggia*” (Licence No 6060038745) for the remaining part of the licensed premises. Claudio Holdings Pty Ltd was the holder of both licences.
53. On 21 February 2014, the Director approved an application to redefine the licensed premises of the small bar licence (Licence No 6340123613) known as Ocean One Bar to include the licensed premises of the restaurant licence known as BOA Brazilian BBQ Restaurant (Licence No 6060038745, formerly known as “*Caffe Spiaggia*”) resulting in the small bar licence comprising the whole of the licensed premises which prior to 2009 was trading under the restaurant licence known as “*Caffe Spiaggia*”. The restaurant licence was surrendered contemporaneously with the grant of the application to redefine the licensed premises of the small bar licence.
54. The applicant to discharge its burden under s 38(2) of the Act, to satisfy the licensing authority that the application is “in the public interest” relies on its PIA; the fact that the proposed premises is currently trading under a small bar licence; the redevelopment of Scarborough Beach being a priority project of the State Government; an extensive petition signed by consumers; witness questionnaires from consumers; and other materials.
55. The applicant in its submissions referred to other tavern restricted licences granted in the locality namely Squires Fortune; Scarborough Beach Bar; and El Grotto Bar and Taqueria and that its application should be granted, in the public interest, to meet the requirements of patrons resorting to the premises for liquor and related services.
56. In considering the applicant’s evidence and submissions; the background of the licensed premises to which the small bar licence relates; and the number of patrons that may be

accommodated on the licensed premises, I am of the view that the grant of the application will be consistent with the objects set out in ss 5(1)(c) and 5(2)(a) of the Act; and I am satisfied that the applicant has discharged its onus under the Act.

57. The Commissioner intervened in the application and highlighted the risks associated with the grant of the application; the long history of alcohol-related problems associated with the Scarborough beach precinct; and recent decisions of the licensing authority wherein, in granting liquor licences, the licensing authority imposed trading conditions to mitigate the risks associated with the grant of a licence in the locality. In this regard, the Commissioner as an Intervener to the application carries no burden of proof (per Greaves J. *Gull Petroleum (WA) Pty Ltd (1998) LLC No. 13/98*).
58. Objections were also lodged by residents, living in close proximity of the licensed premises, in accordance with s 74 of the Act. The objectors submitted that the grant of the application is not in the public interest, because if the application was granted, it would result in offence, annoyance, disturbance or inconvenience to residents and the amenity, quiet or good order of the locality would in some other manner be lessened.
59. In respect of the objections lodged, s 73(10) of the Act, provides that the burden of establishing the validity of any objection lies with the objector.
60. Section 37(3) of the Act, provides:

*"An application shall not be granted where the licensing authority is satisfied that an undue degree of offence, annoyance, disturbance or inconvenience to –*

  - (a) *persons who reside or work in the vicinity of the place or premises to which the application relates; or*
  - (b) *persons in, or travelling to or from, an existing or proposed place of public worship, hospital or school,*

*would be likely to occur."*
61. In regards to s 37(3) of the Act, I acknowledge the general principles contained in *Hackney Tavern Nominees Pty Ltd v McLeod (1983) 34 SASR 207* regarding the word "undue" and that residents living in the vicinity of licensed premises should expect a degree of offence, annoyance or inconvenience from the activities at licensed premises.
62. In respect of the objections lodged, I acknowledge the concerns of the objectors, including:
  - residents have been affected by the manner of trading at the licensed premises for a number of years, particularly excessive noise (loud music) emanating from the licensed premises and by patrons leaving the premises;
  - the steady increase in anti-social behaviour and violence in the locality;
  - the type of music played within the premises not consistent with the type of music intended on the grant of the small bar licence; and
  - the suitability (attenuation) of the licensed premises for the applicant's intended manner of trade, that is, as a live music venue.
63. In considering the concerns raised by the resident objectors; and while I acknowledge that I have not raised with the applicant, in the determination of this application, reports by inspectors of this office, I nevertheless consider that it is relevant for me, in this case, to also have regard to reports submitted by inspectors dated 14/12/2011, 18/01/2013 and 10/08/2014, in particular the report dated 14/12/2011 wherein the inspector's report included:

*"Standing over the road in front of the premises, we considered the male vocalist and music coming from the premises to be loud.*

*From the footpath next to the Observation Rise apartments in Manning Road, which is adjacent to the alfresco area at the premises, the crowd noise was clearly audible and we considered the male vocalist and music being emitted from the premises to be loud."*

64. Therefore having regard to the concerns raised by the objectors, I am satisfied that the objectors, collectively, have discharged their onus under s 73(10) of the Act.
65. Notwithstanding that I am satisfied that both the applicant and the objectors have discharged their onus under the Act, I am required to apply a weighing and balancing exercise between all of the competing interests of the parties to proceedings in the determination of the application, in accordance with the provisions of the Act, and in doing so, in my view, it is worth noting the following:
  - The applicant was not the applicant for the grant of the small bar licence granted in respect of the proposed licensed premises to which this application relates.
  - The trading conditions imposed on the grant of the small bar licence are, in my opinion, conditions reflecting the intended manner of trade of the former applicant of the small bar licence and are not reflective of the manner of trade carried on under the licence by the applicant.
  - The applicant in 2013 applied for and was granted an application to alter and redefine the licensed premises of the small bar licence to include the adjoining area the subject of a restaurant licence, which resulted in the licensed premises being able to accommodate more than the 120 persons permitted under a small bar licence. In this regard, in my view, the applicant at that time should have applied for an appropriate licence to reflect the intended manner of trade to be carried under the licence at the licensed premises, in particular having regard to the number of persons that may be accommodated on the premises, at any one time. It should also be highlighted that the amalgamation of the two licensed premises into the one premise trading under the small bar licence returned the licensed premises to the former licensed area (licensed premises) when it traded under the restaurant licence known as "Caffe Spiaggia".
  - The applicant has planning approval from the Metropolitan Redevelopment Authority for a tavern restricted licence, at the proposed location dated 12 February 2015, subject to conditions including-
    - i) The trading hours of the premises are limited to: Monday to Saturday 6am to 12am and Sunday 10am to 10pm;
    - ii) The maximum number of patrons to occupy the premises at any one time shall not exceed 150 persons; and
    - iii) The sale of packaged liquor (takeaway sales) is prohibited at all times.
  - The location of the proposed tavern restricted licence is situated within the Scarborough Beach redevelopment plan within which a number of tavern restricted licences have been granted, namely The Matisse Beach Club (1 November 2013); The Scarborough Beach Bar and Restaurant (9 January 2014); Squire's Fortune (19 August 2014); El Grotto Bar & Taqueria (20 November 2014); The Local Shack (19 May 2015); and The Sandbar Scarborough Beach (21 March 2016).
  - All of the abovementioned tavern restricted licences were granted with restrictive trading conditions to mitigate the risks associated with the grant of a licence in the locality.

Conditions included restrictions on the number of patrons that may be accommodated on the premises at any one time; food to be available; minimum seating requirements to be available for patrons; music to be played at a level that permits normal conversation between patrons to occur; liquor to be ordered from wait staff; no speakers to be installed in external (alfresco) areas; sound systems not to include subwoofers in order to minimise low frequency noise; sound system volume controls to be in a lockable cabinet or room, so that only authorised staff can adjust them; no dance floor or pool tables to be installed on the premises; bi-fold doors and windows to be closed after 10 p.m. whenever music is played inside the premises; music played through speakers set up in the alfresco area must be maintained at a background level that allows normal conversation to occur; noise emanating from the licensed premises must not exceed that permitted under the *Environmental Protection (Noise) Regulations 1997*.

66. It is also worth noting, that the Director in granting the tavern restricted licence for The Scarborough Beach Bar and Restaurant (9/01/2014) at paragraph 40 said:

*"Finally, a note of caution. This is the second tavern restricted licence granted for this area in recent times. In decision A223464, I granted a licence for The Matisse Beach Club, which can cater for up to 750 patrons. As acknowledged in this decision, and the decision for The Matisse Beach Club, the redevelopment and rejuvenation of the Scarborough beachfront is a significant project which potentially has many benefits for the community. The provision of new hospitality services in an important component of this project and these new premises, if well managed, can enhance the amenity of the area. However, given the proven history of this locality in terms of alcohol-related harm and anti-social behaviour, it is imperative that these new premises operate at a very high standard in order to facilitate a change in the drinking culture and poor patron behaviour that has previously beset this precinct. The cumulative impact of new and relatively large licensed premises operating in this problematic area is an on-going public interest issue. If in due course, it is found that the operation of these premises, or other premises in the area, is not consistent with the public interest, there are various remedies available under the Act to the licensing authority."*

67. In considering the circumstances as they relate to the proposed licensed premises, I conclude that it is not in the public interest to have patrons who resort to the licensed premises to be lining up outside the licensed premises in circumstances where the licensed premises has the capacity to accommodate more patrons on the licensed premises.
68. Therefore, as I am satisfied that the applicant has discharged its obligation under s 38(2) of the Act, I am prepared to exercise my discretion under s 33 of the Act and grant the application for a tavern restricted licence subject to conditions which reflect a change in drinking culture and the applicant's intended manner of trade (live music venue) with the view to minimise the impact the grant of the licence will have on the locality.
69. However, taking into consideration the close proximity of the proposed premises to residents; the concerns raised by the objectors; and the fact that I did not raise with the applicant the information provided to me by inspectors, I propose to grant the application subject to similar trading conditions of the applicant's current small bar licence, and afford the applicant the opportunity to lodge on or before 29 July 2016 submissions as to why some of the specific trading conditions as set out below should not be imposed as trading conditions of its tavern restricted licence.
70. Therefore, as I am prepared to exercise my discretion and grant the application for a tavern restricted licence and I am satisfied that the applicant has complied with all the necessary statutory criteria requirements and conditions precedent to the application being granted,

the application for a tavern restricted licence is granted subject to similar conditions of the small bar licence No 6340123613, as contained in paragraph 10 above; and the trading conditions as set out below except conditions numbered 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

71. In respect of trading conditions, the applicant is required to lodge submissions (further and better particulars) on or before 29 July 2016 as to why the trading conditions as contained in conditions numbered 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 hereunder should not be imposed as trading conditions of this tavern restricted licence in place of those trading conditions carried over from its small bar licence.

#### **Trading hours**

1. The permitted trading hours will be those prescribed in s 98 of the Act for a hotel licence. Other than in respect of Sunday which will be 10 a.m. to 10 p.m. (**Restriction imposed by the Metropolitan Redevelopment Authority**)

#### **Trading Conditions**

2. The applicant is permitted to sell and supply liquor in accordance with the provisions of s 41 of the Act as it relates to a tavern restricted licence.
3. The sale of packaged liquor for consumption off the licensed premises is prohibited.
4. The number of patrons that may be accommodated on the licensed premises, including the extended permit area, must not exceed 150 patrons. (**Restriction imposed by the Metropolitan Redevelopment Authority**)
5. The internal parts of the licensed premises must be set up with tables and chairs for dining, other than for prearranged private functions or special events.
6. Those parts of the licensed premises described on the approved plans as "Alfresco" areas must always be set up with tables and chairs. Within the "Alfresco" areas liquor may only be consumed by patrons while seated at a table, or fixed structure used as a table for the eating of food. That is, the consumption of liquor by patrons while standing is prohibited.
7. Food offerings must be made available for purchase at the licensed premises up to 1 hour prior trading ceasing. However, substantial food, that is meals, must be available for purchase during normal lunch time hours (11.30 a.m. to 2 p.m.) and dinner dining hours (6 p.m. to 9.30 p.m.).
8. All entertainment (music) played in those parts of the licensed premises described on the approved plans as "Alfresco" areas that is, external to the building comprising the licensed premises, must be background in nature and played at a level that permits normal conversation to occur.
9. Live entertainment (includes music presented by a DJ) is only permitted to be played, within the internal parts of the building comprising the licensed premises.
10. When entertainment is played within the internal parts of the licensed premises above background levels, then all doors and windows must be kept closed from 8 p.m. However, doors may be opened to allow persons to enter or exit the premises.
11. Noise emanating from the licensed premises must not exceed that permitted under the *Environmental Protection (Noise) Regulations 1997*.
12. The selling and supplying of beverages in such a way that would encourage rapid consumption of liquor (e.g. but not limited to; unadulterated spirits or liqueur in a shot

glass); or drinks known as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters', or 'bombs' or any other emotive title, is prohibited.

13. No liquor is to be supplied mixed with energy drinks. For the purposes of this condition "energy drink" has the same meaning as formulated caffeinated beverage within the Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.
14. A closed circuit television video ("CCTV") surveillance system, able to identify individuals and showing times and dates must be in place and operational. The CCTV system must comply with the requirements as identified in the Director's Policy 'Security at Licensed Premises'. It is expected that the system will provide and record continuous images of the entrances and exits to the premises (including the ETP area) during the normal trading hours and until one (1) hour after trading ceases. Images recorded via the CCTV system must be retained for, at least, twenty eight (28) days (or such other period as the Director of Liquor Licensing specifies) and must be made available for viewing or removal by the Police or other persons authorised by the Director.
15. Whenever live entertainment is being conducted on the licensed premises, crowd controllers, licensed under the *Securities and Related Activities (Control) Act 1996*, are to be employed at a ratio of two (2) crowd controllers for the first 100 patrons, and one (1) crowd controller for each additional 100 patrons or part thereof.

These crowd controllers (licensed under the *Securities and Related Activities (Control) Act 1996*, are required to be present to monitor the licensed premises and the behaviour of patrons arriving and departing the premises, until thirty (30) minutes after trading ceases.

16. Entry to the licensed premises is prohibited to any person wearing a jacket or any other clothing bearing patches or insignia including accoutrements, jewellery, visible tattoos, branding or any other item that indicates membership or association with any Outlaw Motorcycle Gang, including but not limited to the Coffin Cheaters; Club Deroes; God's Garbage; Gypsy Jokers; Outlaws; Finks; Rebels; Comancheroes; Hell's Angels; Rock Machine; Mongols; Lone Wolf; and Bandidos.

#### ***Entertainment Condition***

17. 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:
  - (a) be immodestly or indecently dressed on the licensed premises, and/or
  - (b) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
18. The licensee or manager, or an employee or agent of the licensee or manager, is prohibited from:
  - (a) 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 film or computer game or "Category 1 – Restricted" or "Category 2 – Restricted" publication or extract therefrom; or
  - (b) 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
  - (c) 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.

19. In this condition “licensed premises” includes any premises, place or area:
  - (a) which is appurtenant to the licensed premises, or
  - (b) 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 Director's Harm Minimisation Policy***

20. 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.

#### **Licence Fees**

21. Pursuant to s 127(2) of the Act the prescribed licence fee payable in respect of this licence is \$289.00 and is payable prior to the grant of the licence.
22. I am satisfied that the licence fee has been paid.

#### **General**

23. The licensed premises are defined as the area outlined in red on the plans attached and dated 20 November 2015. A copy of that plan is to be retained on the premises and produced to any authorised officer on request.
24. Pursuant to s 116(3) of the Act, the premises' trading name of “Ocean One Bar” 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.
25. The applicant must ensure that the signage required under ss 116(4) and 116(5) of the Act is displayed on the licensed premises within fourteen (14) days of the date of this decision.
26. 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.
27. *In addition to the specified trading conditions of the licence, the licensee is also reminded of the obligations of a licensee under the Act including the following:-*

- ***Supervision & Management***

The licensee must ensure that the conduct of the business at the licensed premises is personally supervised and managed by an Approved Manager or by the licensee if the licensee is a natural person at any time when business is conducted.

- ***Mandatory Training - Responsible Service of Alcohol***

Within four (4) weeks of commencing employment at the licensed premises the licensee is required to have any person who will be engaged in the sale, supply and service of liquor on the licensed premises, and all senior staff, successfully complete a course of training in the responsible service of alcohol.

- ***Free Drinking Water***

Pursuant to s 115A of the Act, at all times that liquor is sold and supplied for consumption on the licensed premises, the licensee shall make available to patrons, potable drinking water free of charge. As a minimum, this condition is to be met by way of water

dispensers located at or near all bar service areas. The water must be refreshed regularly, with clean glasses or disposable cups being available for use.

72. The applicant has also sought the grant of an extended trading permit, in accordance with s 60(4)(h) of the Act similar to the current permit No 42751 held by the applicant. This application is approved subject to the following conditions:
- pursuant to s 60(4)(h) of the Act, this permit authorises the licensee to sell and supply liquor to a person within the area outlined in yellow on the plan dated 20 November 2015, for consumption in that area, only while seated at a table;
  - the use of the alfresco dining area is subject to the conditions set out in the Licence to Set Up and Conduct and eating Area issued by the City of Stirling and any subsequent issue of that licence; and
  - The permit is valid for a period of ten (10) years from 1 July 2016 and will remain in force until 30 June 2026 provided the Licence to Set Up and Conduct an Eating Area or other approval from the City of Stirling for the alfresco dining area remains current.
73. The small bar licence No 6340123613 is surrendered contemporaneously with the grant of this tavern restricted licence.
74. Also, together with the submissions to be lodged on or before 29 July 2016, the applicant is required to lodge an acoustic report to satisfy me that the licensed premises are suitable for the conduct of live entertainment within the internal parts of licensed premises in compliance with the *Environmental Protection (Noise) Regulations 1997*.
75. 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.



Eric Romato

DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING