

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** JDP Tourism Resources Pty Ltd
(represented by Mr Marcus Solomon under instructions from Cullen MacLeod Lawyers)
- First Intervener:** Commissioner of Police
(not represented at the Hearing)
- Second Intervener:** City of Mandurah
(not represented at the Hearing)
- Third Intervener:** Chief Health Officer
(not represented at the Hearing)
- Objectors:** Christopher Stone
Paul Dehncke
Gerald and Graziella Giustiniano
Raymond Bayliss
David and Susan Brumell
(all of the above represented by Mr Jarrad Ryan, Ryan & Durey, Solicitors)
Angelo and Carmela Gangemi
William A Jarrott
Adrian, Margaret and Jessica Eastwell and Mikael Lundh
Julian Diletti
- Commission:** Mr Seamus Rafferty (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Mr Alex Zilkens (Member)
- Matter:** Application pursuant to section 25 of the Liquor Control Act 1988 for review of the decision of the delegate of the Director of Liquor Licensing to refuse an application for the conditional grant of a Tavern Restricted licence.

Premises: Butcher & Son, Shop 1 and 2/Unit 57, 2 The Palladio,
Mandurah

Date of Hearing: 20 September 2017

Date of Determination: 25 June 2018

Determination:

The application is granted, subject to the following conditions:

- 1) Trading Hours - the permitted trading hours are those prescribed in section 98(1) of the *Liquor Control Act 1988* for a Tavern Restricted licence;
- 2) CCTV - a video surveillance system must be in place and operational. The system must comply with the minimum requirements identified in the "Minimum Standards – Closed Circuit Television (CCTC) Security System" Policy or with requirements otherwise approved by the Licensing Authority;
- 3) Food - food to be available during all hours of trade when liquor is available to be purchased;
- 4) Entertainment -
 - a) doors to the venue must be closed during any live performance after 7:00pm;
 - b) any live music to be restricted to acoustic or small bands with no drums;
 - c) no live music to be played after 10:00pm;
 - d) any music played through external speakers is to cease at 10:00pm;
 - e) any music being played to be background in nature only, and at a level sufficient to allow normal conversation to occur; and
 - f) inclusion of the standard entertainment condition as per the Director's policy.
- 5) Seating - seating for a minimum of 50% of the prescribed maximum patron number must be permanently set up and available for the use of patrons for dining, except in the case of pre-arranged functions;

6) Drink Standards

- a) the sale and supply of beverages supplied 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 'lay-backs', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters' or 'bombs' or any other emotive title, is prohibited;
- b) low-strength and mid-strength beer, plus non-alcoholic drinks, must be available;
- c) no advertising of cheap or discounted drinks; and
- d) no liquor to be served in jugs.

7) Licensed Security Requirements - crowd controllers, licensed under the *Security and Related Activities (Control) Act 1996*, are to be employed at a ratio of two (2) for the first one hundred (100) patrons; and one (1) for each additional one hundred (100) patrons or part thereafter from 5:00pm (or at a time determined by the Licensing Authority) each Friday, Saturday and Sunday evening and to remain on duty for one (1) hour after the premises has ceased trading.

8) Compliance with the Director's Dress Standards Policy, as per the following:

- a) Jackets or any other clothing or accessory, or any clearly visible body markings bearing patches or insignia of any Outlaw Motor Cycle Gangs not limited to, but including, the following listed Outlaw Motor Cycle Gangs, are not permitted to be worn or to be visible on the licensed premises:
 - i. Bandidos;
 - ii. Brothers 4 Life;
 - iii. Club Deroes;
 - iv. Coffin Cheaters;
 - v. Comancheros;
 - vi. Finks;
 - vii. Gods Garbage;
 - viii. Gypsy Jokers;
 - ix. Hells Angels;
 - x. Lone Wolf;
 - xi. Mongols;
 - xii. Outlaws;
 - xiii. Rebels; and
 - xiv. Rock Machine.

- 9) A maximum number of patrons permitted at any one time to be set at 375; and
- 10) A parking management plan be submitted prior to operation to the satisfaction of the City of Mandurah detailing the provision of additional parking and measures to educate patrons about the efficient use of parking within the Mandurah Ocean Marina Precinct. The plan is to be implemented within the time frames specified within the plan.

Authorities referred to in Determination

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Woolworths v The Director of Liquor Licensing* [2013] WASCA 227
- *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210

Background

- 1 On 31 May 2016, JDP Tourism Pty Ltd (“the applicant”) lodged an application for the conditional grant of a Tavern Restricted licence for premises to be known as “Butcher & Son” and situated at Shop 1 and 2/Unit 57, 2 The Palladio, Mandurah (“the premises”).
- 2 The application was supported by a Public Interest Assessment (“the PIA”), a copy of the City of Mandurah planning approval, a copy of the premises lease agreement, nine (9) letters of support and 131 consumer responses to a survey conducted in the form of a petition.
- 3 The proposed premises will be located over two existing tenancies in Dolphin Quay at the Mandurah Ocean Marina (“MOM”) and will comprise of:
 - a. alfresco area of 85m²;
 - b. internal design/seating of 310m²;
 - c. casual seating/tasting area of 55m²;
 - d. a bar 27m long;
 - e. kitchen of 90m²;
 - f. dry stores of 32m²; and
 - g. freezer/cool rooms, with a combined area of 64m²
- 4 The proposed premises is to have a capacity of 375 patrons with trading hours as permitted by section 98(1) of the *Liquor Control Act 1988* (“the Act”).
- 5 Objections to the application were lodged by:
 - a. Angelo and Carmela Gangemi – lodged 10 July 2016;
 - b. William A Jarrott – lodged 19 July 2016;
 - c. Adrian and Margaret Eastwell, Mikael Lundh and Jessica Eastwell – lodged 27 July 2016;
 - d. Julian Diletti – lodged 29 July 2016;
 - e. David and Susan Brumell, Raymond Bayliss, Paul Dehncke, Gerald and Graziella Giustiniano, and Christopher Stone - lodged 1 August 2016;
- 6 On 26 July 2016 an intervention was lodged by the Commissioner of Police (“the Police”).
- 7 Notices of intervention were also lodged by the City of Mandurah on 29 July 2016 and by the Chief Health Officer (“CHO”) on 1 August 2016.
- 8 The following submissions from parties were subsequently received:
 - a. 8 December 2016: Applicant’s first submission lodged;
 - b. 9 December 2016: CHO first submission lodged;
 - c. 23 December 2016: CHO second submission lodged;
 - d. 3 January 2016: Applicant’s second submission lodged.

- 9 On 31 March 2017, the Delegate of the Director of Liquor Licensing (“the Director”) determined that the application should be refused.
- 10 An application to review the Director’s decision was lodged with the Liquor Commission (“the Commission”) on 28 April 2017.
- 11 On 6 September 2017 submissions were lodged by Ryan and Durey Solicitors on behalf of Christopher Stone, Paul Dehncke, Gerald and Graziella Giustiniano, Raymond Bayliss and David and Susan Brumell, and also subsequently lodged undated responsive submissions.
- 12 The applicant lodged submissions on 6 September 2016 and responsive submissions on 13 September 2016.
- 13 A hearing of the Commission was conducted on 20 September 2017.

Submissions on behalf of the Applicant

- 14 It was submitted that the applicant forms part of a group of companies which are experienced operators of hospitality and licensed venues, particularly in waterfront and marina settings. Current venues include the Oceanic Bar and Grill, which is also located at Dolphin Quay Mandurah and the Harbour Terrace Tavern at Hillarys Marina Sorrento.
- 15 The applicant proposes to operate the restricted tavern in the same manner as its sister property Oceanic Bar and Grill at Dolphin Quay Mandurah and to provide more diversity and offerings to cater for consumer requirements, especially in the summer season when all venues are at capacity with customers queuing for up to an hour to get a table for a drink or meal.
- 16 It was submitted that the concept behind the premises is high quality food served to the customer at a reasonable price where the anticipated revenue split between food and beverage would be 40 per cent drinks and 50 per cent food (no itemisation of the remaining 10% was provided).
- 17 In relation to the differences between the adjacent Oceanic Bar and Grill (“OBG”), which specialises in seafood at Dolphin Quay, Butcher & Son will offer a wide range of meat dishes such as aged beef, sucking pig, pâté, steak tartare and various cuts of steak.
- 18 It is proposed that the style and service be casual and patrons will order and pay for their food or beverage at the food counter or bar; meals will be brought to the table by the waiter or waitress. The premise is to be designed to cater for 375 patrons.
- 19 It was submitted that the PIA has addressed those matters prescribed by section 38(4) of the Act, with the applicant concluding that the grant of the licence would be unlikely to result in any negative social impact or any serious or significant change to the amenity of the locality.
- 20 MOM acts as a drawcard for a mature market that is attracted to Mandurah’s waterways and its growing food and beverage culture. This culture also brings new tourism markets which want to stay in the environment rather than just come for a day trip or a meal at night.

- 21 It was submitted that the serviced apartments and hotels within a 5km range of the Marina are important to the success of Dolphin Quay with Butcher & Son to operate in an area that includes approximately 20 food related businesses, a number that is expected to grow, thereby offering a new level of convenience to meet the consumer trend for fresh food and drinks.
- 22 The alfresco area will be a space for customers to enjoy breakfast, lunch and dinner and if they just want a beer, bar snack and to watch the latest sport or event on the large screen they can do this in the relaxed indoor area which has seating and standing space for quiet enjoyment.
- 23 With regard to amenity issues, it was submitted that:
- a. MOM is a unique mixed-use leisure and entertainment precinct, with residents in the precinct and surrounding area all being required to accept an encumbrance clause when entering into contracts for the sale of land within the Mandurah Ocean Marina Tourist Development Zone, whereby the purchaser acknowledged that the use and amenity of the property would be affected by a variety of marine, commercial, retail and tourist activities, including the operation of restaurants, cafes and licensed premises, which may cause excessive noise;
 - b. with regard to parking, an agreement has been reached with the City of Mandurah for the applicant to make a financial contribution to assist in the implementation of additional parking and that the Mandurah Ocean Marina Design Criteria, which is part of the Town Planning Scheme, specifically states that car parking is not required within the site because it is provided externally by others, i.e. by Landcorp as part of the overall development of the Marina;
 - c. the venue will not be providing rock bands and entertainment for the younger set and will be of the kind that is acceptable to patrons but at the same time does not cause undue offence, noise or disturbance to persons who live in close proximity to the premises;
 - d. Quay security will be on site every evening from 11:30pm to ensure all patrons leave the Quay by 12 midnight. The security at the Quay means that there is no reason for the chairs and tables to be dismantled in the alfresco area, reducing the noise to adjoining residents and allowing staff to exit the premises soon after closing time; and
 - e. management strategies will be put in place to counter the negative impact of any anti-social behaviour, including dedicating security patrols, both mobile and foot, within the tenancies and adjoining tenancies and the installation of CCTV equipment. An ongoing and close working relationship with the local Police and other bars, restaurants and food outlets in the location will be developed.
- 24 The results of a consumer survey (over 100 persons) undertaken by the applicant to demonstrate a consumer requirement for the proposal, were submitted with the PIA, along with a number of letters of support from residents and business owners.

- 25 It was submitted that a number of local stakeholders had been consulted in the application process including the Police, City of Mandurah, Mandurah and Peel Tourism Organisation and the local Member of State Parliament. The applicant is also aware of the Mandurah Liquor Accord which Butcher & Son will become a member of.
- 26 In conclusion it was submitted that Butcher & Son:
- a. will enhance the choice to the customer, the ambience will appeal to families, couples, or groups who want to have a good healthy fresh food offering which is based on research conducted in other marina locations locally and Melbourne, Brisbane and Sydney; and
 - b. will create local employment, further education to consumers and juveniles in the responsible consumption of alcohol as well as promote the Western Australian lifestyle to all visitors to the City of Mandurah.

Submissions on behalf of the Interveners

Commissioner of Police

- 27 The intervention by the Police is for the purposes of making representations:
- a. on the question of whether, if a particular application were granted, public disorder or disturbance would be likely to result – section 69(6)(c)(ii) of the Act; and
 - b. any other matter relevant to the public interest – section 69(6)(c)(iv) of the Act.
- 28 The particulars raised in the intervention are:
- a. hours of trade;
 - b. food to be provided;
 - c. seating;
 - d. entertainment;
 - e. CCTV;
 - f. crowd controllers;
 - g. drink restriction; and
 - h. dress Standards.
- 29 It was submitted that tavern liquor licences pose a far greater risk of harm than a restaurant or small bar liquor licence. This is reflected in the Licensing Authority recognising the risk of harm by classifying tavern liquor licences as ‘complex’.
- 30 Accordingly, an application of this nature should be subject to closer scrutiny and a requirement to implement strategies commensurate with this increase risk. As such, it is submitted that if the application is approved then it is appropriate to impose trading conditions

to ensure compliance with the Act, mitigate any potential alcohol related harm from occurring and reduce the potential for this application to cause disturbance and/or amenity issues.

- 31 The conditions sought are in consideration of the applicant's intended manner of trade and conditions observed to be imposed on similar premises:
- a. Trading Hours - the permitted trading hours are those prescribed in section 98(1) of the Act for a Tavern Restricted licence;
 - b. CCTV - a video surveillance system must be in place and operational. The system must comply with the minimum requirements identified in the "Minimum Standards – Closed Circuit Television (CCTC) Security System" Policy or with requirements otherwise approved by the Licensing Authority;
 - c. Food - food to be available during all hours of trade when liquor is available to be purchased;
 - d. Entertainment -
 - i. doors to the venue must be closed during any live performance after 7:00pm;
 - ii. any live music to be restricted to acoustic or small bands with no drums;
 - iii. no live music to be played after 10:00pm;
 - iv. any music played through external speakers is to cease at 10:00pm;
 - v. any music being played to be background in nature only, and at a level sufficient to allow normal conversation to occur; and
 - vi. inclusion of the standard entertainment condition as per the Director's policy.
 - e. Seating - seating for a minimum of 50% of the prescribed maximum patron number must be permanently set up and available for the use of patrons for dining, except in the case of pre-arranged functions;
 - f. Drink Standards
 - i. the sale and supply of beverages supplied 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 'lay-backs', 'shots', 'shooters', test tubes', 'jelly shots', 'blasters' or 'bombs' or any other emotive title, is prohibited;
 - ii. low-strength and mid-strength beer, plus non-alcoholic drinks, must be available;
 - iii. no energy drinks may be mixed with liquor by any person or sold in any other form on the premises. For the purposes of this condition 'energy drinks' has the same meaning as formulated caffeinated beverage within the Australian New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater;
 - iv. no advertising of cheap or discounted drinks; and
 - v. no liquor to be served in jugs.

- g. Licensed Security Requirements - crowd controllers, licensed under the *Security and Related Activities (Control) Act 1996*, are to be employed at a ratio of two (2) for the first one hundred (100) patrons; and one (1) for each additional one hundred (100) patrons or part thereafter from 5:00pm (or at a time determined by the Licensing Authority) each Friday, Saturday and Sunday evening and to remain on duty for one (1) hour after the premises has ceased trading.
- h. Compliance with the Director's Dress Standards Policy, as per the following:
 - i. Jackets or any other clothing or accessory, or any clearly visible body markings bearing patches or insignia of any Outlaw Motor Cycle Gangs not limited to, but including, the following listed Outlaw Motor Cycle Gangs, are not permitted to be worn or to be visible on the licensed premises:
 - (a) Coffin Cheaters;
 - (b) Club Deroes;
 - (c) Gods Garbage;
 - (d) Gypsy Jokers;
 - (e) Outlaws;
 - (f) Finks;
 - (g) Rebels;
 - (h) Comancheroes;
 - (i) Hells Angels;
 - (j) Rock Machine;
 - (k) Mongols;
 - (l) Bandidos; and
 - (m) Lone Wolf.

City of Mandurah

- 32 The City of Mandurah has intervened due to the premises operations being likely to result in the surrounding community suffering undue offence, annoyance, disturbance and/or inconvenience if not managed properly.
- 33 It was submitted that the section 40 certificate includes a number of conditions relating to noise, security, seating, parking, CCTV and waste management which aim to reduce the impact to the surrounding residents and businesses. It was advised that it was important to note that conditions that do not directly reflect planning conditions have been negotiated with and agreed by the applicant prior to inclusion on the section 40 certificate.
- 34 The City recognises that parking within the Marina Precinct requires review in order to adequately service residential, community use and commercial operations. On 19 August 2014, Council endorsed a plan to provide an additional 28 parking bays to the east and south west of the development where the premises will be located.

- 35 It was submitted that in dialogue with the applicant, an agreement has been reached for a financial contribution to be provided to assist in the implementation of additional parking.
- 36 The City requests that the following condition be included as a condition of approval for any grant of licence:
- a. A parking management plan be submitted prior to operation to the satisfaction of the City of Mandurah detailing the provision of additional parking and measures to educate patrons about the efficient use of parking within the Mandurah Ocean Marina Precinct. The plan is to be implemented within the time frames specified within the plan.

Chief Health Officer

- 37 The purpose of the Chief Health Officer's submission is to make representations regarding the minimisation of the harm or ill-health to people, or any group of people, due to the use of liquor.
- 38 The specific ground of intervention is premised on the following submissions:
- a. the applicant is applying for a Tavern Restricted licence, which research has demonstrated can be a higher risk licence type for alcohol-related harm;
 - b. the venue is large in size (932m²), which has the potential to pose a risk of alcohol-related harm, should the proposed operation of the venue alter in the future; and
 - c. the close proximity of the venue to water increases the risk of alcohol and water-related harms to occur.
- 39 If the licence is granted, the placement of conditions on the licence, in keeping with the manner in which the licensee intends to trade, would be an important harm minimisation approach and unless these conditions are formalised, there is no legal requirement for the premises to operate in accordance with the format described in the PIA or indicated by the applicant.
- 40 The following conditions placed on the licence would help support the premises to uphold the manner of trade indicated within the application, both now and in the future:
- a. food will be available at the premises at all times;
 - b. the premises to have a minimum seating requirement of 300, with the exception of pre-booked functions and events;
 - c. a maximum number of patrons permitted at any one time to be set at 375;
 - d. any music played at the premises must be at a level that permits conversation to occur;
 - e. low-strength and mid-strength options, plus non-alcoholic drinks, must be available at all times; and
 - f. no liquor is to sold or supplied by virtue of their 'emotive' title and known as 'laybacks', 'shots', 'test tubes', 'jelly shots', 'blasters', or 'bombs'.

Submissions on behalf of the Objectors

Combined Objectors

- 41 Combined objectors Christopher Stone, Paul Dehncke, Gerald and Graziella Guistiniano, Raymond Bayliss and David and Susan Brumell, who are owners of property in close proximity to the premises, are represented by the same counsel.
- 42 These objectors note that there were over thirty (30) submissions received by the City of Mandurah to the development application for the premises and basically, they all raised concerns regarding parking, litter anti-social behaviour, smoking, outlet density, noise and nuisance.
- 43 The common grounds for objection pursuant to section 74 of the Act are that the grant of the application:
- a. would not be in the public interest;
 - b. would cause undue harm or ill-health to people, or any group of people, due to the use of liquor;
 - c. would cause undue offence, annoyance, disturbance or inconvenience to persons in or travelling to or from an existing or proposed place of public worship, hospital or school;
 - d. would impact on the amenity, quiet or good order of the locality in which the premises are situate; and
 - e. would be contrary to the Act.
- 44 In *Woolworths v Director of Liquor Licensing*¹ His Honour Buss JA set out the statutory framework for a determination of an application pursuant to section 25 of the Act in the following terms, namely:
- a. by section 38(2) of the Act, an applicant has to satisfy the Commission that the granting of an application is in the public interest;
 - b. the expression 'in the public interest', when used in a statute, imports a discretionary value judgment;²
 - c. the factual matters which the Commission is bound to take into account, in determining whether it is satisfied that the granting of the application is in the public interest are those relevant to the objects of the Act, as set out in section 5(2) of the Act;
 - d. the factual matters which the Commission is entitled to take into account, in determining whether it is satisfied that the granting of an application is in the public interest are those set out in section 38(4) of the Act;
 - e. section 5(2) is mandatory whereas section 38(4) is permissive;

¹ [2013] WASCA 227

² *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ). If the statute provides no positive indication of the considerations by reference to 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. See *O'Sullivan* (216).

- f. on the proper construction of the Act (in particular, sections 5(1), 5(2), 16(1), 16(7), 30A(1), 33 and 38(2)), the Commission is obliged to take into account the public interest in:
 - i. catering for the requirements of consumers for liquor and related services with regard to the proper development of the liquor industry in the State; and
 - ii. facilitating the use and development of licensed facilities so as to reflect the diversity of the requirements of consumers in the State.

45 Pursuant to section 73(10) of the Act, an objector bears the burden of establishing the validity of the objection. Pursuant to section 74(1) of the Act, such objection can only be made on the grounds that:

- a. the grant of the application would not be in the public interest; or
- b. the grant of the application would cause undue harm or ill-health to people, or any group of people, due to the use of liquor; or
- c. that if the application were granted:
 - i. undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity, or to persons in or travelling to or from an existing or proposed place of public worship, hospital or school, would be likely to occur; or
 - ii. the amenity, quiet or good order of the locality in which the premises or proposed premises are, or are to be, situated would in some other manner be lessened;
- d. that the grant of the application would otherwise be contrary to the Act.

46 It was submitted that the applicant has adopted a locality of 2 kilometres from the premises where the Director's policy stipulates 3 kilometres for an outer metropolitan area, country city or town. The applicant's statement that *"It is unlikely that the amenities of these areas will be affected in any way by the development of Butcher & Son as a tavern, as none of the residents reside directly opposite or within 1 km"* is completely without substantiation or justification. Accordingly, in determining the issue of locality, the Commission has applied the ordinary consideration of a 3 kilometre radius from the proposed licensed premises.

47 It was submitted that the evidence submitted by the applicant as part of the application is insufficient to substantiate:

- a. the application is in the public interest;
- b. the statement/claims made in the PIA;
- c. the evidence sufficiently represents the community or a cross section of the community;
- d. the proposed licensed premises will cater to the diversity of the requirements of consumers residing in or resorting to Mandurah;
- e. the existing facilities are not adequately serving Mandurah; or
- f. the public in the locality requires such a premise as the one proposed.

- 48 The applicant's survey, which is actually akin to a petition, does not evidence a consumer requirement for the proposed premises, does not ask respondents questions about whether they require the premises, whether they would frequent the premises, nor any concerns they have about the application. It is therefore submitted that the survey is of little probative value.
- 49 Similarly, the letters of support provided by the applicant are both small in number and are of little probative value in establishing consumer requirement for the premises and how the applicant would operate the premises.
- 50 It was submitted that the applicant has used outdated census data and has failed to expressly state where the locality ranked on the Index of Relative Socio-Economic Disadvantage (SEIFA) in its PIA. It was submitted that Mandurah experiences an unacceptable level of alcohol-related harm and undue offence and that the grant of the application would only worsen existing alcohol-related problems.
- 51 Further, the applicant has failed to identify how the proposed premises differentiates from the other 56 licensed premises in the locality noting that:
- a. the locality of Mandurah is already well serviced with on-premises liquor outlets;
 - b. in addition to the numerous licensed premises in Mandurah, there are numerous unlicensed premises offering food options similar to that proposed by the applicant;
 - c. the applicant has failed to demonstrate how the proposed premises will be any different to the other licensed premises in the locality, let alone the licensed tavern which the applicant operates adjacent to the proposed premises; and
 - d. granting the application would result in an unnecessary proliferation of liquor outlets in Mandurah and this would not be consistent with the harm minimisation object of the Act and therefore would not be in the public interest.

Undue harm and ill-health

- 50 It was submitted that there is an unacceptable level of harm and ill-health currently suffered in the Mandurah locality and that there is the potential that this application will increase the levels currently experienced.
- 51 The SEIFA index and Census QuickStats indicates Mandurah has a level of disadvantage with the index below the benchmark and there are at risk groups in the community.

Undue offence, annoyance, disturbance or inconvenience and lessening of amenity, quiet and good order of the locality

- 52 With regard to the applicant's operation of the Oceanic Bar and Grill ("OBG"), adjacent to the proposed premises, residents and visitors to the area are already experiencing undue offence, annoyance and disturbance and a lessening of the amenity, a situation that will only become exacerbated with the grant of another licence in the locality.
- 53 It was submitted that parking issues have significantly increased since the opening of the OBG, with vehicles being regularly parked on resident's front lawns, in and blocking

driveways and in the nearby reserve. Cars are also often parked in 'no standing' and 'no parking' signed areas.

- 54 Noise levels in the area have also dramatically increased since the opening of the OBG, not only from the premise itself, but patrons entering and exiting, loitering nearby and walking to and from their cars. Patrons get into fights, yell and scream on the street regularly disturbing residents in the locality.
- 55 The operations of the OBG have also caused noise issues with the emptying of glass bottles into bins regularly throughout the night and the collection of rubbish early in the morning. There has been an increase in litter on the footpaths and boardwalk, cigarette butts and broken bottles and glasses strewn across the streets nearby and the marina itself.
- 56 It was submitted that a major cause of disturbance stems from patrons, and even staff of the OGB, smoking outside of the premises, often in an inebriated state, resulting in screaming and loud noise as well as the litter from cigarette butts.
- 57 It is submitted that the introduction of a large venue such as the one proposed by the applicant, operating pursuant to a tavern licence, is only going to worsen the current problems being experienced.
- 58 In conclusion it was submitted that the applicant has not provided sufficient objective evidence to establish that consumers require another licensed premises in Mandurah nor that it is in the public interest for an additional tavern licence to be granted in an already liquor dense precinct.
- 59 It is noted that the conditions proposed to be applied should the licence be granted are similar to those imposed on the liquor licence of OGB which, despite the best efforts of Council and the Licensing Authority, has done little to combat the offence and annoyance being experienced in the locality.

Individual Objectors

Angel and Carmela Gangemi; William Jarrott; Adrian, Margaret and Jessica Eastwell and Mikael Lundh; and, Julian Dillett

- 60 Each of these objectors relied upon the ground permitted by section 74(1)(g)(i) of the Act and were concerned with the potential for the proposed premises to cause undue offence, annoyance, disturbance or inconvenience to persons who reside in the vicinity, particularly in relation to the lack of visitor and resident parking that already exists.
- 61 The potential issues of noise, unruly behaviour of patrons and the general disruption to the amenity of the location as a consequence of the granting of this application was of concern.

Determination

- 62 Section 25(2c) of the Act provides that when considering a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the original decision.
- 63 On a review under section 25 of the Act, the Commission may:
- a. affirm, vary or quash the decision subject to the review; and
 - b. make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and
 - c. give directions –
 - i. as to any question of law, reviewed; or
 - ii. to the Director, to which effect shall be given; and
 - iii. make any incidental or ancillary order.
- 64 In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director, but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials.³
- 65 Notwithstanding the issues of harm and ill-health that have been raised in this application, the Commission does not consider that this is the primary consideration in the determination of this application. There is nothing in the materials that have been submitted upon which a conclusion could be reached that there are such high levels of harm and ill-health in the relevant locality that this should be given primacy above all other matters. The most significant factors are those relating to amenity.
- 66 The MOM is a recognised tourism precinct providing a range of dining and shopping experiences that appeal to both the local and tourist markets. The area is zoned accordingly, with the City of Mandurah issuing a conditional section 40 certificate for the issue of a Tavern Restricted licence for the proposed premises.
- 67 In considering amenity issues for an application of this nature, the Commission recognises the role of local government, particularly when its position is clearly stated by intervention and/or conditions specified on a section 40 certificate.
- 68 The applicant has submitted that these conditions have been addressed in the PIA and will be adhered to during the development process. The applicant has also reached an agreement with the City of Mandurah for a financial contribution to be provided to assist in the implementation of additional parking.
- 69 The objectors have based their concerns on a potential increase in issues adversely affecting the amenity of the locality stating that the conditions that have been applied to the operations of the OBG are not being met nor is there any action to enforce them, therefore it can be anticipated that any conditions that are applied to the premises will also result in the same

³ *Hancock v Executive Director of Public Health* [2008] WASC 224

outcome, the result being that there will a further increase in issues affecting the amenity of the locality.

- 70 The Commission accepts that the operations of premises of the nature proposed has the very real potential to result in offence, annoyance, disturbance or inconvenience to nearby residents at a level to be characterised as undue, more so in these circumstances, where there are existing amenity issues being occasioned by patrons of the MOM.
- 71 The applicant's response to the issues of amenity is that *"...the issues of parking, outdoor smoking, litter and noise will inevitably arise whether or not the premises are occupied by the tavern the subject of this application. The amenity issues are not caused by the grant of a licence under the Act. Rather, to the extent they exist, they are the inherent and invariable consequence of the nature of the precinct and the planning instruments pursuant to which to MOM has developed and will continue to evolve"*. There is merit to this submission, however the Commission must still take into account the potential effects on amenity that may arise from the granting of the application.
- 72 This is a finely balanced application. On the one hand, the granting of the application would be consistent with the operation of the MOM as a tourist and entertainment precinct and be consistent with the primary object of the Act set out in section 5(1)(c) of the Act. On the other hand, the granting of a licence that will allow the operation of a venue with a capacity of 375 persons will potentially exacerbate the amenity issues already experienced by those who live in the locality.
- 73 Having regard to the totality of the evidence before the Commission and an application of the relevant legislative provisions of the Act, the Commission is satisfied that the granting of the licence is in the public interest and that the applicant has discharged the onus placed upon it. The basis for that finding is that the licensed premises will operate in an area that was set up as a tourism and entertainment precinct. It will cater for the requirements of consumers who are attended the precinct seeking an experience that provides food, beverage and entertainment. Further, there are conditions that can be imposed that will ameliorate the concerns of the objectors to some extent, by including a clause in the conditions that dictates that the council must be satisfied that applicant has addressed issues relating to the parking of motor vehicles.
- 74 Further, the Commission considers that there are conditions that can be imposed that will mitigate the potential adverse impacts on amenity that the granting of the licence may have. These conditions are as follows:
- 1) Trading Hours - the permitted trading hours are those prescribed in section 98(1) of the Act for a Tavern Restricted licence;
 - 2) CCTV - a video surveillance system must be in place and operational. The system must comply with the minimum requirements identified in the "Minimum Standards – Closed Circuit Television (CCTC) Security System" Policy or with requirements otherwise approved by the Licensing Authority;
 - 3) Food - food to be available during all hours of trade when liquor is available to be purchased;

- 4) Entertainment -
 - a) doors to the venue must be closed during any live performance after 7:00pm;
 - b) any live music to be restricted to acoustic or small bands with no drums;
 - c) no live music to be played after 10:00pm;
 - d) any music played through external speakers is to cease at 10:00pm;
 - e) any music being played to be background in nature only, and at a level sufficient to allow normal conversation to occur; and
 - f) inclusion of the standard entertainment condition as per the Director's policy.
- 5) Seating - seating for a minimum of 50% of the prescribed maximum patron number must be permanently set up and available for the use of patrons for dining, except in the case of pre-arranged functions;
- 6) Drink Standards
 - a) the sale and supply of beverages supplied 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 'lay-backs', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters' or 'bombs' or any other emotive title, is prohibited;
 - b) low-strength and mid-strength beer, plus non-alcoholic drinks, must be available;
 - c) no advertising of cheap or discounted drinks; and
 - d) no liquor to be served in jugs.
- 7) Licensed Security Requirements - crowd controllers, licensed under the *Security and Related Activities (Control) Act 1996*, are to be employed at a ratio of two (2) for the first one hundred (100) patrons; and one (1) for each additional one hundred (100) patrons or part thereafter from 5:00pm (or at a time determined by the Licensing Authority) each Friday, Saturday and Sunday evening and to remain on duty for one (1) hour after the premises has ceased trading.
- 8) Compliance with the Director's Dress Standards Policy, as per the following:
 - a) Jackets or any other clothing or accessory, or any clearly visible body markings bearing patches or insignia of any Outlaw Motor Cycle Gangs not limited to, but including, the following listed Outlaw Motor Cycle Gangs, are not permitted to be worn or to be visible on the licensed premises:
 - i. Bandidos;
 - ii. Brothers 4 Life;
 - iii. Club Deroes;
 - iv. Coffin Cheaters;
 - v. Comancheros;

SEAMUS RAFFERTY
CHAIRPERSON

- vi. Finks;
 - vii. Gods Garbage;
 - viii. Gypsy Jokers;
 - ix. Hells Angels;
 - x. Lone Wolf;
 - xi. Mongols;
 - xii. Outlaws;
 - xiii. Rebels; and
 - xiv. Rock Machine.
- 9) a maximum number of patrons permitted at any one time to be set at 375; and
- 10) a parking management plan be submitted prior to operation to the satisfaction of the City of Mandurah detailing the provision of additional parking and measures to educate patrons about the efficient use of parking within the Mandurah Ocean Marina Precinct. The plan is to be implemented within the time frames specified within the plan.
- 75 The Commission has considered the thoughtful and well presented concerns of the resident objectors and understands their concerns. However, upon consideration of the totality of the evidence, a consideration of the location in which the premises will operate, the type of operation that is proposed and an application of the relevant legislative provisions applicable to this application, the Commission is satisfied that the granting of the application is in the public interest and that the objectors have not discharged the onus on them prescribed in the Act.
- 76 The application is therefore granted upon conditions.