

DECISION OF THE DIRECTOR OF LIQUOR LICENSING

APPLICANT: SOLOMON KIROS ABREHA

PREMISES: SOLEMIZA CAFE

PREMISES ADDRESS: 1129 ALBANY HIGHWAY BENTLEY WA 6102

APPLICATION NO.: A438379480

LICENCE NUMBER: 6340149303

NATURE OF MATTER: APPLICATION FOR THE GRANT OF AN EXTENDED TRADING PERMIT – ONGOING HOURS

DATE OF DETERMINATION: 13 AUGUST 2021

Introduction

1. On 4 February 2021, an application was lodged by Solomon Kiros Abreha (the applicant), for the grant of an extended trading permit (ETP) in respect of premises situated at 1129 Albany Highway, Bentley and known as the Solemiza Cafe.
2. The application was made pursuant to ss 60(4)(g) and 68 the *Liquor Control Act 1988* (the Act) and the applicant seeks an extended trading permit to allow a continuation of trading on Tuesday to Saturday evenings from 12 midnight to 3 a.m. the following day.
3. In accordance with s 67 of the Act, the application was required to be advertised in accordance with instructions issued by the Director of Liquor Licensing (the Director).
4. Pursuant to ss 73 and 74 of the Act, objections to the grant of the application were lodged by the Commissioner of Police (the Commissioner) and the Cancer Council WA Inc (the Cancer Council) (the objectors).
5. Also, pursuant to s 69 of the Act, the Chief Health Officer (the CHO) lodged a notice of intervention.
6. To give effect to the provisions of s 16 of the Act, by letters dated 15 June 2021, a document exchange process was initiated between the parties. Each party was afforded the opportunity to lodge any additional evidence to be taken into consideration in the determination of the application.
7. The applicant was also requested to provide evidence that smoking was permitted on the licensed premises.

Submissions on behalf of the applicant

8. The applicant seeks the grant of an extended trading permit to allow a continuation of trading on Tuesday to Saturday evenings from 12 midnight to 3 a.m. the following day.
9. The applicant for the purpose of discharging his burden under s 38(2) of the Act lodged, a Public Interest Assessment (PIA), namely Form 2A. The applicant broadly submitted:

- The proposed premises will consist of a late-night café, with an outdoor al-fresco smoking (hookah) area. The café component of the premises will also incorporate the sale of alcohol for patrons.
 - The premises will allow both a service and location for persons to smoke tobacco socially, while providing a dining option (including late nights) for patrons passing by on Albany Highway.
 - The proposed premises is a shisha lounge. Therefore there will be décor characteristic of a typical hookah lounge (e.g. sofas). The owners are also of Ethiopian-origin, so it is anticipated that the premises will ultimately reflect themes pertaining to their Ethiopian heritage.
 - The proposed premises will provide a late-night dining and entertainment option for people within the immediate locality and beyond. The proposed premises adds to the emerging food, drink and entertainment options on Albany Highway south of Victoria Park, while providing a place for people in the community to meet and socialise after work or a night out.
10. To demonstrate consumer support for the application, the applicant together with its PIA lodged a number of emails and a petition showing the name, contact details (phone number) and the signature of the persons listed therein. However, the petition did not include a heading to indicate the purpose of the petition.

Submissions of the objectors

11. The Cancer Council opposed the grant of the application on the ground the grant of the application would not be in the public interest.
12. This objector opposed the granting of application because of its risk to individual and community health. It was submitted that the risks stem from the applicant's primary business as a "Shisha Bar and Café/Restaurant".
13. This objector also submitted:

"..., as an organisation that is part of the global fight to reduce deaths from tobacco smoke we are alarmed the current application proposes to permanently extend trading hours for the social use of tobacco products. Use of tobacco products are universally known to cause and contribute to significant risks of disease and death. These risks are magnified when tobacco is smoked socially because of the serious harms associated with second-hand smoke."

14. This objector further submitted:

"..., to highlight the lesser-known risks of waterpipe smoking, also known as smoking 'hookah' or 'shisha'. This practice is not safe and is associated with many of the same risks as smoking cigarettes, including direct negative health effects for users and serious second-hand smoke impacts for bystanders.¹⁷ Waterpipe smoking is associated with lung cancer, respiratory illness, low birthweight, periodontal disease, impaired lung function and acute cardiorespiratory effects¹⁸. Waterpipe smoking emissions can harm non-smokers in the same way second-hand tobacco smoking does, by generating high levels of toxins into the surrounding air, putting bystanders at significant risk.¹⁹

Waterpipe smoking can also expose users to nicotine, often at greater levels than cigarette smoking, due to the longer duration of use. Research shows that compared to smoking one cigarette, using a waterpipe for one hour can involve ten times the number of puffs, with each puff being ten times the volume of a cigarette.²⁰ This volume and concentration exposes users to nicotine and other harmful substances contained in the smoke. Evidence suggests that people attempting to quit smoking cigarettes may use waterpipe smoking as a substitute, while for young people, waterpipe smoking can act as a gateway to cigarette use initiation.²¹

Use of shisha should not be normalised or made easier though businesses trading in the ways proposed in the current application.”

15. The Cancer Council in support of its objection referred to many authorities and lodged a number of publications, including two publications by the Australian Institute of Health and Welfare.
16. The Commissioner opposed the grant of the application on the grounds that the grant of the application would not be in the public interest and that public disorder or disturbance would likely result.
17. The Commissioner's objection included an analysis of the applicant's PIA, the validity of the applicant's evidence in support of its application and highlighted incidents at the licensed premises.
18. The Commissioner also referred to the Director's policies on *“Extended Trading Permits – Ongoing and Indefinite”* and *“Safety and Security at Licensed premises”* which set out possible trading conditions that may be imposed to minimise the harm and disturbance that additional trading hours may have in the amenity of the licensed premises. Possible trading conditions include Security – Crowd Controllers to be engaged and on duty from 8 p.m. until 30 minutes after close of trade, on days prescribed by the Director and a Closed-Circuit Television system (“CCTV”) to be installed and operated in accordance with the Director's policy.
19. The Commissioner submitted that while the premises is located on Albany Highway, near Coolgardie Street, Coolgardie Street is a residential street with the nearest residence being less than 40 metre from the rear boundary of the licensed premises . The alfresco area to be used during the additional trading hours has the potential to cause offence, annoyance or disturbance to those residents by reason of the nature of the business proposed to be conducted during the additional trading hours.
20. The Commissioner's objection included several incidents occurring in or around the licensed premises. One incident, on 16 January 2021, concerned the licensee trading outside the permitted trading hours of his licence which resulted in the licensee/applicant being issued with a \$1,000 liquor infringement.
21. The Commissioner also submitted data which demonstrates elevated levels of family and non-family violence in the locality. The data shows that alcohol-related assaults in Bentley is higher than the metropolitan rate for 2020.

22. In conclusion, the Commissioner submitted that the quality and quantity of the applicant's evidence falls well short of what can be considered sufficient probative evidence to discharge the applicant's onus under the Act that the grant of the application is in the public interest and the application should be refused.

Submissions of the CHO

23. The CHO, in accordance with s 69(8a)(b) of the Act, intervened in the application for the purpose of making representations. The specific grounds of the CHO's intervention are based on the following:
- the applicant has applied for an ETP to trade on Tuesday to Saturday nights from 12 midnight to 3 a.m. the following morning;
 - research demonstrates that late night trading can facilitate increased consumption and alcohol-related harm, not only inside a venue, but once patrons leave;
 - there are limited public transport options available during the late-night trading hours sought, which may increase the risks of drink-driving and road crashes;
 - there is a level of alcohol-related harm being experienced by residents of the locality; and
 - there are vulnerable at-risk groups within the Bentley locality, who may be adversely impacted by a late-night trading outlet.
24. The representations of the CHO included a summary of the application; the high-risk characteristics associated with late night trading; and research that demonstrates that late night trading can facilitate increased consumption and therefore contribute to alcohol-related harm.
25. In conclusion, the CHO submitted that the grant of the application to allow trading to 3 a.m. the following morning on Tuesday to Saturday evenings has the potential to increase the levels of harm and ill-health in a locality already experiencing alcohol-related harm.
26. The CHO also submitted that if the application is granted it should be granted to only allow a continuation of trading on Friday and Saturday evenings to 1 a.m. the following morning. The CHO also suggested other trading conditions which may be imposed to minimise the risk of harm.

Determination

27. The applicant seeks the grant of an extended trading permit to allow a continuation of trading on Tuesday to Saturday evenings from 12 midnight to 3 a.m. the following day in accordance with s 60(4)(g) of the Act.
28. As the applicant is seeking the grant of an application, to which s 38(1)(b) of the Act and r 9F(b) of the *Liquor Control Regulations 1989* (the regulations) apply, the applicant must 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.

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29. In accordance with ss 73 and 74, objections were lodged by the Commissioner and the Cancer Council.
30. 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.
31. The CHO, in accordance with s 69 of the Act, intervened in the application. In this regard the CHO, as intervenor, carries no burden of proof and make representations to assist the licensing authority. (per Greaves J, *Gull Petroleum (WA) Pty Ltd* [1988] LLC No. 13/98)
32. The objections lodged by the Commissioner and the Cancer Council; and the representations made by the CHO raised matters which, in my opinion, required to be addressed by the applicant. However, I acknowledge that the applicant is not legally represented and may not be familiar with the Act; but more importantly the burden of proof placed on an applicant when required to satisfy the licensing authority that the grant of an application is in the public interest.
33. In this regard, the applicant while given the opportunity to lodge further evidence did not lodge any additional information or addressed the matters raised by the objectors or the representations made the CHO. The applicant did however lodge evidence that he is the holder of a licence issued by the Department of Health (Tobacco Control Branch) under the *Tobacco Products Control Act 2006* authorising the sale of tobacco products at the licensed premises.
34. 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.
35. 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.

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36. 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).
37. The primary objects of the Act, as set out in s 5 are:
- to regulate the sale, supply and consumption of liquor;
 - to minimise harm caused to people, or any group of people, due to the use of liquor; and
 - to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
38. The secondary objects as set out in s 5(2) of the Act are, to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; to provide adequate controls over persons directly or indirectly involved in, the sale, disposal and consumption of liquor; to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act; and to encourage responsible attitudes and practices towards the promotion, sale, supply service and consumption of liquor that are consistent with the interests of the community.
39. Regarding the law and the discretion of the licensing authority in determining whether an application is “in the public interest” in *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 Templeman J said:
- “Although the Government has not formulated any policy specifically for places like Broome, it has formulated a general policy for the implementation of the Act. That policy is contained in s 5, in which the objects of the legislation are set out. These are the considerations which the Director must take into account when exercising the very broad discretions arising under s 60, on an application for an extended trading permit.”*
40. In respect of discretion, in the same case, Templeman J also said:
- “The only question is whether, having regard to all the circumstances and the legislative intention, an extended trading permit is justified. In answering that question the Director has a wide discretion: it is a matter for him to decide what weight he will give to the competing interests and other relevant considerations.”*
41. Also, the licensing authority is entitled, although not bound, to take into consideration the matters set out in s 38(4) of the Act.
42. Pursuant to s 60 of the Act, the licensing authority may grant an extended trading permit authorising the licensee to sell and supply liquor under the licence in circumstances to which that licence would not otherwise apply. Section 60(4)(g) of the Act specifically identifies that one of the purposes for which a permit may be granted is extended hours.

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43. In this case, the applicant seeks an extended trading permit to allow a continuation of trading on Tuesday to Saturday evenings from 12 midnight to 3 a.m. the following morning. The primary focus being to provide a late-night dining and entertainment venue reflecting the applicant's Ethiopian heritage and to provide an area within the licensed premises to smoke tobacco socially (Hookah, Shisha & etc).
44. The applicant is the holder of a small bar licence and it was submitted that the predominant nature of the business to be conducted under the licence at the premises was the sale of food and tobacco. It was also stated *"Alcohol is considered complimentary and pertain a minor role for the enjoyment of both products"*.
45. Under its small bar licence, the applicant's permitted trading hours are:
- Tuesday to Saturday: 2 p.m. to 12 midnight;
Sunday: 2 p.m. to 12 midnight;
ANZAC Day: 2 p.m. to 12 midnight;
Good Friday: 2 p.m. to 10 p.m. but only for liquor sold ancillary to a meal; and
Christmas Day: 2 p.m. to 10 p.m. but only for liquor sold ancillary to a meal.
46. This small bar licence is also subject to trading conditions including:
- The maximum number of persons permitted to be on the licensed premises at any one time is 50.
 - Any music played at the premises must be at a level sufficient to allow normal conversation to occur.
47. In this case taking into consideration the type of licence held by the applicant and the number of persons that may be accommodated on the licensed premises, at any one time, the venue may be considered to be a low-risk venue. However, the applicant in this application seeks a permit to which the provisions of s 38 (2) of the Act apply; and must satisfy the licensing authority that the grant of the application is in the public interest. The additional trading hours sought cannot be considered minor and are significant (i.e. to 3 a.m.).
48. The Commissioner in his objection raised doubt as to the probative value of the applicant's evidence and submitted that the applicant's evidence is not sufficient to discharge his onus under the Act that the grant of the application is in the public interest. The Commissioner also submitted information relating to incidents at the premises including trading occurring outside the permitted trading hours.
49. In considering this matter, I acknowledge decisions of the Liquor Commission which have found that Public Interest Assessments must be supported by objective evidence and that assumptions, opinions, speculation and generalised statements will not be sufficient to demonstrate that applications are in the public interest.
50. In this case, considering the objections and the intervention lodged; and that the applicant has not addressed any of the matters raised by the objectors or the intervenor, I find that the applicant's evidence does not of itself have the probative value which may be considered sufficient to demonstrate that the grant of the application is in the public interest.

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51. Therefore, based on the information presented, I find that the applicant has failed to discharge his onus under s 38(2) of the Act, that the grant of the application is in the public interest.
52. Accordingly, the application is refused.
53. Given my finding that the applicant has not discharge his onus under s 38(2) of the Act, that the application is in the public interest, it is not necessary for me to determine the validity of the objections.
54. 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