DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICATION ID:	A000206321
LICENSEE:	TYBEL NOMINEES PTY LTD
PREMISES:	THE SIXTY30
PREMISES ADDRESS:	36 BALTIMORE PARADE, MERRIWA
LICENCE NUMBER:	6020043158
NATURE OF APPLICATION:	VARIATION OF LICENCE CONDITIONS
DATE OF DETERMINATION:	27 FEBRUARY 2017

Introduction

1. On 17 June 2016, an application was made by Tybel Nominees Pty Ltd ("the Applicant"), to vary a condition of the tavern licence issued in relation to premises situated at 36 Baltimore Parade, Merriwa and known as *The Sixty30*.

2. The application was made pursuant to s 64 of the *Liquor Control Act 1988* ("the Act") and specifically sought approval to vary the existing "entertainment condition" by deleting the word "immodest" from the condition, which would enable the Applicant to provide "immodest" or "adult" entertainment on a part of the licensed premises.

3. On 6 July 2016, the licensing authority advised the Applicant that:

   (a) pursuant to the provisions of s 38(2) of the Act, it would be required to satisfy the licensing authority that the granting of the application is in the public interest (which applies by reason of s 38(1)(c) of the Act); and

   (b) the application would be required to be advertised, pursuant to s 67(5) of the Act, in accordance with instructions from the Director of Liquor Licensing ("the Director").

4. As a result of advertising the application, objections were lodged, pursuant to the provisions of s 73 of the Act, by the following persons:

   (a) Nicholas Walker and Derek Farrell, on behalf of the residents of the Cambrai Retirement Village;

   (b) Jody Bart;

   (c) Wynand van Niekerk and Estelle van Niekerk;

   (d) Dahlia Messiha, on behalf of the Australian Christian Lobby;

   (e) Kirsty-Lee McKenzie;

   (f) Della Foxglove;

(g) Caitlin Roper, on behalf of the Collective Shout;

(h) Paster Phillip Chia, on behalf of the Zion Fellowship;

(i) Cate Vose;

(j) Heath Pilton;

(k) Jacobus Klopper;

(l) Dean Groetzinger;

(m) Gerold Lingg and Irene Lingg; and

(n) Nicole Summers.

5. Additionally, pursuant to s 69 of the Act, a notice of intervention was also lodged by the Commissioner of Police ("the Commissioner").

6. To give effect to the provisions of s 16(11) of the Act, a document exchange was initiated between the parties in order to ensure that each party was given a reasonable opportunity to present its case.

7. Pursuant to ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties and with regard to the substantial merits of the case, which are briefly summarised below.

The Application

8. The notice of application was supported by a Public Interest Assessment ("PIA") and other submissions, in which the Applicant explained that it:

> "...seeks to vary the entertainment conditions imposed on the license so that the reference to "immodest" is removed, permitting waitresses, barmaids and/or adult performers ("the adult performers") to expose their breasts and/or wear lingerie underwear exposing a significant portion of their buttocks, in that part of the Venue known as the "Dining Room".
>
> The Entertainment will be provided during the following trading periods, a maximum of three (3) times per week:
>
> (a) Thursday – Saturday, to late;
>
> (b) Sunday, until 4:00 p.m.
>
> (It should be noted that the Applicant does not propose that entertainment will be held on each of these days every week, for the entire trading periods noted above; rather, a range of days has been provided to enable the Applicant flexibility when booking performers)."

9. The Applicant further explained that the Dining Room incorporates a Change Room for the performers, has no windows in the area and also proposed to cover the doors in the area with black curtains at all times that adult entertainment is being held.

It was further submitted that a barrier screen would be fitted to the entry door, so that adult entertainment would not be visible from outside the Dining Room.

10. The Applicant also submitted that:

    (a) the entry point for the Dining Room will be via the front door of the Venue or the Bistro/Lounge area, with entry points being manned by an Approved Manager at all relevant times;

    (b) both the male and female toilets can be accessed via the dining room so there is no requirement for patrons to exit the dining room;

    (c) in order to keep the provision of adult entertainment low key, there would not be any signage at the premises promoting adult entertainment, which will instead be advertised on the Facebook page and website of *Perths Best Girls* (the entertainment service provider); and

    (d) between 60 to 80 patrons are expected to be attracted to the premises for adult entertainment per event.

11. The PIA further explained that the premises largely attracts persons who reside or work in the locality due to:

    (a) its convenient location in Merriwa;

    (b) its reputation as the neighbourhood “local” pub;

    (c) its friendly atmosphere; and

    (d) the provision of a variety of entertainment offerings.

12. It was also submitted that there are no licensed premises within the locality that provides adult entertainment and therefore the Applicant seeks to offer a unique style of entertainment, which is in demand by consumers.

13. Appended to the PIA were:

    (a) 80 Consumer Surveys showing support for the proposed adult entertainment at the premises (with an additional 73 surveys lodged later); and

    (b) 12 statements in support of the application (following the later withdrawal of two statements).

The objections

Mr Walker and Mr Farrell

14. The objection by Mr Nicholas Walker, Manager of the Royal Australian Air Force Association (WA Division Inc.) Cambrai Retirement Village and Mr Derek Farrell, Chairman of the Cambrai Retirement Village Committee, was made on behalf of

508 residents of the Australian Air Force Association, Cambrai Retirement Village, on the grounds permitted by:

(a) s 74(1)(a) of the Act (that the grant of the application would not be in the public interest);

(b) s 74(1)(b) of the Act (that 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;

(c) s 74(1)(g)(i) of the Act (that if the application were granted 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); and

(d) s 74(1)(g)(ii) of the Act (that if the application were granted 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).

15. Reasons provided in support of the objection were that:

(a) approval of the application will likely lead to an increase of traffic and noise in the vicinity, with a risk of undesirable persons and rowdy disorderly behaviour that will upset the peace and tranquillity that retired persons are entitled to and need;

(b) the likelihood of undesirable and liquor affected persons wandering into the Cambrai Retirement Village, particularly after the entertainment finishes;

(c) the strong possibility that some of the residents of the Cambrai Retirement Village will utilise the Merriwa Shopping Centre, which contains a supermarket, medical centre, chemist and food outlets; and be confronted by patrons leaving the tavern;

(d) the average age of persons living in the Cambrai Retirement Village is 78 years and one of the prime concerns of aged persons is their sense of safety and well-being; and

(e) at times, residents of the Cambrai Retirement Village have meals in the premises' "Dining Area" and even if there are meals available in another part of the premises, this type of entertainment would preclude residents from this amenity.

16. Additional concerns were also raised, including that the premises is in close vicinity to a pre-school, primary school, child care centre and child's dance studio and also outlined how a resident, Mr Bicton, had previously had cause to complain about noise emanating from the premises (with a copy of an email chain regarding the complaint was attached to the objection).

17. The objection was supported by a copy of the minutes of an Annual General Meeting of the Cambrai Village Resident's Branch, held on 18 August 2016, in which the residents unanimously endorsed the objection.

Other objectors

18. The common broad grounds of objection relied upon by these objectors were:

    (a) a general opposition to the proposed variation;

    (b) that approval of the application would encourage out-dated attitudes towards women, gender and sexuality and the viewing of women as sexual objects causes gender inequality; which has far-reaching negative effects on all women, including strong links to violence against women;

    (c) the treatment of women as sexual entertainment undermines government initiatives to reduce violence against women;

    (d) the Applicant's entertainment supplier, Perths Best Girls, lists sex acts that include live sex shows featuring penetration by vibrators, fruit, vegetables and strings of pearls, as well as 'girl on girl' sex shows and that such adult performances will cause offence to the community;

    (e) the employment of young women in sexualised 'entertainment' can be highly damaging and exploitative – not only for the women involved, but also for impressionable young people who live in the area and might be encouraged to regard such activity as normalised and/or acceptable;

    (f) female employees in sexual service roles report frequent sexual harassment, assaults and abusive treatment; and

    (g) the increased volume and nature of the clientele who would be attracted to the premises due to topless/skimpy bar-staff would have a negative impact on community well-being, which cannot be mitigated by the fact that the Applicant proposes that signage will not be visible to passers-by, given the general reputation the tavern will develop for hosting adult entertainment;

    (h) Merriwa has a lot of young families and is a community that needs positive influences, as opposed to the negative influence of 'skimpies' at the 'local' pub.

    (i) it would send the wrong message to young people and, given that the premises is located in an area that is filled with young families, could also represent a threat to women and young girls who live in or pass through the locality.

    (j) that the premises is located in a residential suburb with a primary school located within approximately 100 metres and other community facilities, which are used during both the day and night;

(k) adult entertainment is incongruent with the residential area in which the premises is located and attacks a type of clientele that is radically different than residents of the community and will result in clashes;

(l) the consumption of alcohol, binge drinking, drunkenness have always caused problems, unruly behaviour and anti-social behaviour, including more fights and brawls in the community and will disrupt law and order of the society;

(m) Ms Foxglove particularly submitted that:

> "nearby Merriwa Primary School (for example), has had, in the past, to confront many issues relating to family and domestic violence and abusive behaviours – as indicated in Education Department Audits (2010/11). While some considerable effort has been undertaken by parents and teachers to improve circumstances of entrenched cultures of disrespect, bullying and violence – this is an ongoing challenge which requires constant reinforcing and basic awareness of acceptable and empathic behaviours. Clearly, none of these aspirations is in anyway assisted by having any local venues employing young women for so-called 'skimpy' work. The messages sent to young women and girls in the area are absolutely *in strong contradiction* to any efforts made to reduce the exploitation of women and girls..."

The Intervention

19. The intervention on behalf of the Commissioner of Police, dated 25 August 2016, made representations on the question of whether the grant of the application would likely result in public order or disturbance (s 69(6)(c)(ii) of the Act refers) and on other public interest matters (s 69(6)(c)(iv) of the Act refers).

20. The Commissioner submitted that there are numerous community facilities in the immediate vicinity of the premises that should be taken into consideration, including a primary school, Salvation Army, supermarket, community centre, day care centre, retirement village and club rooms for Addison Park reserve. Therefore, the Commissioner submitted that restrictions should be placed upon the times that such entertainment is permitted so as to minimise any impact on persons living in close proximity, travelling through or resorting to the locality; particularly children resorting to the school and sports ground nearby.

21. Furthermore, while acknowledging that the Applicant does not intend for the proposed entertainment to be on each of the relevant times for the entire trading period, the "flexibility" it is seeking leads to an almost unenforceable condition and could result in adult entertainment being offered for "an excessive amount of hours."

22. Alternatively, the Commissioner submitted that if such entertainment was to take place at a designated time and place, it would ensure that potential patrons would know the days and times that adult entertainment is generally provided and allow them to

choose an alternative venue, should they be in company with children or offended by the entertainment.

23. Similarly, given that the Applicant proposes to exclude advertising of the proposed entertainment in a visible way, the Commissioner submitted that families might inadvertently attend the premises with young children, who may then be accidentally exposed to such entertainment. Therefore, the Commissioner submitted that signage would also assist in informing potential patrons of the times the proposed adult entertainment will take place, provided that such signs are not promotional in nature and do not feature any image or photograph of the proposed adult entertainment.

24. The Commissioner also submitted that:

    (a) rather than having an approved manager positioned at designated entry points to the relevant part of the licensed premises, it may be a more appropriate for the Applicant to employ licensed crowd controllers, which would enable approved managers to undertake their usual role and duty, particularly given that crowd controllers are commonly utilised in licensed venues for the purpose of monitoring and maintaining the good order of the premises; and

    (b) while noting the Applicant's proposal that would enable patrons in the Dining Room to access toilets without exiting that area, it would not prevent the reverse situation where patrons of other areas within the venue might access the toilets and then enter the Dining Room unencumbered and recommended that to prevent this from occurring, a screen or barrier should be put in place between the two areas.

25. Accordingly, the Commissioner submitted that the engagement of crowd controllers and effective screenings and barriers would assist to minimise any potential for aggression, should some undesirable patron behaviours become apparent during times when adult entertainment is provided.

26. The Commissioner also submitted that only persons who have an RSA certificate should be permitted to sell and supply liquor during the proposed performances and that waitresses and barmaids should not be permitted to be dressed in an immodest manner, so that they are able to move freely through the licensed premises should they be required to assist in other areas and so that there is a clear separation between waitresses/barmaids and adult performers.

27. The Commissioner also submitted the following concerning the Applicant's consumer evidence:

    (a) Facebook posts by Nat Baker on 20 April 2016 and 4 December 2015, indicate that the Applicant had specifically sought out female support for the application, yet despite this, the questionnaires and statements provided by the Applicant are predominantly from male respondents;

(b) while acknowledging there were some female respondents, the small number of persons indicating a willingness to attend the premises while the proposed entertainment is being provided, is outweighed by those persons who will either:

(i) not attend the premises because of the entertainment;

(ii) be required to leave the specified area; or

(iii) choose to leave because of the type of entertainment that may be about to take place; and

(c) the Applicant has sought to address the "consumer requirement" by nominating the venue as attracting "...patrons who reside or work in the Locality", due to its convenient location in Merriwa, yet its consumer evidence represents only 1.3% of the population of Merriwa and falls well short of being an overwhelming number.

Responsive submissions

28. In submissions dated 2 December 2016, the Applicant responded to the objections and intervention. In relation to the objections, the Applicant "noted that the majority of objections can be characterised as a moral objection to the form of entertainment proposed" and submitted that it is not the role of the licensing authority to pass moral judgement on this matter.

29. In relation to specific claims by these objectors, the Applicant submitted that:

(a) the present application is not for a "strip club", which would be more appropriate under a night club licence, but rather the application has been lodged to enable the Applicant to host dance shows where performers will expose their breasts and a portion of their buttocks and that similar dance shows have previously been held at the Applicant's venue, albeit the performers' breasts and buttocks were covered;

(b) no evidence has been presented which would support a finding that hotels and taverns that operate under a modified entertainment condition are associated with violence against women;

(c) many of the concerns expressed in the objections had already been addressed in the Applicant's PIA;

(d) concerns expressed about domestic and family violence and sexual assault are not supported by evidence that would enable a finding that there is a link between the style of entertainment proposed by the Applicant and domestic violence or sexual assault;

(e) there is no evidence that would ground a finding that the style of entertainment proposed by the Applicant leads to the "further breakdown of families"; and

(f) many claims are no more than speculation and should be disregarded.

30. In response to the objection by Messrs Walker and Farrell, the Applicant submitted that concerns about the school and community centre being within close proximity to the premises had already been addressed in its PIA and that no evidence was lodged in support of the other grounds of objection, particularly the contentions that persons attracted to this style of entertainment are "undesirable" and would consume more liquor.

31. In respect to the concerns of Messrs Walker and Farrell that residents would be discouraged from having meals at the premises, the Applicant referred to and relied upon the statement of Ian Strover, who stated that "It is not clear... how frequently or when residents of the village attend the Tavern."

32. In relation to the intervention by the Commissioner, the Applicant submitted that it is seeking flexibility with respect to when such entertainment will be held and it is unclear what the public interest would be in having the modified condition varied to specify a time and day when such entertainment could be held.

33. Also, in order to clarify confusion about the signage proposed at the premises, the Applicant submitted that:

    (a) the nature of the entertainment occurring upon the licensed premises will not be advertised i.e. there will be no external advertising of "Perths best girls" performing at the tavern other than by way of Perths Best Girls' Facebook page and website; and

    (b) the signage on all external and internal entrances and exits will merely be signage stating that R rated entertainment is being provided within the designated area, so that persons do not unwittingly enter during a performance.

34. In response to the representations of the Commissioner regarding families and children, the Applicant again referred to the statement of Mr Strover to demonstrate that while the Applicant has in the past sought to be family friendly, it was not successful in attracting this demographic and the demographic that is attracted to the tavern is blue collar workers.

35. Additionally, the Applicant submitted that pursuant to the provisions of the *Security and Related Activities Act 1996*, approved managers are authorised to undertake crowd controller activities on licensed premises, but are exempted from the requirement to obtain and hold a crowd controllers licence. The Applicant also noted that the Act imposes a number of obligations, not only upon licensees and approved managers, but all staff members, with respect to monitoring and controlling patron behaviour; which cannot be delegated to a crowd controller.

36. Accordingly, the Applicant submitted that it is aware of its responsibilities under the Act and will ensure that its staff members are properly trained with respect to their responsibilities and further, that crowd controllers are utilised when and where the

Applicant considers appropriate. For these reasons, the Applicant opposed the recommended crowd controller condition.

37. In respect to the Commissioner's observations regarding the Applicant's consumer evidence targeting women, it was submitted that "the Applicant was simply interested in exploring all demographics that may be attracted to this form of entertainment. While males may well be the obvious target source, the Applicant was aware that some female patrons had expressed an interest in this type of entertainment and, as such, this demographic was one which the Applicant wished to explore."

38. Furthermore, in relation to the Commissioner's submissions regarding the social media interactions of Nat Baker, the Applicant submitted that Ms Baker is not one of its employees and is therefore outside of its control.

39. The Applicant also submitted that whenever a licensee chooses to host certain entertainment, by virtue of that entertainment, they are targeting a specific section of their patron base. For example, a licensee who chooses to televise live football matches at their venue, will do so knowing that persons who do not wish to view live football are unlikely to attend the venue during those times.

40. In summarising the consumer evidence lodged, the Applicant noted that it had lodged:

    (a) 153 consumer requirement surveys; and

    (b) 12 statements of support (following the withdrawal of two statements).

41. Therefore, the Applicant submitted that there is no legal basis for the assertion by the Commissioner that in order to demonstrate that the grant of the application will satisfy the "requirements of consumers", the level of evidence must equate to a positive response from a significant proportion of the residential population of an area.

Legislative requirements

42. By ss 38(1)(c) and 38(2) of the Act, the Applicant is required to satisfy the licensing authority that the granting of the application is in the public interest. A positive obligation is imposed on the Applicant to discharge this onus (see *Liquorland (Australia) Pty Ltd v Executive Director of Public Health* [2013] WASC 51); *Seoul Mart City Pty Ltd v Commissioner of Police* (LC 27/2014)).

43. It is therefore incumbent upon the Applicant to adduce sufficient information to satisfy the licensing authority that the grant of the application is in the public interest. This evidentiary requirement cannot be achieved by merely expressing assertions or opinions about the public interest. Accordingly, any such assertion or opinion must be supported by an appropriate level of evidence (see *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* (LC 16/2015); Seoul Mart City Pty Ltd, supra; *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17/2010)).

44. Additionally, pursuant to s 33(1) of the Act, the licensing authority has the "absolute discretion" to grant or refuse an application for any reason that it considers is in the public interest; with such discretion being confined only by the scope and purpose of the Act when read as a whole (see *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384; *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356; *Palace Securities v Liquor Licensing* (1992) 7 WAR 241).

45. Accordingly, s 33(2)(a) of the Act provides that an application may be refused, even if it meets all the statutory requirements, where such refusal is consistent with the objects and purposes of the Act.

46. Further, the expression "in the public interest" imports a discretionary value judgment and where a 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 *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227; citing *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 201, 216.)

47. Therefore, the factual matters which the licensing authority is bound to take into account, in determining whether it is satisfied that the grant of an application is "in the public interest", are the primary objects of the Act set out in s 5(1) and the secondary objects of the Act set out in s 5(2) (see Woolworths Ltd v Director of Liquor Licensing [2013], supra).

48. The licensing authority is also entitled, but not bound, to take into account the factual matters set out in s 38(4) of the Act.

49. In considering the "public interest" a tension may arise between the primary object of the Act, such as regulating the sale, supply and consumption of liquor, minimising harm or ill-health caused to people, or any group of people, due to the use of liquor, and other objects contained in section 5 of the Act, particularly the object concerned with catering for the requirements of consumers for liquor and related services. When such conflict arises, the licensing authority must undertake a weighing and balancing exercise. The decision will depend on the particular circumstances of the case (*Executive Director of Public Health v Lily Creek International Pty Ltd* [2000] WASCA 258; (2000) 22 WAR 510).

50. It is significant that the primary object in section 5(1)(b) is to "minimise" harm or ill-health, not to prevent harm or ill-health absolutely. The word "minimise" is consistent with the need to weigh and balance all relevant considerations. It is a matter for the licensing authority to decide what weight to give the competing interests and other relevant considerations (Hermal Pty Ltd, supra).

51. The harm contemplated by the Act is not confined to consumers of alcohol and extends to harm caused to the health and well-being of individuals, families and communities, as well as social, cultural and economic harm. This includes harm which

may occur through an increase in anti-social or injurious behaviour due to the use of liquor and is not limited to physical harm (*Re Gull Liquor* 340); *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 [271]).

52. Whether harm or ill-health will, in fact, be caused to people, or any group of people, due to the use of liquor is essentially a matter of prediction. However, it is unnecessary to establish on the balance of probabilities that harm or ill-health will be caused to people or any group of people before the consideration can be taken into account. In this regard, the potential for harm or ill-health is a powerful public interest consideration (refer Executive Director of Public Health v Lily Creek International Pty Ltd, supra).

53. Ultimately, the question for determination is whether, having regard to all the circumstances and the legislative intention, the grant of the application is justified. In answering this question, the licensing authority has a wide discretion. It is a matter for it to decide what weight to give the competing interests and other relevant considerations (Hermal Pty Ltd, supra).

Determination

54. In order for me to find that the grant of the application will materially cater for the requirements of consumers of liquor and related services, the Applicant is required, by cogent evidence, to prove that there is, in fact, a consumer requirement - that is, some call by consumers for the products and services that will be offered at the premises; as well as identifying some objective features of the application that will not just address consumer requirements, but result in benefits that can be said to be advantageous to the public interest.

55. As such, it is not sufficient for the Applicant to merely assume that the supply of liquor and related services, such as the provision of “immodest” or “adult” entertainment at the licensed premises, will be in the public interest.

56. The long title of the Act provides that *inter alia* it is an Act to regulate the use of premises on which liquor is sold and the services and facilities provided in conjunction with or ancillary to the sale of liquor. Because hotels (and any subcategory of hotel licence prescribed in s 41 of the Act) are expected to provide facilities for a broad consumer base, including men, women and families; the licensing authority has previously found that the provision of entertainment by immodestly dressed performers can not meet the requirements of that broad base of consumers[1]. Therefore, the Director imposes a standard entertainment condition on most licences, to prohibit lewd or indecent activities and require that no one be permitted to be immodestly or indecently dressed on the licensed premises.

[1] NB: some of the objectors have indicated that they will cease to patronise the premises if the application is approved

57. Decisions made by the Liquor Licensing Court have subsequently determined that 'immodest' includes, but is not limited to, bare breasts and bare buttocks. Consequently, the exposure of breasts and/or buttocks (including by way of see through material, nipple stickers or G –string) on a licensed premises is generally not permitted, although. The entertainment condition is not imposed on a nightclub licence.

58. By way of background, it is relevant to note than on 13 December 2012, the Applicant previously applied to vary the entertainment condition. In the determination of that application, the delegate of the Director found that the evidence in those proceedings relevantly established that:

    (a) the suburb of Merriwa experienced high rates of offending, which in some instances were significantly higher than the State rates;

    (b) the area in the immediate vicinity of the licensed premises had a high rate of police attendances, including at the times when the Applicant intended to conduct adult entertainment; and

    (c) the licensed premises is located in close proximity to a school, an oval used by young children and families in the evenings, a dance studio used by young children in the evenings, a centre which caters for disadvantaged people from the area and a retirement village.

59. The delegate found that the evidence submitted by the Applicant failed to establish that the interests and welfare of the local community or any other section of the public would be advanced by the grant of the application (with reference to *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142; (2005) 220 ALR 587 per Tamberlin J) and in weighing and balancing the competing interests of those persons who wish to view the proposed entertainment and the interests of the local community, found that the potential negative impact of the grant of the application outweighed the marginal benefits that may be gained by a relatively small group of people. Accordingly, the delegate found that the Applicant had not discharged its onus under s 38(2) of the Act and the application was refused.

60. In the subsequent review of those proceedings by the Liquor Commission (refer *Tybel Nominees Pty Ltd v Commissioner of Police* [LC 35/2013]), the Commission also found that:

> "The evidence fell well short of establishing that the variation of the licence was in the public interest. Whilst "Dan the Man", "Show me pussy", "Robbo", "Marshy", "Bob", "Jacko", "Swanny", "Fido", and others may want to see strippers at the hotel based on their signing of the questionnaire, there is nothing before the Commission that is capable of establishing that the variation of the licence is in the public interest."

61. In relation to the Applicant's consumer evidence, I consider at the very least, that it shows some demand for the variation sought. However, despite the Applicant's claims that this type of entertainment is being demanded by its patrons, I note that none of the consumers who provided a statement indicated that they had approached the Applicant to seek out this type of entertainment. On the contrary, the consumers:

    (a) indicated that they only became aware of the Applicant's intention to pursue this application after "talking to the Venue's staff and particularly the manager of the Venue, Ian Strover" (refer to the statements of Todd Brooks and Cindy Brooks);

    (b) declared that they were only "aware of the Merriwa Tavern's intention to apply to have their entertainment condition varied..." (refer to the statements of Angelo Betti and Phillip Bleach); or

    (c) stated that they "have been made aware of" the Merriwa Tavern's intention or application (see the statements of Darryn Redfearn, Geoff Miethe and Alexis Mitchell).

62. I have also noted that in his statement, Shane Riley declared that the type of entertainment proposed does not interest him, although I note that he "does not have a problem with this kind of entertainment".

63. I have also noted inconsistencies in some of the Applicant's evidence. For example, in the Applicant's PIA, it was submitted that the premises largely attracts persons who reside or work in the locality, due to its convenient location in Merriwa and reputation as the neighbourhood "local" pub; whereas in its closing submissions, the Applicant effectively contradicted its PIA by submitting that the demographic attracted to the tavern is blue collar workers.

64. Additionally, the Applicant's analysis of customer surveys lodged under its cover letter dated 11 July 2016 contains obvious inconsistencies. For example, despite:

    (a) 37 of 38 consumers indicating that they lived in or near Merriwa, 29 of those consumers also indicated that they live in Perth; and

    (b) three of the 38 consumers indicated that they were a visitor to Perth, 37 of those same consumers also indicated that they are a regular patrons of the Sixty30.

65. In my view, these types of irregularities raise concerns over the veracity of the Applicant's consumer evidence and falls well short of the Applicant's claims about the level of consumer demand in support of the application, particularly in view of the social media activities employed to drum up support. I also note that in relation to customer surveys, the Liquor Commission has previously found that petitions, surveys and social media interactions have little probative value and should be treated with a degree of caution (see *Woolworths Limited v Commissioner of Police* (LC 12/2013) [35]).

66. Similarly, while I note the Applicant's claim that it had no control over the social media activities of Nat Baker, I have also observed that Ms Baker is the Managing Director of Perths Best Girls and appeared to be actively referring people to the Applicant's legal representatives and conveying information from those lawyers back to prospective witnesses. As such, I find it difficult to accept that the Applicant had no interest in Ms Baker's activities.

67. Section 19(1)(a) of the *Interpretation Act 1984* permits recourse to extrinsic materials to confirm the meaning of legislative provisions, taking into account its context in the written law and the purpose or object underlying that law.

68. The phrase "cater for" is defined by the *Macquarie Dictionary* to mean, amongst other things, "to provide what is necessary for". The term "requirement" is defined, amongst other things, to mean "that which is required; a thing demanded or obligatory" or "a need".

69. Rather than proposing something that is necessary for consumers of liquor on licensed premises, or providing something that is required; demanded or obligatory; the responses of the consumers appear to be typical of people who don't have any problems with the entertainment proposed, rather than people demanding or actively seeking out this type of entertainment at the licensed premises.

70. In fact, some of the consumers indicated that they have already attended the premises to see skimpies and dance reviews when the skimpies were not topless and "found that it was a good time to be at the Venue" (see the statement of Adam Bromley).

71. Similarly, I do not accept the Applicant's assertion that the provision of "adult" entertainment equates to the televising of a football match or other sporting event, particularly in relation to the question of whether or not patrons who fall outside of the licensee's "target" market for the event, may still elect to attend the premises anyway. In my view, there is little correlation between those consumers who might not be interested in football, yet still attend the premises regardless of the televised sporting event and those members of the public who would be offended by "adult" entertainment and therefore feel excluded from the premises; which can be inferred in the evidence of some of the objectors.

72. Further, in the determination of the Applicant's previous application, a number of matters were enumerated as relevant to the finding that the previous application was not in the public interest (see paragraph 58).

73. In my assessment of the Applicant's PIA and other submissions, I have noted that the Applicant:

    (a) stated that it "does not expect to experience any problems with anti-social behaviour";

(b) submitted "that the grant of the application will not cause offence, annoyance, disturbance or inconvenience to residents, business owners of persons passing through the locality"; and

(c) suggested that there is no evidence to make a finding that the proposed entertainment would be associated with offence, annoyance, disturbance or inconvenience to residents, business owners or persons passing through the locality.

74. In accordance with the Director's *Public Interest Assessment Policy*, the Applicant should have undertaken a risk assessment with respect to the harm or ill health that might be caused to people, or groups of people within the locality, due to the use of liquor, as well as undertaking a report on the amenity of the locality, including an assessment of any likely impacts associated with the application.

75. In regard to 'at risk' groups and sub-communities, the Director's policy also notes that there are a range of groups that may be more vulnerable to the impact of alcohol, notably groups identified under the *Drug and Alcohol Interagency Framework for Western Australia 2011-2015*, which include *inter alia* children and young people and families.

76. The Director's *Public Interest Assessment Policy* also states that when addressing potential alcohol-related harm or ill-health, applicants need to consider *inter alia* the social health indicators for the locality, which may include (but is not limited to) the incidence of alcohol related crime in the area.

77. This is consistent with the findings of the Supreme Court in Woolworths Ltd v Director of Liquor Licensing [2013] supra, where the Court found that "...in considering whether the grant or an application is in the public interest, the Commission needs to consider both the positive and negative aspects of the application and how the application will promote the objects of the Act."

78. While I have noted that many objectors have provided reasons as to why the grant of the application would be contrary to the public interest, the Applicant does not seem to have turned its mind to this matter.

79. Clearly, there is an onus on the Applicant to appropriately consider the matters prescribed in s 38(4). It is my view that the Applicant's failure to identify these relevant issues impacts upon the assessment of the cogency of the evidence (particularly the PIA) relied upon by the Applicant.

80. For example, the Applicant's statement at paragraph 59(a) of the PIA that, "With respect to the current levels of offending within Merriwa and further, Police attendances in close proximity to the Tavern, we are unaware of whether these rates of offending have remained the same. In accordance with normal practice, however; we are aware that the Licensing Authority will refer this application to the Liquor Enforcement Unit and the Liquor Enforcement Unit will provide any relevant evidence

to the Licensing Authority", is deficient and shows a failure by the Applicant to understand that its evidentiary onus is not something that can be devolved to any other party, including the Commissioner.

81. In my view, the Applicant should have informed itself on current levels of offending in Merriwa, as well as the number of police attendances in the immediate vicinity of the premises, otherwise how can it possibly suggest that the grant of the application will advance the object at s 5(1)(b)?

82. Accordingly, I consider that the Applicant has failed to adequately consider amenity issues, particularly relating to the type of entertainment proposed and the particular location of the premises in close proximity to the sensitive places referred to in paragraph 58 [above]. This is particularly relevant given the previous decisions of the licensing authority relating to the Applicant's earlier application of 13 December 2012.

83. In my view, the Applicant's assertion that the grant of the application will have no impact on the persons utilising the abovementioned services or attending these locations in the wider community, simply because the activity will be held within the interior of the premises, is short sighted and ignores public interest matters associated with the potential impact that such approval may have on the amenity of the locality. For example, the Applicant has not appeared to have reported on the amenity of the locality or undertaken a meaningful assessment of any likely impacts associated with the application, such as whether the grant of the application will:

    (a) result in the tavern developing a general reputation for hosting adult entertainment, which would be incompatible with the residential nature of the location; notwithstanding the Applicant's proposal that external 'signage' will not be visible;

    (b) result in increased patron capacity and traffic at those times when adult entertainment is being offered or undertaken any assessment of the impact of the same on the locality; and

    (c) the impact on residents when patrons leave the premises after adult entertainment, particularly given that the Applicant is seeking to host adult entertainment without any time restriction on Thursday to Saturday *until late in the evening* [emphasis added].

84. Accordingly, I consider that the Applicant has not sufficiently demonstrated the positive aspects of the application, apart from a slight benefit associated with a small number of its clientele who may desire this type of entertainment. I consider this matter to be particularly relevant given the previous findings of the licensing authority regarding whether the proposed activities are compatible within the premises residential location and in close proximity to:

    (a) a school;

(b) an oval used by young children and families during the days and in the evenings;

(c) the club rooms for Addison Park reserve;

(d) a dance studio used by young children in the evenings; and

(e) a retirement village.

85. While catering to the requirements of consumers for liquor and related services, such as the provision of adult or immodest entertainment on licensed premises, is an important public interest consideration, it is not the sole criterion and it is also important to distinguish between the public interest and private interests.

86. In regard to this, the Commission has previously found that licences should not be granted simply because an applicant has a "good idea" (refer *Harold Thomas James Blakeley and Director of Liquor Licensing* (LC 44/2010). See also Seoul Mart City Pty Ltd, supra). While those comments of the Commission specifically related to the grant of new licences, I consider they are also relevant to any application that is subject to the public interest test as set out in s 38(2) of the Act.

87. In my view, the application is primarily concerned with the private financial interests of the Applicant and the operators of Perths Best Girls. Accordingly, I reiterate that the onus remains on the Applicant to demonstrate that the grant of the application is in the public interest, and this onus cannot be discharged by simply pointing to a desire to provide additional services at the licensed premises.

88. In my view, notwithstanding that it has sought to address the shortfalls identified by the licensing authority regarding its previous application, the Applicant has failed to produce sufficient, probative evidence to satisfy me that the grant of the application is in the public interest.

89. Therefore, having regard to the totality of the Applicant's evidence, I am not satisfied on balance that it has discharged the onus prescribed by section 38(2) of the Act that the granting of the application is in the public interest. Given that the Applicant has not discharged its onus, there is no need to consider whether each or all of the objectors have made out their objections.

90. 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.

91. This matter has been determined by me under delegation pursuant to s 15 of the Act.

Brett Snell
DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING

Government of **Western Australia**
Department of **Racing, Gaming and Liquor**

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Our Ref: A000206321
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Mr P Fraser
Dwyer Durack Lawyers
GPO Box M931
PERTH WA 6843

Dear Mr Fraser

VARIATION OF TRADING CONDITIONS: THE SIXTY30

I refer to the application lodged on behalf of your client, Tybel Nominees Pty Ltd, on 17 June 2016 and enclose a copy of the decision in respect of this matter.

Should you have any queries regarding this please contact me on (08) 6551 4810.

Yours sincerely

Richard Duncan
CUSTOMER SERVICES OFFICER – ADMINISTRATIVE LAW

27 February 2017

[Enc]

cc: WA Police - Liquor Enforcement Unit
And to: Nicholas Walker & Derek Farrell
Jody Bart
Wynand & Estelle van Niekerk
Australian Christian Lobby
Kirsty-Lee McKenzie
Della L Foxglove
Collective Shout
Zion Fellowship
Cate Vose
Heath Pilton
Jacobus Klopper
Dean Groetzinger
Gerold and Irene Lingg
Nicole Summers