

Pimp Pad [2011] SALC 125

LICENSING COURT OF SOUTH AUSTRALIA

PIMP PAD ADELAIDE PTY LTD

JURISDICTION: Application for a Special Circumstances Licence

FILE NO: 3785 of 2011

HEARING DATES: 22, 23, 24 and 25 November 2011 and 7 December 2011

JUDGMENT OF: His Honour Judge B Gilchrist

DELIVERED ON: 22 December 2011

Application for a Special Circumstances Licence - Premises adjacent to a school have received planning consent to operate as a licensed gaming venue - Whether the prerequisites for the grant of the special circumstances licence have been met - Consideration as to whether a Hotel or Restaurant's licence could be moulded to accommodate the applicant's proposed business - Held that they could not and that a prima facie case for the grant of a special circumstances licence has been established - Whether as the Licensing Authority the Court should exercise its discretion in favour of the grant of the licence - The nature and the extent of the discretion considered and discussed - In exercising that it requires the applicant to prove that the safety and welfare of children at the adjacent school will not be prejudiced by the grant of the licence and that the Court has to be satisfied that is in the public interest to grant the licence - Held on the conditions submitted to the Court the applicant has not discharged that onus in relation to children and that it would not be in the public interest to grant the licence - A change to the conditions and a change to the name of the proposed establishment might lead the Court to conclude that the onus has been met and that it is in the public interest to grant the licence on an interim basis - Application is in its present form refused but the applicant is granted liberty to apply to renew its application with altered conditions - Ss 32, 33, 34, 53, 57 Liquor Licensing Act 1997

REPRESENTATION:

Counsel:

Applicant:

Objector Eynesbury Senior College
& Eynesbury International:

Objector Hilton Hotel:

Commissioner of Police:

Solicitors:

Applicant:

Objector Eynesbury Senior College
& Eynesbury International:

Objector Hilton Hotel:

Commissioner of Police:

Mr J Firth with Mr B Moody

Mr S Walsh QC with Mr P Hoban

Mr C Thomson

Sergeant A Heffernan

Moody Rossi and Co

Wallmans

Australian Hotels Association

N/A

- 1 This is an application by Pimp Pad Pty Ltd for the grant of a special circumstances licence pursuant s 40 of the *Liquor Licensing Act 1997* in respect of premises at 11-13 Franklin Street Adelaide (the premises).
- 2 Franklin Street runs from east to west immediately to the west of the western edge of Victoria Square. The premises are on the south side of Franklin Street. The eastern side of the building is immediately adjacent to Morialta Street which runs from north to south from Franklin Street to Grote Street. It is a one way street. Parking is permitted on the western side. The building which houses the premises is attached to another building to the west which contains Eynesbury College. The College abuts to the west into Trades Hall Lane which also runs from north to south from Franklin Street to Grote Street. Trades Hall Lane is about half the width of Morialta Street. A little further to the west is Pitt Street which is a two way street. On the north eastern corner of Pitt Street and Franklin Street is the Maughan Uniting Church and Adelaide Central Methodist Mission. On the south eastern corner of Pitt Street and Grote Street is the Metropolitan Hotel. Across the road from that is the Adelaide Market. There are licensed premises within the Market. To the east of the Adelaide Market is the Hilton Hotel. On the western side of Victoria Square is a licensed premise known as The Dragonfly. It is an entertainment venue. It backs into Morialta Street. There is also on that side of the Square and near to the premises a licensed restaurant called the Thyme Restaurant.
- 3 The nature of the business that the applicant proposes to operate is conveniently summarised in the submission that it made to the Adelaide City Council in connection with its application for planning approval in the following terms:

“PiMP is currently looking to establish a gamers’ hangout or ‘headquarters’ in the Adelaide CBD called PiMP Pad. This will provide a venue for the large Adelaide gaming community to go to play brand new and existing PC games and be able to have a couple of drinks and something to eat at the same time, all for an acceptable price. The PiMP Pad will be the first venue in the state to provide the combination of PC and high definition console gaming, hot food and both alcoholic and non-alcoholic beverages. In short, the PiMP Pad is an advanced Internet and gaming cafe with a liquor licence that has a general targeted range of people being males aged 18-35.

We are currently looking to install about 50 personal computers (8 on the first floor mezzanine and the remainder on the first and second floor) in the building, as well as having about 10 televisions on the ground floor connected to Xbox 360s, PlayStation 3s and Nintendo Wiis.”

- 4 The point of entry into the premises is from Franklin Street. Immediately above a double metal doorway is a space at which advertising material can be placed. A photo of the façade of the premises that was tendered shows a war scene with the title “Battlefield Bad Company 2 Now playing”. A metre or so above that in large letters are the words: “PiMP TV” and in smaller letter “GAMERS BAR & LOUNGE”.
- 5 The premises comprise of a ground floor, which contains four television screens on each of the eastern and western walls. At the front on the eastern wall are five lounge chairs and three coffee tables. There are three high tables each with two bar stools. About midway into the building there is a bar/food servery/member register and computer monitor. It contains a drink fridge. Immediately behind that is a kitchen that is four by six metres with minimal kitchen appliances, a deep fryer and a fridge. There is a door leading to Morialta Street in about the middle of the building.
- 6 Above the ground floor is a mezzanine floor, which is accessed by narrow stairs to the west of the building. They lead into a store room, female toilets and an area upon where there are ten computers with screens, keyboards and headsets. The computers are on tables able to accommodate food and drinks. There is a speaker which provides background music.
- 7 Next is the first floor, which is also accessed by narrow stairs on the western wall. It contains a male toilet, a small room that contains five computers with screens, keyboards and headsets. These computers are on tables able to accommodate food and drinks.
- 8 The premises have been operating as a computer games venue for the last few months without a liquor licence. It sells hot food, such as egg and bacon sandwiches, ham and cheese croissants, hot dogs, hot chips, hamburgers, pizzas and schnitzels. It sells a range of coffees, teas and soft drinks. It advertises these products on a sandwich board placed outside of the premises.
- 9 By letter dated 30 March 2011 the applicant was advised by the Council that it had approval to change the existing use of the premises from office to licensed premises as a computer games venue. The applicant presently operates the venue, unlicensed. The within application is to complete the applicant’s plans in respect of the premises.
- 10 In its planning application, the applicant indicated that it would be seeking a liquor licence for the venue to operate from 7am to 5am. The conditions that the applicant seeks to attach to the licence have varied significantly since. In its latest form it is proposed that the premises will be licensed on Monday to Fridays between 5.00 pm and 5.00 am on the

following morning and on Saturday, Sunday and public holidays from midday to 5.00 am the following morning. It is proposed that the premises will be closed from 5.00 am to 8.00 am. It is also proposed that from 9.00 pm there will be a licensed security person stationed at the Franklin Street entry and that from 11.00 pm there will be additional security within the premises. It contemplates certified capacities of 130 persons, 50 on the ground floor, 30 on the mezzanine and 50 on the first floor.

- 11 For this application to succeed, the Court will need to be satisfied that the prerequisites for the grant of a special circumstances licence have been met. If they have been, the Court will then have to consider, as the licensing authority, whether in the exercise of its discretion it ought to grant the application.

Objections

- 12 The application has attracted a number of objections.
- 13 The primary objector is the College. The College is a specialist senior secondary college that caters for Years 10, 11 and 12. It is focussed upon being a pathway to University. Its benchmark of success is academic excellence. It sets itself apart from other schools. Students do not wear a uniform. There are no prefects or school houses. It has no emphasis on sport or extra curricular activities. Students and teachers address themselves on a first name basis. Students have freedom of movement in and out of the school during the day. It attracts a number of students from overseas.
- 14 The College's school day presently runs through until 5.35 pm. The College is intending to implement later closing next year which might involve some students remaining at the College until 7.30 pm. It occupies five floors. Its point of entrance is from Franklin Street. Access is by entry card. The doorway is a matter of metres to the west of the entry into the premises.
- 15 The College is opposed to having a gaming venue adjacent to it. Given that the premises have been reclassified so as to permit them to operate as a gaming venue, the College will have to live with the fact that that consent has been granted. The College is, however, vehemently opposed to there being licensed premises adjacent to it.
- 16 The Commissioner for Police did not specifically articulate the grounds upon which he objected to the grant of the licence, but I took him to contend that as a general proposition, the premises are not a suitable venue from a policing perspective.

- 17 The Hilton Hotel indicated that the basis of its objection was that the applicant could not satisfy the requirements for the grant of a special circumstances licence.

The Evidence

- 18 Before analysing the evidence I make the general observation that I thought that all of the witnesses called were generally reliable.
- 19 The applicant relied upon the oral testimony of Mr Aaron Jackson, Mr Peter Russ and Mr Mark Carter.
- 20 Mr Aaron Jackson is the day to day manager of the premises. He has a keen interest in intellectual technology and gaming. Since 2007 he has been involved as a sales and marketing consultant for electronic technology for the gaming industry.
- 21 In 2009 he commenced consulting to Pimp TV, which is a trademark owned by a company, which is co-owned by his father, Mr Phillip Jackson and Mr Peter Russ.
- 22 Pimp TV is an internet gaming website that provides news to gamers worldwide. As part of its marketing strategy Pimp TV uses the images of bikini clad girls.
- 23 Pimp TV's major competitor in this area is the News Corporation. The establishment of the Pimp Pad was orchestrated as a means of achieving something that News Corporation could not do, that is, not only providing news about games, but also providing a venue where gamers could go and play, and through which Pimp TV could promote products.
- 24 As indicated earlier, at present the Pimp Pad operates without a liquor licence. Although it is open to the public, it uses a filtering mechanism to monitor those permitted access to its games. The person has to demonstrate some connection with gaming before being able to become a member. Only a member is permitted to access gaming machines. It was proposed that this membership process would be used in selling liquor, so that the proprietors could police underage drinking and excessive drinking by having personal details of the member and a computer generated record of liquor sales to individual members.
- 25 The applicant contemplates the sale of a limited range of liquor comprising of some keg and bottled beer and a limited range of spirits and mixers. It does not propose to sell wine although it recognises that with a not insignificant proportion of their patronage being female it might be necessary to revisit this later.

- 26 The target range is primarily males aged between 18-32 years. At the present time persons of all ages and of both sexes visit the premises. About 15-20% are under 18. It is anticipated that this percentage might diminish if the liquor licence is granted.
- 27 Mr Jackson said that the Pimp Pad is not interested in having the general public at its premises. He said that they had created the ultimate gamers hangout and that having members of the public would detract from that image. He said that they wanted to create “A niche market; a place for our members who are into gaming.”¹
- 28 Mr Russ described the profile of patrons using the premises as follows:
- “... they’re very similar to people that you’d see on television depicted as nerds or geeks, such as the Big Bang Theory which is a popular show on television. They’re into games, into wearing character costumes, and generally inoffensive to society as a whole, but to someone of my age it might appear strange or weird. ... they’re certainly not a football crowd ... they go there to play games and play games internationally, to celebrate their culture, and ... commune with their peers.”²
- 29 This description of the sort of patrons using the Pimp Pad is consistent with the evidence of Mr Aaron Jackson and consistent with the evidence of the Mr Mark Carter, a company director, who operates game centres in Victoria. On the basis of the evidence, I find this description as accurate.
- 30 The College relies upon evidence from Mr William Spur, a Board Director, who relevantly, for present purposes, is the Chair of Education Adelaide, which is a body set up to market Adelaide in the international education market.
- 31 Mr Spur was very concerned about the impact of having licensed premises described as the Pimp Pad Gaming and Bar Lounge immediately adjacent to the College. He said:
- “A perception of particularly the parents, is the key determining issue, particularly when parents are separated from their children. Things like the word ‘pimp’ once they – and social media will soon get that information back to overseas country just so quick that – and that understanding word of mouth; that and the association of alcohol is just – brings a degree of anxiety of parents, and because this whole industry is so competitive, that will easily shift their students either from that premise, from that State or even that country.”³

¹ Tr 43

² Tr 90

³ Tr 125

32 I accept this evidence.

33 The College relied upon the evidence of Mr Michael Scarpantoni, a vigneron who is the father of one past and one present student at the College. Mr Scarpantoni expressed the view that it was not appropriate to have a nightclub gaming lounge next to a school. He also said:

“...if the place is going to be open and the kids are going to be congregating around the front door when there are in fact 18-plus-year olds drinking, coming outside, going inside, and at the same time there’s still the question of what happens to their clientele that are under 18. I’m a bit concerned about that.”⁴

34 The College relied upon the evidence of Ms Angela Hudeba, an advertising executive whose daughter will be attending the College next year. She was concerned about Pimp TV and in particular ladies in bikini clad bathers talking about games. She said:

“That it’s belittling women, yes, I just thought, ‘Oh, it’s not a nice place.’”⁵

35 She expressed concern about the violence in gaming and then, in connection with this application, said that her fears were heightened because “you know, alcohol fuelled with playing violent games will only make matters worse.” In connection with her daughter she expressed her concerns thus:

“well obviously children that are going to Eynesbury are wanting to know what’s happening next door and I am afraid, you know, my child might be going into that building. I can’t stop her, peer group pressure, she might end up going in there and without my knowledge, obviously – that’s what kids do.”⁶

36 I accept that these concerns are genuinely held.

37 The College relied upon the evidence of its principal, Mr John Warren.

38 It was Mr Warren’s evidence that there had been a marked increase in the amount of graffiti around the College since the Pimp Pad started its operation. I do not think the evidence is such that I could find that this increase, if it has occurred, is attributable to the Pimp Pad’s presence.

39 Mr Warren expressed his concerns about the scenes depicted in the Pimp TV’s website. He said:

⁴ Tr 149

⁵ Tr 161

⁶ Tr 161

“Schools operate in a protective environment these days. We are driven by a protective behaviour code, and to see our next door neighbours connected to a site like that, just sends shivers down my spine against that code. It’s disturbing.”⁷

- 40 He then explained his concern about the association between Pimp TV and Pimp Pad. He said:

“Well, apart from the fact that the Pimp TV name appears on the - emblazoned across the front of the building about a metre and a half from my school, so it’s indelible at that level, it trades on the connection, so if you look for Pimp TV you get taken to the Pimp TV site. I’ve got to say that the site I’ve had difficulty finding is the Pimp Pad site, which apparently exists. But if I go looking for the Pimp Pad, what I come up with is Pimp TV.”⁸

- 41 Mr Warren then went on to explain his concerns about the proximity of the premises. He said:

“If you look at Google Earth and find Eynesbury, in street view, next to us is the building that is currently occupied by Pimp Pad. Visible to the world to see it, people search for us on the web; and will see the Pimp Pad next door.”⁹

- 42 As to the name incorporating the word “pimp” he said:

“Our parents will automatically connect it with the connotation that we draw from it, which is, that it is about prostitution. I just cannot believe that that name is going to be emblazoned on a business that spills a shadow onto my school; my students see it as a stain. The whole notion of the Pimp Pad, pimps and, you know, what we might have called in our generation, pimps and gangsters and gangsters molls, in current parlance is pimps and I have to excuse my indelicacy, your Honour, but the current parlance is pimps and hoes and bitches, that’s how women are referred to in this culture. So our girls understand that. I mean, our boys understand that; our staff do and our parents understand that at both ends of the spectrum. And on every single level it is an affront. It’s inflammatory. It’s provocative. It’s designed to get a rise, and it’s certainly getting one out of my school’s community.”¹⁰

- 43 Mr Warren expressed his concern that his students might visit the Pimp Pad. He said:

“I’m troubled by the notion that it could be for some our students a seductive place to be, I’m troubled that its sheer proximity to my

⁷ Tr 193

⁸ Tr 194

⁹ Tr 196-7

¹⁰ Tr 197

school appears in some ways to be predatory. There's a 400-head population sitting five metres away from the Pimp Pad. That's not good for me, I've got to say. It's not good for any school in the CBD, but particularly not good for me and not good for my school."¹¹

- 44 I accept that his concerns are genuinely held.
- 45 Finally the College relied upon the evidence of Ms Wendy Bell, a town planning consultant who has a particular interest in the area of liquor licensing and crime. She said that street crime was particularly linked to the volume of alcohol consumed. She said hotels and taverns and night clubs are more likely to be associated with the consumption of high volumes of alcohol and therefore more likely to attract the more serious offences. She said that even in other premises where there is concentration of young people, particularly young males, there is a link between alcohol consumption and crime, albeit that the criminality is less serious and usually relates to things such as offensive behaviour and damage to property.
- 46 She spoke of the fear factor in relation to crime and the paradox that the perception and reality of fear do not correlate. Women are less likely to be victims of crime but they have higher levels of fear than young men, who are much more likely to be the victims of crime.
- 47 She said that from a planning perspective, if it had been up to her, she would not have given the applicant consent. She was concerned about the lack of natural surveillance, which she said was a powerful factor in reducing street crime. She thought there were entrapment spots in Morialta Street where an assailant could hide. She was concerned about the level of lighting in Morialta Street. She thought there was potential for the premises to generate some crime, especially given the link between young people, alcohol and crime. She was concerned about the limited mix of uses in the area and of the lack of people in the vicinity after hours. She noted that there was no taxi or bus route on Franklin Street at night-time. She said that in her opinion there was some potential that the safety and welfare of students at the College might be prejudiced if a licence were granted because they might be in the vicinity of the licensed premises with limited surveillance. She accepted that it would be an advantage if there were a security person at the door of the premises to provide surveillance.
- 48 When asked about whether it would alleviate some of the perceived problems if the entrance were in Morialta Street she said that it would be better if both doors were open. She was concerned about only having access from Morialta Street because in her opinion the worst of the

¹¹ Tr 200-1

crimes occur down the laneways and at the end of laneways. She said that she did not think it would make any difference to the students of the College and it would not be in the interests of the users of the premises to have the main entrance off Morialta Street.

Special circumstances licence

49 The nature and the circumstances permitting the grant of a special circumstances licence are prescribed by s 40 of the Act in the following terms:

- “(1) A special circumstances licence authorises the licensee to sell liquor for consumption on or off the licensed premises in accordance with the terms and conditions of the licence.
- (2) A special circumstances licence cannot be granted unless the applicant satisfies the licensing authority that-
 - (a) a licence of no other category (either with or without an extended trading authorisation) could adequately cover the kind of business proposed by the applicant; and
 - (b) the proposed business would be substantially prejudiced if the applicant’s trading right were limited to those possible under a licence of some other category.”

50 There are potentially two categories of licence that might cover the kind of business that the applicant proposes, they being a hotel licence and a restaurant licence.

Hotel licence

51 The hotel licence is provided for by s 32 of the Act, which provides as follows:

“Hotel licence

32. (1) A hotel licence authorises the licensee-

- (a) to sell liquor on the licensed premises for consumption on or off the licensed premises on any day (except Sunday, Good Friday and Christmas Day) between 5 am and midnight; and
- (b) to sell liquor on the licensed premises for consumption on or off the licensed premises on a Sunday (not being Christmas Day) between 11 am and 8 pm or if the Sunday is New Year's Eve, between 11 am and midnight; and

- (c) to sell liquor on the licensed premises for consumption on or off the licensed premises on Christmas Day between 9 am and 11 am; and
- (d) to sell liquor on the licensed premises for consumption on or off the licensed premises on New Year's Day between the hours of midnight and 2 am (in addition to the hours authorised under paragraph (a) or (b)); and
- (e) to sell liquor at any time on the licensed premises to a lodger for consumption on or off the licensed premises; and
- (f) to sell liquor at any time in a designated dining area to a diner for consumption in that area with or ancillary to a meal provided by the licensee in that area; and
- (g) to sell liquor at any time in a designated reception area to a person attending a reception for consumption in that area; and
- (h) if an extended trading authorisation is in force-
- (i) to sell liquor for consumption on the licensed premises in accordance with the authorisation; and
 - (ii) subject to any conditions of the authorisation excluding or limiting the authority conferred by this subparagraph-to sell liquor on a Sunday (not being Christmas Day) for consumption off the licensed premises between 8 am and 11 am and between 8 pm and 9 pm; and
- (i) to sell liquor at any time through direct sales transactions (provided that, if the liquor is to be delivered to an address in this State, the liquor is despatched and delivered only during trading hours fixed by or under a preceding paragraph for the sale of liquor for consumption off the licensed premises).

(2) A hotel licence is subject to the following conditions:

- (a) a condition requiring the licensee to keep the licensed premises open to the public for the sale of liquor on every day (except Good Friday, Christmas Day or Sunday) between 11 am and 8 pm;
- (b) a condition requiring the licensee to provide a meal, at the request of a member of the public, between noon and 2 pm, and between 6 pm and 8 pm, on any day on which

the licensed premises are open to the public for the sale of liquor.

(3) However-

- (a) the licensing authority may exempt a licensee from the obligation to keep the licensed premises open for the sale of liquor to an extent the authority considers appropriate in the circumstances of a particular case; and
- (b) a licensee is not required by a condition under this section to provide a meal for a person if-
 - (i) the person appears to be intoxicated; or
 - (ii) the licensee has reasonable grounds to believe that the person cannot or will not pay for the meal; or
 - (iii) the licensee cannot comply with the request because of prior obligations to provide meals for others; or
 - (iv) there is some other proper reason for not complying with the request; and
- (c) the licensing authority may exempt a licensee from the obligation to provide meals wholly or to a specified extent.”

52 In *Facac Pty Ltd v Talbot Hotel Group Pty Ltd & Anor* Doyle CJ made the following observations about a hotel licence. He said:

“The hotel licence continues to be the class of licence with the most extensive trading rights. But the provisions of the Act relating to the hotel licence, and to other classes of licence, reflect a trend over some 30 years towards a more flexible scheme for regulating the sale of liquor.

The holder of a hotel licence is no longer required to provide accommodation for lodgers. The only obligation imposed on the holder of such a licence is, as s 32(2) provides, to be open for the sale of liquor between 11am and 8pm and to provide a meal on request during the specified hours.

I mention here that, in my opinion, it is implicit in s 32(2)(a) that a hotel will be open for the sale of liquor for consumption on the premises and off the premises. I consider that it is an obligation of a hotel licensee to have liquor available for sale in both ways.

But even these obligations can be lessened. As s 32(3) provides, the obligatory hours (as I will call them) can be reduced. However, the

provision contemplates that they may be reduced, not eliminated entirely. Despite the use of the word "exempt", the manner in which the power to exempt is expressed, and the contrast with the power to exempt from the obligation to provide meals, implies that the Court cannot wholly remove the obligation to be open for the sale of liquor. Obviously enough, no-one would obtain a licence and then keep the premises closed. The point I make is that a licence is to be granted only in respect of premises that will be open for the sale of liquor to the public. The Court has a wide power to fix the hours during which those premises will be open, but it is part of a concept of a hotel that the Court will determine when it must be open, and will ensure that it does provide an appropriate service to the public. Finally, under this head, it is clear that the obligation to provide meals can be wholly removed.

Thus, the Act contemplates premises suitable for the grant of a hotel licence as including those in which there will be no accommodation for lodgers, from which no meals will be provided, and from which liquor is sold to the public during hours less than the obligatory hours. This is how some older hotels traded in the past (in breach of earlier legislation) and probably do still trade, and, no doubt, how some of the newer hotels trade."¹²

- 53 Later, having expressed caution about reading too much into earlier authorities that dealt with limitations upon the Court's ability to tailor a licence, the learned Chief Justice said:

"Nevertheless, I consider that the Act is still based on the fundamental concept of licence classes, nine of the eleven classes being for a business of a well-known type as I said in *Australian Wine Traveller*. But I accept that the characteristics of each class and the boundaries between each class are less clear than they were in the past. The Act permits licences to be shaped or moulded to a greater extent that was possible under the former Act, and contemplates licences being shaped so as to permit trading in a way that would not have been consistent with the scheme of the previous Act.

Just how far the Court can go in a given case will depend upon the circumstances of the particular case, and will require the Court to make what will sometimes be a difficult judgment.

But in my view the applicant's proposal goes to a point to which the Court cannot go. The hotel licence envisaged by the Judge would wholly exempt the applicant from the statutory conditions found in s 32(2), contemplating that the applicant would trade when it chose, provide no meals, and when trading would sell no liquor for consumption off the premises. To my mind that would go beyond the power to grant an exemption. The Court would have

¹² (2001) 80 SASR 580 at 583-4

departed from the fundamental statutory concept of a hotel licence.”¹³

- 54 In this case the applicant proposes to trade when it chooses. It proposes not to permit the sale of liquor to those it deems do not merit membership, such that access to liquor on the premises is not available to the public at large. It does not propose the sale of liquor for consumption off the premises.
- 55 To grant exemptions to enable all of this, would, in my view, similarly involve a departure from the fundamental statutory concept of a hotel licence.

Restaurant licence

- 56 Pursuant to s 34 (2) “it is a condition of a restaurant licence that business must be so conducted at the licensed premises that the supply of meals is at all times the primary and predominant service provided to the public at the premises.” It is plain that in this case the proposed business does not fit this description. Whilst it is theoretically possible to alter the condition of the licence to dispense with this requirement, it would, in my view, so substantially alter the character of a restaurant licence as to no longer fit that description.

Substantial prejudice?

- 57 Having reached this conclusion, I now need to ask myself whether to grant the applicant a licence that fits either category with appropriate exemptions would mean that the proposed business would be substantially prejudiced. If not, the application for a special circumstances licence must be refused.
- 58 Although, in conformity with *Farac*, I could grant the applicant an exemption from the obligation to keep the premises open for the sale of liquor for consumption off the premises, and I could grant an exemption from the obligatory hours to the extent considered “appropriate in the circumstances of [the] particular case”, I do not think I could grant an exemption that would permit it to decline to serve members of the public that did not satisfy its membership requirements.
- 59 The objectors ask me to reject the evidence given by the applicant that the business intends to exclude the general public. They point to the fact of menus at the entrance, the use of a sandwich board, the style of furniture, the advertising on the internet, the improved menu relative to the more rudimentary sample given in its planning application, the stated desire to improve profitability through the sale of alcohol, the fact that

¹³ (2001) 80 SASR 580 at 586

there are 53 seats for gamers yet the premises has a capacity for 130 persons and that there will be promotions on gaming and food.

- 60 I accept that these matters seem a little inconsistent with the notion that the premises are intended to be exclusive. However, there are factors pointing the other way. Photographs of the clientele indicate the niche market that Mr Aaron Jackson spoke of. The general layout of the premises is not consistent with it being welcoming to the public generally.
- 61 On balance, I am prepared to accept that the business will be conducted in the manner indicated by Mr Aaron Jackson and Mr Russ. I accept that an important aspect of the applicant's business plan is that the premises are intended to be a safe and exclusive haven for people interested in playing computer games. And I would hold them to their word. If I were to grant a licence, I would impose conditions so as to ensure that the nature of the business to be conducted under the licence conforms with the representations made to me.¹⁴ Having found, as I do, that this is an integral part of the applicant's proposed business, I find that to require it to abandon this aspect of its plan would result in the proposed business being substantially prejudiced. I find that to lose that exclusivity would seriously compromise the proposed business.
- 62 If the applicant was required to conduct its business such that at all times the primary and predominant service was the supply of meals to the public at the premises, the proposed business would, in my view, be substantially prejudiced. It would be obliged to completely refigure its layout and make much greater provision for dining. To be viable, it would need to substantially alter its existing kitchen, which at the present time is relatively small and rudimentary. It would involve a radical departure from its business plan.
- 63 I therefore find that there is a *prima facie* entitlement to a special circumstances licence.

Discretion

- 64 The general discretion in relation to a licensing authority is as provided for by s 53. That section relevantly provides as follows:
- (1) Subject to this Act, the licensing authority has an unqualified discretion to grant or refuse an application under this Act on any ground, or for any reason, the licensing authority considers sufficient (but is not to take into account an economic effect on other licensees in the locality affected by the application).

¹⁴ s 43(1)

(1a) An application must be refused if the licensing authority is satisfied that to grant the application would be contrary to the public interest.”

65 The exercise of that discretion must give specific consideration to matters referred to in s 57 of the Act. That provision relevantly provides as follows:

“(1) An applicant for a licence premises or proposed premises must satisfy the licensing authority –

(b) That the operation of the licence would be unlikely-

(i) to result in undue offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the premises; or

(ii) to prejudice the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the premises.”

66 Finally, I make reference to s 43(1) which provides:

“The licensing authority may impose licence conditions the authority considers appropriate.”

67 Within that provision the Act contains examples including the following:

“Conditions to minimise offence, annoyance, disturbance or inconvenience to people who reside, work or worship in the vicinity of the licensed premises, or to minimise prejudice to the safety or welfare of children attending kindergarten, primary school or secondary school in the vicinity of the licensed premises, resulting from activities on the licensed premises, or the conduct of people making their way to or from the licensed premises.”

68 The effect of s 53(1a) of the Act is that to grant this application I must be satisfied that it is in the public interest to do so.

69 In *O’Sullivan v Faer and Another*, Mason CJ, Brennan, Dawson and Gaudron JJ, in the context of a case concerning liquor licensing legislation, stated:

“...the expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only ‘in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced]

definitely extraneous to any objects the legislature could have had in view.”(footnotes omitted)¹⁵

- 70 They approved the judgment of Neasey J in *In re Thompson*. In that case, Neasey J said, in connection with that expression as it appears in the Licensing Act 1932 (Tas):

“It is a term of the widest scope, *prima facie* because I take it to be synonymous with the public welfare – that is to say, with the interests of the public at large, whose representative the court is”¹⁶

- 71 I therefore approach the issue of discretion from the premise that I must be concerned with the interests of the public at large.

- 72 It is all very well for Mr Aaron Jackson to say that the title “The PiMP Pad Gaming Bar and Lounge” is intended to convey no more than the fact that it is a cool establishment for gamers at which food and beverages, including alcohol, may be served. I accept that persons of his generation might understand that to be so.

- 73 But, it is not only people of his generation who reside, work, and worship or take their children to school, in the vicinity of the premises. These people include people of an older generation who are likely to associate the title with premises that are in the nature of a strip club or a place where waitresses who serve patrons are topless or scantily clothed. A visit to the Pimp TV website would confirm that view.

- 74 I appreciate that the Adelaide City Council has given planning consent for the premises to operate under that name. Mr Firth would have it that this is decisive. In saying so, he relied upon the judgment of Perry J in *Liquorland (Aust) v Hurley’s Arakba Hotel and Others*. In the course of his reasons Perry J said as follows:

“The learned Licensing Court Judge refers to the question of parking and ingress and egress for vehicles travelling on Unley Road, but it seems to me that the considerations to which he had regarded in that respect were not such as might properly lead to the exercise of the discretion against the grant. Parking and traffic considerations have separately been addressed and resolved in Liquorland’s favour by the Environment Resources and Development Court. Although, as the learned Licensing Court Judge indicated, he did not regard himself as bound by the decision of that Court, it seems to me that the circumstances would be rare indeed in which would be proper for the Licensing Court to revisit planning consideration associated with an application and

¹⁵ (1989) 168 CLR 210 at 216

¹⁶ [1964] Tas SR 129 at 144

determine them inconsistently with a view expressed by the Environment Resources and Development Court.”¹⁷

- 75 However, this case does not concern the grant of planning consent following the hearing before the Environment Resources and Development Court. Here, the approval was given by the Council through its normal bureaucratic processes.
- 76 In conformity with what King CJ said in *Vandeleur v Delbar Pty Ltd* I am obliged to give this matter consideration. The learned Chief Justice said:

“The court is not concerned only with such additional impact as the proposed premises might have over other uses of the land by reason of their being licensed premises. The grant of the licence will cause premises to come into existence which would not otherwise be there and all effects on those nearby resulting from the new use of the land must be considered. In considering what is “undue” the court is entitled to have regard to the previous use of the land and as to likely alternative uses if the licence is refused. As to the latter, relevant considerations may include zoning requirements and the fact that there has been planning approval for the licensed premises. **The court is not entitled, however, to abdicate the function of determining the effect of any of the consequences of the grant of a licence simply because those consequences may have been considered by the planning authority.**”¹⁸ (emphasis mine)

- 77 In my view, given the locality and what is proximate to it, it is a factor that strongly points against exercising my discretion to grant the application. The name and the present advertising on the façade of the premises, within metres of a school, with a church and mission a short distance away, are, in my view incompatible. In my opinion the words used are likely to cause undue offence.
- 78 A further factor that I must consider is the positive obligation upon the applicant to discharge the onus cast upon it by s 57(b)(i) of the Act.
- 79 Although I recognise the danger in substituting the words of a statute, I think that where the provision talks of “prejudice” it is directed towards matters that might unacceptably compromise the safety or welfare of children at proximate schools or kindergartens.
- 80 The proposed conditions contemplate the sale of liquor from 5.00 pm each weekday. That is a time of day when some students, including children, might reasonably be expected to be leaving the College and to

¹⁷ [2001] SASC 232 at para 111

¹⁸ (1988) 48 SASR 156 at 162

be out and about the footpath in front of the College. I found Ms Bell's evidence on this topic persuasive. I accept her opinion there is some potential that the safety and welfare of students at the College might be prejudiced if a licence were granted.

- 81 I find that the applicant has not discharged its onus of establishing that the grant of the licence will not compromise the safety or welfare of children at the College.
- 82 Accordingly, as things presently stand, the application must be refused. However, that is not the end of the matter. Consistent with what fell from Doyle CJ and Milhouse J in *Young Street (No 172) v Barnabit Pty Ltd and Others*¹⁹ I am obliged to consider whether the imposition of appropriate conditions might cause me to exercise my discretion differently.
- 83 If the premises traded under an innocuous name like "The P Pad"; there was no advertising on the façade in Franklin Street and any other advertising, say in Morialta Street, was discrete; the licence did not commence to operate until 6.00 pm on weekdays; minors were not permitted on the premises when it was operating as a licensed venue; security was required to man the point of entry and to be vigilant in keeping an eye on persons smoking and loitering around the outside of the premises; and consideration was given as to whether that point of entry could be safely moved to the doorway in Morialta Street, my tentative view is that I might be persuaded that the applicant has discharged the onus cast upon it by s 57(b)(i) of the Act and that I should exercise my discretion differently.
- 84 If Mr Aaron Jackson is genuine when he says that the applicant is not interested in having the general public at its premises and that he wants to create a safe haven for members who are into gaming I fail to see how changing the name and diminishing the scope for external advertising would adversely affect the proposed business. The later opening ought to minimise the potential contact between students from the College and patrons attending or leaving the licensed premises. Security at the door with appropriate instructions ought to provide another layer of protection. Having the premises operate exclusively as an adult venue when licensed would deal with what I think would otherwise be a potential issue of ensuring that minors did not drink alcohol on the premises. And all of this would be subject to the grant of a licence on an interim basis such that if difficulties arise the matter could be brought back before the Court on short notice.

¹⁹ [1996] SASC 5531

- 85 I accept that the College may still be troubled by this. But the reality is that it is a school in the CBD which is replete with licensed premises. As a result some contact by students with those premises and the patrons that use them is an unavoidable consequence of the College's location. As it is there are at least five licensed premises within easy walking distance of the College.
- 86 I therefore adjourn further consideration of the matter to enable the applicant and the objectors to consider these reasons. If the applicant wishes to submit further conditions I will enable it and the objectors to be heard on the matter. I grant the parties liberty to apply.