

Liquor Commission of Western Australia
(*Liquor Control Act 1988*)

Applicant: Grill'd Pty Ltd
(represented by Mr Mario Sequeira of Hospitality Total Services (Pty) Ltd)

First Intervener: Commissioner of Police

Second Intervener: Director of Liquor Licensing
(represented by Mr Warren Fitt of State Solicitor's Office)

Commission: Mr Eddie Watling (Acting Chairperson)
Ms Helen Cogan (Member)
Mr Evan Shackleton (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* ("the Act") for a review of the decision of the delegate of the Director of Liquor Licensing to refuse an application to grant a restaurant licence.

Premises: Grill'd Brookfield Place situated at Brookfield Place,
125 St Georges Terrace Perth (CBD)

Date of Hearing: 23 May 2014

Date of Determination: 17 September 2014
(on papers)

Determination The application is dismissed and the decision of the delegate of the Director of Liquor Licensing is affirmed.

Authorities referred to in this determination:

- *Hancock v Executive Director of Public Health (2008) WASC 224*
- *Palace Securities Pty Ltd v Director of liquor Licensing (1991) 7 WAR 241*

Background

- 1 On 31 October 2012, the applicant, by its approved representative, Hospitality Total Services (Pty) Ltd, lodged an application pursuant to section 50 of the *Liquor Control Act* 1988 (“the Act”) for the grant of a restaurant licence and for approval of a profit sharing arrangement in respect of the premises being Grill’d Brookfield Place situated at 125, St George’s Terrace, Perth.
- 2 The applicant complied with all statutory requirements and lodged all necessary and required documentation in relation to the application including a Public Interest Assessment (“PIA”).
- 3 On 7 January 2013, the Commissioner of Police (“the Commissioner”) lodged a notice of intervention pursuant to section 3(6) and section 69(6)(c)(ii) and (iv) of the Act for the purpose of making representations in relation to the application.
- 4 On 16 October 2013 the delegate of the Director of Liquor Licensing (“the Director”) refused the application by his decision number A223213. The matter was determined by the delegate on the papers.
- 5 On 10 February 2014, pursuant to section 25 of the Act, the applicant lodged with the Liquor Commission (“the Commission”) an application for review of the decision. The Commission gave consent for late lodgement.
- 6 On 13 February 2014, the Director of Liquor Licensing lodged a notice of intervention pursuant to section 69(11) of the Act for the purpose of making representations in relation to the review proceedings. On 11 April 2014, with the consent of the parties the review proceedings were adjourned sine die and in June 2014 with consent, the review proceedings were resumed for determination on papers.

Grounds for review

- 7 The grounds for the application for review of the decision were stated to be:
 - i. the applicant submitted an application for a restaurant licence that satisfied section 5 and section 38(4) of the Act. The determination number A223213 did not reflect any matter to the contrary;
 - ii. the application was compliant with section 68 of the Act and was accompanied by unconditional section 39 and 40 certificates issued by the local authority;
 - iii. the Director’s Policy ‘Standards of Licensed Premises’ provides guidance only as to the legislative requirements and criteria that are used when considering the suitability of premises to be licensed under the Act;
 - iv. the determination that the alleged lack of onsite patron toilets was an insufficient ground for refusing the application;

- v. the applicant believes that the Department failed to consider all the relevant matters submitted by the applicant to justify the use of the external toilets as was approved by the local authority and the landlord;
- vi. the Department appeared to rely on material that was submitted for another application with the applicant not having the opportunity to sight these documents which appear contradictory to the documents submitted by the applicant as issued by the local authority;
- vii. the Department appeared to base the determination to refuse the application predominately on assumptions, i.e., congestion during busier periods with no cogent objective evident to support the same;
- viii. the applicant strongly believes that it is not in the public interest to refuse this application.

Submissions on behalf of the applicant

- 8 The applicant made detailed and thorough submissions in the PIA and other documentation lodged to support its application for a restaurant licence for the premises.
- 9 The matters referred to in the applicant's submissions included a description of the premises and the capacity of the premises, the locality of the premises, the location of toilets to be used by patrons of the premises, details of the applicant's experience in operating other similar premises, the proposed method of conducting business at the premises, strategies in relation to harm minimisation, impact on amenity and issues relating to potential offence annoyance, disturbance or inconvenience.
- 11 The applicant provided 140 pro-forma style letters of support for its application and 92 pro-forma style letters regarding patron safety and toilet facilities and correspondence from the City of Perth ("local authority") and the applicant's landlord regarding toilet facilities for the premises.
- 12 In relation to the issue of toilet facilities for the premises the applicant submitted:
 - i. that the Director's Policy "Standards of Licensed Premises" refers to requirements for toilet facilities for licensed premises and in particular:

Location - toilets in respect of all licences (other than club restricted licences and special facility licences) shall be located on the licensed premises and entered from within, or in the case of existing premises, immediately adjacent to the licensed premises and protected from the elements. This requirement may be varied in respect of restaurants that are part of a shopping complex and toilets are provided in the centre or complex for the use of the tenants patrons

It was submitted that while the restaurant is not part of a shopping complex, the restaurant is located within a dining and shopping precinct that also includes a

newsagency, a pharmacy, a dry cleaners, a hairdresser, a Mont Blanc store and an office tower.

ii. The toilet facilities that are applicable to this application are open at all times the restaurant is open, with the access path available for use by patrons of the premises being unique and requiring special consideration for a number of reasons including:

- the location of the premises (lower ground floor) being an estimated 35 to 40 metres along the access path from the restaurant, where the maximum distance generally permitted being up to 50 metres;
- the fact that the path is well protected on all sides by multi storey buildings even in inclement weather;
- non-slip tiles are used on the access path;
- the rain weather pattern in Perth limits the number of days on which patrons using the access path may not be 100% protected from the rain when causing the toilet facilities;
- non-slip floor tiles are used in the toilet facilities;
- the pavers of the access path are non-slip and diligently cleaned and maintained by the cleaning staff at Brookfield Place;
- there is 24 hour (monitored) CCTV coverage of the access path;
- the applicant is prepared to provide commercial grade umbrellas for use by patrons wishing to use the toilet facilities in inclement weather;
- all properly completed sample surveys submitted by the applicant indicate that the respondents stated they feel safe and had no concerns in using the external toilet facilities available for patrons at the premises.

13 It was submitted that the licensing authority should exercise its absolute discretion in approving the application as being in the public interest pursuant to section 33(7) of the Act when considering the following matters (summarised):

- the premises are a quick service restaurant and patrons of the applicant's other restaurants generally spend no more than half an hour or so and consume one drink on average;
- the premises are part of a dining and shopping precinct with other toilet facilities available in the precinct;
- the applicant, as part of its business model, offers a healthy burger meal along with the choice of an alcoholic or non-alcoholic beverage, holds liquor licences at its venues in all States of Australia and currently safely and responsibly operates 6 licensed restaurants in Western Australia with a view to opening more licensed restaurants in the future. The applicant therefore has a vested interest in the safe and responsible operation of the premises;

- the applicant currently employs some 400 staff at Grill'd restaurants across Western Australia and intends to continue providing employment, training and development opportunities for staff while upholding the primary object of the Act, (section 5(1)(c)) in catering "to the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State";
- the premises are located within the lower level of a heritage building and hence the installing of toilets on the premises is not a feasible option given its location in a heritage precinct. Also, given the lower level location bounded by heritage buildings that provide shelter to the access path, the applicant has been advised that consideration for an overhead covered walkway would not gain council approval;
- the entire heritage precinct has been assessed to meet all BCA (Building Code of Australia) and DDA (Disability Discrimination Act 1992) requirement by reputable BCA consultants. Part of this BCA approval was for the toilet facilities to be used by patrons of the premises, with the City of Perth also approving the facilities as being suitable for patrons of the premises;
- the applicant is willing to accept any relevant condition the licensing authority may deem necessary in the public interest to impose on the licence (if granted) e.g. limit of alcoholic beverages consumed per patron;
- there are regular security patrols in the common areas of Brookfield Place which monitor patron safety at all times including ensuring that the access ways are clear and uncongested;
- the two perceived matters for the delegates' refusal of the application appear to be the eastern block toilet capacity arguably not being sufficient to accommodate the 157 Grill'd Brookfield patrons and the access path to the toilets not being protected from the elements, albeit the solution of umbrellas acknowledged by the delegate of the Director to be reasonable. However, the unsubstantiated assumption of congestion in the access path is a major contributing factor in the Director's refusal of the application;
- the Director's policy "Standards of Licensed Premises" provides guidance as to legislative requirements and criteria that are used when considering the suitability of premises to be licensed under the Act. As stated, the policy is to 'provide guidance only and is 'not an absolute' requirement to justify refusing a low risk quality restaurant application that has met the Public Interest criteria;
- the Director's policy is to be used in 'considering the suitability' of the premises to be licensed. In 'considering the suitability', the premises needs to be treated on their merits in their entirety as per the submissions made during the application process. This was justifiably acknowledged in the Director's determination, but which incorrectly refused the application due to an unsubstantiated assumption of congestion in the access pathway to the toilets.

Submissions on behalf of the Commissioner of Police

- 14 The Commissioner, the first intervener, intervened in the application proceedings on the grounds that “if the application was granted and/or conditions not imposed, public disorder or disturbance would be likely to result, or as to any other matter relevant to the public interest”.
- 15 As noted in the Director’s decision, the specific concerns of the first intervener relate to the intended manner of trade, the existing high outlet density and the existing alcohol related harm in the locality.
- 16 The first intervener recommended that should the application be approved, a number of conditions be imposed on the licence relating to permitted trading hours, entertainment restrictions, CCTV and drink standards.

Submissions on behalf of the Director of Liquor Licensing

- 17 The submissions on behalf of the Director, the second intervener, were detailed and thorough and in summary contained matters relating to:
 - the legal principles governing review;
 - the Public Interest Test;
 - the standard and suitability of premises in light of the available toilet facilities;
 - the delegate had regard to (but understood he was not bound by) the Department of Racing, Gaming and Liquor’s policy ‘Standard of Licensed Premises’ and its relevant provisions regarding the provision of toilets for licensed premises. The delegate found the following relevant facts:
 - (a) there is a consumer requirement for consumption of liquor at the premises ancillary to a meal;
 - (b) the premises are a unique style of restaurant of a type significantly different from the other food offerings within the Brookfield Place dining precinct;
 - (c) the premises are a low risk venue which are likely to result in minimal liquor related harm or ill-health;
 - (d) the premises are a restaurant within the meaning of the Act;
 - (e) the premises do not contain toilets;
 - (f) there are two sets of publicly accessible toilets to which the applicant’s patrons may resort, the food hall toilets and the eastern public toilets;
 - (g) the food hall toilets are approximately 150m from the premises;
 - (h) the pathway between the premises and the food hall toilets is convoluted, being “through the food hall and onto another level”;
 - (i) the food hall toilets are not open during all the hours of the applicant’s trade;

- (j) the eastern public toilets are approximately 40m away from the premises;
- (k) the pathway between the premises and the eastern public toilets leads past other licensed premises, including their entry and queuing area;
- (l) the pathway is not protected from the elements;
- (m) the width of the pathway is approximately 2.5m in places;
- (n) the eastern public toilets comprise male, female and disabled facilities and cater for up to 300 persons under the Building Code of Australia;
- (o) the eastern public toilets are already used by the Sushia licensed restaurant, seating 204 persons; the unlicensed Theobroma Chocolate Lounge, seating 50 persons; other retail businesses in the precinct; and by the Linton and Kay Gallery as “overflow” toilets for large events;
- (p) the premises, the subject of the licence application have a maximum occupancy of 157 persons;
- (q) the enclosure of the pathway from the premises to the eastern public toilets is not feasible;
- (r) a proposal that umbrellas be provided to patrons for use in inclement weather was “reasonable.”

18 The delegate concluded:

- the food hall toilets referred to in the application documentation were not suitable (for patrons of the premises) because they were too distant from the premises; the pathway between the premises and the food hall toilets was too convoluted; and the food hall toilets were not open during all the hours of the applicants trade;
- the eastern public toilets were inadequate because, while the distance between the premises and the toilets was “more appropriate” the pathway was uncovered and required patrons to negotiate a pathway only 2.5 metres wide in places and past the entry and queuing areas of nearby licensed premises;
- the eastern public toilets were already near capacity and that it was inappropriate to assign these toilets to the applicant “as a licensed premises”;
- that the applicant’s proposals that if necessary conditions on the licence relating to a limit of one alcoholic drink per person and operating the premises as a quick service restaurant where patrons are expected to stay for a maximum of 25-30 minutes would be ‘difficult if not impossible’ to enforce.

19 Therefore the delegate was not satisfied that the premises were of a sufficient standard or suitable for the conduct of a licensed restaurant and that “the proper development of the liquor industry” would not be advanced by the approval of “these inadequate patron toilet

facilities” under a restaurant liquor licence. It may be inferred from this remark that the delegate was not satisfied the grant of the licence was in the public interest.

- 20 It was submitted that although the premises are presently operating as a restaurant without a liquor licence and make use of the eastern public toilets, the delegate was entitled to conclude that it was inappropriate to countenance and reinforce the over-assignment of these toilets by the issue of a restaurant licence. Premises which are afforded the privilege of selling liquor are held to a higher standard than those which are not.
- 21 The question to be answered by the licensing authority is whether the premises to which the application relates are of a sufficient standard and suitable for the proper conduct of the business. The delegate was entitled to conclude that the grant of a restaurant licence for premises with inadequate toilet facilities would detract from the ‘proper’ development of the liquor, tourism and hospitality industries.
- 22 It was submitted that in relation to the issue of procedural fairness the applicant’s claim that it was not given an opportunity to comment on two documents, namely the email from the City of Perth dated 18 February 2013 and the email from Brookfield Commercial Operations Pty Ltd dated 15 May 2013 (“Sushia emails”) are not correct in that the applicant was given a reasonable opportunity to inspect and comment upon the Sushia emails but did not avail itself of that opportunity.
- 23 Whilst the Sushia emails, which were sourced from the Department of Racing, Gaming and Liquor’s file on the Sushia application were not provided to the applicant their contents were discussed with the applicant’s agent during a meeting with the premises inspector and premises manager at the Department of Racing, Gaming and Liquor on 18 July 2013. Further, by email dated 1 August 2013, the applicant’s agent confirmed the matters raised in the Sushia emails and advised that it was following up these matters with the applicant.
- 24 It was submitted that due to the safety, convenience and capacity concerns by the delegate in respect of the available toilet facilities, it is clearly open to the Commission to be satisfied:
- (1) that the premises are not of a sufficient standard or suitable for the proper conduct of a licensed restaurant; and
 - (2) that the grant of the application is not in the public interest.

Applicant’s responsive submissions

- 25 In its responsive submissions dated 6 March 2014, the applicant stated (in summary):
- the application is a ‘low risk’ application (as acknowledged in the decision) as opposed to a ‘high risk’ application;
 - the second Intervener’s comments about congestion of the access path are not supported by any cogent evidence – i.e., are unsubstantiated;

- the 'standard' and 'suitability' of the toilet facilities was the central issue of the decision and that the licensing authority was not bound by the Department's policy on 'Standard of Licensed Premises'. However it is undisputed fact that the application met all the requirements of the Act and Policies of the department with the exception of the singular contentious matter about the access way not being entirely protected from the elements;
- the applicant submitted significant mitigating factors in relation to the access pathway to the toilets not being protected from the elements;
- the only licensed premises that may have people queuing in the access pathway is Choo Choos which operates under a small bar licence and this is mitigated by the fact that there is no cogent evidence of queuing, there is a three metre wide access path outside Choo Choos, with CCTV surveillance 24/7 and on-foot security guards to ensure no queuing or milling outside licensed premises. Patron convenience and safety is of paramount importance;
- in relation to the pathway not being protected from the elements, the applicant has submitted significant mitigating factors including (but not limited to) the fact that the pathway has been designed and approved by qualified Access and Disability consultants, is on the lower level of the precinct protected on either side by building structures and overhead bridges, with non-slip flooring and commercial umbrellas available for use in inclement weather;
- there are examples of recently granted restaurant licences including Sushia (in Brookfield Place - pathway not entirely protected) and Don Tapa (at the E Shed Markets) where the pathway to the toilets is not protected from the elements and the flooring is not non-slip. The applicant understands this waiver of the Director's Policy was granted due to the heritage nature of the precinct – no different than Grill'd Brookfield within a heritage building;
- less than 10% of the access pathway is approximately 2.5 metres in width; with a 1.5 metre width being the standard minimum width required for public spaces as per BCA guidelines;
- Bar Lafayette should not be considered in the determination of this matter as it is on the west side of Grill'd Brookfield and there is clear physical delineation via fixed planter boxes that would make it impossible for patrons of the Trustee or Heritage Bar to interfere in the access pathway of Grill'd patrons accessing the eastern block toilets;
- Choo Choos has a maximum patron capacity of 90 patrons and is licensed as a small bar and not a nightclub that could raise the potential of milling and congestion – even single file queuing would take less than a metre of the three metre access way outside Choo Choos;
- the provision of umbrellas was acknowledged as reasonable and patron safety has been substantially addressed with the non-slip flooring, CCTV coverage 24/7 and live security patrols;

- the summary table provided by the applicant in its responsive submissions clearly demonstrates that the Commission should on full review of the index of documents and submissions of the applicant, approve the restaurant liquor licence to Grill'd Brookfield as it is in the public interest to do so;
- as can clearly be seen from the summary table, after considering all relevant requirements for the grant of a restaurant liquor licence, the only policy requirement not met was the access pathway to the toilets not being entirely protected from the elements;
- the applicant strongly believes that this one generally applied rule which has been mitigated by several supporting factors should not be a sufficient ground for the application to be refused.

Determination

- 26 Section 25(2c) of the Act provides that when conducting a review of a decision made by the Director, the Commission may have regard only to the material that was before the Director when making the decision.
- 27 In conducting a review pursuant to section 25 of the Act, the Commission is not required to find an error in the Director's decision, and is required to undertake a full review of the merits of the materials before the Director and make its own determination based upon those materials (*Hancock –v- Executive Director of Public Health [2008] WASC 224*).
- 28 Pursuant to section 25(4) of the Act the Commission may:
- (a) affirm, vary or quash the decision;
 - (b) make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance;
 - (c) give directions as to any questions of law reviewed, or give directions to the Director, to which effect will be given; and
 - (d) make any incidental or ancillary order.
- 29 Advancing the objects of the Act as set out in section 5, is also relevant to the public interest considerations (refer *Palace Securities Pty Ltd v Director of liquor Licensing (1991) 7 WAR 241*). The primary objects of the Act are:
- (a) to regulate the sale, supply and consumption of liquor; and
 - (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and

- (c) to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.

30 The Commission has considered:

- all of the materials before the delegate of the Director when making the decision;
- all written submissions filed by the applicant and the second Intervener in the review proceedings before the Commission.

31 Essentially the issue to be determined by the Commission is whether the applicant has satisfied the Commission that the granting of the application is in the public interest (section 38 (2)).

32 The Commission is of the view that:

- there are sufficient indicators of a consumer requirement for the consumption of liquor at the premises, ancillary to a meal;
- the business represents a low risk venue which is likely to result in minimal liquor related harm or ill health;
- there is unlikely to be any adverse impact on the amenity of the locality; and
- it is unlikely that offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity,

as a consequence of the grant of this licence.

33 Accordingly, the Commission is not persuaded by the representations made by the first intervener in this application.

34 However, it is apparent from the materials before the Commission that the main issue to be addressed is whether the premises to which the application relates are of a sufficient standard and suitable for the conduct of the business (section 37(1)(f)(i)).

35 In particular, the adequacy of the toilet facilities to cater for the patrons of the business requires close evaluation to determine whether they are of a sufficient standard.

36 The Director's Policy "*Standards of Licensed Premises*" provides guidance as to the legislative requirements and criteria that are used when considering the suitability of premises to be licensed under the Act (refer paragraph 12(i)).

37 The premises are relatively small with a maximum capacity of 157 patrons and presently operate as an unlicensed restaurant.

38 The Commission is satisfied that on the evidence, the only toilets suitable for use by the premises patrons are the eastern block toilets which are:

- approximately 35-40 metres from the premises;

- only accessible along a walkway which narrows to approximately 2.5 metres in places and leads past other licensed premises including their entry and queuing areas;
- not sufficiently protected from the elements and no measures (apart from the provision of umbrellas for patrons) can feasibly be taken which would protect patrons from the elements when accessing the toilets;
- already near full capacity due to their use by other tenants of Brookfield Place.

- 39 None of the above factors conform with the Director's policy *Standards of Licensed Premises* and collectively represent a significant departure from the general requirements specified to be used to determine whether or not premises should be licensed.
- 40 Whilst the licensing process is not bound by the Director's Policy, the general requirements relating to the standard of premises are based on well-established criteria to ensure that the public interest is met.
- 41 The Commission notes that the 24 May 2013 report of the Department's Senior Premises Inspector stated "The proposed public toilets do not comply with distance, access, protection or capacity requirements".
- 42 Whilst the applicant has presented a series of arguments (paragraph 12(ii) above) to address these shortcomings and also provided a number of mitigating factors (paragraph 13 above) to be considered, the fact remains that the location of the business in these premises is inappropriate for the purposes of being granted a restaurant licence.
- 43 Despite the nature of the business operation and the positive factors identified in paragraph 24 above, the Commission is not persuaded that the public interest will be best served by granting a liquor licence under circumstances where, by virtue of the non-compliance of toilet facilities, the premises are not of a sufficient standard and suitable for the conduct of the business.
- 44 The Commission considers that the analogies drawn by the applicant to licences issued to Don Tapa at the E Shed Markets in Fremantle, The Left Bank in East Fremantle, the Luxe Bar in Highgate and the Belgian Beer Café in Perth are not apposite to this application. The circumstances and situation of those premises and Grill'd Brookfield Place premises are demonstrably different in the distance from the licensed area to the toilets, the area of exposure to the elements and the capacity of the available toilets to meet the demand of the licensed premises as well as other users.
- 45 The Commission also finds that there is no persuasive evidence that the applicant has been denied procedural fairness whether in relation to the 'Sushia emails' or otherwise.
- 46 The Commission has paid no regard to the email from the City of Perth, dated 26 November 2013 nor to paragraphs 11 to 14 of the letter dated 23 June 2013 forwarded

by the applicant's representative as this is material that was not before the Director when making the decision and therefore cannot be considered under section 25(2c) of the Act.

47 Ultimately, the Commission considers that:

- the premises are not of a sufficient standard or suitable for the proper conduct of a licensed restaurant due to the lack of on-site patron toilets and the inadequacies of other available common access toilets;
- the object of the Act relating to the proper development of the liquor industry, the tourism industry and other hospitalities in the State would not be served or advanced by granting this application for a restaurant licence given the inadequate patron toilet facilities;
- there is no evidence to persuade the Commission to exercise its discretion pursuant to section 33 of the Act to grant the application.

48 Accordingly, the Commission determines that the decision of the delegate of the Director is affirmed and the application for review is refused.



EDDIE WATLING
ACTING CHAIRPERSON