

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: MASA INVESTMENTS PTY LTD

PREMISES: JAWS

PREMISES ADDRESS: SHOP 4, 580 HAY STREET, PERTH

APPLICATION ID: A000057168

NATURE OF APPLICATION: APPLICATION FOR GRANT OF A RESTAURANT LICENCE

DATE OF DETERMINATION: 2 OCTOBER 2015

Introduction

1. On 12 August 2014, Masa Investments Pty Ltd (“the Applicant”), made an application for the grant of a restaurant licence for premises to be known as *Jaws*¹ and situated at Shop 4, 580 Hay Street, Perth.
2. Pursuant to the provisions of s 17(1)(d) of the *Liquor Control Act 1988* (“the Act”), Hospitality Total Services (Aus) Pty Ltd has been approved to represent the Applicant in this matter².
3. The application is made pursuant to s 50 of the Act and was advertised in accordance with instructions issued by the Director of Liquor Licensing (“the Director”), which resulted in the lodgement of a notice of intervention by the Commissioner of Police (“the Commissioner”) pursuant to the provisions of s 69 of the Act.
4. Pursuant to the provisions of ss 13 and 16 of the Act, the application will be determined on the written submissions of the parties, which are summarised below.

The submissions of the Applicant

5. The evidence lodged by the Applicant included a number of submissions, together with a Public Interest Assessment (“PIA”), which thoroughly examined the application in respect of most matters. Notwithstanding this, I consider it germane to note that the PIA did not address the issue of the proposed licensed premises not having its own toilet facilities or include submissions in relation to the matters set out in the Director’s *Standards of Licensed Premises* policy.

¹ The proposed licensed premises also referred to as *Jaws Sushi Town Hall* and other variations of that name throughout the Applicant’s submissions.

² Any reference in this determination to the submissions of “the Applicant” is also a reference to the submissions of its representatives.

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6. Despite this omission, the PIA did provide an introduction to the Applicant and explained its desire to “offer residents and workers of Perth, as well as those resorting to the locality, a truly authentic Japanese Restaurant experience, to enhance their appreciation of Japanese cuisine and culture”, as well as some generalised background information on the location of the proposed premises. The PIA also included:
- (a) the Applicant’s analysis of the Act’s legislative framework;
 - (b) background information on the Applicant and its directors, as well as the restaurant’s Head Chef;
 - (c) information on the location and locality relevant to the application;
 - (d) details of:
 - (i) the proposed trading hours;
 - (ii) the Applicant’s proposed drinks menu, which will include a selection of Australian and Japanese beers, as well as a choice of Japanese Sake and Australian wines and non alcoholic beverages, such as soft drinks, juices, water, tea and coffee; and
 - (iii) the Applicant’s staff training program;
 - (e) public interest submissions, including an analysis of 52 patron surveys in order to establish that the grant of the licence will to cater for the requirements of consumers for liquor and related services;
 - (f) an analysis of the matters prescribed in s 38(4) of the Act; and
 - (g) a summary of the application, together with a list of attachments.
7. In relation to the public interest, the Applicant identified a number of issues as relevant, including that:
- (a) *Jaws Sushi Town Hall* will provide a quality, well managed, authentic Japanese dining venue that will not cause harm or ill-health to the surrounding locality and will further assist in increasing the diversity available within the locality;
 - (b) the option for patrons to purchase a select range of beverages (alcoholic or non-alcoholic) will complement the style of food on offer at *Jaws*; and
 - (c) the specialised Japanese Restaurant increases the diversity of restaurants available in the locality.

Representations of the Commissioner

8. The representations of the Commissioner are advanced through an analysis of the Applicant's submissions, including its proposed manner of trade and the outlining of conditions, which in the Commissioner's view, will ensure that the Applicant adheres to their intended manner of trade as outlined in the PIA.
9. The Commissioner also noted that the Applicant's PIA made no reference to surveillance strategies at the premises, particularly given that this is a recommended strategy in the *Designing Out Crime Planning Guidelines* published by the Western Australian Planning Commission in June 2006 and lodged by the Applicant in support of its application. Accordingly, the Commissioner recommended that a condition of the licence, if granted, should require the Applicant to install a Closed Circuit Television ("CCTV") system throughout the premises, including the entry and exit points.
10. Other recommended conditions related to the imposition of:
 - (a) drink standards;
 - (b) dress standards; and
 - (c) two general conditions relating to:
 - (i) the playing of amplified music at the premises; and
 - (ii) setting of a maximum accommodation number on the licence in accordance with that set by the local authority.

Determination

11. The onus is on the applicant to satisfy the licensing authority, on the balance of probabilities, that the granting of the licence is in the public interest (ss 38 and 16(1)(b)(ii) of the Act).
12. Section 38(2) of the Act clearly places a positive burden on an applicant to demonstrate that the granting of the application is in the public interest. This means that an applicant cannot simply show that the grant of a licence will not be contrary to the public interest, but must demonstrate a clear public benefit through the grant of the application. Furthermore, the licensing authority is also entitled to take into consideration the factual matters set out in s 38(4) of the Act (refer *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227). As such, the level and degree of evidence to be submitted by an applicant will vary depending upon the facts and circumstances of each case. In addition, the courts have found that applications under the Act cannot proceed on the basis of any legal or factual presumption in favour of approval, or on the expectation that the commercial interests of an application will coincide with the public interest.

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13. Without limiting the matters the licensing authority may consider for the purposes of s 38(2), s 38(4) of the Act prescribes the following matters to which the licensing authority may have regard in determining whether granting the application is in the public interest:
- (a) the harm or ill-health that might be caused to people, or any group of people, due to the use of liquor; and
 - (b) the impact on the amenity of the locality in which the licensed premises, or proposed licensed premises are, or are to be, situated; and
 - (c) whether offence, annoyance, disturbance or inconvenience might be caused to people who reside or work in the vicinity of the licensed premises or proposed licensed premises; and
 - (d) any other prescribed matter³.
14. Section 33 of the Act provides that, subject to the Act, the licensing authority has an absolute discretion to grant or refuse an application on any ground, or for any reason, that the licensing authority considers in the public interest. In this regard, s 33(2) of the Act provides that an application is required to be dealt with on its merits, after such enquiry as the licensing authority thinks fit and —
- (a) may be refused, even if the applicant meets all of the requirements of the Act; or
 - (b) may be granted, even if a valid ground of objection has been made out.
15. Finally, it should also be noted that the concept of the public interest is not limited to the express objects and provisions of the Act and in *McKinnon v Secretary, Department of Treasury* [2005] FCAFT 142, Tamberlin J observed that the expression 'in the public interest' directs attention to a determination that best serves the advancement of the interest or welfare of the public, society or nation.
16. Therefore, in making a determination that is in the public interest, I am required to exercise a discretionary value judgement confined only by the scope and purpose of the Act. In this regard, the factual matters which the licensing authority is bound to take into account in such a determination are those relevant to the primary and secondary objects of the Act (also refer to *Woolworths Ltd v Director of Liquor Licensing*, supra).
17. The general requirements relating to licences and permits are set out in s 37 of the Act, with s 37(1)(f) providing that an application for the grant of a licence shall not be granted, unless the licensing authority is satisfied that the premises to which the application relates are, or when constructed will be, of sufficient standard and suitable for the proper conduct of business to be carried on there.

³ As at the date of this determination, no other matter has yet been prescribed.

18. To give some practical effect to these provisions, the Director has published a policy on the *Standards of Licensed Premises*, which provides the following guidance on the criteria that will be used when considering the suitability of premises to be licensed under the Act:

“The following general criteria will be used to determine whether or not premises should be licensed:

- a) All buildings must conform to the requirements of all Acts of Parliament, regulations and by-laws, including the *Building Code of Australia*.
 - b) Applications for the grant or removal of a licence are required to be accompanied by the information detailed in the relevant lodgement guide.
 - c) Premises involved in the handling of food will be subject to the requirements of the Food Safety Standard 3.2.2 and may also be subject to separate licensing requirements pursuant to the Health Act, *Food Act 2008*, and Local Authority by-laws...
 - d) Licensed premises, and in some cases parts of licensed premises, *may* be classified as public buildings and be subject to the requirements of the *Health (Public Buildings) Regulations 1992* (as amended).
 - e) In addition to the requirements of the *Health Act 1911* and *Food Act 2008*, the licensing authority, in taking into consideration the nature of the business to be conducted at the premises, can impose specific requirements in respect of bars, toilets and the premises' construction.
 - f) Licensed premises must be completely separate and distinct venues which are able to operate independently of any other venue. Patrons cannot be permitted to enter a licensed premise through another licensed premise.”
19. In relation to toilet facilities, the policy generally provides that toilets for licensed premises 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, although an exception may be made for restaurants that are part of a shopping complex, where toilets are provided in the centre or complex for the use of the tenant's patrons. In relation to this matter, the policy states that “toilets must be in close proximity of the premises and the operator (applicant/licensee) must ensure that patrons have access to toilets at all times during which the restaurant operates.”
20. Although omitted from its PIA, the plans of the premises and enquiries by the Inspector of Licensed Premises (“the Inspector”), established that the premises does not have its own toilet facilities and that the Applicant is therefore seeking approval to share toilets located within the *Equus Arcade*, in which the proposed premises are situated.

The relevant toilets are located approximately 30 metres from the proposed licensed premises.

21. According to the Inspector, *Equus Arcade* is made up of multiple commercial tenancies and based on the site plan lodged by the Applicant. It was ascertained that approximately 26 other tenancies are located on the same level as the proposed licensed premises. The Inspector also noted that the Applicant had failed to lodge submissions around the use of those toilet facilities, which lead to further verbal enquiries with the Applicant's representative. As a result, the Applicant lodged written permission from Carmen Berridge, Strata Manager of the Council of Owners of *Equus Arcade*, dated 2 December 2013, for *Jaws Sushi* for patrons of *Jaws* to access the *Equus* toilet facilities and for *Jaws Sushi* staff to use the basement toilet facilities.
22. However, after a site visit on 17 September 2014, the Inspector found that the proposed toilets had 'staff only' signage on them and concluded that:

“...it appears that the building has not been designed to accommodate food outlets under the BCA⁴. With the other tenancy using the facilities for staff there may not be enough [toilet] capacity under the BCA. If there is a capacity issue under the BCA the grant of a restaurant licence may not be in the public interest...”

23. The Inspector also noted that Applicant had not lodged any details on how their patrons will access the toilet facilities, given that the toilets are locked at all times, with staff access being via a swipe card.
24. Consequently, the Schedule of Requirements forwarded to the Applicant on 22 September 2014, included the following requirements:
 - (a) that the Applicant provides details on the other tenancies within the *Equus Arcade* who have permission from the Strata Manager to access the toilets;
 - (b) that the Applicant provides details how the proposed toilets cater for the size of the premises under the BCA, including information on:
 - (i) tenancy type;
 - (ii) tenancy right of use of the toilets (i.e. staff only or staff and patrons);
 - (iii) maximum number of staff at tenancy at any one time; and
 - (iv) size of the tenancy; and
 - (c) that the Applicant must lodge details on how it intends to provide patrons with access to the proposed toilet facilities.

⁴ Building Code of Australia.

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25. On 18 March 2015, the Applicant advised that:
- (a) *Jaws* has three swipe cards for patron use to the *Equus Arcade* toilets, which are held at the service counter by the staff;
 - (b) any patron who wishes to use the toilets will be escorted by a staff member who will swipe the card and permit the patron access to the toilets; and
 - (c) the access is totally under cover with CCTV coverage to capture persons entering the toilet facilities.
26. That Applicant also lodged a spreadsheet detailing number of toilet facilities in the *Equus Building* and their current usage and submitted that:
- (a) it has irrevocable rights for *Jaws Restaurant* patrons to use the *Equus Arcade* toilet facilities as per the lease agreement and strata approval;
 - (b) *Jaws Restaurant* staff will use the toilets in the basement;
 - (c) no other licensed facility uses the *Equus Arcade* toilets;
 - (d) the local government authority has issued an unconditional s 39 and s 40 certificate; and
 - (e) there has not been any issue with *Jaws Restaurant* patrons having access to the *Equus Arcade* toilets.
27. The relevant spreadsheet shows that the:
- (a) “retail staff toilet” facilities consist of:
 - (i) two female water closets;
 - (ii) two male water closets;
 - (iii) one urinal; and
 - (iv) one handicap toilet,and are proposed to deal with 128 potential users, comprising approximately 80 persons who work for up to 25 businesses at the *Equus Arcade* and 48 patrons of *Jaws*; and
 - (b) basement toilets of one female water closet, one male water closet and one handicapped toilet are proposed for use by 61 or more persons, including six or more *Jaws Sushi Restaurant* staff.
28. Based on the information contained in the spreadsheet, the Inspector found that the toilet facilities in the *Equus Building* are insufficient for the proposed licensed premises under the BCA and noted that the Applicant appeared to be relying on the fact that the

City of Perth has issued an unconditional s 39 certificate in order to demonstrate compliance with the BCA.

29. While ss 39 and 40 of the Act deal with the requirement for a number of specified applications, including an application for the grant of a licence, to be accompanied by certificates from the local government in relation to:

(a) whether or not the premises comply (s 39 of the Act) with all relevant requirements of —

(i) the *Health Act 1911*;

(ii) the *Food Act 2008*;

(iii) any written law relating to the sewerage or drainage of those premises;

(iv) the *Local Government Act 1995*;

(v) the *Local Government (Miscellaneous Provisions) Act 1960*; and

(b) the proposed use of the premises being compliant with the written laws relating to planning (s 40 of the Act),

the Director's policy clearly provides that the Director's standards are in addition to the requirements specified in s 39 of the Act.

30. Accordingly, on 19 March 2015, the Inspector requested more detailed responses to the issues raised in the Schedule of Requirements.

31. On 21 May 2015, the Applicant sought to address the outstanding information in relation to the Schedule of Requirements, by:

(a) referring to separate submissions from its legal representative, Mr Patrick White, Civil Courts and Maritime Lawyer, in relation to toilet facilities at *Equus Arcade* (see paragraph 32 below);

(b) referring to correspondence from the City of Perth regarding that body being satisfied that patrons of *Jaws Restaurant* have access to *Equus Arcade* toilets as per the BCA requirements and that no further restaurant uses will be approved within the *Equus Arcade* with existing toilet facilities; and

(c) submitting that by enabling patrons entry to the toilets in the company of a staff member, the Applicant is merely trying to offer a more personalised service to its patrons.

32. Further evidence from the Applicant was lodged in the form of a letter, also dated 21 May 2015, from its lawyer Mr Patrick White, who had also sought information for the Applicant on the toilet facilities, in compliance with the information sought in the Schedule of Requirements. In this regard, Mr White lodged the same spreadsheet as was previously lodged by the Applicant on 18 March 2015 and advised that:

“...the spreadsheet clearly identifies the toilet use allocated to my client and the patrons of the Jaws Sushi Restaurant.

... I am instructed by my client that patrons of Jaws Sushi Restaurant enjoy full access to the Equus Arcade Toilets.”

33. After consideration of both of the Applicant’s submissions of 21 May 2015, the Inspector maintained the view that the number of toilets intended for use in connection with the proposed licensed premises do not comply with the requirements of the BCA; are insufficient for the numbers of persons using them and would therefore be unsuitable to be approved in connection with a licensed premises.
34. On 9 September 2015, the Applicant lodged further submissions in which it summarised its evidence in relation to the proposed toilet facilities and further submitted that “the one spreadsheet issued by the Strata, cannot be a valid reason that the application not be approved.”
35. In my view, the issues surrounding the suitability of the proposed licensed premises can be summarised as:
 - (a) the toilet facilities are located approximately 30 metres from the proposed licensed premises;
 - (b) the relevant toilets are not *bona fide* patron toilets given that they are locked and are in fact staff toilets;
 - (c) the relevant toilet facilities have insufficient capacity under the BCA for the numbers of persons using them;
 - (d) the relevant toilet facilities are already being used at capacity, given their use by other tenants of the *Equus Arcade*; and
 - (e) the Applicant’s proposal for staff to escort patrons to the toilet facilities and to unlock them for their use, would appear to be inconsistent with the public’s expectation for a licensed restaurant.
36. I also note that such issues are not unique to this application.
37. In matter LC 28/2014, the Liquor Commission considered that the distance of the toilet facilities some 25 to 45 metres from the proposed premises, was a relevant consideration, as was the fact that the toilet facilities were shared by six other businesses and determined that:

“the granting of the application is not in the public interest, as the provision of toilet facilities is, in the opinion of the Commissioners, inadequate in all the circumstances.”

38. Similarly, in matter LC 32/2014, the Commission considered that the:

- (a) Director's *Standards of Licensed Premises* policy provides guidance on the legislative requirements and criteria used to determine the suitability of premises to be licensed under the Act; and
- (b) relevant standards included in the policy are based on well-established criteria to ensure that the public interest is met.

39. With these relevant factors in mind, the Commission then found that it was:

“...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.

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.

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Whilst the applicant has presented a series of arguments... to address these shortcomings and also provided a number of mitigating factors... 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.

Despite the nature of the business operation and the positive factors identified... 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 noncompliance of toilet facilities, the premises are not of a sufficient standard and suitable for the conduct of the business.”

40. While I note that the circumstances of the above two matters are not entirely the same as those raised in the current application, I consider that they are nonetheless analogous to the consideration of whether or not the proposed premises are of a sufficient standard and suitable for the conduct of the business.

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41. In this regard, the onus is on the applicant to satisfy the licensing authority, on the balance of probabilities, that:
- (a) the granting of the licence is in the public interest;
 - (b) the premises are of a sufficient standard and suitable for the conduct of the business to be carried on there; and
 - (c) that the proposed manner of trade is compliant with any relevant prerequisites of the Act or class of licence sought.
42. Accordingly, advancing the objects of the Act as set out in s 5, is crucial to the licensing authority's public interest considerations (refer *Palace Securities Pty Ltd v Director of Liquor Licensing* (1991) 7 WAR 241).
43. Section 5(1) prescribes the Act's primary objects as:
- (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.
44. In carrying out its functions under the Act, s 5(2) further provides that the licensing authority shall have regard to the Act's primary objects and also the following secondary objects:
- (a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; and
 - (b) to provide adequate controls over, and over the persons directly and indirectly involved in, the sale, disposal and consumption of liquor; and
 - (c) to provide a flexible system, with as little formality or technicality as may be practicable, for the Act's administration.
45. In this regard, while I have no concerns regarding the potential for liquor related harm or ill-health arising from the grant of the application, I am concerned with how an application can advance the Act's regulatory object (refer s 5(1)(a) and s 5(1)(b) of the Act) when it does not comply with the general requirements relating to the standard of licensed premises, particularly when regard is had to the proper development of the liquor industry, as required by s 5(1)(c) of the Act.

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46. As already observed, in considering whether the grant of the application is in the public interest, I must also be satisfied that the Applicant can comply with the relevant provisions of the Act.
47. In relation to the suitability of the premises, I consider that there is nothing in the evidence to lead me to question the Inspector's analysis of the suitability of the toilet facilities under the BCA and the Director's policy. Accordingly, I concur with the observations of the Inspector and find that the proposed toilet facilities do not conform with the Director's *Standards of Licensed Premises* policy and in fact represent a departure from the general requirements specified for use in determining whether or not premises should be licensed.
48. Furthermore, I do not consider that the Applicant, or its approved representative, who was present in both of the aforementioned matters before the Liquor Commission, have provided any cogent reason as to why the Director's policy should not apply in relation to this application, although the evidence before me makes it abundantly clear that the Applicant was aware of the requirements of the policy.
49. While the rules of evidence do not apply to proceedings before the licensing authority (refer section 16(7) of the Act), decisions of the authority must be made on the balance of probabilities and be based on the evidence before it. Therefore, while s 5(2)(e) of the Act requires the licensing authority to provide as little formality or technicality as may be practicable, the evidence of the parties needs to be relevant, reliable and logically probative to assist the licensing authority to assess the probability of the existence of the facts asserted in each case (refer *Busswater Pty Ltd v Director of Liquor Licensing* (LC 17 of 2010)).
50. Accordingly, I can give little, if any, weight to the Applicant's submission of 9 September 2015 that seek to undermine the value of its own evidence relating to the numbers of the relevant toilet facilities and persons using those facilities.
51. I also find that I can attribute little, if any, weight to the Applicant's apparent reliance upon the issue of the ss 39 and 40 certificates by the City of Perth to address the number of toilet facilities failing to comply with the requirements of the BCA, particularly given my earlier observation that the requirements of the Director's *Standards of Licensed Premises* policy are "in addition to" those of the *Health Act 1911* and the other legislative requirements listed in the policy.
52. Therefore, I find that:
- (a) the premises is 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;
 - (b) the public interest will not be served by granting a liquor licence under circumstances where, by virtue of the noncompliance of toilet facilities, the

premises are not of a sufficient standard and suitable for the conduct of the business;

- (c) 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 proposed;
 - (d) the Applicant has not demonstrated a clear public benefit to justify the grant of the application; and
 - (a) there is no evidence before me to persuade me to exercise my discretion pursuant to s 33 of the Act to grant the application.
53. Having considered all the submissions and evidence before me, I have determined that the proposed premises are not of a sufficient standard to be suitable for the conduct of the business and that the Applicant has therefore failed to discharge its onus under s 38(2) of the Act.
54. Accordingly, the application is refused.
55. 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.
56. 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