

DECISION OF DIRECTOR OF LIQUOR LICENSING

APPLICANT: AUTO & CO PTY LTD

PREMISES: ATOMIC ESPRESSO CAFE

PREMISES ADDRESS: SHOP 1, TENANCY 8, 21-23 MENDS STREET SOUTH PERTH

APPLICATION ID: A276331941

NATURE OF APPLICATION: APPLICATION FOR THE GRANT OF A RESTAURANT LICENCE

DATE OF DETERMINATION: 29 AUGUST 2019

Introduction

1. On 12 December 2018, Auto & Co Pty Ltd (the applicant) applied to the Director of Liquor Licensing (the Director) for the grant of a restaurant licence in respect of premises situated at Shop 1, Tenancy 8, 21 to 23 Mends Street, South Perth (Form 10) and known as the Atomic Espresso Café.
2. The application was made pursuant to ss 50 and 68 of the *Liquor Control Act 1988* (the Act).
3. The application was processed in accordance with instructions issued by the Director and no objections or interventions were lodged.
4. Together with the application for the restaurant licence, the applicant, in accordance with s 60(4)(ca) of the Act, also lodged an application for the grant of an extended trading permit to authorise the sale and supply of liquor for consumption, whether or not ancillary to a meal supplied by the licensee (for not more than 120 persons), to apply to the whole of the licensed premises, and an application in accordance with s 104 of the Act for approval of a rental arrangement with Silverleaf Investments Pty Ltd, the freehold owner of the proposed premises.
5. During the application process Daniel Pearce, Premises Inspector, by letter dated 18 December 2018 (Schedule of Requirements attached) advised the applicant as follows:

“Toilets

The Director’s policy titled – ‘Standard of Licensed Premises’, details specific structural and design requirements. In relation to the location of the toilet facilities, it states...

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 tenant's patrons. Nevertheless, 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.

The Department does not consider the location of the toilets proposed to be utilised under the licence as being "in close proximity to the premises", in that patrons must:

- 1. Walk approximately 80m away from the venue along an uphill incline to the opposite end of the shopping arcade;*
- 2. exit the arcade through sliding doors to a foyer;*
- 3. wait for an elevator to take patrons to the basement level (two levels below the ground level access point).*
- 4. exit the lifts and walk a further 5m to the toilets.*
- 5. Patrons then must reverse points 1-4 to return to the premises."*
6. In the same letter, the applicant was requested to lodge submissions addressing the Director's policy and why the toilets should be considered to be "in close proximity to the premise" and the premises considered suitable.
7. By letter dated 14 February 2019, I advised the applicant that after taking into consideration its submissions dated 21 December 2018 I concluded that the proposed toilets cannot be deemed to be located "in close proximity" of the proposed premises and provided the applicant with a further opportunity to lodge any further information or evidence that the Director's policy regarding toilets should not apply and that the grant of the applications were in the public interest.
8. Amongst other things my letter dated 14 February 2019 included:

"Any further information lodged must include submissions confirming that the whole of the proposed premises are covered by the applicant's lease and there is no need for an extended trading (area) permit in accordance with section 60(4)(h) of the Act; why it is in the public interest to approve the section 104 arrangements between the applicant and the freehold owner given the fact that the proposed premises do not comply with the Director's policy; and why the decision of the Liquor Commission of WA [LC 28/14] (copy enclosed) should not be taken into account."
9. The applicant lodged submissions dated 8 March 2019 which reiterated its former submissions and included two letters of support.
10. Pursuant to ss 13 and 16 of the Act, the application was determined by me, on the papers, and after consideration of the information presented, I concluded that the proposed premises were not suitable to be approved as licensed premises; and that there was no

public interest reason to depart from the Director's Policy on the "*Standard of licensed Premises*".

11. Accordingly, a notice of decision dated 4 April 2019, was issued to the applicant pursuant to s 18AA of the Act, in which the application for the restaurant licence was refused.
12. By emails dated 5 April 2019 and 2 May 2019 the applicant requested written reasons for the notice of decision, in accordance with s 18AA(4) of the Act.

The application

13. The applicant sought the grant of a restaurant licence for premises situated at Shop1, Tenancy 8, 21 to 23 Mends Street, South Perth under the Quest South Perth Foreshore Serviced Apartments.
14. The proposed licensed premises comprise:
 - kitchen of approximately 38m²;
 - coolroom of approximately 9m²;
 - servery of approximately 18m² with a 2m service counter;
 - take-away servery of approximately 5m²;
 - internal dining of approximately 81m²; and
 - an alfresco dining area of approximately 22m².
15. The applicant lodged a Public Interest Assessment (PIA) to support its application. (PIA identified proposed premises as Tenancy 7) The PIA provided information on the background of the applicant, the locality, its intended manner of trade, harm minimisation initiatives to be adopted, social health indicators and demographics of the area and the likely impact the grant of the restaurant licence would have on the amenity of the area.

Determination

16. Pursuant to s 33 of the Act the licensing authority has an absolute discretion to grant or refuse an application under the Act on any ground, or for any reason, that the licensing authority considers in the public interest, provided that the application is dealt with on its merits within the scope of the Act (refer *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC; and *Palace Securities v Director of Liquor Licensing* (1992) 7 WAR).
17. In determining whether an application should be granted "in the public interest" the licensing authority, is required to exercise a discretionary value judgement within the scope and purpose of the Act (refer *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; *O'Sullivan v Farrer* (1989) 168 CLR 210; and *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241. That is, consideration must be given to the objects of the Act as specified in s 5 and regard may be given to the matters prescribed in s 38(4) of the Act.
18. In *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 Tamberlin J said:

The reference to "the public interest" appears in an extensive range of legislative provisions upon which tribunals and courts are required to make determinations as to what decision will be in the public interest. This expression is, on the authorities, one that

does not have any fixed meaning. It is of the widest import and is generally not defined or described in the legislative framework, nor, generally speaking, can it be defined. It is not desirable that the courts or tribunals, in an attempt to prescribe some generally applicable rule, should give a description of the public interest that confines this expression.

The expression "in the public interest" directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.

19. In determining whether an application should be granted "in the public interest" consideration must be given to the objects of the Act as specified in s 5 of the Act.
20. The primary objects of the Act, as set out in s 5(1) are:
 - to regulate the sale, supply and consumption of liquor;
 - to minimise harm caused to people, or any group of people, due to the use of liquor; and
 - to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.
21. The secondary objects as set out in s 5(2) are, to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State; to provide adequate controls over persons directly or indirectly involved in, the sale, disposal and consumption of liquor; to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act; and to encourage responsible attitudes and practices towards the promotion, sale supply, service and consumption of liquor that are consistent with the interests of the community.
22. In this matter, the applicant sought to re-establish a licensed restaurant in the redeveloped shopping arcade. The proposed premises do not include toilet facilities and the applicant during the application process was advised that the proposed premises did not meet the Director's Policy "Standard of Licensed Premises".
23. The applicant's former licensed premises situated in the shopping arcade also did not include toilets within the defined licensed premises. However, the toilets were located on the same level approximately 50 metres away and accessed via the shopping mall.
24. Section 37 of the Act prescribes the pre-requisites for the grant of licences, etc., with s 37(1)(f) of the Act providing that an application for the grant of a licence, shall not be granted by the licensing authority, unless the authority is satisfied that the premises to which the application relates are of a sufficient standard and suitable for the proper conduct of business on there.
25. In this regard, I acknowledge that the Act does not prescribe a minimum standard for premises, which must be satisfied, for all of the various types of liquor licences which may be applied for under the Act. However, s 33(7) of the Act provides:

"Where the licensing authority is to determine whether any premises are of a sufficient standard or suitable for the proper conduct of any business –

- (a) *the class of licence or kind of permit sought, and the obligations thereby imposed and the accommodation and facilities required; and*
- (b) *the customary requirements of those persons from whom the applicant would ordinarily be expected to derive trade; and*
- (c) *any requirements made known, or reasons appearing, in a certificate under section 39 or section 40; and*
- (d) *any report submitted, or intervention made, under section 69,*

shall be taken to be relevant and amongst the matters to which consideration should be given.”

26. Also, r 11 of the *Liquor Control Regulations 1989* (the regulations) provides that floor plans which accompany an application for a liquor licence for premises to which the application relates, must among other things show the uses of each room and the fit-out details for all toilets.
27. To provide guidance on the requirements that will be used to assess the suitability of premises to be licensed under the Act, the Director has developed and published his *Standard of Licensed Premises* policy. The Director in developing his policy acknowledged that premises are not only built to comply with the Act but must be planned and built in accordance with the relevant building, health and zoning regulations.
28. While I acknowledge that at times conflict may arise between the authorities in respect of sanitary requirements, the Director’s policy in respect of toilets, provides:
 - Separate male and female toilet facilities, which include hand-wash basins, are required for all premises.
 - Toilets ideally should be of a masonry construction with a concrete floor, and with ducted plumbing and cisterns. If of timber or steel construction, walls are required to be strengthened. For example, compressed fibro cement sheeting, of not less than 18mm thickness would be a suitable material to provide strengthening.
 - Floor and walls surfaces (to a height of 1.8 meters and excluding airlocks) are to be of a smooth, impervious, non-slip, easily washable and hard wearing nature.
 - 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 the complex for the use of the tenant’s patrons. Nevertheless, 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.

- Ducted plumbing (or equivalent to protect the plumbing from patron interference) is required in all hotels (including small bar and tavern), nightclub and casino category

licences. Ducted plumbing does not apply to restaurants, clubs, producers, wholesalers and certain special facility licences.

29. The Director's policy also states that licensed premises must be completely separate and distinct venues which are able to operate independently of any other venue; and provides guidance to licensees as to the Director's expectations as to the standard that toilets on licensed premises, should be maintained.
30. Reference to the Director's policy is contained in the relevant application kit for the grant of a licence provided by the Department of Local Government, Sport and Cultural Industries. At the very start of the application process, applicants are advised that plans and specifications of licensed premises are required and applicants are also referred to Information Bulletin 25 on *Plans and Specifications* and to the Director's *Standards of Licensed Premises* policy.
31. In this case, the premises to which the application relates do not include toilet facilities, the toilets proposed are not on the same level, but located two levels down in the basement, over 80 metres away and are only accessible by an elevator.
32. In responding to the matters raised by the Inspector of licensed premises, the applicant in its submissions dated 21 December 2018 referred to a number of other premises which have been granted restaurant licences without toilet facilities and submitted that the application should be granted in the public interest on the following:
 - The location of the toilets in the same shopping centre,
 - The well-lit walkway being the route to the toilets,
 - The CCTV throughout the shopping centre,
 - The proximity of the toilets to the lift on level B,
 - The low-risk Restaurant Licence,
 - Patrons at the premises remain on the premises for limited periods of time only,
 - Precedent determinations have permitted to use of toilets further away from a Restaurant Licensed premises,
 - To date no concern has been raised by patrons about the distance to the toilet,
 - The internal walkway is fully protected from the elements,
 - The high-quality standards of the new toilet facilities,
 - The Council have approved the toilet amenity as it complies with BCA requirements, and
 - All recent new shopping centre redevelopments have toilet facilities external to the F&B premises that meet the contemporary expectations of consumers to licensed premises.
33. In responding to my letter dated 14 February 2019, the applicant in its submissions dated 8 March 2019 reiterated its submissions dated 21 December 2018 and included letters of support from John McGrath MLA, Member for South Perth and Brad Pike, JMG Building Surveyors.

34. Mr Pike in his letter dated 7 March 2019 included:

“This is to confirm that, as the Building Certifier for the development, the public toilet facilities were reviewed and deemed compliant with the NCC to serve all tenancies throughout the ground floor.

Furthermore, it is our expert opinion that the facilities available in the Shopping Centre are universal and suitable for patrons from the Atomic Espresso Café dining and licensing facility.”

35. While I acknowledge Mr Pike’s opinion, the Director’s relevant policy has been established for many years, as noted by His Honour Judge Greaves, in the matter of an application for a restaurant licence by *Michael Hurst and Marjorie Camila Hurst for a Review of a Decision of the Director made on 28 February 1992* [LLC No 25/92], who observed that:

“...it quite clear that it is the policy of the Director of Liquor Licensing to require adequate toilet facilities to be located in or immediately adjacent to restaurant premises save in an exceptional case. In my opinion, that is a policy which he is entitled to have formed and applied in this and other cases to govern the exercise of his discretion in ordinary cases, provided that he is prepared to depart from the policy in exceptional cases. See Hotop, *Principles of Australian Administrative Law*, Sixth Edition, at 236. I am of the opinion that the policy of the Director of Liquor Licensing which I have identified is a policy which has been well known in the industry in Western Australia for many years, if not to many members of public using licensed premises. It is a policy which takes into account the sort of criteria referred in s.33(7)(a)(b)...”

36. Further, in *Re Romato; Ex Parte Mitchell James Holdings Pty Ltd* [2001] WASCA 28, McLure J observed that where a decision maker adopts a policy, it is entitled to apply that policy, “provided applicants are given an opportunity to show that there are exceptional reasons why it should not be applied in their case.”
37. The Director published his policy on “*Standards of Licensed Premises*” to provide guidance to the liquor/hospitality industry of the requirements which will be taken into consideration in determining the suitability of relevant premises to be licensed premises. In this regard, while the Director’s policy has been amended, from time to time to meet the developing nature of the liquor industry, the tenor of the Director’s requirements has remained constant to ensure that licensed premises meet the requirements and expectations of consumers for liquor and related services. In this regard, in my opinion, toilet facilities are a related service which should be provided by licensees and that it is an expectation of consumers who resort to licensed premises that toilets facilities are provided thereon or at least in respect of restaurants in close proximity.
38. In this case, the proposed licensed premises do not include toilet facilities. The toilets are located in the basement, the distance of the toilets away from the proposed premises is over 80 metres away and they can only be accessed, via a lift.
39. Therefore, I concluded that the proposed premises do not comply with the Director’s policy as the location of the toilets cannot, in my opinion, be considered to be in close proximity of the proposed licensed premises.

40. In considering the applicant's submissions and taking into consideration the location of the proposed licensed premises and that packaged liquor can be readily available in the locality, I am not satisfied that any public interest reason exists to satisfy me to exercise my discretion under s 33 of the Act to depart from the Director's policy and find the premises suitable to be licensed.
41. Accordingly, as I concluded that the proposed premises are not suitable, the application was refused.
42. If the applicant is dissatisfied with this outcome the applicant 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 applicant receives notice of this Decision.



Eric Romato

DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING



Department of
**Local Government, Sport
and Cultural Industries**

Your Ref:

Our Ref: A276331941

Enquiries: Richard Duncan
☎ (08) 6551 4810

Auto & Co Pty Ltd
Atomic Espresso Cafe
PO Box 54
SOUTH PERTH WA 6951

Dear Sir/Madam

APPLICATION FOR THE GRANT OF A RESTAURANT LICENCE: ATOMIC ESPRESSO CAFE

I refer to the application lodged by Auto & Co Pty Ltd on 12 December 2018 and your request for reasons for decision following its refusal by letter dated 4 April 2019.

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

Yours faithfully

A handwritten signature in black ink, appearing to read 'R. Duncan', with a stylized flourish extending to the right.

Richard Duncan

29 August 2019

cc: Liquor Enforcement Unit
[Enc]