

Liquor Commission of Western Australia

(Liquor Control Act 1988)

Applicant: Mad Mex Fresh Mexican Grill Pty Ltd
(represented by Mr Mario Sequeira of Hospitality Total Services (Pty) Ltd)

Interveners: Commissioner of Police

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

Commission: Mr Jim Freemantle (Chairman)
Ms Helen Cogan (Member)
Mr Evan Shackleton (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the delegate of the Director of Liquor Licensing to refuse an application for a restaurant licence to Mad Mex Fresh Mexican Grill Pty Ltd

Premises: Mad Mex Hay Street, 777 Hay Street, Perth

Date of Hearing: 2 July 2014

Date of Determination: 18 August 2014

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

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Gull Petroleum (WA) Pty Ltd* (1998) LLC No. 13/98

Background

1. An application was made by Mad Mex Fresh Mexican Grill Pty Ltd (“the applicant”) to the Director of Liquor Licensing (“the Director”) for the conditional grant of a restaurant licence for the premises known as Mad Mex Hay Street, located at Shop 6, Central Park, 777 Hay Street, Perth.
2. The application was made pursuant to sections 50, 62 and 68 of the *Liquor Control Act 1988* (“the Act”).
3. Pursuant to section 67 of the Act, the application was required to be advertised by way of a notice on the site of the premises for a period of 28 days commencing on 26 July 2013; by a notice published in the West Australian newspaper; by way of a notice to residents and businesses located within a 200 metre radius of the premises; and a general notice to educational, health care and local and regional government institutions, as well as community and church groups, within the locality.
4. The applicant also sought an extended trading permit, pursuant to section 60(4)(h) of the Act, to allow alfresco dining on the footpath adjacent to the proposed premises.
5. No objections were lodged, but the Commissioner of Police (“the Police”) lodged a notice of intervention, pursuant to section 69 of the Act.
6. The delegate of the Director of Liquor Licensing (“the Director”) determined the application on the papers pursuant to sections 13 and 16 of the Act.
7. On 24 March 2014, the Director refused the application (see decision A 223860).
8. On 17 April 2014, the applicant lodged an application for a review of the Director’s decision, pursuant to section 25 of the Act.
9. A hearing before the Commission was held on 2 July 2014.

Submissions on behalf of the applicant

10. The applicant bears the onus of establishing that the grant of a restaurant licence is in the public interest (section 38(2) of the Act).
11. In order to discharge that onus, the applicant lodged a Public Interest Assessment (“PIA”) as well as 113 proforma survey forms and 9 online reviews submitted by diners of various Mad Mex outlets.
12. The applicant submits that it is committed to providing unique, fresh Mexican food as demonstrated in their vision to grow Mad Mex nationally within Australia and to share their unique Mexican food with hungry Mexican fans everywhere, by remaining true to their founding principles of “fresh and healthy, fast and delicious, authentic and exciting.”
13. The applicant submits that Mad Mex restaurants have proved to be successful around Australia, with approximately 40 restaurants operating nationally in New South Wales Victoria, Queensland, Western Australia and the Australian Capital Territory.

14. There are 5 Mad Mex restaurants operating in Western Australia; Hillary's Boat Harbour, Claremont, Subiaco, Brookfield Place and Hay Street, Perth.
15. The applicant submits that the Director's reasons for refusing the licence were:
 - a. the size and layout of the restaurant;
 - b. the perceived manner of trade; and
 - c. the location of toilet facilities for patrons.
16. The applicant submits that Mad Mex Subiaco and Mad Mex Claremont are of similar size, offer the same menu and operate in the same manner of trade as Hay Street. Both of those stores operate under a restaurant liquor licence.
17. The applicant submits that the Act does not require any minimum size for a premises to be granted a restaurant licence, and that the Hay Street premises is sufficient in size and standard for the licence to be granted.
18. The applicant submits that the manner of trade at Mad Mex Subiaco and Mad Mex Claremont are identical to Hay Street, and that both of those restaurants have been granted restaurant licences.
19. The applicant submits that the proposed off-site toilets are adequate for the business, and were approved by the Premises Manager of the Department of Racing, Gaming and Liquor. It further submits that there were no objections to the application or intervention by the Executive Director of Public Health.

Submissions on behalf of the Interveners

20. On 22 August 2013, the Police lodged a notice of intervention, pursuant to section 69(c) of the Act before the Director. On 7 May 2014, the Director intervened in the proceedings before the Commission pursuant to section 69(11) of the Act.
21. The Interveners carry no burden of proof (refer *Gull Petroleum (WA) Pty Ltd (1998) LLC No. 13/98*).
22. The Director submitted that his delegate's Decision related to the standard and suitability of the premises, and turned on the adequacy of the toilet facilities. In this regard, the Director points to section 37(1)(f)(i) of the Act, which provides that a licence shall not be granted unless the licensing authority is satisfied that the premises are of a sufficient standard and suitable for the proper conduct of the business to be carried on there.
23. The Director submitted that the relevant considerations for determining whether a premises is of a sufficient standard and suitable for the proper conduct of the business include (among other things) are:
 - 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.
24. A “restaurant licence” is defined in section 3(1) of the Act as being “a licence granted under section 50”. Section 50(1) provides that “a licensee of a restaurant licence is, during business hours, authorised to sell to any person liquor on the licensed premises for consumption on the premises ancillary to a meal supplied by the licensee to, and eaten by, that person there. Subsection (3)(a) provides that “the business conducted at the licensed premises must consist primarily and predominantly of the regular supply to customers of meals to be eaten there.”
25. “Restaurant” is relevantly defined to be, “premises on which meals are...regularly prepared for sale, or supplied, and are eaten” (section 3(1) of the Act).
26. The Director submitted that the toilets are locked staff toilets, shared with 6 other small businesses. They are located approximately 45 metres from the Mad Mex Hay Street premises. A patron wishing to use the facilities would have to request a key from the applicant. They would be provided with a key and a map, instructing them where the toilets could be found. The patron would then leave the premises, walk approximately 10 metres along Hay Street, enter a shopping arcade and walk to a lift. They would then proceed in the lift, down to level B1, and then walk across the car park to the toilets.
27. In those circumstances, the Director submitted that the location of the toilets, and therefore the premises, was unsuitable. The Director took guidance from the Department of Racing, Gaming and Liquor’s *Standards of Licensed Premises (Toilet Policy)* which provides that toilets “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”. The policy provides that the “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 tenant’s patrons. Nevertheless, toilets must be in close proximity of the premises and the operator must ensure that patrons have access to toilets at all times during which the restaurant operates.”
28. The Director submitted that the premises also failed to meet the definition of a restaurant pursuant to the Act. The Director accepted that the size of the premises is not determinative, and that there is no minimum size required under the Act. The Director submitted that size was one factor, amongst others (such as whether there was a “reception area”) that could be considered in deciding whether a premises was a restaurant. The Director submitted that once all factors were considered Mad Mex Hay Street was more in keeping with a take away food outlet than a restaurant.
29. The Director pointed to the definition of a restaurant in the Act, which requires the business to consist “primarily and predominantly” of the regular supply to customers of meals “to be eaten there.” The Director considered the observations and figures supplied by premises inspectors from the Department of Racing, Gaming and Liquor. Those figures suggested that on the 3 occasions when figures were kept, 41.7%, 33.8% and 12.5% of customers chose to take away their purchase, and that a numerical majority of dine in customers at a particular time of day was not enough to demonstrate that the applicant’s business consisted “primarily and predominantly” for the regular supply to customers of meals to be eaten at the premises.

Determination

30. The onus is on the applicant to satisfy to the licensing authority, on the balance of probability, that the granting of the licence is in the public interest (sections 38 and 16(1)(b) (ii) of the Act).
31. Section 5 of the Act provides the primary objects of the Act as -
- a. to regulate the sale, supply and consumption of liquor;
 - 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.
32. Section 5(2) of the Act provides that in carrying out its functions under the Act, the licensing authority shall have regard to the primary objects of this Act and also the following secondary objects –
- d. 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;
 - e. to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and
 - f. to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.
33. 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.
34. 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).
35. Pursuant to section 25(4) the Commission may:
- (a) affirm, vary or quash the decision subject to the review;
 - (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 to the Director to which effect shall be given; and
 - (d) make any incidental or ancillary order.

36. Section 33 of the Act provides that the licensing authority has an absolute discretion to grant or refuse an application under this Act on any ground, or for any reason, that the licensing authority considers is in the public interest. An application may be refused, even if the applicant meets all the requirements under the Act. An application may be granted, even if a valid ground of objection is made out. But an application is required to be dealt with on its merits, after such enquiry as the licensing authority thinks fit.
37. In this case the Commission finds 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. The applicant submitted at the hearing that the distance from the premises to the toilets was 25 metres. However, the Director found it to be 45 metres. The Commission can only have regard to the materials that were before the Director, and the material relied upon by the Director was the applicant's letter, dated 7 September 2013.
38. Further, the toilets are shared with 6 other businesses. Mad Max Hay Street has 34 seats for patrons, and only 1 key to the toilets. No provision has been made for the possibility that 1 patron may wish to use the facility when another is already doing so. The fact that the Premises Manager of the Department of Racing, Gaming and Liquor deemed the toilets as being satisfactory is not determinative to the Commission's decision.
39. The Commission is also not satisfied that the premises is a restaurant, and finds that it is more in keeping with a takeaway food outlet. Section 3(1) of the Act defines "meal" as "food that is eaten by a person sitting at a table, or a fixed structure used as a table, with cutlery provided for the purpose of eating the food." Relevantly, this section also defines restaurant to mean "a premises on which **meals** (Commission's emphasis) are proposed to be regularly prepared for sale or supplied and are eaten."
40. The inference which the Commission draws from these definitions is that a patron visiting a restaurant is entitled to and expects a seat at a table to be provided and available at which he or she may enjoy their meal. In the case of this application, this is clearly not the case as a patron does not initially know whether or not he or she can be seated or will have to take their food elsewhere to be consumed. This is clearly not in compliance with the letter or spirit of section 3(1) of the Act.
41. The size of the premises is not determinative. The business model is not determinative. The toilet facilities are not determinative. The number of seats is not determinative. The number of patrons who take away or eat on premises at a particular time and occasion is not determinative. But each and all of those factors, considered in their totality, lead the Commission to that conclusion.
42. The submission by the applicant that Mad Mex Subiaco and Mad Mex Claremont are of similar size, offer the same menu and operate in the same manner of trade as Hay Street is not influential, because the applicant accepted at the hearing that the Subiaco Premises had seating for 72 patrons, and Claremont (which is located in a shopping centre) had seating for 44 patrons, whereas Hay Street has seating for only 34 patrons.

43. Accordingly, the application is dismissed and the decision of the delegate of the Director is affirmed.

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**JIM FREEMANTLE
CHAIRPERSON**