

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicants: Wrestpoint Nominees Pty Ltd
(represented by Mr Peter Fraser of Dwyer Durack Lawyers)

Forrest Road Liquor Pty Ltd
(represented by Mr Phil Cockman of Canford Hospitality Consultants Pty Ltd)

Respondent: Woodfield Enterprises Pty Ltd
(represented by Mr John Prior, instructed by Mr Grantham Kitto of Kitto & Kitto Lawyers)

Intervener: Executive Director of Public Health
(not a participant in the review proceedings)

Commission: Mr Jim Freemantle (Chairperson)
Ms Helen Cogan (Member)
Mr Alastair Bryant (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 grant a conditional removal of a tavern licence.

Premises: Farson's for Liquor
129, Eighth Avenue, Armadale

Date of Hearing: 31 May 2013

Date of Determination: 4 June 2013

**Reasons for
Determination:**

6 August 2013

Determination:

The applications are refused.

Authorities referred to and considered in the determination:

- *Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384
- *Executive Director of Health v Lily Creek International Pty Ltd & Ors* [2000] WASCA 258
- *Shallcross Investments Pty Ltd v Director of Liquor Licensing* (LC 26/2010)
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Repertoire Wines Pty Ltd v Director of Liquor Licensing and Ors* (LC 40/2011)

Background

- 1 On 13 October 2011, the respondent, Woodfield Enterprises Pty Ltd applied for the removal of Tavern Licence 6020019588 from Girrawheen Street, West Armadale to 129 Eighth Road, West Armadale, a distance of approximately 750 metres.
- 2 On 22 December 2011 the following were lodged:
 - a notice of intervention by the Executive Director of Public Health;
 - a notice of objection on behalf of Wrestpoint Nominees Pty Ltd, Palinode Pty Ltd and Ernston Pty Ltd by Dwyer Durack Lawyers; and
 - a notice of objection on behalf of Forrest Road Liquor Pty Ltd by Canford Hospitality Consultants Pty Ltd.
- 3 On 29 June 2012, Dr Bangor-Jones, Delegate of the Executive Director Public Health, wrote to the Director Liquor Licensing confirming his suggestions that harm minimisation conditions be imposed in order to “... *reduce the risk of alcohol-related harm or ill-health effects increasing in the locality.*”
- 4 On 27 July 2012, Canford Hospitality Consultants Pty Ltd lodged further submissions in support of the objection on behalf of Forrest Road Liquor Pty Ltd.
- 5 On 3 August 2012, Canford Hospitality Consultants Pty Ltd lodged closing submissions on behalf of Forrest Road Liquor Pty Ltd objecting to the application for the removal of the licence.
- 6 On 10 December 2012, the delegate of the Director of Liquor Licensing (“the Director”) granted the respondent’s application for removal of licence (decision no. A221325).
- 7 On 7 March 2013, Dwyer Durack Lawyers representing Wrestpoint Nominees Pty Ltd lodged an application for review of the Director’s decision no. A221325.
- 8 On 11 March 2013, Canford Hospitality Consultants Pty Ltd representing Forrest Road Liquor Pty Ltd lodged an application for review of the Director’s decision no. A221325.
- 9 A hearing was held before the Liquor Commission (“the Commission”) on 31 May 2013.

Submissions on behalf of Wrestpoint Nominees Pty Ltd

- 10 Wrestpoint Nominees Pty Ltd (“Wrestpoint”) sought to have the decision of the Director of 10 December 2012 quashed, on the grounds that the removal of the licence was not in the public interest and would cause undue harm or ill health to people due to the use of liquor.
- 11 The outline of submissions on behalf of Wrestpoint describes the statutory provisions of the *Liquor Control Act 1988* (“the Act”) in relation to the considerations necessary for

an application for the removal of a licence and in opposing the granting of the removal of the licence advised that it also relied upon the arguments contained in the notice of objection dated 22 December 2011.

- 12 Wrestpoint maintained that the survey conducted by Patterson Research Group was flawed and unreliable as it confused the interviewee through the use of the descriptions employed.
- 13 Wrestpoint also maintained that the applicant for the removal of the licence failed to satisfy the onus placed upon it to demonstrate a consumer requirement for the sale of packaged liquor as required for a tavern licence.
- 14 In arguing the public interest test, Wrestpoint pointed out that the obligation was on the applicant for a licence to demonstrate that it was in the public interest for the licence to be granted (refer *Woolworths Ltd v Director of Liquor Licensing [2012] WASC 384*). It was also submitted that the positive aspects of the public interest test for the application for removal of the licence had not been satisfied to the extent that it did not provide any service that was not already catered for in the locality (refer *Shallcross Investments Pty Ltd v Director of Liquor Licensing (LC 26/2010)*).
- 15 On the matter of harm or ill health due to the use of liquor Wrestpoint relied on the common law position established in *Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WASCA 258*, to establish that the potential for harm or ill health must be taken into account in considering an application for a licence or removal of a licence irrespective of the likelihood of its occurrence.
- 16 Wrestpoint asserted that "... the licensing authority must:
 - a. consider the increased harm or ill health due to the use of liquor that may result from the specified premises in question if the application is granted;
 - b. consider the existing harm or ill health occurring within a particular area within which the premises is located;
 - c. assess the increased harm identified against the existing levels of harm or ill health due to the use of liquor to determine the overall level of harm or ill health which is likely to result if the application is granted; and
 - d. consider whether the risk of increased harm is acceptable or unacceptable."
- 17 Attention was also drawn to section 5 of the Act to emphasise the priority of the interest of public health over requirements of consumers in the scheme of the Act.
- 18 A background survey of the locality of Armadale was also provided, including statistics based on the 2006 Census Quickstats to establish Armadale as a low socio-economic area, with a high number of disadvantaged people such as unemployed, the young, indigenous and single parents.

- 19 The applicant suggested the level of alcohol-related harm experienced within the area is evidenced by the wide range of support services in the locality aimed at addressing such alcohol-related harm or ill health.
- 20 A three year comparison of WA Police statistics between Armadale and Midland was also tendered to demonstrate that there was more crime in Armadale than Midland.
- 21 Within the three kilometre relevant locality radius, Wrestpoint advised that there were 12 existing liquor licences, including two tavern licences (other than that the subject of objection) and this demonstrated "... *that the locality is well catered for and has reached saturation point in respect of the provision of licensed premises.*"
- 22 The intervention report by the Executive Director of Public Health was also submitted as evidence of the risk of harm and ill-health that would arise from the granting of the removal of the licence.
- 23 The applicant submitted two recent comparison cases where, in the case of Liquorland Brookdale, the Director of Liquor Licensing, and in respect of Forrest Road Liquor Pty Ltd (LC 24/2012), the Commission rejected both the applications which were within close proximity of the site to which it is proposed to remove the licence the subject of this review application. In the case of Liquorland Brookdale the application was rejected on public interest grounds. The application by Forrest Road Liquor Pty Ltd was rejected on the grounds of potential harm to vulnerable groups and that such considerations outweighed the requirements of consumers.
- 24 Wrestpoint submitted results from questionnaires completed by 110 patrons from the Armadale Tavern, the Ye Old Narrogin Inn, the Westfield tavern and Challis Road Liquor. The applicant states that the results indicate that there are sufficient packaged liquor outlets in Armadale (85.08% of respondents), patrons would not use the Haynes Tavern services (73.34%), and after reading the Public Interest Assessment ("PIA") 78.85% of respondents would not attend the proposed venue.

Submissions on behalf of Forrest Road Liquor Pty Ltd

- 25 Canford Hospitality Consultants Pty Ltd representing Forrest Road Liquor Pty Ltd ("Forrest Road Liquor") raised five grounds in its letter of objection dated 20 December 2011, namely that the grant of the application:
 1. *would not be in the public interest;*
 2. *would be likely to cause undue harm or ill health;*
 3. *would be likely to cause undue offence, annoyance, disturbance or inconvenience;*
 4. *would lessen the amenity, quiet and otherwise good order of the locality; and*
 5. *is otherwise contrary to the Act and to the purposes of the Act.*

- 26 Evidence submitted in relation to ground 1 is based on the lack of detail in the plans for the proposed premises, the generality in the description of the offering as replacing the Girrawheen Street premises in a superior way and alleges the relative size of the proposed bistro/restaurant area is overstated.
- 27 Forrest Road Liquor claims that the PIA prepared by the respondent failed to address the potential impact of the substantial bar and packaged liquor facility on the locality and has not provided the required level of objective evidence to satisfy the grant as being in the public interest. Nor does the PIA adequately address the matters raised in section 38(4) of the Act.
- 28 They further argued that the rationale in the decision of the Commission (LC24/2012) for denying its application for a liquor store licence, including the submissions by the Executive Director of Public Health, applies equally to the respondent.
- 29 In relation to its ground of objection of likelihood of harm and ill-health, it was submitted that contrary to the respondent's claim in its PIA that the new premises will be located away from residences adjacent to other commercial and non-residential uses, the new site is within 75 to 80 metres of some houses. There is also a complete failure in the PIA to consider the impact on local residents from people leaving the premises late at night including the capacity of the licensee to manage the behaviour of patrons and the additional vehicular traffic from people using its large packaged liquor outlet. The risk of undue harm or ill health is too high to allow the removal of the licence.
- 30 The objector also notes the lack of information provided as to the expertise and skills of the proposed operator and argues this to be significant given the research indicating the disproportionate propensity for harm, including assaults, on licensed premises that have a hotel/tavern or nightclub licence.
- 31 Similarly in respect of ground 3, Forrest Road Liquor claims that the lack of detail in the PIA and the plans for the premises fail to address how the impact of live music to close residential neighbours will be managed.
- 32 It further asserts that the respondent has failed to consider the impact on the amenity of the locality (ground 4) from the operations of the tavern.
- 33 Ground 5 asserts that the application for the removal of the licence is contrary to section 68(2a) of the Act.

Submissions on behalf of Executive Director of Public Health

- 34 The Executive Director of Public Health drew the attention of the licensing authority to the existing alcohol-related harm, particularly in regard to assaults and domestic violence and consequently recommended the following conditions:
- food is to be available at all times during trading hours of the premises;

- a required amount of seating is to be provided;
- the licensee is not permitted to promote or sell drinks which offer liquor by virtue of their 'emotive' titles such as (but not exclusive to) 'laybacks', 'shooters', 'slammers', 'test tubes', and 'blasters';
- no energy drinks are to be mixed with liquor on the premises (for the purposes of this condition energy drinks has the same meaning as formulated caffeinated beverage within Australia New Zealand Food Standards code with a composition of 145mg/l of caffeine or greater);
- drink options that contain light and mid strength alcohol content will be available at all times;
- a closed circuit television video surveillance system, compliant with the licensing authority's policy to be maintained at the venue; and
- a strict dress code signage is to be displayed at the entrance of the venue.

Submissions on behalf of Woodfield Enterprises Pty Ltd

- 35 The application by Woodfield Enterprises Pty Ltd ("the respondent") is for the removal of an existing tavern licence and not for the grant of a new one.
- 36 The licence will be removed less than 750 metres from its current site.
- 37 Farson's for Liquor ceased trading in August 2010. Planning has been taking place since with the City of Armadale and the Western Australian Planning Commission. The respondent has diligently and properly followed due process in the planning and removal of the licence. The City of Armadale encouraged the removal of the tavern to the new location which accords with the objects of the Act. The City of Armadale and the Western Australian Planning Commission have both approved the tavern's new location after lengthy planning and public consultation.
- 38 The removed licence will be located in a new high standard building zoned 'local centre' and is not close to residential housing or schools.
- 39 The premises will have a positive impact on the amenity of the locality.
- 40 The new site will not give rise to any offence, annoyance, disturbance or inconvenience to people who reside or work in the vicinity of the proposed licensed premises.
- 41 The City of Armadale has imposed its harm minimisation policy on the respondent's development application.
- 42 Public interest has been clearly demonstrated through the survey conducted by Patterson Research Group.

- 43 It is noteworthy that the Commissioner of Police did not intervene.
- 44 The Executive Director of Public Health has intervened but not objected to the grant of the licence, although he has suggested conditions be imposed to minimise harm and ill-health caused by the use of alcohol.
- 45 The Executive Director of Public Health is the pre-eminent authority to assess issues relating to harm or ill-health and has a statutory right to intervene by virtue of section 69(8a)(b) of the Act.
- 46 The Executive Director of Public Health is fully apprised of the application and despite three opportunities to do so has not altered his conditional support.
- 47 The respondent has formally agreed to accept all the conditions recommended by the Executive Director Public Health.

Determination

- 48 When considering a review of a decision made by the Director, the Commission is required by section 25(2c) of the Act to have regard to only the material that was before the Director when making the decision.
- 49 On a review under section 25 of the Act, 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 –
 - (i) as to any question of law, reviewed; or
 - (ii) to the director, to which effect shall be given; and
 - d) make any incidental or ancillary order.
- 50 Section 38 of the Act requires the licensing authority, and on review, the Commission to be satisfied that in granting an application for the grant or removal of a licence that the application is in the public interest.
- 51 In determining whether the grant of an application is in the public interest the Commission is required to exercise a discretionary value judgement confined only by the scope and purpose of the Act (*Palace Securities Pty Ltd v Director of Liquor Licensing* (1992) 7 WAR 241 at 249 per Malcolm CJ).
- 52 The three primary objects of the Act as set down in section 5 are:
- 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.
- 53 By operation of section 33(1) of the Act the Commission has an absolute discretion to grant or refuse an application on any ground or for any reason that it considers to be in the public interest. The scope of this discretion was recently considered by EM Heenan J in *Woolworths v Director of Liquor Licensing* [2012] WASC 384 [32]:
- “s.33(1), is an example of a very full and ample discretion which is only confined by the scope and purpose of the Act which in turn is to be determined by the express objects of the Act and the legislation read as a whole. Section 5(2) in requiring the licensing authority to have regard to the primary and secondary objects of the Act, which have already been mentioned, obliges the licensing authority to pay regard to those objects on any application but does not otherwise confine the scope or meaning of the public interest or make those objects the exclusive considerations nor the sole determinants of the public interest”*
- 54 Section 37(3) of the Act provides that a licence shall not be granted where the Commission is satisfied that an undue degree of offence, annoyance, disturbance or inconvenience to residents in the vicinity is likely to occur.
- 55 The two pertinent and crucial tests submitted by the applicants and considered by the Commission for the grant of the removal of the licence were the public interest test (section 38) and the harm minimisation test (section 5).
- 56 In determining the public interest the Commission agreed with the respondent that consideration of the removal of licence application required a different but not lesser approach to determining whether the removal of the licence was in the public interest.
- 57 The Commission notes that the licence was at all times in existence and the question turned on whether it was in the public interest for it to be removed to a new location.
- 58 The applicants submitted that the police crime statistics for the area indicate that the original premises had contributed to alcohol related crime on the basis that the level of crime in the area had reduced in the period of its closure pending the consideration of its removal to a new location. However, in noting that the Commissioner of Police has not intervened in this application, it is the Commission’s view there was no evidence advanced to demonstrate a link between the licensed premises and the crime rate in the area.
- 59 It was further submitted that applications by Liquorland Brookdale and Forrest Road Liquor were rejected by the licensing authority on concerns about existing levels of harm in the area. As both the rejected applications related to sites in close proximity to

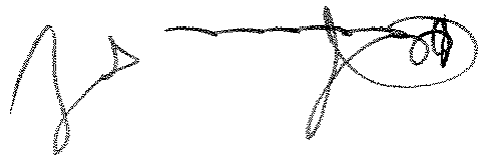
the site to which the respondent is applying to have the licence removed such a grant was totally inconsistent with the decisions made in the two cases cited.

- 60 The Commission rejects this argument as there can be no commonality drawn between the two liquor store licence (emphasis added) applications and the subject application for a tavern licence.
- 61 The pre-existing licensed premises were run-down, dilapidated, unattractive to potential patrons and inconsistent with local authority planning guidelines. The proposed site to which the licence is to be removed has been planned in close cooperation with the local authority and has been endorsed by the Western Australian Planning Commission. The intervention by the Executive Director of Public Health is to the extent of suggesting conditions that may be imposed on the operation of the tavern licence in order to reduce the risk of alcohol-related harm or ill-health increasing in the locality, all of which have been unequivocally agreed to be imposed on the licence by the applicant for the tavern licence.
- 62 Despite wide publicity of the proposal to remove the licence, not one objection was received from a resident or other interest group. It is noteworthy that two other licensees, parties to the original objection considered by the Director and operating within a three kilometre zone of the proposed site, decided not to join the proceedings before the Commission seeking review of the Director's decision to approve the removal of the licence.
- 63 The Commission on the facts before it has difficulty in reaching any other conclusion than that the objections are simply commercially based. It is relevant to note the Commission's comment in the matter of *Cellar Repertoire Wines Pty Ltd v Director of Liquor Licensing and Ors* (LC 40/2011 at para 58):
- "In making its decision the Commission has had regard to the requirement of consumers. The contest between the applicant and the objectors in this regard raises the issue of how the Commission treats existing liquor outlets. Whilst the Commission does not consider an application in isolation from existing liquor outlets because of the various objects of the Act such as harm minimization, the requirements of the consumers and other public interest issues, what the Commission cannot do is to taken into account the competitive impact that a new outlet would have on the existing outlets".*
- 64 The proposed premises will provide a wide matrix of modern style facilities with bar, restaurant and bottle shop facilities and will be located in a modern shopping complex in a commercial and non-residential area. Although the Commission is mindful of the area allocated in the floor space to the bottle shop, it is of the view that the "family focused" style of operation with a strong focus on food and dining at the premises will add significantly to the amenity of the area.
- 65 Ultimately it is the Commission's view that the public interest associated with the multifaceted services proposed to be provided by the applicant for this tavern licence far outweighs any potential of harm and ill health which may arise as a result of the grant of this removal application.

66 The Commission is further comforted with the licensee's acceptance of all conditions suggested by the EDPH as well as imposition of harm minimisation policy to the licensee's development application by the City of Armadale in ensuring a further check in reducing alcohol related harm.

67 The Commission is satisfied that the respondent has met the requirements of the Act in establishing that the removal of the licence is in the public interest.

68 Accordingly the applications fail and the decision of the Delegate of the Director stands.



MR JIM FREEMANTLE
CHAIRPERSON