

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)

Heard: 20th/21st November 1989
Delivered: 21st December 1989

THE FULL COURT

CORAM: MALCOLM C.J., BRINSDEN & WALLWORK JJ.

No. 2154 of 1989

IN THE MATTER of an Application
for a Writ of Certiorari against
the Director of Liquor Licensing
and the Acting Director of Liquor
Licensing

and

IN THE MATTER of an Application
by FIVER PTY LTD for Removal of a
Cabaret Licence from premises
known as The Warehouse situate at
408 South Terrace South Fremantle
to premises to be known as The
Warehouse and situate at Lot 104
James Street Northbridge

EX PARTE:

THE CABARET OWNERS ASSOCIATION OF
WESTERN AUSTRALIA INCORPORATED
First Applicant

and

CEDUS HOLDINGS PTY LIMITED
Second Applicant

and

C.H.B. CHARTERS PTY LIMITED
Third Applicant

and

EXPLORER CRUISE LINES PTY LIMITED
Fourth Applicant

and

VERDELL PTY LIMITED
Fifth Applicant

and

VERMOUTH NOMINEES PTY LTD
Sixth Applicant

AND

No 2155 of 1989

IN THE MATTER of an Application
for a Writ of Certiorari against
the Director of Liquor Licensing
and the Acting Director of Liquor
Licensing

and

IN THE MATTER of an Application
by AUSTRALIAN FINE WINES LTD for
Removal of a Cabaret Licence from
premises known as The Minnow
situate at 167 James Street
Guildford to premises to be known
as The Minnow situate at 647
Wellington Street Perth.

EX PARTE:

THE CABARET OWNERS ASSOCIATION OF
WESTERN AUSTRALIA INCORPORATED
First Applicant

and

CEDUS HOLDINGS PTY LIMITED
Second Applicant

and

C.H.B. CHARTERS PTY LIMITED
Third Applicant

and

EXPLORER CRUISE LINES PTY LIMITED
Fourth Applicant

and

VERDELL PTY LIMITED
Fifth Applicant

and

VERMOUTH NOMINEES PTY LTD
Sixth Applicant

Catchwords.

Licences - liquor licensing - return of order nisi directed to Director of Liquor Licensing under the Liquor Licensing Act 1988 (WA) - application of transitional provisions - Australian Wine Licence and provisional certificate for removal under the Liquor Act 1970 (WA) - conversion to special facility licence and conditional grant for removal on same conditions by cl.6(1)(5) and 11(1) of the transitional provisions - subsequent grant of cabaret licence purportedly made under cl.11(2) of transitional provisions - whether valid - application for grant of conditional removal of cabaret licence under ss.62(1) and 81 of the Liquor Licensing Act 1988 - decision by Director to "waive all advertising requirements" - whether valid - ss. 3, 17, 24, 30, 30(1)(b), 37(5), 62, 67, 71, 73, 74, 77, 81, 9- and cl.1, 6, and 11 of Schedule 1 of the Liquor Licensing Act 1988.

Prerogative Writs - certiorari - discretion - allegation of delay in obtaining order nisi - hardship to respondents - applicants deprived of right to reject.

Mr. C.J.L. Pullin Q.C. and Mr J.F.I. Curlewis (instructed by Phillips Fox) appeared for the applicants.

Mr. S.J. Archer and Mr D.J. Bishop (instructed by Robinson Cox) appeared for Fiver Pty Ltd., Australian Fine Wines Pty Ltd and Salmon Point Holdings Pty Ltd.

There was no appearance on behalf of the Director of Liquor Licensing or the Acting Director of Liquor Licensing.

Cases referred to in Judgment:

Ansell v Wells (1943) A.L.R. 66
Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia (1932) 47 C.L.R. 1
Calvin v Carr [1980] A.C. 574
Ellis v The Home Office [1953] Q.B. 135
Hoffman-La Roche v Secretary of State for Trade and Industry [1975] A.C. 205
Kioa v Minister for Immigration and Ethnic Affairs (1985) 159 C.L.R. 550
Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 C.L.R. 627
London v Clydeside Estate v Aberdeen D.C. [1980] 1 W.L.R. 182
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 C.L.R. 24
R v Herrod; Exparte Leeds District Council [1976] 1 Q.B. 540
R v O'Sullivan; Exparte Clarke [1967] W.A.R. 168

R v Stafford Justices [1940] 2 K.B. 33
R v Wallis; Exparte Employers' Association of Wool Selling
Brokers (1949) 78 C.L.R. 529
Ridge v Baldwin [1964] A.C. 40
Smith v East Elloe Rural District Council [1956] A.C. 736

Cases also Cited:

Australian Broadcasting Tribunal v Saatchi & Saatchi Comptom
(Vic) Pty Ltd (1985) 60 A.L.R. 756
Cooma-Monaro Shire Council v Mannering [1986] 7 N.S.W.L.R. 258
Exparte Metropolitan Meat Industry Board [1972] 1 N.S.W.L.R.
259
Fonteio v Morando Bros Pty Ltd [1971] V.R. 658
R v Aston University Senate; Exparte Roffey [1962] 2 Q.B. 538
R v Knightsbridge Crown Court; Exparte Marcrest Properties Ltd
[1983] 1 W.L.R. 300
R v Monopolies & Mergers Commission; Exparte Argyll Group Plc
[1986] 1 W.L.R. 763
Reseck v FCT (1975) 133 C.L.R. 45
Savage v Teck Explorations Limited; Supreme Court of Western
Australia (Full Court); unreported; Library No. 7285;
delivered 16th September 1988.

MALCOLM CJ:

This is the return of two orders nisi made by Ipp J on 6th September 1989 calling upon the Director of Liquor Licensing and the Acting Director of Liquor Licensing to show cause why a writ of certiorari should not be issued against the Director or alternatively the Acting Director to remove into this Court for the purpose of being quashed certain orders made by the Director or the Acting Director on 17th May 1989 that applications made by Fiver Pty Ltd ("Fiver") and Australian Fine Wines Pty Ltd ("AFW") respectively under the Liquor Licensing Act 1988 ("the new Act") need not be advertised.

The order nisi in No. 2154 of 1989 involves an application for removal made by Fiver. The applicants for certiorari are the Cabaret Owners Association of Western Australia Inc ("the Cabaret Owners") and various holders of cabaret licences in the Northbridge area. The order nisi in No 2155 of 1989 involves an application for removal made by AFW. The applicants for certiorari are the Cabaret owners and the same group of holders of cabaret licences in the Northbridge area. The significance of the Northbridge area is that it is the general area in which the places to which the applications for removal by Fiver and AFW relate are located.

Fiver's Application for Removal

It is convenient to deal with the facts relating to the Fiver application for removal first. Prior to 1st February

1989 Fiver occupied premises at Fremantle ("the Fremantle premises") and held an Australian Wine Licence in respect of those premises under s.39 of the Liquor Act 1970 ("the repealed Act"). That licence authorised the licensee to sell and supply wines, made in a State of the Commonwealth from grapes grown in the Commonwealth, on the licensed premises, during ordinary trading hours. The repealed Act was repealed by the new Act which came into force on 1st February 1989.

The Fremantle premises were leased by Fiver from a Mr & Mrs Cirillo pursuant to a Lease Agreement dated 10th October 1985 between the Cirillos as lessors and Fiver as lessee. On 15th December 1986 Bella Holdings Pty Ltd ("Bella") purchased the Fremantle premises subject to the lease. In October 1988 Fiver gave instructions to solicitors to make an application under the repealed Act for removal of the Australian Wine Licence to new premises in James Street Northbridge known as "The Warehouse" ("the James Street premises"). On 1st November 1988 the promoters of Salmon Point Holdings Pty Ltd ("Salmon Point") a company then to be formed, agreed on behalf of Fiver to lease the James Street premises from the owners, subject to certain special conditions set out in an Agreement to Lease dated 1st November 1988. The essence of the special conditions was that Fiver succeed in locating a Cabaret Licence in the James Street premises and securing Council approval within 120 days.

On 14th November 1988 Fiver made application pursuant to s.90 of the repealed Act for a provisional certificate to

remove the Australian Wine Licence from the Fremantle premises to the James Street premises. On 26th January 1989 the Director of Liquor Licensing granted Fiver a provisional certificate for such removal which was in the following terms:-

"The Director of Liquor Licensing hereby grants Fiver Pty Ltd a provisional certificate for removal of the Australian Wine licence known as Smugglers Den Winebar situate at 408 South Terrace, South Fremantle, and to be known as The Warehouse Lot 104 James Street Northbridge.

We certify that these premises will be an adequate place for business to be carried on under a Australian Wine licence and, upon application being made for removal of the licence in respect of the premises within six (6) months from the date hereof, such removal application will be granted upon proof that the said premises have been erected substantially in accordance with such plans and specifications, and that the following conditions have been complied with:-

1. The premises being completed within six months in accordance with the plans and specifications lodged on 4th November 1988.
2. The recommendations of the senior supervisor of licensed premises as detailed in my letter of 24 November 1988 being incorporated in the work."

This certificate was issued under s.62(1) of the repealed Act which provided that:-

"Where an application is made for the grant of a provisional certificate for a licence or for the removal of a licence and the Licensing Authority approves of the plans and specifications submitted by the applicant, with or without modifications, and is otherwise satisfied, as provided by this Act, that the certificate should be granted, the Licensing Authority may grant the applicant a provisional certificate, imposing such terms and conditions as to the effecting of the erection, completion, extension or alteration of the subject premises as the Licensing Authority thinks fit."

The plans and specifications lodged on 4th November 1989 related to the James Street premises. These were the "subject premises" for the purposes of s.62(1). On 2nd February 1989 the plans were revised so that they would be suitable for the operation of a Cabaret Licence under ss.42 and 43 of the new Act. The revised plans were lodged with the Director on 13th February 1989. The revised plans were approved by the City of Perth on 23rd May 1989.

In the meantime, on 17th March 1989, purporting to act under cl.11(2)(c) of the transitional provisions in Schedule 1 to the new Act, which had effect pursuant to s.177 of the new Act, the Director of Liquor Licensing granted Fiver a Cabaret Licence in respect of the Fremantle premises. On the same date the Cabaret Licence was "wholly suspended until further notice". On 23rd March 1989 Salmon Point, on behalf of Fiver, agreed to amend the special condition in the Agreement to Lease to provide for relocation of the Cabaret Licence by 15th May 1989.

By letter dated 3rd April 1989 the Director informed Fiver that the Cabaret Licence was "the subject of a conditional removal to premises in Northbridge pursuant to Section 62 of the Act" (ie the new Act). Acting on that information Salmon Point, on behalf of Fiver, acknowledged to the owners that it was bound unconditionally to take a lease of the James Street premises.

By an application dated 16th May 1989 Fiver sought removal of the Cabaret Licence for the Fremantle premises to

the James Street premises, conditional upon construction of the proposed new premises. This application was expressed to be made under ss.68 and 81 of the new Act. Section 67(1) of the new Act (the detailed provisions of which will be considered below) provides that an application in respect of the removal of a licence "must be advertised" and that "the applicant must comply with any relevant requirement under subsection (3) and with subsection (4)."

On 17th May 1989, as appears from the face of the relevant decision the Acting Director of Licensing decided that he should waive all advertising requirements as follows:-

"I consider this is an appropriate case to waive all advertising requirements, and I do so under section 33(3) of the Liquor Licensing Act 1988."

Section 33(3) of the new Act provides that:-

"The licensing authority may waive or modify any requirement for formal compliance with any procedure relating to an application, but may impose conditions in relation to the waiver or modification."

On the same day the Director of Liquor Licensing decided to grant the application for removal subject to certain conditions. The Director also noted that the Cabaret Licence remained suspended.

AFW's Application for Removal

The facts relating to AFW's application for removal are very similar. They are set out in detail in the reasons for judgment of Brinsden J. Prior to 1st February 1989 AFW occupied premises at Guildford ("the Guildford premises") and

held an Australian Wine licence in respect of those premises under s.39 of the 1970 Act.

On 25th October 1988 AFW made application pursuant to s.90 of the repealed Act for a provisional certificate to remove the Australian Wine Licence from the Guildford premises to premises known as "The Minnow" at Wellington Street Perth ("the Wellington Street premises").

On 27th January 1989 AFW was granted a provisional certificate in similar terms to the provisional certificate granted to Fiver.

The application for the provisional certificate was based upon plans and specifications relating to the Wellington Street premises. These were the "subject premises" for the purposes of s.62(1) of the repealed Act.

On 17th March 1989, purporting to act under cl.11(2)(c) of the transitional provisions in the new Act, the Director granted AFW a Cabaret Licence in respect of the Guildford premises. By the same decision the Director stated that the Cabaret Licence was "wholly suspended until further notice".

By an application dated 16th May 1989 AFW sought removal of the Cabaret Licence for the Guildford premises to the Wellington Street premises, conditional upon construction of the proposed new premises. On 17th May 1989, again on the face of the relevant decision, the Acting Director decided that he should "waive all advertising requirements" and purported to do so under s.33 of the new Act. The decision was expressed in the same terms as in the case of Fiver's application for

removal. On the same day the Director decided to grant AFW's application for removal subject to certain conditions. The Cabaret Licence remained suspended.

The Orders Nisi

The reason why the order nisi in each case is directed against the Director or alternatively the Acting Director is that, in each case, the signatory to the decision to waive all advertising requirements is designated "Acting Director" and the signatory to the decision to grant the removal is designated "Director", although both decisions appear to bear an identical signature "G. Aves". The Acting Director is a Mr G.B. Aves.

The grounds upon which the order nisi was granted in the case of Fiver are:-

1. "The Acting Director, or alternatively the Director:-
 - (a) made an error of law which appears on the face of the record of proceedings, in that he concluded that he had the power to make an order pursuant to Section 33(3) of the Liquor Licensing Act 1988 waiving the requirement (pursuant to Section 81(3)(b)(i) and Section 67(1)(a) and (b)) that the application for removal of the Cabaret Licence be advertised, when he should have concluded that the only power he had to dispense with any requirement for advertising was pursuant to Section 81(4), and then only after taking into account the considerations specified in that section;
 - (b) had no jurisdiction to make an order under Section 33(3) waiving the advertising requirements of the Liquor Licensing Act 1988 as specified above; and

(c) had no jurisdiction to make an order dispensing with advertising requirements if he failed to take into account relevant considerations, namely the considerations specified in Section 81(4)."

2. "The Director had no jurisdiction to make an order of removal of the Cabaret Licence because Fiver Pty Ltd had not satisfied the Director that the requirements of the Liquor Licensing Act in relation to the grant of a new licence (which included the advertising requirements set out in Section 67(1)(a)) had been met in relation to the Cabaret Licence sought to be removed and the premises to which it was sought to be removed."

Two additional grounds were added to para. 2 of the grounds by amendment at the hearing of the return by the order nisi, namely:-

"(b) The Director had no jurisdiction to make an order of removal of the Cabaret Licence because Fiver Pty Ltd had no interest in the Cabaret Licence in that it had vacated the South Fremantle premises on 7th April 1989.

(c) The Director had no jurisdiction to make an order of removal of the Cabaret Licence because contrary to Section 81(2) of the Liquor Licensing Act, Fiver Pty Ltd was not the person wishing to hold the Cabaret Licence after the removal."

The grounds in the case of AFW are identical in all relevant respects, save that the date upon which AFW vacated the Guildford premises was 9th May 1989. In each case the applicants were ordered to serve the order on the Acting Director and the Director, neither of whom has appeared. The orders were also served on Fiver and Salmon Point and on AFW respectively.

The applicants complain that because the advertising requirements were waived they were deprived of any right to

object to the grant of the removal and, consequently, their interests have been adversely affected. The Cabaret Owners Association of Western Australia ("the Association") is an association incorporated under the Associations Incorporations Act 1895, the membership of which comprises the holders of Cabaret Licences, including the licensees of premises in the Northbridge area. The individual applicants are the holders of Cabaret Licences in respect of premises in the Northbridge area. By s.73(2)(a)(ii), where an application is required to be advertised and an affected area is specified, any person holding a Category A licence (which includes a Cabaret Licence) has a right to object on any ground permitted by s.74. By s.73(2)(a)(i), when read with s.73(3), the Association would also be entitled to object on any such ground, where the Court is of opinion that the interests of the body of persons represented by the Association may be adversely affected. See also s.17(1)(c). No question was raised before us concerning the standing of the Association or any of the individual applicants to apply for a writ of *certiorari*. It will be convenient to deal with the advertising point before considering the question of jurisdiction. First, however, it is necessary to consider the impact of the transitional provisions so as to both identify the appropriate subject matter of the applications made by Fiver and AFW and consider the interpretation and application of the transitional provisions.

The Transitional Provisions

It is convenient to consider first the impact of the transitional provisions in relation to Fiver. As at 1st February 1989 Fiver held an Australian Wine Licence in respect of the Fremantle premises, which had been the subject of a grant of a provisional certificate under s.62(1) of the repealed Act for the removal of that licence to the James Street premises. ~~The provisions of s.62(1) have been set out~~ already. Provision was made for the Court or the Director to approve of any changes in the plans: s.62(3). Section 62(5) provided that the Court or the Director, on the application of the holder of the provisional certificate, may grant the removal of the licence in respect of which the provisional certificate was granted, provided the application is made within the time specified in the certificate, or within any extended time, and on proof of erection of the premises substantially in accordance with the plans and specifications and compliance with conditions. The printed form 62 in fact certifies that the removal application "will be granted upon proof" of such matters. It is apparent from s.62 of the repealed Act and the certificate itself, that there is no removal unless and until that application has been granted. It follows, therefore, that under the repealed Act the Australian Wine Licence remained operative, with respect to the Fremantle premises, until the grant of the application for removal. The Provisional certificate had been granted on 26th January 1989. The certificate specified a period of six months as the period

during which the actual application for removal was to be made.

The new Act created a new licensing scheme with different categories of licenses and permits from those granted under the old Act. In particular the new Act contained no provision for an Australian Wine Licence. Section 177 of the new Act provided that:-

"Schedule 1, which contains transitional provisions, has effect."

The general purpose of the transitional provisions appears to have been to ensure that licensees and permit holders under the repealed Act held corresponding licences and permits under the new Act. Provision also needed to be made for part heard matters and matters where applications had been set in train under the repealed Act.

Immediately before the coming into operation of the new Act Fiver held both an Australian Wine Licence in respect of the Fremantle premises and a provisional certificate for the removal of that licence to the James Street premises, which were the "subject premises" for the purposes of s.62(1) of the repealed Act.

Clause 6 of the transitional provisions provides that:-

"(1) On and after the appointed day a person who immediately before that date held a licence or a provisional certificate granted or permit issued and currently in force under the repealed Act shall, subject to this Act, be deemed to be the holder of a licence or permit in accordance with this Schedule, relating to the same premises, until -

(a) where a permit was issued for a specified period or would otherwise have expired

under the repealed Act, that permit expires;

(b) a licence is granted or a permit is issued to that person in accordance with subclause (2) in respect of those premises;

(c) it is surrendered; or

(d) that licence or permit is cancelled under this Act by reason of -

(i) section 93; or

(ii) a determination made under section 96.

(2) As soon as practicable after the appointed day, the Director shall, without requiring any application unless this Schedule otherwise provides, grant to a person to whom subclause (1) applies a licence under this Act of a corresponding class, or shall issue him a permit of a corresponding kind, relating to the same premises as were the subject of the former licence or permit under the repealed Act.

(3) In determining the terms and conditions of the licence or permit to be issued under subclause (2), the Director shall have regard -

(a) to the type of licence or permit held under the repealed Act; and

(b) to any term or condition to which clause 5(1) applies and which relates formerly or formerly related to the premises,

and the determination of the Director is not subject to review or appeal.

(4) Where a licence or permit under the repealed Act is converted under this Schedule or a licence is to be granted under this Schedule, no approval or consent that would otherwise have been required in respect of a licence of that class under this Act is required for the purposes of or in relation to that conversion or grant.

(5) Any conditions that were under the repealed Act imposed in relation to a provisional certificate for the grant or removal of a licence shall be deemed to have been imposed in

relation to a conditional grant made under section 62 in respect of a licence of a corresponding class upon the same terms as were applicable to the provisional certificate.

- (6) Where, for any reason, the operation of a licence or permit was suspended or a licence was temporarily removed under the repealed Act, that licence or permit shall be deemed to be a licence or permit the operation of which is in like manner suspended or temporarily removed under this Act.
- (7) A licence or permit which comes into force or is issued under this Schedule -
 - (a) does not have effect so as to prejudice any proceedings which may have been instituted under the repealed Act in relation to the carrying on of a business under that Act; and
 - (b) is subject to proceedings under section 95 in respect of any matter of complaint which arose prior to the coming into operation of that section and is not the subject of proceedings under the repealed Act."

In the present case, immediately prior to 1st February 1989 Fiver held an Australian Wine Licence with respect to the Fremantle premises. By virtue of cl.6(1) Fiver was deemed to become the holder of a licence in accordance with the Schedule relating to the same premises until the happening of a relevant event specified in cl.6(1) occurred. The only relevant event was that specified in cl.6(1)(b), namely, that "a licence is granted .. to that person in accordance with sub-cl. (2) in respect of those premises". Clause 6(2) provides that the Director is required to grant to a person to whom sub-cl. (1) applies a licence under the new Act of a "corresponding class ... relating to the same premises as were the subject of the former licence .. under the repealed Act."

Clause 6(1) does not specify the class of licence deemed to be held pending the grant under cl.6(2). This point is covered by cl.11(1) of the transitional provisions, which provides so far as relevant that an Australian Wine Licence in force immediately before 1st February 1989 became on that day a special facility licence under the new Act, subject to the like conditions as applied immediately before that day, but not subject to s.29(2) and s.39(4) of the repealed Act.

Hence, on 1st February 1989, Fiver's Australian Wine Licence relating to the Fremantle premises was deemed to be a special facility licence relating to those premises. A special facility licence is a licence of a corresponding kind to an Australian Wine Licence under the 1970 Act by reason of the conversion effected by cl.11(1): see cl.1(5). Thus, unless something more appeared, the Director would be required to grant Fiver a special facility licence under cl.6(2) "as soon as practicable".

Something more does appear. Clause 11(2) provides that:-

"Notwithstanding clause 6(2), the Director may, instead of granting to a person who immediately before the appointed day held a licence under sections 29 or 39 of the repealed Act in respect of the same premises a special facility licence of the kind referred to in subclause (1), upon the lodging of a notice of application grant to that person in respect of premises comprising the whole or a part of the premises formerly licensed -

- (a) a special facility licence subject to a condition restricting the sale of liquor to -
 - (i) wine and brandy, for consumption on or off the premises; and
 - (ii) beer (not being beer sold on draught) and spirits (other than brandy), for consumption on the licensed premises only;

(b) a restaurant licence; or

(c) a cabaret licence,

having regard to any representations made to the Director by or on behalf of the licensee, to the requirements of this Act in relation to the grant of licences of that class, and to the premises and the services and facilities provided, or capable of being provided, there and the determination made by the Director is not subject to review or appeal."

The Australian Wine Licence was held under s.39 of the repealed Act. Thus, instead of granting a corresponding licence under cl.6(2) the Director was empowered to grant Fiver in respect of the Fremantle premises, being the premises "formerly licensed" under the 1970 Act, a Cabaret Licence upon the lodging of a notice of application, having regard to:-

- (a) representations made by or on behalf of the licensee;
- (b) the requirements of the new Act in relation to a Cabaret Licence;
- (c) the premises and the services and facilities provided, or capable of being provided, "there".

In this case the Director granted Fiver a Cabaret Licence in respect of the Fremantle premises on 17th March 1989 and on the same date "wholly suspended" the licence. The order nisi does not direct any challenge to the grant of the Cabaret Licence or the suspension.

Against this background it is necessary to consider the effect of the transitional provisions on the provisional certificate. It was contended on behalf of the applicants that Fiver, being the holder of a provisional certificate for

removal of the Australian Wine Licence to the James Street premises was, by virtue of cl.6(1), deemed to be the holder of a licence in accordance with Schedule 1, relating to the same premises, until a licence was granted of a corresponding class under cl.6(2). The question which arises is what kind of licence? While cl.6(1) refers to a licence, provisional certificate or permit, cl.6(2) refers only to a licence or a permit. Reference is made to a provisional certificate only in cl.6(5). In my view the evident purpose of cl.6(5) was to effect the conversion of a provisional certificate into a conditional grant of removal under s.62 of the new Act in respect of a licence of a corresponding class upon the same terms as the provisional certificate. By cl.6(5) the conditions imposed in relation to the provisional certificate are deemed to have been imposed "in relation to a conditional grant under section 62 in respect of a licence of a corresponding class upon the same terms as were applicable to the provisional certificate". This requires analysis. First the conditions imposed in relation to the provisional certificate continue to apply, namely those relating to completion of the premises and incorporation in the work of the recommendations of the senior supervisor. Secondly, those conditions are deemed to be imposed in relation to a conditional grant under s.62 of the new Act.

Section 62(1) of the new Act provides that:-

"Where an application is made -

(a) for a licence in respect of premises; or

- (b) for the removal of a licence to premises, whether or not to be dealt with at the same time as a related application for the transfer of the licence,

and those premises at the date of the final hearing of that application are uncompleted, if the licensing authority is satisfied that a licence of the class sought in the application, or the removal of a licence to those premises, as the case may be, should be granted to the applicant in relation to those premises on the condition that the premises are completed in accordance with the plans submitted by the applicant, the licensing authority shall grant the licence or removal to the applicant subject to that condition."

It follows from cl.6 of the transitional provisions, when read with s.62(1), that as from 1st February 1989 Fiver was deemed to be the recipient of a grant of removal under s.62(1) subject to the conditions specified in the provisional certificate.

Thirdly the conditional grant is deemed to be in respect of a licence of a corresponding class. In my opinion this means that the licence the subject of the conditional grant is deemed to be a licence of a corresponding class to the licence which was the subject of the provisional certificate of removal, namely, the licence which was held immediately before the commencement of the new Act. This was the Australian Wine Licence which was converted into a special facility licence by virtue of cl.11(1) of the transitional provisions. The result is that as from 1st February 1989 Fiver was deemed to have been granted removal to the James Street premises of the special facility licence, which it was then also deemed to hold subject to the same terms as were applicable to the provisional certificate.

The next step is to consider the effect of a conditional grant of removal. Section 31(1)(b) of the new Act provides that "in this Act":-

"an application for the removal of a licence means an application seeking the variation of the licence so that it no longer has effect in relation to the premises to which it most recently applied and takes effect in relation to other premises."

Thus an application for removal is defined as an application for the variation of a licence. The grant of an application for removal is not itself a licence, but merely the grant of a variation of licence.¹¹ The subject matter of the provisional certificate was the removal of the Australian Wine Licence with respect to the Fremantle premises from those premises to the James Street premises. The subject matter of the conditional grant of removal under s.62(1) of the new Act was the removal of the special facility licence with respect to the Fremantle premises from those premises to the James Street premises, subject to the same conditions as in the provisional certificate.

¹¹This gives rise to an important question, namely, whether the deemed conditional grant had the effect contemplated by s.31(1)(b) of the new Act, namely that the licence ceased to apply in relation to the Fremantle premises and took effect in relation to the James Street premises. If the answer to this question is in the affirmative, the result would be that the special facility licence had ceased to have effect in relation to the Fremantle premises as soon as the conversion of the Australian Wine Licence and the provisional certificate of

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removal had taken place. In my opinion the conditions in the provisional certificate and incorporated in the deemed conditional removal were in the nature of conditions which had to be satisfied before the grant of removal took effect. Only then would the special facility licence cease to apply to the Fremantle premises. Thus, in s.62(3) a person to whom a conditional grant of a licence or removal is made is referred to as "the holder of a licence or removal granted subject to conditions under subsection (1) ..." The grantee of a conditional removal is only regarded as the holder of a conditional removal rather than the holder of a removed licence in respect of the new premises. In my view, having regard to s.31(1)(b) of the new Act, a grant of a conditional removal is a grant of a variation of the licence so that it shall cease to have effect in relation to the original premises and take effect in relation to the new premises when the conditions have been complied with. This is not altogether consistent with the effect of cl.6(1) of the transitional provisions, which deems the holder of a provisional certificate to be the holder of a licence under the Schedule with respect to "the same premises". The inconsistency may not have been intended.

In the case of Fiver the "subject premises" were the James Street premises and in the case of AFW they were the Wellington Street premises. The difficulty is that while cl.6(1) refers to licences, provisional certificates and permits under the repealed Act, cl.6(2) only provides for the

grant of a licence or permit under the new Act corresponding to the licence or permit under the repealed Act. There is no reference to a provisional certificate in cl.6(2). Thus the deemed licence under cl.6(1) in relation to the provisional certificate does not lead to a grant of a licence under cl.6(2).

By s.81(5)(a) of the new Act, however, removal of a licence is effected by an endorsement made on the licence substituting the name of the premises to which the licence is removed for that of the premises to which it previously applied. by s.81(5)(b) the removal takes effect on the date specified in that endorsement "on an application for the proposed removal being granted." In the absence of specification it would seem to be necessarily implied that the deemed conditional grant referred to in cl.6(5) would take effect if and when the relevant conditions were complied with. The Director would then be required to endorse the licence for the Fremantle premises accordingly. The position in relation to AFW was the same.

If all this is correct, the combined effect of the transitional provisions in the case of Fiver was:-

- (a) under cl.11(1) the Australian Wine Licence in relation to the Fremantle premises was converted to a special facility licence;
- (b) under cl.6(5) the conditions in the provisional certificate were deemed imposed in relation to a conditional grant of removal under s.62(1) of the

new Act in respect of the special facility licence from the Fremantle premises to the James Street premises;

(c) under cl.6(1) Fiver as the holder of a provisional certificate for the removal of the Australian Wine Licence to the James Street premises was deemed to be the holder of a licence in accordance with the Schedule relating to the same premises, namely a special facility licence, but there was no provision for that deemed licence to be made the subject of an actual grant under cl.6(2); and

(d) the special facility licence continued to have effect in relation to the Fremantle premises pending compliance with the conditions.

The existence in respect of the provisional certificate of a deemed licence under cl.6(1) which was not capable of a grant under cl.6(2) is difficult to explain. The relevant transitional provision for both a provisional certificate for the grant of a licence and a provisional certificate for the grant of a removal is cl.6(5). The existence of a deemed licence under cl.6(1) would seem to be an anomaly which leads nowhere.

In my view the effect of the transitional provisions on the Australian Wine Licence and the provisional certificate for removal held by AFW under the repealed Act was the same as in the case of the licence and provisional certificate held by Fiver.

The significant point is that there was from 1st February 1989 a deemed special facility licence under cl.11(1) held by Fiver in relation to the Fremantle premises and by AFW in relation to the Guildford premises.

The Cabaret Licence

In my opinion, before considering the validity of the purported removals of the Cabaret Licence which are the subject of the orders nisi, there is a threshold question to consider concerning the validity of the purported grant of the Cabaret Licence under cl.11(2) of the transitional provisions. On 17th March 1989 and 3rd March 1989 the Director purported to grant to each of Fiver and AFW Cabaret Licences in respect of the Fremantle premises and the James Street premises and immediately suspended such licences.

A Cabaret Licence is a "Category A Licence": s. 3 of the new Act. On an informal application made in writing by the licensee the Director may suspend a Category A licence in accordance with the wishes of the licensee for such period as the Director thinks fit: s.90 of the new Act. Whether such an application was made does not appear. It is apparent that the purpose of the suspension was to facilitate a cessation of business at the Fremantle premises pending the completion of construction at the James Street premises. Fiver in fact ceased to occupy the Fremantle premises on 7th April 1989.

As to cl.11(2), however, it is not known what representations were made to the Director on behalf of the

licensee to which he had regard. It is not known to what extent, if any, the Director had regard to the requirements of the Act in relation to the grant of a Cabaret Licence in respect of the Fremantle premises. Likewise it is not known to what extent, if any, the Director had regard "to the premises and the services and the facilities provided, or capable of being provided, there ..." The inference is strong, however, that the Director could not have had regard to the relevant requirements of the Act contained in s.43 of the new Act in respect of the Fremantle premises, or to the premises and the services and facilities referred to with respect to such premises. There was no relevant material before him in relation to those matters. There was in fact no intention on the part of the licensee to conduct a Cabaret Licence at Fremantle. The only plans and specifications in relation to the premises, and the only services and facilities to which the Director was able to have regard were those in relation to the James Street premises. Hence the pre-conditions to the exclusion of review or appeal in cl.11(2) had not been met. The grant of the Cabaret Licence was coupled with an immediate suspension of it. In my opinion these matters are enough to displace the presumption of regularity (*omnia praesumuntur rite esse acta*). The failure of the Director to have regard to the considerations specified as relevant considerations would have the effect that the purported exercise of the power to grant a Cabaret Licence in respect of the Fremantle premises was void and liable to be quashed. The position in relation to AFW was the same.

In each case unless and until the grant of the Cabaret Licence was quashed the grant would have the benefit of the presumption of validity: Hoffman-La Roche v Secretary of State for Trade and Industry [1975] A.C. 205 at p.366 per Lord Diplock; and see Wade, Administrative Law (5th Edn) at pp.305, 313-314. This is so even if the grant may be regarded as a nullity as being beyond power. In Smith v East Elloe Rural District Council [1956] A.C. 736 at p.769 Lord Radcliffe said:-

"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

Wade, Op.Cit at p.313 says "This must be equally true even where the 'brand of invalidity' is plainly visible." Lord Radcliffe's proposition was restated in Ridge v Baldwin [1964] A.C. 40 at p.125 per Lord Morris; in Calvin v Carr [1980] A.C. 574 at pp.589-590 per Lord Wilberforce; and in London v Clydeside Estates v Aberdeen D.C. [1980] 1 W.L.R. 182 at p.189 per Lord Hailsham.

If the grant of the Cabaret Licence was beyond power and void, there would be no valid subject matter for the applications for removal of those licences subsequently considered and granted by the Director in each case on 17th May 1989. Consequently, the Director would have no jurisdiction to grant the removal of the Cabaret Licence and the grant of removal in each case would also be void.

It is only if it be assumed that the Cabaret Licences were validly granted that it becomes necessary to consider the grounds in the order nisi. During the course of argument counsel for the respondents sought to finesse all the grounds as amended by an argument that, in effect, upon the grant of a Cabaret Licence in each case under cl.1(2)(c) of the transitional provisions in lieu of a special facility licence, the Cabaret Licence became the subject matter of the conditional grant of removal instead of the special facility licence. If this was correct it would follow that there was no need to apply for the removal of either of the Cabaret Licences and the order of the Director on 17th May 1989 was unnecessary.

As I have already pointed out, the effect of the transitional provisions was that, as from 1st February 1989, the Australian Wine Licence held by Fiver was deemed to be converted into a special facility licence and Fiver was deemed to have been granted a conditional removal under s.62(1) of the new Act in respect of that licence from the Fremantle premises to the James Street premises. Pending compliance with the conditions the special facility licence continued. The subsequent grant on 17th March 1989 of a Cabaret Licence to Fiver under cl.11(2) in respect of the Fremantle premises was in respect of the premises "formerly licensed", ie the Fremantle premises.

In my opinion the deemed grant of conditional removal of the special facility licence deemed to be held by Fiver by

virtue of cl. 6(1) and 11(1) of the transitional provisions was not converted into a conditional removal of the Cabaret Licence by reason of the subsequent grant of that licence. The position in relation to AFW was the same. Under s.81(3) of the new Act an applicant for the removal of a licence must satisfy the licensing authority of various matters including:-

"(b) that the requirements of this Act in relation to the grant of a new licence of that class are met in relation to -

- (i) the licence sought to be removed; and
- (ii) the premise to which it is sought to be removed."

It is one thing to treat a removal of a licence under the repealed Act as a removal of a licence of a corresponding kind under the new Act, as contemplated by cl.6(5) of the transitional provisions. It is another to treat a removal of a licence of a corresponding kind under the new Act as extending to the removal of a licence granted in lieu of the licence of a corresponding kind under cl.11(2). The provisional certificate in respect of the Australian Wine Licence was granted after the merits of the application had been considered. The special facility licence was a corresponding licence and was subject to the same terms and conditions as the former licence, save for ss.29(2) and 39(4) of the repealed Act. The Cabaret Licence was not a corresponding licence to the former licence. It was one which could be granted in lieu of the corresponding licence having regard, *inter alia*, to the requirements of the Act relating to cabaret licences and the services and facilities at the Fremantle

premises. Acceptance of the respondent's argument would have the result that removal of the Cabaret Licence could take place without any consideration of compliance with the requirements referred to in s.81(3)(b) of the new Act.

There is no express provision in the transitional provisions or the new Act which supports the respondent's argument. In the end it must rest upon necessary implication. In my opinion, however, the implication sought to be drawn would be contrary to the express provision of s.81(3)(b) and the general policy of the Act. Consequently, it would require a separate application for removal under the new Act in each case to effect the removal of the Cabaret Licence to the James Street premises and the Wellington Street premises respectively.

Waiver of Advertising Requirements

In each case the Director made a decision on 17th May 1989 in relation to the application to remove the Cabaret Licence "to waive all advertising requirements". He purported to do so under s.33(3) of the new Act. Section 33(3) confers a power to "waive or modify any requirements for formal compliance with any procedure relating to an application".

Section 67(1) provides that:-

"An application in respect of any of the following matters must be advertised -

- (a) the grant of a licence, other than an occasional licence;
- (b) the removal of a licence;

- (c) the transfer of a licence; or
 - (d) the application to which section 77(6) applies,
- and the applicant must comply with any relevant requirement under subsection (3) and with subsection (4)."

Upon the assumption that advertising is a "procedure" relating to an application for removal for the purposes of s.33(3), the power of waiver or modification extends only to a requirement for "formal compliance" rather than waiver of substantial compliance with a requirement. In my opinion the power in s.33(3) to waive or modify a requirement for formal compliance does not extend to waiver of any compliance at all with a requirement that an application must be advertised. In my view the power in s.33(3) is limited to waiver or modification of a requirement for formal compliance in relation to advertising such as the size or timing of an advertisement. This being so it is not necessary to consider the submission on behalf of the applicants that the existence of a special or limited power to waive or modify requirements as to advertising in one provision of an Act means that resort may not be had to a general power in another provision of the Act: see Leon Fink Holdings Pty Ltd v Australian Film Commission (1979) 141 C.L.R. 627 at p.678.

The requirement of advertising in s.67(1) of the Act is a general provision which applies equally to applications for the grant of a licence (other than an occasional licence); the removal of a licence; the transfer of a licence; and an application to which s.77(6) applies. Section 77 is concerned

with applications for the approval of any material alteration to premises the subject of plans and specifications submitted under s.62. Section 77(6) provides that:-

"Where the Director is satisfied in relation to a Category A licence that an alteration of the licensed premises or redefinition proposed is likely

- (a) to lead to a substantial increase in actual or potential liquor sales; and
- (b) to reduce significantly the actual or potential liquor sales under a Category A licence held by any other person,

and so directs the application is required to be advertised under section 67."

Section 67(1) not only provides that any of the specified applications "must be advertised", but also that the applicant "must comply with any relevant requirement under subsection (3) and with subsection (4)". Subsections (2) to (5) of s.67 provide that:-

"(2) An application in respect of any other matter must, if the Director so requires, be advertised.

(3) The Director may, in an appropriate case -

(a) waive or modify any requirement as to advertisement prescribed, or specified in this section;

(b) direct that -

(i) a requirement as to advertisement shall have effect in relation to a particular application to which it would not otherwise apply; or

(ii) for a requirement of this section there shall be substituted a requirement as to advertisement specified by the Director.

(4) Where an application is required to be advertised -

(a) the applicant shall cause a notice, complying with any direction given by the Director and with any prescribed requirement, to be published, within such period after the application is lodged as the Director may specify, by way of advertisement in a daily newspaper specified by the Director; and

(b) in the case of an application relating to a Category A licence, the applicant shall take all reasonable steps to ensure that a notice of the application, complying with any direction given by the Director and with any prescribed requirement, is kept posted and conspicuously displayed -

(i) on the premises to which the application relates; or

(ii) if those premises are not then constructed, on the land on which it is proposed to construct them,

so that it can be clearly seen and easily read by passers-by during such period after the application is lodged as the Director may require, being a period ending after the last day on which objections to the application should be lodged.

(5) Where an application is required to be advertised, the Director -

(a) shall cause a copy of the notice of application, endorsed with the date of its lodgement with the Director, to be publicly displayed -

(i) at the office of the Director, at Perth; and

(ii) at the office of the clerk to the local court nearest to the place where the premises or proposed premises to which the application relates are, or are to be, situate if this place is not within 48 kilometres of the General Post Office, Perth; and

- (b) shall cause to be published in the Gazette a summary of the notice of application."

The applicants say that in the exercise of the discretion to waive or modify under s.67(3) the Director must take into account the specific provisions in relation to removal in s.81. Section 81(1) provides that subject to certain other provisions, none of which are presently relevant, the licensing authority has the same jurisdiction in relation to an application for removal as it does in relation to the grant of a new licence of that class. As has been seen the applicant must comply with the requirements of the Act in relation to a grant of a new licence of that class: s.81(3). These provisions are a recognition that a grant of removal into a new area may be as significant as the grant of a new licence of the relevant class in that area. In that context s.71 provides that:

"(1) Where -

- (a) a notice of application is lodged for the grant of a Category A licence; or
- (b) the Director, having regard to the nature of an application in any other case, determines that it would be appropriate,

the Director shall cause an area surrounding the place where the premises to which the application relates are, or are proposed to be, situate to be specified, and the area so specified shall be taken to be the affected area to which the application relates.

(2) In specifying an affected area, the Director may take into account -

- (a) the class of licence to which the application relates;

- (b) the nature and location of the places from which, and the persons from whom, the prospective licensee might derive trade;
 - (c) planning matters;
 - (d) existing or proposed licensed premises or other recreational venues, facilities or amenities;
 - (e) question of access, or of limitations on access;
 - (f) established or prospective trading patterns; and
 - (g) any other matter likely to be relevant to the reasonable requirements or expectations of the public.
- (3) A person may obtain a copy of the specification of the affected area from the Director."

Thus it is mandatory for the Director to specify an affected area in the case of an application for the grant of a new licence and a matter of discretion in the case of other applications. Where the jurisdiction in relation to removal is the same as that for the grant of a new licence of that class and the requirements are likewise the same under s.81(1) and (3) the starting point would be that it would be appropriate to specify an affected area in the absence of some relevant reason to the contrary. Having regard to the terms of s.73(2), one would also expect that whenever an affected area was specified it would also be appropriate to advertise. The grounds of objection under s.74(1) include in para. (d) in relation to an application for a Category A licence "that the grant of the application is not necessary in order to provide for the requirements of the public." For example, it may be objected that there are already sufficient licences of the

relevant class and the grant of a new licence or the grant of a removal into the affected area would adversely affect the ability of the existing licensees to meet the requirements of the public. This may also be said to be contrary to the public interest under s.74(1)(a). It is in this context that s.81(4) provides that:-

"Notwithstanding subsection (3), the Director may dispense with any requirement for advertising, and need not specify an affected area, where the Director considers that the removal of the licence is from and to premises within the same locality and is unlikely to cause significant adverse effects on other licences, or that any other proper reason exists, and that to do so will assist in an expeditious determination of the application in a manner not contrary to the public interest."

It is significant that the primary reason for dispensation of the requirement for advertising and specification of an affected area is that "the removal of the licence is from and to premises within the same locality and is unlikely to cause significant adverse effects on other licensees ...". This would seem to imply that, on the face of it, where the removal is into a different locality where there are existing licensees of the same class who would have potential claims to be significantly adversely affected by the removal, the discretion should not be exercised. It would also seem to follow that "no other proper reason" could exist in such a case, save in exceptional circumstances. Another reason may exist where premises in the relevant area the subject of a licence of the same class have closed down, and the licence surrendered or cancelled. The removal to move premises will do no more than restore the status quo. In any case the Director

would also need to be satisfied that to dispense with advertising and specifying an affected area "will assist in an expeditious determination of the application in a manner not contrary to the public interest."

Counsel for the respondents contended that s.67(3) conferred a power on the Director to waive advertising absolutely in an appropriate case. In other words the Director could dispense with advertising altogether. Reliance was placed on the words "specified in this section" in sub-s.(3). It was said that they showed that the power to waive or modify was not limited to the requirements in sub-s.(4), but extended to the provision that a matter "must be advertised" in the opening words of sub-s.(1). This was said to be a requirement as to advertisement specified in the section. The power to waive or modify is expressly limited to requirements "as to advertisement prescribed, or specified in this section". In my view this expression points to some specific requirement where there is an obligation to advertise rather than to the obligation itself. In s.81(4) by contrast the Director is given power to "dispense with any requirement for advertising" as distinct from a power to waive or modify a prescribed or specified "requirement as to advertisement". While the drafting is not altogether satisfactory, I consider that the words "Where an application is required to be advertised" in s.67(4) are a reference to the basic obligation to advertise imposed by the opening words of s.67(1) that a relevant application "must be advertised". This is consistent with the

concluding words in s.67(1) which amplify the basic obligation by requiring compliance with "any relevant requirement under sub-section (3) and with sub-section (4)". The words "any relevant requirement" in this passage are referable only to a "requirement as to advertisement" under sub-s. (3) imposed by a direction of the Director pursuant to sub-s.3(b). Acceptance of the respondent's contention would have the result that the Director, having directed that the applicant advertise in a certain way could subsequently waive or modify the requirement so imposed. So far as sub-s.(4) is concerned the effect of sub-s.(1) is that an application for removal of a licence "must be advertised ... and the applicant must comply .. with sub-section (4)." Section 67(4) imposes a number of specific requirements as to advertisement. For example para. (a) provides for publication of a notice "complying with any direction given by the Director and with any prescribed requirements". It is also provided that publication shall take place within such period after the application is lodged that "the Director may specify, by way of an advertisement in a newspaper specified by the Director". Clearly each of these matters is a "requirement as to advertisement" for the purposes of s.67(3) (a). Section 67(4) (b) provides for a notice of the application "complying with any direction given by the Director and with any prescribed requirement" to be displayed on the subject premises or on the land on which they are to be constructed. In my view each of these matters is also "a requirement as to advertisement" for the purposes of s.67(3) (a).

The intention of the legislature in these provisions is clear. It is that the Director was given power to waive or modify any requirement as to advertisement prescribed by regulation or specified in the section itself. By s.175(d) the Governor is empowered to make regulations "prescribing all matters which are required by this Act to be prescribed .. and in particular for or with respect to advertising and the content of notices". In my view there is nothing in s.67 which lends any support for the view that the power to waive or modify conferred on the Director under s.67(3)(a) extended beyond any particular "requirement as to advertisement" to include a power to waive absolutely the basic obligation that a relevant application "must be advertised". As already noted that obligation is imposed in respect of an application for approval of any material alteration to premises to which s.77(6) applies. Acceptance of the argument of counsel for the respondents that the power to waive extends to an absolute waiver could lead to the extraordinary result that the Director, having been satisfied that the alteration would lead to a substantial increase in actual or potential sales from the subject premises and reduce significantly such sales from other relevant premises and directed advertising under s.67, could then waive the obligation to advertise imposed by s.67(1). I reject the respondents' argument that such a power is necessary to enable the Director to change his mind or correct a mistake.

The respondents also sought to rely on s.81(4) of the new Act the provisions of which are set out above. Section 81, of course, is specifically referable to applications for removal and must be read with s.62 in relation to conditional grants of removal where the relevant premises are uncompleted. Section 81(3) provides that the applicant must satisfy the licensing authority *inter alia* as to the matters referred to in s.37(1) and that the requirements of this Act in relation to the grant of a new licence are met in relation to the licence to be removed and the premises to which it is sought to be removed. In my opinion, the latter requirements include the compliance with the obligation to advertise imposed by s.67(1).

It is clear that s.81(4) confers a power on the Director to dispense with advertising in the circumstances specified and relieves him of the obligation under s.71 to specify an affected area. It is also clear that the primary head of power to dispense arises where the removal is from and to premises within the same locality has no application in the present cases. Thus, the power to dispense could only arise in these cases if the Director considers that:-

"... any other proper reason exists, and that to do so will assist in the expeditious determination of the application in a manner not contrary to the public interest."

The respondents contend that in the present cases the Director considered that a "proper reason" existed. The proper reason was said to be that set out in the decision to waive all advertising requirements on 17th May 1989, namely, as expressed in the case of Fiver:-

"On the understanding that the conditional removal applies to the cabaret licence, the licensee has irrevocably entered into commercial arrangements and leases and paid large sums of money. To make it clear that the conditional removal applies to the cabaret licence, the present application for removal has been lodged. The applicant has also applied for all advertising requirements to be waived, and for the plans of the new premises lodged on 13 February 1989 to be accepted in relation to this application."

The respondents further contend that the Director also considered that the dispensation would assist in an expeditious determination of the application in a manner not contrary to the public interest.

The threshold difficulty with these contentions is that there is no evidence that the Director directed his mind to the provisions of s.81(4) at all. The evidence discloses only that he purported to act under s.33(3). There is no evidence that the Director considered the relevant circumstances in the context of s.81(4). Before he could exercise the dispensing power he would be bound to consider those circumstances and come to a conclusion both that a proper reason existed for the exercise of the power and that exercise would not lead to a determination of the application in a manner contrary to the public interest: cf Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 C.L.R. 24 at p.30 per Gibbs CJ; at pp.43-44 per Mason J (with whom Dawson J agreed).

The circumstances relevant to the exercise of the power must be determined by reference to the purpose of the provisions for advertising in s.67 and the specification of an affected area under s.71 in the context of the grounds for

objection in s.74. In the case of a Category A Licence, the relevant considerations would include whether the circumstances were such that it was so unlikely that the interests of any existing licensee in the relevant area would be adversely affected, that advertising and the specification of an affected area were unnecessary. This is because the effect of the exercise of the dispensing power is to deprive any licensee of any right to object. It would also be relevant to consider the interests of the residents in the area who are likewise deprived of any right to object by the exercise of the power.

In the case of a removal from and to premises within the same locality there is a real possibility that the interests of neither other licensees nor residents in the locality would be adversely affected. Hence the rationale for the dispensation in such circumstances. In my opinion the expression "any other proper reason" takes its colour from the express reason which precedes it and the circumstances under which advertising and the specification of an affected area are required and the purpose of doing those things. The purpose is to confer upon persons whose interests may be affected a right to object.

Neither in the case of Fiver nor in the case of AFW is there any evidence to suggest that the Director gave any consideration to the question whether the removal of the relevant licence into the Northbridge area would be likely to cause any significant adverse effects on the holders of other

cabaret licences in that area. Five of the applicants in each case are the holders of cabaret licences in an area in close proximity to both the James Street premises and the Wellington Street premises.

Neither in the case of Fiver nor in the case of AFW, is there any evidence to suggest that the Director gave any consideration to the question whether the dispensation would lead to an expeditious determination in a manner not contrary to the public interest. The dispensation certainly led to an expeditious determination, for it enabled the Director to grant the applications for removal, which had been lodged on 16th May 1989, on 17th May 1989. There is no reference in his decision to the public interest. The matters to which he referred were related only to the private and particular interests of the applicants. It was submitted by the respondents that for a determination to be "not contrary to the public interest" it must be fair or just in the circumstances: Ellis v The Home Office [1953] Q.B. 135 at p.147. It was argued that, having regard to the understanding of Fiver and AFW that the deemed conditional removal resulting from the operation of the transitional provisions applied to the Cabaret Licence subsequently granted on 17th March 1989, and their conduct in acting to their detriment on that understanding, it was fair and just in the circumstances to dispense with advertising. Hence the dispensation had led to the determination of the application to remove the Cabaret Licences in a manner not contrary to the public interest.

I accept the submission but reject the argument. The fairness and justice of the manner of the determination must be considered from the standpoint of the purpose of the requirements of advertising and specifying an affected area. Hence the interests of potential objectors must be the primary consideration. The first ground of objection specified in s.73(1)(a) of the new Act is:-

"that the grant of the application would be contrary to the public interest."

The objects of the Act set out in s.5 include the regulation and proper development of the liquor industry and the provision of adequate controls. One of the basic purposes of the Act is to regulate the sale of liquor by licensing in a manner which ensures that the reasonable requirements of the public are met. This is achieved by limiting the number of licences of a particular category in any given area. These purposes are apparent from the provisions of s.38. This sets out the matters to which the licensing authority is required to have regard in determining whether a licence is necessary to provide for the reasonable requirements of the public in the relevant area. Section 38 applies both to the grant or removal of a Category A licence. It would not be in the public interest to have a licence granted in or removed to an area, if the result would be that the overall standard of services and facilities would fall because of significant adverse effects on the viability of the individual outlets in the area. The public, therefore, have an interest in the administration of the Act in a way which will take account of

and be consistent with the objects and purposes of the legislation. There is no evidence that the Director considered the public interest when he decided "to waive all advertising requirements".

For these reasons, I consider that, even if it is open to the respondents to support the Director's waiver under s.33(3) on the basis that the decision could be supported under s.81(4) which conferred a power he did not purport to exercise, the decision cannot in fact be supported under s.81(4). In the context of that provision, the Director failed to take into account the relevant considerations. In any event there was nothing in the materials before him to suggest that a proper reason existed for the exercise of the power or that to do so would assist in an expeditious determination of the application in a manner not contrary to the public interest. It follows that the decision to waive all advertising requirements was founded on an error of law on the face of the record, in that s.33(3) provided no foundation for the decision and no other foundation for the decision existed under the Act. This was a case in which the Director was bound to specify an affected area under s.71(1)(a). It was a case in which the application for removal had to be advertised under s.67(1). This means that the order of the Director approving the application for removal of the Cabaret Licence was made without jurisdiction because the affected area had not been specified and the application had not been advertised. The jurisdiction of the Director would only arise under

s.30(4)(a)(i) after advertising had taken place and there were no objections to the removal, or, notwithstanding objections, the Court remitted the matter to the Director for determination under s.30(4)(a)(ii). Further, in the absence of advertising, the Director could not have been satisfied that all the requirements of the Act in relation to the grant of a new licence had been met, as provided in s.81(3)(b), because the application had not been advertised.

In my opinion, therefore, the grounds specified in paras. 1 and 2(a) of the order nisi have been made out. Consequently, it is not strictly necessary to deal with the two grounds added by amendment at the hearing. I propose to refer to them, however, because they raise questions of construction concerning legislation which has only been introduced this year and which may be of some importance in the administration of the new Act.

The first ground, being that in para. 2(b), is based on a submission that the Director had no jurisdiction to make the order in the case of Fiver, because Fiver had ceased to have an interest in the Cabaret Licence as it had vacated the Fremantle premises on 7th April 1989. Likewise in the case of AFW, because it had vacated the Guildford premises on 9th May 1989. The submission was founded upon s.37(5) of the new Act which provides that:-

"Every licence, other than a club restricted licence or an occasional licence, is subject to the condition that the licensee occupies, and retains a right to occupy, the licensed premises to the exclusion of others, and -

- (a) an application for the grant or removal of such a licence shall not be granted unless the licensing authority is satisfied that the applicant can, or on the grant of the application will be enabled to, comply with that condition; and
- (b) if the licensee ceases to occupy the licensed premises, whether or not to the exclusion of others, the interest of the licensee in the licence terminates."

In the meantime, however, the Cabaret Licence, immediately upon its grant in March 1989 had in each case been suspended and the suspension was continued by the order for conditional removal made on 17th May 1989. Even though the latter order was void, the earlier suspension would continue because it was expressed to be "until further notice". As already noted s.90(b) gave power to the Director to suspend the Cabaret Licence in accordance with the wishes of the licensee, having regard to the detrimental effect, if any, the suspension might have on the interests of the public in the area. There is no material before us which would displace the presumption of regularity in either case in relation to the suspension on 17th March 1989. Section 32(5) provides that a suspended licence continues in force and is capable of being removed or transferred, but does not authorise the sale of liquor during the period of the suspension. In my view, the suspension of the operation of a licence under s.90 has the effect that, during the period of suspension, the licensee is relieved of the obligation to comply with the terms and conditions of the licence, including the occupation of the premises. The licensee, however, retains an interest in the

licence which enables it to be transferred or removed. In my opinion ground 2(b) fails.

Ground 2(c) in each case rests on the proposition that because the agreements entered into by Fiver and AFW contemplated that others would become the licensees of the premises when the relevant conditions were satisfied, neither Fiver nor AFW was "the person wishing to hold the licence after the removal" as required by s.81(2). In my opinion, the terms of the relevant agreements were such that, in order to put themselves in a position to sell and transfer the licence to the proposed transferees, Fiver and AFW each had to succeed in obtaining removal of their licences. Hence, each wished to hold the relevant licence after removal, if only for the purpose of completing the sale and transfer. It follows that ground 2(c) also fails.

Discretion

The grant of the remedy of a writ of certiorari lies in the discretion of the Court. Certiorari, however, has as its primary purpose the preservation of the rule of law by preventing excess or abuse of power, rather than the final determination of private rights: Wade, Administrative Law (5th Ed 1982) p.592. Professor Wade, *Ibid*, makes it clear that:-

"The discretion to withhold remedies against unlawful action may make inroads upon the rule of law and must therefore be exercised with the greatest care. In any normal case the remedy accompanies the right."

Order 56 r.11(1) provides that:-

"An order nisi for a writ of Certiorari to remove a judgment, order, conviction or other proceeding of an inferior court or tribunal, or of a magistrate or justices, for the purpose of its being quashed, shall not be granted unless the application for the order is made within 6 months after the date of the judgment, order, conviction or other proceeding, or within such other periods as may be prescribed by an enactment, or except where a period is so prescribed, the delay is accounted for to the satisfaction of the Court to which the application is made."

The respondents submitted that the respondents had been guilty of delay. O. 56 r.11(1), of course, sets a time limit for applying for an order nisi. The relevant orders were made by the Director on 17th May 1989. The applications for an order nisi were filed on 21st July. The respondents were notified of the application in each case by 31st July at the latest. The relevant circumstances are set out in an affidavit sworn by the solicitor having the conduct of the matter on behalf of the applicants in each case. In my view the applicants and their solicitors acted promptly in seeking the order nisi. There is no foundation in the evidence before us which would support any complaint of delay. Consequently it is unnecessary to go into the authorities concerning delay such as R v O'Sullivan; Ex parte Clarke [1967] W.A.R. 168 at pp.171, 172-173; and the authorities referred to in deSmith, Judicial Review of Administrative Action (4th Ed 1980) at pp.479-480. The fact that between 17th May and 31st July the respondents and Salmon Point may have acted to their detriment cannot be regarded as prejudice caused by any delay on the part of the applicants: cf R v Herrod; Ex parte Leeds District Council

[1976] 1 Q.B. 540 at pp.557-570, 574-575. In my opinion, there is no substance in the submission that the applicants were guilty of delay.

The respondents also submitted that certiorari should not be granted because it would cause hardship to the respondents. It was argued that as a result of their dealings with the Director, following the commencement of the new Act, they had a legitimate expectation based on statements made to them by him, that they would be entitled to the Cabaret Licences for the respective premises in Wellington Street and James Street: cf Kioa v Minister for Immigration and Ethnic Affairs (1985) 159 C.L.R. 550; (1985) 62 A.L.R. 321

It is true that, at least to some extent, the respondents relied on advice given to them by the Director. They were also being advised by their own legal advisers. In the case of Fiver, on the day after the new Act commenced, Fiver requested architects to revise the approved plans for the James Street premises so that they would be suitable for a Cabaret Licence. This indicates that Fiver considered that it could obtain a Cabaret Licence under the new Act and remove it to the James Street premises. In a letter dated 6th January 1989 sent to all holders of Australian Wine Licences the Director explained the transitional provisions and explained that application could be made for the grant of a Cabaret Licence. In that letter the Director said:-

"It should be noted, however, that this grant will apply only to the premises which were licensed on the appointed day. If the licensee then wishes to alter or enlarge those premises, or to remove them

to a new location, that must be the subject of a separate application. All the provisions of the new Act as to advertising, objections and the like will then apply to that application.

If you have any queries about this procedure, please contact this Division or obtain separate legal advice."

This letter suggests that if a Cabaret Licence was granted and the licensee then wished to remove it to a new location, a separate application for removal would be necessary and all the provisions of the new Act would apply. The question which then arose was what effect the grant of the Cabaret Licence had on the deemed conditional removal of the special facility licence as a result of the transitional provisions. On 3rd April 1989 the Director advised Fiver's solicitors by letter that the Cabaret Licence was "the subject of a conditional removal to premises in Northbridge pursuant to section 62 of the Act." Fiver and Salmon Point then proceeded to act on that advice which was incorrect. Fiver has outlaid moneys on the basis of that advice. On 10th May 1989 the Director informed Fiver's solicitors by letter that there was a question of law whether the conditional removal applied to the Cabaret Licence. The Director said:-

"The question of law is whether the conditional removal of the special facility licence now applies to the cabaret licence. On one argument, the cabaret licence has simply been a conversion of the special facility licence, so that they are still the same licence with a different title. On this interpretation, the conditional removal order still applies to the cabaret licence. On the other side, it could be argued that the cabaret licence is in substitution for the special facility licence so that the conditional removal does not apply to the new cabaret licence.

At previous meetings, I indicated that the former interpretation was to be preferred, but now I am not so certain. If as a matter of law the latter interpretation is correct, then the cabaret licences may not be removed to the new premises at Northbridge under the existing orders, whatever previous indications I may have given.

This is obviously a matter of considerable significance to your clients, and should be resolved as quickly as possible.

Please consider this matter and let me know whether you want to make submissions on the question. I would be willing to refer the matter to the Liquor Licensing Court as a question of law under section 24(2) of the new Act if you consider that is the best way to approach the matter."

In my opinion it was reasonable to assume that the respondents and their advisers knew or ought to have known that there were difficult legal questions relating to the application and interpretation of the transitional provisions and the provisions of the new Act to their situation. The Director had merely expressed a "preferred view".

There was clearly uncertainty. There was provision under s.24(2) of the new Act for the Director to refer any question of law to the Court for determination. Fiver did not ask him to do so. When he offered to do so in his letter dated 10th May 1989 his offer was not accepted. Fiver was only prepared for a question to be referred "on objective basis" (i.e. without reference to Fiver).

In my view the respondents must have known that in acting on the Director's view as set out in his letter dated 3rd April 1989, having regard to the earlier letter dated 6th January 1989, that they were taking a risk. The respondents could have asked the Director to refer their applications for removal to the Court under s.24(1) but did not do so.

The evidence in relation to AFW's position does not differ in any material respect. In my view the material before us leads to an inference that the respondents were not prepared to test the matter. Instead they wished to attempt to gain an advantage by securing the removal of the Cabaret Licences into the Northbridge area without the necessity of either advertising or having to meet objections.

To the extent that any hardship on the respondents is relevant to the exercise of discretion, it must be balanced against the hardship to the applicants who are the holders of Cabaret Licences in the Northbridge area. The evidence before us indicates that all were potential objectors who claim they will be adversely affected. They have been deprived of the right to object that they would have had, had the requirements of the Act regarding advertisement and specification of the affected area been complied with. The Association has also been deprived of the opportunity to object.

In my opinion there is no reason why the Court should exercise its discretion to refuse the relief sought.

For these reasons I am of the opinion that the applicants in each case are entitled to have the order of the Director made on 17th May 1989 quashed. For that purpose the order nisi should be made absolute and the Court should direct pursuant to O.56 r.13 that the order of the Director shall be quashed on the return of the writ without further order.