

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Applicant:** Deva Paradiso Pty Ltd
(Represented by Mr Mario Sequeira of Hospitality Total Services (Aus) Pty Ltd)
- Intervener:** Chief Health Officer
(Represented by Mr Thomas Ledger of the State Solicitor's Office)
- Commission:** Ms Pamela Hass (Presiding Member)
Mr Nicholas van Hattem (Member)
Ms Sandra Di Bartolomeo (Member)
- Matter:** Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the Director of Liquor Licensing to refuse an application to vary a condition of a Nightclub licence in respect of the premises know as Club Paradiso.
- Premises:** Club Paradiso
160 James Street
Northbridge, Western Australia, 6003
- Date of hearing:** 26 July 2022
- Date of determination:** 19 October 2022
- Determination:** The Application is refused and the decision of the Director of Liquor Licensing of 25 February 2022 is confirmed.

Authorities considered in the determination:

- *Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227
- *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208
- *Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356
- *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384

Background

1. On 15 July 2021, a Nightclub licence was conditionally granted to Deva Paradiso Pty Ltd (“**Applicant**”) under section 42 of the *Liquor Control Act 1988* (WA) (“**the Act**”).
2. The conditional licence was in respect of premises to be known as Club Paradiso at 160 James Street, Northbridge (“**the Premises**”).
3. Condition 6, being a condition contained in a Schedule of Trading Conditions to a Nightclub Licence granted for the Premises, provided as follows:
 - “6. *The sale of 'shooters' are:*
 - (a) *limited to only one shot per person per transaction during those permitted trading hours prior to midnight; and*
 - (b) *prohibited after 12 midnight.*” (“**Condition 6**”).
4. On 11 September 2021, an application was lodged by the Applicant to “add, vary or cancel” (in this case remove) Condition 6 on that licence (“**Application**”). The Application provided various Attachments to Submissions listed as Documents 1.1 to 1.8.
5. On 5 November 2021, the Chief Health Officer (“**CHO**”) submitted a written Intervention (“**the Intervention**”) in relation to the Application pursuant to Section 69(8a)(b) of the Act.
6. By the Intervention, the CHO opposed the variation to Condition 6 on the basis that there is harm minimisation value in restricting access to high-risk alcohol products such as shooters, particularly during late night trading hours when harm due to alcohol consumption peaks in the locality in question, being Northbridge. The CHO provided various Attachments to the Intervention listed as Documents 4.1 to 4.3 and 5.1 to 5.6. It is noted that the CHO had previously intervened in the original application seeking harm minimisation conditions on the licence.
7. The Applicant had on 4 August 2021 met with the CHO representatives and provided subsequently written submissions about the removal of Condition 6.
8. The Applicant proposed in submissions to the Delegate of the Director of Liquor Licensing that the Application be approved and include a 2-year trial during which time it would maintain data on the sale of shooters and other beverages. The Applicant also indicated its willingness to acceptance of a variation of Condition 6 rather than its removal, as follows: “*The Licensee shall not promote or employ incentives which encourage the excessive consumption of 'shooters'.*”
9. The CHO provided further submissions dated 10 December 2021 attaching Documents 7.1 (being an Expert Witness Statement by Professor Daniel Fatovich) and Documents 8 and 8.1.
10. The Applicant provided further Submissions dated 10 December 2021 attaching Document 9.1.
11. The CHO provided closing Submissions dated 17 December 2021.

12. The Applicant provided closing Submissions dated 17 December 2021.
13. On 14 February 2022, the Delegate of the Director of Liquor Licensing refused the Application stating that Condition 6 imposed on the Nightclub licence is considered a positive harm minimisation measure and is relevant considering the nature of the Licence, the trading hours of a Nightclub licence and the existing levels of harm in the locality.
14. Reasons for Decision were provided dated 25 February 2022 ("**Decision**").
15. The Applicant applied for a Review of the Decision on 16 March 2022, pursuant to section 25 of the Act.

Submissions by the Applicant

16. The Application to add, vary or cancel a condition of the Licence was lodged with the Director of Liquor Licensing on 1 October 2021 with attachments as follows:
 1. Drinks Data Summary.
 2. Shooter Alcohol Strength Calculation.
 3. Banned Shooter Alcohol Strength Calculation.
 4. Email to CHO of 5 August 2021.
 5. Email Response to CHO of 1 September 2021.
 6. Letter from CHO Delegate of 17 September 2021.
17. The Applicant provided further submissions dated 10 December 2021 attaching the decision in *Carnegies Realty Pty Ltd v Director Liquor Licensing* [2015] WASC 208 ("**Carnegies**").
18. The Applicant provided further closing submissions dated 17 December 2021.
19. These documents are all before the Commission on review and have been taken into consideration by the Commission.
20. The grounds for the Application lodged with the Commission for review of the decision of the Director of Liquor Licensing under section 25 of the Act on 16 March 2022 are that the delegate of the Director of Liquor Licensing:
 - a) Applied too much weight to the general submissions of the CHO and took a narrow approach in applying the primary object as outlined in Section 5(1)(a) of the Liquor Control Act (the Act) to 'regulate' the sale, supply and consumption of liquor (e.g., shooters).
 - b) Failed to adequately consider the significant and specific harm minimisation approach to be implemented by the experienced Licensee Applicant in accordance with Section 5(1)(b) of the Act.
 - c) Failed to consider the diverse requirements of consumers as per Section 5(1)(c) of the Act and gave too much weight to alcohol related harm in the entertainment precinct with no specific reference to the sale and supply of shooters in a Nightclub setting.

- d) Gave little to no weight to the public interest aspects of the application, particularly when considering the development of licensed premises for the provision of live music (Section 5(2)(a) of the Act).
 - e) Failed to consider the public interest benefits of the substantial submissions of the Licensee Applicant to minimise harm as per Section 38(4) of the Act and failed to link the alcohol related harm in the locality after 12am to the controlled sale of shooters that are typically half a standard drink.
21. The Applicant in submissions before the Commission stated:
- a) The Licensee was an experienced nightclub operator in Northbridge.
 - b) Shooters are an integral offering in a nightclub operation.
 - c) It is not practical or feasible to comply with a condition such as Condition 6.
 - d) There is no evidence to link consumption of “shots” or “shooters” with alcohol related harm in the Northbridge area.
 - e) It is wrong to conclude that consumption of shooters after midnight will cause unacceptable levels of alcohol related harm in the area.
 - f) The *Carnegies* decision applies and general information about alcohol related harm in a general location is not sufficient.
 - g) The Licensee intends to implement harm minimisation strategies, namely the availability of food; Nurses Station; extensive and robust CCTV cameras; crowd controllers and toilet amenity.
 - h) The harm minimisation strategies such as data collection, multiple better quality cameras providing CCTV footage of high quality and food availability are relevant.
 - i) There are other factors which contribute to alcohol related harm, and often other categories of drinks which deliver similar alcohol content should be considered.
22. The Applicant submits also that while the total capacity of the Premises is large there will be 5 different controlled areas in which patrons will be located with each area having the harm minimisation measures in place referred to above.
23. The Applicant submits that the matters outlined in section 38(4) with respect to public interest have been fully addressed in its Public Interest Assessment and submissions, along with the matters outlined in its primary submissions to the Commission.
24. In particular, the Applicant referred to the Director of Liquor Licensing’s Policy on public interest assessments that states: *“Licensee Applicants can complete their own public interest assessment by following the guidelines provided within the Public Interest Assessment Policy, and by taking a common-sense approach to their submission and liaising with the relevant key stakeholders and interest groups in the community.”* (as underlined by the Applicant).
25. In this regard, the Applicant states that it accordingly liaised with both the Chief Health Officer (CHO) and the Liquor Enforcement Unit (LEU) with respect to the Add, Vary, Cancel application.

26. The Applicant, in consideration of the concerns of the Intervener has proposed an amended Condition 6, namely:

“6. The sale of ‘shooters’ are:

(a) limited to only one shot per person per transaction during the permitted trading hours prior to 3 am; and

(b) prohibited after 3 am.”

27. The Applicant further proposes a trial period for the amended Condition 6 in conjunction with a reliable Identification Scanning System and a Data Collection System during the trial period as there exists in the Applicant’s submission no data to link shooters directly to alcohol related harm in the specific locality of Northbridge.

Submissions by the Chief Health Officer as Intervener

28. The CHO lodged the intervention dated 5 November 2021 under Section 69 of the Act, attaching the following documents listed at Document 4 of the Index of Documents:

- a) Attachment 1 - Promotions on Paramount Nightclub Facebook Page.
- b) Attachment 2 - Western Australia Police Force Data (Unpublished) 2021.
- c) Attachment 3 - Newspaper Articles.

29. The CHO further provided references listed at Document 5 of the Index of Documents as follows:

- a) 5.1 Alcohol and Licensed Premises: Best Practice in Policing.
- b) 5.2 Australian Guidelines to Reduce Health Risks from Drinking Alcohol.
- c) 5.3 The Risks of Drinking Alcohol – SA Health.
- d) 5.4 WA Police Annual Report 2021.
- e) 5.5 The Conversation – What is Drink Spiking? How can you know if it’s happened to you, and how can it be prevented?
- f) 5.6 NCETA Report – Young People and Alcohol – The role of cultural influences.

30. The CHO referred to the harm or ill-health concerns which arise from shooters being a high-risk alcohol product for harm due to:

- a) The way they are served i.e., neat or straight.
- b) The manner in which they are consumed i.e., a single gulp.
- c) The resulting potential to lead to rapid drunkenness and related harm.
- d) Shots are often consumed with other alcohol products.

31. The Application relates to conditions on a new Nightclub licence in an area already experiencing alcohol related harm, which peaks during late night trading hours. The CHO provides data which, he says, proves that alcohol related offences peak in the hours during which the Applicant seeks to sell shooters.

32. The CHO submits that there is harm minimisation value in restricting access to high-risk alcohol products such as shooters during late night and early morning hours when alcohol related harm peaks in the immediate locality of the nightclub.
33. The CHO submits that there is no evidence that the availability of shooters will serve as a harm minimisation measure by eliminating any risk of drink spiking.
34. The CHO also submits that the Applicant's suggestion of a 2-year trial period during which data could be maintained as to the number and type of shooters sold is flawed, as the proposed data collection does not provide an accurate picture of actual drinking practices and consumption of, in particular, shooters.
35. In the CHO's further submission dated 10 December 2021, he attaches a witness statement of 8 December 2021 by Professor Daniel Fatovich, Senior Emergency Physician at Royal Perth Hospital ("**RPH**"), which is located within the locality of the Premises and is the closest hospital to the Northbridge entertainment district.
36. Professor Fatovich states that:

"Alcohol is a major contributor to presentations to the RPH ED...(15.2% of all presentations were alcohol related... and 66.7% of the incident locations that led to presentation at RPH ED were from Perth City/Northbridge".
37. Professor Fatovich also refers to the physical aggression experienced towards staff from alcohol affected patients. He states as follows: *"Injury was the most common presentation [from alcohol related incidents] followed by a mental health diagnosis (20.2%)"*.
38. Between midnight and 5:00am Sunday morning, 51.4% of attendances were alcohol related.
39. Based on Professor Fatovich's clinical experience, and the experience of [RPH] ED, the sale of alcohol products that are designed to be consumed rapidly (e.g., shooters) means the blood alcohol concentration will rise rapidly, sometimes in the background of an already excessive consumption of alcohol. This rapidly increases the risk of alcohol related harms such as injury and risks of assault to innocent bystander third parties. Professor Fatovich concludes that [shooters] have an overall adverse impact on public health and safety.
40. The CHO's closing submissions dated 17 December 2021 are also included at Document 10.
41. In closing, the CHO reiterates his earlier submissions noting concerns with the Applicant's proposed new condition that the sale of shooters is limited to only one shot per person per transaction during permitted trading hours prior to 3:00am and prohibited after 3:00am.
42. Those concerns are as follows:
 - a) The condition does not prevent separate multiple transactions of shots by a single patron within a short time frame and/or in conjunction with other alcoholic drinks.
 - b) This could result in rapid intoxication before staff are able to identify physical and behavioural signs of intoxication.
 - c) The manner in which shots are designed to be consumed has the potential to lead to rapid drunkenness and related harm.

Legal and Statutory Framework

43. The Commission is not required to find error on the part of the Director of Liquor Licensing, but rather undertakes a full review and makes a determination on the basis of the same materials as before the Director when the decision was made (*Hancock v Executive Director of Public Health [2008] WASC 224*).
44. On a review under section 25 of the Act, the Commission may:
 - a) affirm, vary or quash the decision subject to the review; and
 - 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; and
 - c) give directions:
 - i. as to any question of the law reviewed; or
 - ii. to the Director, to which effect shall be given; and
 - d) make any incidental or ancillary order.
45. When considering a review of a decision made by the Director, the Commission is required to have regard to only the material that was before the Director at first instance (section 25(2c) of the Act).
46. Section 16 of the Act provides that the Commission:
 - a) may make its determinations on the balance of probabilities [subsection(1)(b)(ii)];
 - b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the regulations make them apply [subsection (7)(a)]; and
 - c) is to act accordingly to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; [subsection (7)(b)].
47. In addition, the Director is obliged to comply with the requirements of procedural fairness when exercising the powers conferred by the Act (*Hermal Pty Ltd v Director of Liquor Licensing [2001] WASCA 356*).
48. Under section 33(1) of the Act, the Commission has an absolute discretion to grant or refuse the Application on any ground, or for any reason, that it considers in the public interest. This power must be exercised consistently with the objects set out in sections 5(1) and 5(2) of the Act, as well as the purpose of the Act.
49. The decision by Allanson J in *Carnegies Realty Pty Ltd v Director of Liquor Licensing [2015] WASC 208 [42]* sets out the Commission's function in reviewing a decision of the Director pursuant to section 25 of the Act as follows:
 - a) make findings that specifically identify the existing levels of harm and ill-health in the relevant area due to the use of liquor;
 - b) make findings about the likely degree of harm to result from the grant of the application;
 - c) assess the likely degree of harm to result from the grant of the application against the existing degree of harm; and
 - d) weight the likely degree of harm, so assessed, together with any other relevant factors to determine whether it is in the public interest to grant the application.

50. Determining the public interest is a discretionary value judgment to be made having regard to the objects of the Act (*Liquorland (Australia) Pty Ltd v Director of Liquor Licensing* [2021] WASC 366 ("**Liquorland**") [34], [105]; *Woolworths v Director of Liquor Licensing* [2013] WASCA 227 [48] (Buss JA)). In exercising its broad discretion, it is for the Commission to decide what weight it will give to the competing interests and other relevant considerations under the Act (*Hermal Pty Ltd v Director of Liquor Licensing* [2001] WASCA 356 [37] (Templeman J); *Woolworths Ltd v Director of Liquor Licensing* [2012] WASC 384 [36] (Heenan J)).
51. In considering the public interest, the Commission needs to consider the positive and negative aspects of the Application and how the Application will promote the objects of the Act (*Liquorland* [31]). The risk of negative consequences such as harm or ill-health, the reduction of amenities in the locality, and offence to those who live or work there may be considered, as well as the effect the granting of the licence may have in relation to tourism or community or cultural matters (*Liquorland* [105]).
52. The Commission also:
 - a) must take into account those matters relevant to the objects of the Act; and
 - b) may take into account the matters set out in section 38(4) of the Act, which includes the harm or ill-health that might be caused to people, due to the use of liquor.

Determination

53. The Commission has undertaken a full review and now makes a determination based on the same materials as were before the Director of Liquor Licensing when the decision was made.
54. The Commission has been provided with a large amount of material from the parties to assist in the determination. The fact that a particular piece of evidence has not been specifically referred to in these reasons should not be construed as a failure by the Commission to consider that evidence or submission. We assure the parties that all materials provided by each of the parties have been considered in determination.
55. The Commission emphasises that it is required to have regard only to the material that was before the Director when making the decision (section 25(2c) of the Act).
56. Whilst the Commission is cognisant of the need to comply with procedural fairness obligations, it is placed in difficulty when, in the context of section 25 of the Act, the Applicant seeks to adduce from the Bar table evidence of material not before the Director (such as, in this case, the previous extensive experience and good record of the Applicant as licensee and nightclub operator).
57. The Commission has had regard to the submissions of the parties.
58. The Commission draws no inference from the fact that the Commissioner of Police has not intervened nor that the Director of Liquor Licensing has not been represented.
59. In considering the locality for the purposes of considering public interest, the Commission can consider the geographic area most likely to be affected by the grant of the Application. The Director's Public Interest Assessment Policy provides that the locality definition for a suburb in the inner metropolitan area is a 2km radius, being the locality definition generally applicable to any suburb located within 15 kms of the Perth CBD ("**Prescribed Area**"). The Commission finds that the Prescribed Area is an appropriate guide to the relevant geographic area in this case.

Existing levels of harm and ill-health

60. Having considered all the evidence, the Commission is particularly persuaded by the statement of Professor Daniel Fatovich of RPH who provided evidence of the significant correlation between high alcohol consumption in the immediate Northbridge precinct in which the Premises is situated, and presentations with alcohol related harm at the RPH emergency department.
61. In particular, in respect of the application to allow the sale of unrestricted volumes he says (Statement 8/12/21) as follows:
- “Based upon my clinical experience, and the experience of our ED, the sale of alcohol products that are designed to be consumed rapidly (eg shooters) is expected to increase the risk of alcohol related harm, not only for the person consuming the alcohol but also for bystanders. For the person consuming the alcohol, their blood alcohol concentration will rise rapidly, sometimes on the background of an already excessive consumption of alcohol. This rapidly increases the risk of alcohol related harms eg injury. For innocent bystander third parties, their personal risk of being injured (eg by assault) is increased (remember that one in five of our alcohol related presentations were caused by an alcohol affected person). So it has an overall adverse impact on public health and safety.”*
62. In addition, the Western Australia Police Force Data provided by the CHO states:
- a) according to the WA Police Force Incident Management System aggregated offence data, in the period between 1 September 2020 to 1 September 2021, for the suburb of Northbridge, there was a total of 746 reported assaults, equating to over 2 assaults per day and of the 746 reported assaults, over one in three (41%, n=307) were recorded as alcohol related; and
 - b) data for the above period indicates that alcohol related offences peak in Northbridge between 12:00am and 1:00am (see Graph 1 of the Intervention). This data demonstrates increased levels of harm occurring in the hours sought by the Applicant to sell shooters.
63. The Commission accepts that the evidence provided by the CHO, and in particular, the evidence referred to at paragraphs [37] to [40] and [67], demonstrates an existing level of alcohol related harm in the Prescribed Area.
64. The Commission, in receiving all the evidence and taking into account all of the submissions, accepts that the condition imposed (Condition 6) on the Licence was a positive harm minimisation measure in place as it takes into account the trading hours of the Nightclub licence and the existing levels of harm in the immediate precinct, applying the overriding public interest criteria (*Carnegie*) (*Lilly Creek*) (*Woolworths*).

Likely degree of harm to result from the grant of the application

65. Assessing the likely degree of harm and ill-health that may occur if the Application is granted necessarily requires a level of prediction, which can only be done by reference to a degree of probability.

66. While the Applicant submitted that he is an experienced and responsible operator of licensed premises, the Commission notes that the total capacity of the Premises is large. The Applicant submits that notwithstanding the size of the Premises, there will be 5 different controlled areas in which patrons will be located with each area having the harm minimisation measures in place referred to above in paragraph [22].
67. Based on the evidence of the CHO, including:
- a) the clinical and statistical evidence provided by Professor Fatovich;
 - b) the Western Australia Police Force Data, which provides statistics on the alcohol related harm occurring in the Prescribed Area, and demonstrates increased levels of harm occurring in the hours sought by the applicant to sell shooters;
 - c) the various medical and academic papers which support the proposition that:
 - i. shooters are usually consumed more rapidly when compared to other products, for example, a glass of wine or a bottle of beer;
 - ii. drinking more than four standard drinks on any one day increases the risk of harm, the social consequences of which can include involvement in anti-social behaviour, such as physical or verbal abuse and violence; and
 - iii. greater venue capacity was strongly associated with an increased risk of violence, and further exacerbated by late-night trading,
- the Commission is satisfied that the granting of the Application may result in an increase in consumption and therefore the potential for increased harm and ill-health in the Prescribed Area.

Assessment of likely degree of harm against existing degree of harm

68. The Commission has found that alcohol related harm and ill-health exist within the Prescribed Area, and that the degree of harm may increase due to the granting of the Application.
69. The Applicant has referred to the following excerpt from the *Carnegies* decision to support the premise that you cannot look at the level of general harm in an area and use that alone as the basis for refusing an application:
- “It is not sufficient to simply reason that, where there is already a high level of harm in the particular area, even a small increment in potential or actual harm may be determinative, without making specific findings on the evidence about the level of alcohol related harm which is likely to result from the grant of the particular application. Those findings about the effect of the particular application must be the basis on which the Commission evaluates what is in the public interest.”*
70. The evidence produced by the CHO, in particular as detailed in paragraph [67] above, is specific to the Prescribed Area and to the increased risk of ill-harm which results from the rapid consumption of alcohol. The Commission is of the view that this evidence supports the proposition that the likely degree of harm on granting the Application is significant.
71. The Commission finds:
- a) alcohol related harm and ill-health exist within the Prescribed Area;
 - b) there is a high level of violence in the Prescribed area between 12:00am and 1:00am;

- c) a material amount of this violence is associated with intoxication (whether by the perpetrators of the violence, or the victims);
- d) in addition to violence the subject of clear police data, there is likely to be other violence, including sexual violence, associated with intoxication deriving from the Prescribed Area;
- e) consuming alcoholic beverages as shooters can enable patrons to consume alcohol at a faster rate than drinks served in higher volumes in conventional glassware;
- f) consuming alcohol at faster rates can lead to higher levels of intoxication; and
- g) allowing the Applicant to serve alcoholic beverages in shooters after midnight is likely to increase levels of intoxication in the Prescribed Area including at the times of peak reported violence.

Weighing of the factors

72. The final factor in the analysis set out in *Carnegies* requires that the Commission weigh the likely degree of harm, as assessed, together with any relevant factors, to determine whether the grant of the Application is in the public interest.
73. In weighing the likelihood of alcohol related harm and ill-health (as set out above) against the benefits to the Prescribed Area of the grant of the Application, the Commission finds that such likelihood outweighs the benefits of granting the Application.
74. In this regard, it is important to note that a Nightclub licence has been granted in relation to the Premises, and the sale of 'shooters' is not prohibited, but rather, permitted until midnight. The Commission considers that Condition 6 provides a balanced weighing of all relevant considerations, and in particular, in weighing the positive benefits arising from the liquor industry in granting the Application, with the harm minimisation value in restricting access to high risk alcohol products.

Conclusion

75. The Commission has determined to confirm the decision of the Director of Liquor Licensing and does not agree to remove Condition 6 as prescribed limiting the sale of shooters as set out therein, nor does the Commission agree to the amendment of Condition 6 as proposed by the Applicant to apply until 3:00am.
76. The Application is therefore refused and the decision of the Director Liquor Licensing of 25 February 2022 is confirmed.



PAMELA HASS
PRESIDING MEMBER



NICHOLAS VAN HATTEM
MEMBER



SANDRA DI BARTOLOMEO
MEMBER