

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

Complainant: Commissioner of Police
(represented by Mr Graham Pidco)

Respondent: Sylvester Pty Ltd
(represented by Mr John Prior instructed by Mr Peter Fraser of Dwyer Durack lawyers)

Present: First Class Constable Ms Christie Humphrey
First Class Constable Mr Richard Busby
Mr Ashok Parekh and Mrs Marie Parekh
(Directors of Sylvester Pty Ltd)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan (Member)

Matter: Complaint pursuant to section 95 of the *Liquor Control Act 1988* ("the Act") and imposition of a penalty pursuant to section 96 of the Act.

Premises: The Gold Bar, Kalgoorlie

Date of Hearing: 11 January 2012

Date of Determination: 18 April 2012

Determination

- A. Pursuant to section 96(1)(m) of the Act, Sylvester Pty Ltd is to pay a monetary penalty of \$10,000.

B. The following conditions are imposed on the licence:

1. Permitted Hours

- a) on a day other than a Sunday – from 6 p.m. to 12 midnight and then continuing to 4 a.m. on the next day;
- b) on a Sunday – from 8 p.m. to 12 midnight;
- c) on Good Friday – from immediately after 12 midnight on the previous day to 3 a.m. and there are no further permitted hours before 6 p.m. on the following day;
- d) on Christmas Day (other than a Monday) – from immediately after 12 midnight on the previous day to 3 a.m., and there are no further permitted hours:

- (i) before 6 p.m. on the following day, or

- (ii) if the following day is a Sunday – before 8 p.m. on the following day;

If Christmas Day falls on a Monday:

- (a) there are no permitted hours under a nightclub licence on that day; and

- (b) there are no further permitted hours before 6 p.m. on the following day.

- e) on ANZAC Day – from immediately after 12 midnight on the previous day to 3 a.m. and then in accordance with paragraph (a), (b) or (c), as the case requires.

2. From 11.00 p.m. until close of trading, no liquor is to be sold or supplied for consumption on the premises in any of the following ways:

- a) in any vessels with a measurement capacity exceeding 750ml, except vessels containing premixed drinks (e.g. RTDs) which shall not exceed 375ml;

- b) no more than 50mls of spirits is permitted in any vessel

3. From 11.00 p.m. until close of trading, the licensee is prohibited from selling and supplying;

- a) premixed drinks (e.g. RTDs) where the liquor contains 5 percent or more concentration of ethanol at 20 degrees celsius.

- b) liquor mixed with energy drinks. (For the purposes of this condition 'energy drinks' has the same meaning as formulated caffeinated beverage

within the Australian New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater).

4. The licensee is prohibited from selling and supplying beverages in such a way that would encourage rapid consumption of liquor (e.g. but not limited to unadulterated spirits or liqueur in a shot glass); or drinks known as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters', or 'bombs' or any other emotive title.
5. Persons (other than "an authorised person") are prohibited from entering or re-entering the licensed premises 90 minutes prior to the close of trading prescribed on the licence.
- 6(i) Crowd controllers, licensed under the *Security and Related Activities (Control) Act 1996* (or persons authorised to undertake crowd control activities on licensed premises but who are exempted from the requirement to obtain and hold a crowd controller's licence by virtue of Regulation 4 of the *Security and Related Activities (Control) Regulations 1997*) are to be employed inside the premises;
 - a) at a minimum ratio of two (2) crowd controllers for the first 100 patrons or part thereof;
 - b) at a minimum ratio of one (1) crowd controller for the first additional 100 patrons or part thereof; and
 - c) at a minimum ratio of one (1) crowd controller for the next additional 100 patrons or part thereof; from 8.00pm (or the time of opening the premises if after 8.00pm) until trading ceases;
 - d) two (2) crowd controllers, additional to those inside the premises, to be stationed at the entrance door of the premises from 11.00pm (or the time of opening the premises if after 11.00pm) until 30 minutes after trading ceases on Thursday, Friday and Saturday night.
- 6(ii) Two (2) security personnel (crowd controllers) either licensed, or exempted from holding a licence, under the *Security and Related Activities (Control) Act 1996* and its regulations, are to be present to monitor the licensed premises and persons departing the licensed premises, for a period of one (1) hour from the time that trading ceases.
7. The licensee must refuse entry to the licensed area to any person wearing a jacket or any other clothing bearing patches or insignia including accoutrements, jewellery, visible tattoos, branding or any other items that indicates membership or association with an Outlaw Motorcycle Gang, including but not limited to the following:
 - Coffin Cheaters
 - Comancheros

- Club Deroes
- Finks
- Gods Garbage
- Gypsy Jokers
- Hell's Angels
- Outlaws
- Rebels
- Rock Machine

A notice stating this condition is to be clearly displayed at each entry and exit point of the licensed premises.

8. If there is an inconsistency between these conditions and any other condition to which the licence is subject, the condition that is more onerous for the licensee prevails.

Authority referred to in the determination:

- *The Commissioner of Police v Bremerton Pty Ltd and West Lander Pty Ltd*
(LC 24/2011)

Introduction

- 1 On 18 October 2011, the Commissioner of Police ("the Police") lodged a complaint pursuant to section 95 of the *Liquor Control Act 1988*, against Sylvester Pty Ltd, the licensee of the premises known as The Gold Bar, situated at 137 Hannan Street, Kalgoorlie.
- 2 On 13 December 2011 the Director of Liquor Licensing ("the Director") advised the Liquor Commission ("the Commission") that effective from Wednesday 14 December 2011, pending determination of the complaint lodged by the Police, the following conditions are to have effect on the hotel licence:

1. Permitted Hours

- a) on a day other than a Sunday - from 6 pm to 12 midnight and then continuing to 3 am on the next day;
- b) on a Sunday - from 8 pm to 12 midnight;
- c) on Good Friday - from immediately after 12 midnight on the previous day to 3 am and there are no further permitted hours before 6 pm on the following day;
- d) on Christmas Day (other than a Monday) - from immediately after 12 midnight on the previous day to 3 am, and there are no further permitted hours:
 - (i) before 6 pm on the following day; or
 - (ii) if the following day is a Sunday - before 8 pm on the following day;

If Christmas Day falls on a Monday:

- a) there are no permitted hours under a nightclub licence on that day; and
 - b) there are no further permitted hours before 6 pm on the following day.
 - c) on ANZAC Day - from immediately after 12 midnight on the previous day to 3 am and then in accordance with paragraph (a), (b) or (c), as the case requires.
2. From 11:00pm until close of trading, no liquor is to be sold or supplied for consumption on the premises in any of the following ways:
 - a) in any vessels with a measurement capacity exceeding 750ml, except vessels containing premixed drinks (e.g. RTDs) which shall not exceed 375ml;
 - b) in non-standard measures of spirits (i.e. no more than 30ml of spirits is permitted in any vessel).

3. From 11:00pm until close of trading, the licensee is prohibited from selling and supplying:
 - a) premixed drinks (e.g. RTDs) where the liquor contains 5 percent or more concentration of ethanol at 20 degrees celsius.
 - b) liquor mixed with energy drinks. [For the purposes of this condition 'energy drinks' has the same meaning as formulated caffeinated beverage within the Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.]
4. The licensee is prohibited from selling and supplying beverages in such a way that would encourage rapid consumption of liquor (e.g. but not limited to, unadulterated spirits or liqueur in a shot glass); or drinks known as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters' or 'bombs' or any other emotive title.
5. Persons (other than "an authorised person") are prohibited from entering or re-entering the licensed premises 30 minutes prior to the close of trading prescribed on the licence.
- 6.(i) Crowd controllers, licensed under the *Security and Related Activities (Control) Act 1996* (or persons authorised to undertake crowd control activities on licensed premises but who are exempted from the requirement to obtain and hold a crowd controller's licence by virtue of Regulation 4 of the *Security and Related Activities (Control) Regulations 1997*) are to be employed inside the premises:
 - a) at a minimum ratio of two (2) crowd controllers for the first 100 patrons or part thereof;
 - b) at a minimum ratio of one (1) crowd controller for the first additional 100 patrons or part thereof; and
 - c) at a minimum ratio of one (1) crowd controller for the next additional 100 patrons or part thereof, from 8:00pm (or the time of opening the premises if after 8:00pm until trading ceases);
 - d) two (2) crowd controllers, additional to those inside the premises, to be stationed at the entrance door of the premises from 11:00pm (or the time of opening the premises if after 11:00pm or until trading ceases) on Thursday Friday and Saturday night.
- 6.(ii) Three (3) security personnel (crowd controllers) either licensed, or exempted from holding a licence, under the *Security and Related Activities (Control) Act 1996* and its regulations, are to be present to monitor the licensed premises and persons departing the licensed premises, for a period of one (1) hour from the time that trading ceases.
7. The licensee must refuse entry to the licensed area to any person wearing a jacket or any other clothing bearing patches or insignia including accoutrements, jewellery, visible tattoos, branding or any other items that indicates membership or association with an Outlaw Motorcycle Gang, including but not limited to the following:
 - Coffin Cheaters
 - Comanchero
 - Club Deroes
 - Finks
 - Gods Garbage

- Gypsy Jokers
- Hell's Angels
- Outlaws
- Rebels
- Rock Machine

A notice stating this condition is to be clearly displayed at each entry and exit point of the licensed premises.

8. If there is an inconsistency between these conditions and any other condition to which the licence is subject, the condition that is more onerous for the licensee prevails.

- 3 The period to which the complaint relates is from January 2009 until July 2011. During this period the Police have recorded a high number of incidents attributable to these licensed premises.

At the hearing, parties to the proceeding agreed that the following material should be excluded from consideration by the Commission in the determination of the section 95 complaint:

Statements of:

- Susanne Adeline Davey
- Narelle Elizabeth Jones
- Daren Jordan Baird
- Peter Arthur Cecil Polglase

Incident Reports:

- No 0304 (tab 6.6)
- No 0305 (tab 6.7)
- No 0306 (tab 6.8)
- No 0307 (tab 6.9)
- No 1099 (tab 6.10)

Licensees Submissions:

- Paragraphs 17 - 23 (inclusive), 63 - 66 (inclusive)

Licensee Witness Statements:

- Darren John Baird
- Benjamin Graeme Harper
- Lachlan Paul Fox
- Brendan John Gray
- Thomas Charles Ritchie

Police Submissions dated 1 February 2012:

- Paragraphs 6 - 19 (inclusive)

Police Submissions dated 19 December 2011:

- Paragraphs 38 – 39 (inclusive), and 41

4 A hearing in respect of the complaint was held by the Commission on 11 January 2012.

Submissions on behalf of the Commissioner of Police

5 It was alleged by the Police that pursuant to section 95(4) of the Act there is proper cause for disciplinary action on the following grounds:

- (i) the business under the licence is not properly conducted in accordance with the licence [section 95(4)(a)];
- (ii) the licensed premises are not properly managed in accordance with the Act [section 95(4)(b)];
- (iii) the licensee has contravened a requirement of the Act or a term or condition of the licence [section 95(4)(e)(i)];
- (iv) the safety, health and welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee [section 95(4)(k)].

6 Given that the licensee has conceded ground iii of the complaint there is proper cause for disciplinary action.

7 It follows that it is not necessary to establish the other grounds submitted to make out the complaint. However to establish the gravity of the complaint and the consequent penalty, the evidence submitted to support these grounds (i, ii and iv) is highly relevant.

8 In respect of ground (i) the Police submit that admitting to ground (iii) (that is the licensee has contravened a requirement of the Act or a term of the licence) is evidence that the business under the licence is not being properly conducted.

9 561 crowd controller incident reports were compiled between 1 January 2009 and 21 May 2011 of which 368 refer to recordable incidents after 2am and approximately 219 incidents of those refer to reportable incidents i.e. after 3 a.m. It was agreed between the parties that 5 incident reports viz 0304, 05, 06, 07 and 1099 be excluded.

10 The crowd controller incident reports show a high incidence of patrons being removed for drunkenness and disorderly behaviour. The reports also indicate a high incidence of drunken and anti-social behaviour in the near vicinity of the premises. The licensee had an apparently tolerant attitude to such incidents.

11 To support grounds (ii) and (iv) the Police tendered a volume of incident reports indicating that there were 57 separate incidents between mid January 2009 and early June 2011 involving 67 alleged separate offences. These included 6 alleged assaults inside the premises and 16 in the near vicinity in 2009 and 18 alleged assaults in 2010 of which 15 occurred inside the premises.

12 Computer Aided Despatch (CAD) data shows that between January 2009 and July 2011 police were requested to attend the premises on 43 separate occasions.

- 13 Some instances are of particular concern. On 11 February 2010 police were called to the premises to attend a large fight. Outlaw Motor Cycle Gang (“OMCG”) members were in the premises and believed to be armed with weapons. Police ordered the premises closed.
- 14 Analysis of Move On Notices indicates a high proportion of these resulted from activity near the premises.
- 15 The CAD data, incident reports and Move On Notices provide evidence of high levels of drunkenness and intoxication on the part of patrons coupled with offences involving violence.
- 16 Failure by the licensee to implement dress standards, identification scanning and an appropriate harm minimisation strategy as agreed with the Police demonstrated a lack of proper management.
- 17 The recorded presence of OMCG members is of particular concern.
- 18 Whilst it is accepted that the licensee has put measures in place to deal with Police concerns, these have not had the required effect and there is evidence to suggest the licensee is not committed to minimising harm to patrons.
- 19 The Police is of the view that should the Commission find there are grounds for disciplinary action, the appropriate penalty is a fine.

Submissions on behalf of the respondent

- 20 Sylvester Pty Ltd has been the licensee of the Gold Bar since October 2004.
- 21 The period of operation relied upon by the police for the purposes of the complaint is 2009-2011, during which time neither the licensee, management nor staff have been convicted of, or paid an infringement notice for, an offence under the Act.
- 22 It was submitted that the licensee appears before the Commission with an unblemished record.
- 23 Mr Ashok Parekh, a director of the licensee company, was the original member of the local Liquor Accord on its inception 15 years ago and is fully committed to it.
- 24 When approached by WA Police Liquor Enforcement Unit the respondent voluntarily initiated a number of measures to deal with anti-social behaviour in the vicinity of the premises.
- 25 No deadlines were imposed by the WA Police Liquor Enforcement Unit as to when the initiatives proposed were to be introduced and many were in the process of being introduced as equipment required became available.
- 26 Police statistics are all but irrelevant as they apply to the entertainment precinct of Kalgoorlie where the premises are located, not the premises themselves.
- 27 Directors of the licensee company, Marie and Ashok Parekh, denied seeing any drunken patron as asserted by Police Officer D’Souza in his statement and also further denied the allegation in the statements by Police Officers Huxley and Davey that Mr Parekh was intoxicated.
- 28 Mr Parekh denies the account of the incident described in Police Officer Parkin’s

statement.

- 29 The music played at the venue is not “aggro” and the licensee cooperated with the Police by not playing it in the premises.
- 30 Dress standards should take account of the fact that Kalgoorlie is a mining town and workers coming off shift are permitted to enter the premises in work clothes.
- 31 The Directors of the licensee company believed that they were on good terms with the Police, who had not raised any concerns with them.
- 32 The licensee has spent a considerable amount of money upgrading the premises particularly improving patron safety and comfort.
- 33 The voluntary restrictions imposed on the premises by the licensee demonstrate a desire to co-operate with Police and minimize harm and anti-social behaviour.
- 34 OMCG members wearing patches are not permitted entry. If not patched, security may well not recognise them for who they are.
- 35 There is no onus of proof on the licensee and in arriving at a conclusion on the balance of probabilities as the licensing authority is required to do, the Briginshaw principle must apply in view of the quasi criminal nature of a section 95 complaint and the potential impact on the licensee.
- 36 Initiatives by the licensee have yet to bear full fruit.
- 37 Kalgoorlie is a mining town and in some ways unique. This should be taken into account when one of the primary objects of the Act concerns catering for consumer requirements.
- 38 With regard to off-premises issues, these are difficult to control, particularly as there are four (4) licensed venues which close between 2.00 am and 4.00 am on the following day after Friday and Saturday night trading. There are issues with the taxi service which would be further exacerbated should each of the premises close at the same time.
- 39 The licensee had introduced a voluntary 3.00 am lockdown to assist in managing patron migration between venues in the lead up to a 4.00 am close.
- 40 The respondent does concede that there are grounds for disciplinary action in relation to ground 3 of the complaint, however, notes that the history of fines for a first offender show a penalty range of \$5000 - \$15000.
- 41 With regard to conditions imposed pending the determination of the complaint, the limit of 30ml of spirits in any vessel means that no cocktails can be served after 11.00 pm. This should be increased to 50ml to allow normal trade.
- 42 It is further contended that managers should be able to act as crowd controllers to help overcome the difficulties in recruiting staff in this location.
- 43 The requirement for three (3) crowd controllers to remain one hour after closing is considered excessive and should be reduced to two (2).

Determination

- 44 Section 95 of the Act provides that the Commission may take disciplinary action in respect of a complaint laid under the section.
- 45 If the Commission is satisfied on the balance of probabilities that grounds upon which the complaint was made have been made out, thus establishing cause for disciplinary action pursuant to section 96, the Commission may exercise its disciplinary powers as set out in section 96(1)(a) to (n) or may take no action in the matter.
- 46 The respondent has admitted to ground 3 of the complaint. Proper cause for disciplinary action has been established and it is now a matter for the Commission to determine how it should exercise its discretion under section 96(1) of the Act.
- 47 However in order to do this the Commission needs to assess the evidence submitted supporting grounds (i), (ii) and (iv) of the complaint and the respondent's evidence relevant to those grounds in order to satisfy itself as to the appropriateness of any penalty imposed.
- 48 The Commission accepts that the premises are located in the heart of the entertainment precinct (on the Hannan Street strip) where there is a high density of licensed premises and there is often a large number of people congregating in the vicinity either queuing to gain entry to the various licensed premises, moving through or simply just "hanging around" in this part of Hannan Street.
- 49 In a section 95 complaint brought by the Police in respect of De Bernales Tavern, a licensed premises on the Hannan Street strip (refer LC24/2011) the Commission accepted the respondent's broad submission that Police IMS and CAD data does not always clearly link an alleged problem with the operation of the venue or with patrons of the venue. Similarly, information in respect of Move On Notices issued to persons in the vicinity of the premises cannot all be attributed to patrons of those premises (De Bernales) due to proximity to other licensed premises in the "entertainment precinct". The Commission accepts that this similarly applies to these premises.
- 50 The Commission however further stated that:
- "The Commission also accepts that licensees cannot always prevent some violent incidents occurring at their premises, however where there is a frequency of anti-social behaviour in and about licensed premises, this may reflect on a licensee's permissive attitude towards intoxication and poor management practices."*
- 51 The Commission considers it reasonable to expect that the licensee, being aware of the nature of the entertainment precinct and the management challenge it presents, would demonstrate a high level of vigilance and care in conduct of the premises.
- 52 Whilst the licensee has shown a positive attitude in recognising the issues and has commenced some action, progress in implementing agreed management measures has been slower than the Commission would expect, even accepting the stated difficulties of obtaining necessary equipment in some cases.
- 53 Notwithstanding the submissions made at 38 and 39 above, the Commission finds that the Police incident reports and CAD data indicate there has been some degree of failure by the licensee to properly conduct the business at these licensed premises. The Police evidence goes far enough to establish a nexus between the premises and anti-social behaviour at and in the immediate vicinity of the premises thereby enabling the Commission to be satisfied that grounds i, ii and iv of the complaint have been

established.

- 54 It was submitted by the respondent that although Police were seeking a 3:00am close, since the amendment of the Act in January 2011, which reduced the permitted trading hours of a nightclub licence from 6:00am to 5:00am, the proposed condition would result in a two hour reduction when compared with the pre-January position. It was further submitted that the proposed condition to limit measurements of spirits to 30 ml would prohibit the sale of cocktails and that the requirement of 3 crowd controllers to remain one hour after closing time was excessive.
- 55 The Commission is of the view that the conditions already imposed by the director will assist the licensee in the management and conduct of the business in accordance with the Act. However, the Commission has accepted the respondent's position with regard to the measurement of spirits after 11.00pm, closing time and the number of crowd controllers to be present for one (1) hour after closing and has accordingly varied the conditions as set out in paragraph B.
- 55 The "lockout" period has been varied to (90) minutes in order to reduce the migration of patrons due to the earlier closing times of other late night premises in the vicinity.
- 56 The Commission is satisfied that the seriousness of breaches will be adequately reflected by imposing the conditions set out in paragraph B on the licence together with a monetary penalty of \$10,000.

A handwritten signature in black ink, consisting of a stylized 'J' and 'F' followed by a horizontal line and a small flourish.

MR JIM FREEMANTLE
CHAIRPERSON