

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Complainant:** Commissioner of Police
(represented by Ms Leanne Atkins of WA Police)
- Respondent:** M.D. Holdings Australia Pty Ltd
(represented by Mr Peter Fraser, Dwyer Durack Lawyers)
- Observers:** Mr Aperahama (Pera) Taonui Wairua
(approved manager and director of the Premises)

Janet Wairua
(approved manager of the Premises)
- Commission:** Mr Jim Freemantle (Chairperson)

Ms Helen Cogan

Dr Eric Isaachsen
- Matter:** Complaint for disciplinary action pursuant to Section 95 of the *Liquor Control Act 1988*
- Premises:** Stirling Arms Hotel, 117 James Street, Guildford
- Date of Hearing:** 29 March 2011
- Date of Determination:** 23 May 2011
- Determination:**
1. Pursuant to section 96 (1)(m) of the *Liquor Control Act 1988*, the Licensee shall pay a monetary penalty of \$10,000. The Licensee shall lodge with the Commission within 28 days of the publication of this determination evidence of payment of the penalty.
 2. The following conditions are imposed on the operation of the Licence:
 - 2.1 Pursuant to section 96 (1)(b) of the *Liquor Control Act 1988* the Licensee shall as soon

as possible put in place a Business Plan including a Harm Minimisation Plan and Code of Conduct and submit it for approval by the Director of Liquor Licensing.

2.2 The Licensee is to comply with conditions set out in the Director's Policy – Security at Licensed Premises and in addition to the minimum requirements of the CCTV Policy the CCTV Plan must include a minimum of:

- one camera with a field view covering each bar service area and each area where the consumption of liquor takes place and each patron entrance and exit up to 10 meters;
- a minimum of one camera with a field of view covering the Bottle Shop and entrance and exit up to 10 meters;
- each camera to be installed with suitable vandal damage resistant camera housings;
- images recorded via the video surveillance system must be retained for a minimum of 30 days and the Licensee shall ensure that no person is able to delete or alter any recordings within the 30 day period; and
- access to, and copies of, recordings from the CCTV system are to be immediately made available upon request to any sworn officer of the WA Police, Department of Racing, Gaming and Liquor Inspectors and any authorised officer, as defined by section 3 *Liquor Control Act 1988*.

Authorities and Legislation referred to by parties to proceedings and considered in the reasons for Determination

- *Hughes and Vale Pty Ltd v New South Wales* [no2] (1995) 93 CLR 127
- *Securities and Related Activities (Control) Act 1996*
- *Douglas-Brown v Commissioner of Police* (1995) 13 WAR 441 per Pidgeon J
- *Jackson v Dyball* (1993) 74 A Crim R 10 at page 20
- *Holden v Sainken*, Supreme Court of WA, Library No: 970700 at page 14
- *Keeley v Kjellgren* (1996) WAR 149, Wolfe CJ
- *The Licensing Court (South Australia) v Cummins* (1919) 27 CLR 26
- *Commissioner of Police v Leohag Holdings Pty Ltd* [LC30/2010] 2 September 2010
- *Commissioner of Police v Golfing Pub Pty Ltd* [LC 06/2010] 14 April 2010
- *Commissioner of Police v That's Entertainment (WA) Pty Ltd* [33/2010] 6 September 2010.
- *Australian Broadcasting Tribunal v. Bond and Ors* 170 CLR 321 at page 380 ("the Bond Decision").
- *The Guildford Association Inc. v M.D. Holdings Pty Ltd* [LC14/2011] 18 April 2011

Introduction

1. On 18 January 2011 the Complainant lodged a Complaint (apparently mistakenly dated 18 January 2010) pursuant to Section 95 of the Act against the Respondent, the Licensee of the Premises known as the Stirling Arms Hotel of 117 James Street Guildford (License No 60100002394).
2. The Complaint alleged that pursuant to Section 95(4) of the *Liquor Control Act 1988* (“the Act”) there was proper cause for disciplinary action on the following grounds:
 - the licensed premises are not properly managed in accordance with the Act [Section 95(4) (b)];
 - 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)];
 - the Licensee has been given an infringement notice under Section 167 and the modified penalty has been paid in accordance with that Section [Section (95) (4) (fa)];
 - the Licensee has contravened a requirement of the Act or a term or condition of the licence [Section 95(4) (e) (i)];
 - a person who is interested in the business or the profits or proceeds of the business, is or becomes not fit and proper to hold that position [Section 95(4) (h)];
 - the Licensee employed at a material time, a person who, in the course of that business, committed an offence in any jurisdiction that, in the opinion of the Director , may imply that a person is unfit to be a holder of a licence [Section 95(4)(f)(ii)].
3. The remedies sought by the Complainant were:
 - a) cancellation of the liquor licence, or;

- b) suspend the operation of the Stirling Arms Hotel, Liquor Licence No. 60100002394, pursuant to section 96(1)(d) of the Act for a period of three (3) months, or as the Commission sees fit;
- c) if there is a resumption of the operation of the license, order the Licensee to put into place a proper Business Plan, including a Harm Minimisation Plan and Code of Conduct, and submit it for approval by the Director of Liquor Licensing, prior to trading [(Section 96(1)(n)];
- d) deem Mr Aperahama Taonui WAIRUA as not a fit or proper person to manage licensed premises, and prohibit Mr WAIRUA from being approved as a licensee, manager or in a position of authority for any licensed premises for five (5) years [section 96(1)(n)];
- e) deem Mrs Janet WAIRUA as not a fit or proper person to manage licensed premises, and prohibit Mrs WAIRUA from being approved as a licensee, manager or in a position of authority for any licensed premises for five (5) years [section 96(1)(n)];
- f) impose the following conditions upon the licence in terms to the effect of the proposed conditions set out below, or on other terms as the Commission thinks fit [section 96 (1)(b)];
- g) The Licensee is to comply with conditions set out in the Director's Policy – Security at Licensed Premises, and, in addition to the minimum requirements of the CCTV Policy, the CCTV Plan must include a minimum of:-
 - one camera with a field of view covering each bar service area and each area where the consumption of liquor takes place and each patron entrance and exit up to 10 meters; and

- a minimum of one camera with a field of view covering the Bottle Shop and entrance and exit up to 10 meters
 - each camera to be installed with suitable vandal damage resistant camera housings
 - images recorded via the video surveillance system must be retained for a minimum of 30 days and the Licensee shall ensure that no person is able to delete or alter any recordings within the 30 day period
 - access to, and copies of, recordings of CCTV system are to be immediately made available upon request to any sworn officer of the WA Police, Department of Racing, Gaming and Liquor Inspectors and any other authorised officer, as defined by Section 3 of the Act.
- i) Pursuant to section 96(1)(m) of the Act, imposition of a monetary penalty on the Licensee of \$20,000, or as the Commission sees fit.

Submissions by the Complainant:

4. The Complaint is supported by documents contained in the Attachments to the Complaint. [It is noted by the Commission that the Attachments are voluminous comprising 2 full lever arch files.]
5. The Submissions by the Complainant were thorough and detailed and can be summarised as follows
 - 5.1 The relevant provisions of Section 95 of the Act were set out.
 - 5.2 In determining whether there is proper cause for disciplinary action all that is required to be proved on the balance of probabilities is that one of the subsections of Section 95(4) of the Act has been contravened.

- 5.3 Section 96(1) of the Act outlines the penalties that may be imposed by the Commission, provided it is satisfied on the balance of probabilities that the ground(s) on which the Complaint was made has or have been made out so that a proper cause for disciplinary action exists.
- 5.4 Pursuant to Section 5 of the Act the Commission is required to have regard to the primary and secondary objects of the Act which include inter alia the regulation of the sale, supply and consumption of liquor and the minimisation of harm or ill health caused to people or any groups of people, due to the use of liquor .
- 5.5 Section 100 of the Act requires that the conduct of a business under a licence is always the responsibility of the Licensee and the Licensee is to ensure that the conduct of the business at the licensed Premises is supervised and managed in accordance with Section 100 of the Act.
- 5.6 A Licensee is liable for offences committed on the licensed premises by an employee or agent, even if the Licensee did not know and could not reasonably have been aware of or have prevented the commission of the offence.
- 5.7 References to Section 3A – definition of ‘drunk’; to Section 3(4) – position of authority and Section 33(6) – matters to be taken into consideration for determining whether a person is ‘fit and proper’.
- 5.8 Detailed submissions in relation to grounds 2.1 and 2.2 concerning responsibilities of Licensees and that the number and type of interactions licensed premises may have with Police may indicate that the Premises are not properly managed.
- 5.9 Demonstration by reference to attachments 2, 3 and 4 to the Complaint of interactions between Police and the Premises.
- 5.10 Submissions in relation to Ground 2.3 of the Complaint, concerning notices given to the Licensee under Section 167 and payment of the modified penalty in respect of those notices.

- 5.11 Submissions in relation to Ground 2.4 of the Complaint concerning attendances of Police officers at the Premises in connection with alleged contravention of the Act and conditions of the Licence by the Respondent, Mr Wairua and/or by an employee or agent
- 5.12 Submissions in relation to Ground 2.5 of the Complaint concerning the issue of whether a person who is interested in the business or profits of the business, is or becomes not fit and proper to hold that position
- 5.13 Submissions in relation to Ground 2.6 of the Complaint concerning the employment by the Respondent of a person who in the course of the conduct of the business, committed an offence in any jurisdiction that in the opinion of the licensing authority may imply that person is unfit to be a holder of a licence.
- 5.14 Submissions in relation to order sought in the Complaint against Mr Wairua.
- 5.15 Submissions stating that Attachments 1 to 24 to the Complaint demonstrate, on the balance of probabilities that the following grounds of the Complaint have been made out, as per police submissions
- the licensed premises are not properly managed in accordance with the Act (Section 95(4) (b));
 - the safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the Licensee (Section 95 (4) (k));
 - the Licensee has been given an infringement notice under section 167 and the modified penalty has been paid in accordance with that section (Section 95 (4) (fa));
 - the Licensee has contravened a requirement of the Act or a term or condition of the licence (Section 95 (4) (e)(i));

- a person who is interested in the business or the profits or proceeds of the business, is or becomes not fit and proper to hold that position (section 95(4)(h));
- The Licensee employed, at a material time, a person who, in the course of that business, committed an offence in any jurisdiction that, in the opinion of the Director, may imply that a person is unfit to be the holder of a licence (section 95(4)(f) (ii))

5.16 Concluding submissions:

- The nature and circumstances of the attendances by Police at the licensed premises and the contraventions of the Act and the conditions of the Licence by the Respondent over a period of time strike at the very foundation of the regulation of the sale, supply and consumption of alcohol and the regulation of licensed premises.
- Further, given the nature and seriousness of the alleged contraventions of the Act and the conditions of the Licence, the Respondent has, and continues, not to demonstrate willingness to abide by the Act or the conditions on the Licence as is evidenced by Mr Wairua's conduct and attitude as the manifestation of the Respondent.
- The evidence submitted in relation to Mr Wairua's personal conduct on 8 separate occasions in 2008, 2010 and 2011 satisfies ground 2.5 of the Complaint and permits the Commission to take disciplinary action against him as it sees fit.
- The penalties suggested by the Complainant are reasonable and commensurate given the nature and seriousness of the allegations contained in the Complaint. However, the Complainant does not wish to pursue any penalty against Mrs Janet Wairua who is also an approved manager of the licensed premises.

Submissions by the Respondent

6. Submissions in relation to ground 2.6 of the Complaint – concerning the lack of jurisdiction of the Commission to deal with this ground on the basis that the Director of Liquor Licensing has not formed the opinion that a conviction renders the person in question unfit to be the holder of a licence.
7. Submission in relation to ground 2.3 of the Complaint - an Infringement Notice and payment of the modified penalty. The Respondent acknowledges that there is proper cause for disciplinary action but states that the infringements in question are relatively minor and at the lower end of the scale for offences under the Act and should not attract the penalties being sought by the Complainant.
8. Submissions in relation to paragraphs 2, 3 and 4 of the evidence in support of disciplinary action attached to the Complaint concerning Offences reported at the Premises, Move on Notices and Excessive Police Attendance. These submissions are very detailed, refer to specific incidents and generally state that the grounds of the Complaint are not supported by the evidence in the Attachments to the Complaint.
9. Submissions in relation to paragraphs 6.1 to 6.8 of the evidence in support of disciplinary action attached to the Complaint under the heading “Offences committed by Management”.
10. The Submissions state generally that unless a charge has been laid in relation to these offences and a finding of guilt made, it is incorrect to define these incidents as offences, rather they are allegations. For example:
 - Paragraph 6.1 The allegation concerning the attendance of officers on 4 April 2008 at the Premises in relation to the training register is disputed.
 - Paragraph 6.2 The offence referred to in paragraph 6.2 is admitted by the Respondent (offence resulted in a fine of \$500 being issued to the Mr Wairua, the Director of

the Respondent and an approved Manager of the Premises for disorderly behaviour in public).

- Paragraph 6.3

The allegation-

- (a) that the liquor licence was not fully displayed is admitted;
- (b) that the incident register was lacking details is disputed; and
- (c) that the training register was lacking details is denied; and

it is stated that even if the allegations are proven they are extremely minor details.

- Paragraph 6.4

Failure to produce the plans in question, (the “blue line” plans) when requested did not constitute a breach of Section 116(2) of the Act which might occur if there was a failure to produce the “red line” plans.

- Paragraph 6.5

The employee Sophie Horschkes’ name was recorded in the training register but she had not been employed for a period of 14 days so there was no breach of the Act by her not having completed the RSA training-

- there is no evidence to find Ms Horschke had been coached or briefed in relation to how to respond to Police questions;
- from the information obtained by Police it is clear there was no breach of the Act;
- the powers of authorised officers specified in Section 154(1) of the Act do not give Police authority to compel an employee of a Licensee (other than an approved manager) to speak to

them or answer their questions or compel a Licensee or manager to release an employee from their employment for the purpose of speaking to Police and the circumstances of this incident are irrelevant.

- Paragraph 6.6 The failure by Janet Wairua to produce a notice of authorisation to duty crowd controllers (which notice she was not aware had to be issued) does not constitute a breach of Section 154(3) (b) of the Act and in the absence of such a breach the circumstances of this incident are irrelevant.

- Paragraph 6.7 There is no evidence that Mr Martin Mufandi was employed as a crowd controller and no breach of either Section 154(3) (c) of the Act or Section 39 of the *Security and Related Activities (Control) Act 1996* has been revealed. The evidence in support of this ground as to the attempts by Police to seize the CCTV camera shows that such attempts were unlawful, the Police would require a warrant if such removal was to be lawful.

- Paragraph 6.8 While it is acknowledged that more attention to detail could be provided in relation to completion of incident reports, the errors identified are not sufficient to support the submission that they “highlight the Licensee’s blatant disregard towards his obligations under the Act and raises significant concern about the way in which management deals with and documents incidents which occur on the Premises.

The review of the incident reports reveals that

- (A) disorderly people are not permitted on licensed premises;
- (B) intoxicated persons attempting to obtain entry are refused;
- (C) intoxicated patrons located on premises are removed;
- (D) disorderly patrons upon premises are removed
- (E) the vast majority of incidents which occur at the licensed premises involve refusal of entry
- (F) very few incidents on site involve patron intoxication
- (G) the majority of people refused entry are refused by reason of intoxication; and
- (H) a significant number of incidents recorded are incidents observed in the locality of the licensed premises, but which have not commenced (on) or (are) associated with the Hotel.

The incidents in the report reveal that management and staff take their obligations under the Act seriously.

Supporting Observations

11. The Police have provided details of a number of incidents where they indicate they have experienced significant resistance and difficulty in dealing with the approved managers Mr Wairua and Mrs Janet Wairua. The incidents are referred to under paragraphs numbered 7.1-7.12 of the document headed “Evidence in Support of Disciplinary Action” of the Complaint. Each incident is dealt with in some detail, contains an explanation in relation to each incident and contains references to the statements of Mr Wairua and Janet Wairua lodged with the Respondents submissions.

It is acknowledged that at the time of lodgement of the Respondents submissions and at the time of the hearing, a Section 117 Complaint was under review and that the Police indicated that the Premises were well managed during the course of that Complaint.

12. Submissions concerning the expression “fit and proper person” and the provisions of section 33(6) of the Act as to matters which are relevant in

determining whether a person is 'fit and proper'; the effect of a declaration that Mr Wairua is no longer a fit and proper person would be to deprive him of his livelihood; while the evidence relied on by the Complainant may be sufficient to find Mr Wairua has exercised poor judgement in the manner in which he has dealt with the police, this is not sufficient to ground a finding that he is no longer a fit and proper person to act as either an approved manager or a person in authority.

13. Submission that Mr Wairua's frustrations with Police, at its source, are based on legitimate grounds.

14. Concluding Licensee's submissions;

(a) The licensed premises are not properly managed in accordance with the Act

The police, in the context of the 117 hearing, submitted that the Premises were well managed. While a differing position is sought to be adopted for the purpose of the present proceedings, the evidence relied upon by the police does not demonstrate that there is a problem arising from the management of the venue. In particular, we note that:

- (i) There are no convictions for permitting the sale and consumption of liquor to intoxicated persons, juveniles or permitting disorderly conduct upon the Premises;
- (ii) While greater attention is needed with respect to the completion of incident reports, it is submitted that the substance of the reports accurately reflects the incident reported and that the deficiencies with the incident reports identified do not attack the substance of the reports, but rather attention to detail.

(b) The safety, health and welfare of persons who resort to the licensed premises is endangered by an act or neglect of the Licensee

No act or neglect of the Licensee has been identified which would give rise to the above mentioned ground.

As discussed above, the interior of the venue is well managed. However, problems which arise on the street are, based upon the evidence, unrelated to the operation of the Hotel, but rather are specific to certain problems which exist within the locality (in particular street drinking and feuds arising amongst Aboriginal families). These are matters which are not the responsibility of the Licensee, notwithstanding that steps have to be taken by the Licensee to ensure that these difficulties do not impede upon the operation of the Hotel.

(c) The Licensee has been given an Infringement Notice under section 167

It is conceded that this has occurred, that it has been paid and as such there are grounds (proper cause) for disciplinary action.

(d) The Licensee has contravened a requirement of the Act or a term or condition of the licence

It is conceded that this has occurred and as such there is proper cause for disciplinary action.

(e) A person who is interested in the business or in the profits or proceeds of the business is or becomes not fit and proper to hold that position

It is submitted that as discussed above, there is insufficient evidence for such a finding to be made. While it may well be appropriate for Mr Wairua to modify the manner in which he deals with police, Mr Wairua should be provided with an opportunity to do this and the matters complained of by Police should not be viewed as of sufficient seriousness to warrant the deprivation of Mr Wairua's livelihood.

(f) The Director's Ground of Complaint (Ground 6)

Given that no finding has been made by the Director that an offence has been committed that may imply that a person is unfit to be a holder of a licence, the Liquor Commission has no jurisdiction to consider this ground.

Determination

15. Section 95 of the Act empowers the Commission to take disciplinary action in respect of a complaint lodged under this section. Section 96 sets out the action the Commission may take if on the balance of probabilities, the grounds of the complaint are made out.
16. Having read and considered the material in the Attachments to the Complaint and the detailed written and oral submissions of the Complainant and the Respondent the Commission:
- 16.1 is satisfied that on the balance of probabilities grounds 1,2,3 and 4 have been made out; and
 - 16.2 does not consider that ground 5 of the complaint has been made out; and
 - 16.3 is of the view it does not have jurisdiction in relation to ground 6 of the Complaint as there is no evidence that the Director of Liquor Licensing formed the relevant opinion.
17. The Commission had little evidence before it that the management of the premises was such to warrant any other conclusion. There is little doubt in the Commission's mind that Mr Wairuas's attitude to the Police could and should be improved.
18. The Commission is mindful of the conditions imposed by Commissioner Watling in determination LC 14/2011 and the recommendation made by him in respect of the improvements to the amenity of the car park, bottle shop and drive through.
19. Consequently, the Commission is of the view that in light of the recommendation and conditions already imposed in LC 14/2011, further conditions being now imposed could significantly reduce the problems at the premises and improve the amenity.
20. Notwithstanding the Respondent's denial of specific allegations contained in the attachments to the complaint, the Commission is satisfied on the evidence that It is clear that there are issues concerning the operation of the Premises and its

surrounds. It is accepted that there a number of factors including the difficulty in identifying whether those responsible for anti-social activities in the surrounds of the Premises are patrons of the Premises.

21. There appears to be some tension between Police and Liquor Enforcement Officers on the one hand and the approved managers and staff of the premises on the other hand which is not conducive to an effective working relationship. A greater effort by the management of the premises to co-operate with the Police and involve the appropriate officers of the City of Swan would assist in overcoming the anti social behaviour in the vicinity of Stirling Hotel. The determination of Commissioner Watling in LC 14/2011 made similar observations.

22. Whilst acknowledging that these licensed premises are located in an area which gives rise to added pressure on the management of the premises, the Act makes the obligation of licensees in respect of the overall management of their establishment very clear. The Commission is of the view, weighing all the submissions, that proper cause for disciplinary action has been established and a monetary penalty of \$10,000 is appropriate.

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

JIM FREEMANTLE
CHAIRPERSON