

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

Complainant: Commissioner of Police
(*represented by Ms Leanne Atkins of WA Police*)

Respondent: Bremerton Pty Ltd and West Lander Pty Ltd
(*represented by Mr Peter Fraser of Dwyer Durack Lawyers*)

Commission: Mr Jim Freemantle (Chairperson)
Mr Greg Joyce
Dr Eric Isaachsen

Matter: Complaint for disciplinary action pursuant to Section 95 of the *Liquor Control Act 1988*

Premises: De Bernales Tavern

Date of Hearing: 18 May 2011

Date of Determination: 27 June 2011

Determination:

1. Pursuant to section 96(1)(m) of the *Liquor Control Act 1988* Bremerton Pty Ltd and West Lander Pty Ltd are to pay a monetary penalty of \$10,000.
2. The following conditions are imposed on the licence:
 - i. All twelve (12) installed video surveillance systems must be in place and all operational in compliance with the Director of Liquor Licensing's Policy on 'Minimum Standards Closed Circuit Television CCTV Security System';
 - ii. Crowd controllers licensed under the *Security and Related Activities (Control) Act 1996* are to be employed at a ratio of two (2) for the first 100 patrons and one (1) crowd controller for each additional 100 patrons or

part thereof from 8.00pm (or the time of opening if after 8.00pm) until thirty (30) minutes after trading ceases on Friday and Saturday nights;

- iii. The licensee is to submit a revised Harm Minimisation Policy, including a House Management Plan and a Code of Conduct within two (2) months. This policy is to be approved by the Director of Liquor Licensing;
- iv. Management to refuse admission to any person failing to comply with the following requirements:
 1. Jackets, or any other clothing or accessory, bearing patches or insignia of any Outlaw Motor Cycle Gang not limited to, but including the listed Outlaw Motor Cycle Gangs are not permitted to be worn on these premises at any time –
 - Coffin Cheaters
 - Comancheros
 - Club Deroes
 - Finks
 - Gods Garbage
 - Gypsy Jokers
 - Outlaws
 - Rebels
 - Rock Machine

Introduction

- 1 On 18 March 2011 the Commissioner of Police lodged a complaint, pursuant to section 95 of the *Liquor Control Act 1988* (the Act), against Bremerton Pty Ltd and West Lander Pty Ltd, the licensees of premises known as De Bernales and situated at 193 Hannan Street, Kalgoorlie.
- 2 A hearing in respect of the complaint was held by the Commission on 8 June 2011.

Submissions on behalf of the Commissioner of Police

- 3 It was alleged by the Commissioner of Police that pursuant to section 95(4) of the Act there is proper cause for disciplinary action on the following grounds:
 - 1) The business under the licence is not properly conducted in accordance with the licence [section 95(4)(a)];
 - 2) The licensed premises are not properly managed in accordance with the Act [section 95(4)(b)];
 - 3) The licensee has been given an infringement notice under section 167 of the Act and the modified penalty has been paid in accordance with that section [section 95(4)(fa)];
 - 4) The licensee has contravened a requirement of the Act or a term or condition of the licence [section 95(4)(e)(i)];
 - 5) The licensee has been convicted of an offence against the Act [section 95(4)(f)(i)]; and
 - 6) 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)].
- 4 The complaint covers the period January 2010 to February 2011.
- 5 During this period, the Western Australian Police Incident Management System (IMS) has 22 offences linked to the premises. These offences relate to incidents occurring inside the premises or in the immediate proximity of the premises and in most cases relate to the excessive consumption of alcohol. The offences reflect a trend towards anti-social behaviour and crimes against the person such as assault, assault occasioning bodily harm, damage and disorderly behaviour. A summary of the offences and the related Incident Reports was submitted.
- 6 Also, during the period 1 January 2010 to 1 January 2011, the police were called to attend the premises on nine occasions to deal with general anti-social and minor criminal activity. A summary of these offences and the related Police Computer Aid Dispatch (CAD) attendance records were submitted.
- 7 With the introduction of the *Criminal Investigation Act* in 2006, police have had the ability to order people suspected of either committing an offence, or about to

commit an offence, away from public places through the use of “move-on” notices. These notices are typically issued to individuals causing breaches of the peace, hindering public officers, or committing minor offences such as public disorder or liquor related offences. Between January 2010 and January 2011 a total of 29 move-on notices were issued to individuals ordering them away from De Bernales Tavern. The majority (22) of these notices were issued after midnight. Details of the 29 move-on notices were provided.

8 It was submitted that the following offences have been detected at the premises during the period covered by the complaint:

- at 3.00am on 4 April 2010 officers from Kalgoorlie Police attend De Bernales Tavern and saw two intoxicated female patrons standing in the entry/exit area refusing to leave the licensed premises. Police assisted the crowd controllers to remove the two female patrons and on further investigation police established that both females were 16 years of age. By permitting juveniles to enter and remain in the premises the licensee breached section 121(4) of the Act;
- at 4.00pm on 22 April 2010 police officers from the Liquor Enforcement Unit attended the premises and required the approved manager to produce the incident register. An audit of the register ascertained that prescribed information had been omitted from numerous incident reports, including some incidents being solely recorded on crowd controller forms and not entered in the register. The approved manager was advised of the deficiencies in the registers. Failing to properly maintain the incident register is a breach of sections 110(1)(aa) and 116A(1) of the Act;
- at 2.45am on 4 July 2010 officers from Kalgoorlie Police found a 17 year old juvenile on the licensed premises. The juvenile had produced his valid driver's licence (displaying his correct age) to on duty crowd controller, however the crowd controller failed to properly examine the identification produced and allowed the juvenile into the premises. Allowing a juvenile to enter and remain on licensed premises is a breach of section 121(4) of the Act.
- at 5.30am on 12 December 2010 officers from Kalgoorlie Police attended De Bernales Tavern and found a bar staff member along with two cleaners and a person from another licensed premises sitting at the front bar consuming alcohol. De Bernales had closed 2.5 hours earlier and the person from other licensed premises was not entitled to be at De Bernales after the end of permitted trading hours consuming alcohol. This is a breach of section 111(1)(b) of the Act.
- De Bernales Tavern is subject to a condition on its licence that food in the form of light meals must be made available for sale to patrons on the

licensed premises at all times. At 8.15pm on 10 February 2011 police officers from the Liquor Enforcement Unit attend the premises and spoke to a bar staff member and requested the bar and snack menu to obtain a meal. The officers were informed that the kitchen had closed at 7.30-8.00pm and meals were not available. Officers then made a similar inquiry with the on duty crowd controller who advised that the premises were closing between 10.00–10.30pm and the kitchen closed at 8.00pm. The officers further inquired with this crowd controller about the availability of meals over the weekend and were advised that “the kitchen closes at 8.00pm and the tables are moved aside as the venue turns into a ‘nightclub’ from 9.00pm to cater for the ‘young kids’ to dance and drink.” Over the next two evenings these officers attempted to obtain a meal during trading hours but were refused on each occasion. Failure to comply with a condition of licence is a breach of section 110(1)(aa) of the Act.

- De Bernales Tavern is subject to a condition on its licence that requires the licensee to maintain, in a form approved by the Director of Liquor Licensing, an incident register and a staff training register and these registers must be produced to an authorised officer on request. At 9.30pm on 12 February 2011 officers from the Licensing Enforcement Unit required the approved manager to produce the incident register for incidents that occurred on 11 February 2011 (this was to assess the level of detail contained in the report from a serious incident that had occurred inside the premises on that night). The incident was not entered in the register as required and the current register was unable to be located. Consequently, officers conducted further investigations and ascertained that numerous incidents had not been entered in the incident register. Also on 12 February 2011, the approved manager was requested to produce the training register for the premises. On inspection, it was determined that this register was missing information that is required under the Act and Regulations. Failure to properly maintain these registers is a breach of section 110(1)(aa) of the Act.
- De Bernales Tavern is subject to a condition on its licence that requires crowd controllers to be engaged at the premises until thirty minutes after trading ceases. An audit by police of the crowd controller time sheets for the premises reveal that crowd controllers have ceased duty anywhere between 3.00am and 3.15am when the premises closed at 3.00am. Failing to ensure that crowd controllers remain on duty for thirty minutes after trading ceases is a breach of section 110(1)(aa) of the Act.

- 9 It was also submitted on behalf of the Commissioner of Police that there have been two serious incidents in recent times at the premises. The first occurred on 7 November 2010 when there was a violent confrontation between Gypsy Joker Outlaw Motor Cycle Gang (OMCG) members and Maori patrons and the second occurred on 12 February 2011 in which a fight erupted between several patrons

resulting in one being hit in the head with a glass bottle causing the bottle to smash.

- 10 Between 12 midnight and 3.00am on 12 February 2011 police monitored the premises for instances of disorderly conduct and intoxicated patrons and assess how management dealt with these issues. During this time, police:
 - observed a female patron stumble backwards near the front of the premises, join the queue and then gain entry to the premises. The female patron displayed visible signs of intoxication and had to hold on to furniture and walls as she moved throughout the premises;
 - witnessed approximately eight patrons being ejected from the premises for intoxication and police had to request crowd controllers remove other patrons who were identified as being heavily intoxicated and causing annoyance to other patrons; and
 - witnessed two male patrons engage in a fight near the dance floor.
- 11 Police have also spoken to the approved manager of the premises about the operation of the CCTV system at the venue. It was ascertained that there are 12 cameras in total, but only 11 are operational. It was claimed by the manager that one camera was destroyed in the Kalgoorlie floods in 2010 and had not been replaced, however according to police, this camera records the furthest end of the bar where police have frequently observed OMCG members and associates congregating and drinking. Police are also concerned that an approved manger of the venue and her partner are known to drink and associate with OMCG members.
- 12 Finally, in support of the complaint, details of the infringement notices issued to the licensee or staff of the premises between 2006 and 2010 were provided. Eight infringement notices have been issued during this period.
- 13 Pursuant to section 96(1) of the Act, the Commissioner of Police sought the following penalties:
 - A monetary penalty of \$20,000 be imposed on the licensee;
 - The special facility licence for the premises is cancelled and a hotel restricted licence is issued in its place;
 - The licensee be disqualified from making any Extended Trading Permit applications for a period of 12 months; and
 - The following conditions are imposed on the licence –
 - i. All twelve (12) installed video surveillance systems must be in place and all operational in compliance with the Director of Liquor Licensing's

Policy on 'Minimum Standards Closed Circuit Television CCTV Security System';

- ii. Crowd controllers licensed under the *Security and Related Activities (Control) Act 1996* are to be employed at a ratio of two (2) for the first 100 patrons and one (1) crowd controller for each additional 100 patrons or part thereof from 8.00pm (or the time of opening if after 8.00pm) until thirty (30) minutes after trading ceases on Friday and Saturday nights;
- iii. The licensee is to submit a revised Harm Minimisation Policy, including a House Management Plan and a Code of Conduct within two (2) months. This policy is to be approved by the Director of Liquor Licensing;
- iv. Impose and enforce a minimum dress standard at the venue –

Management to refuse admission to any person failing to comply with the following requirements:

1. Jackets, or any other clothing or accessory, bearing patches or insignia of any Outlaw Motor Cycle Gang not limited to, but including the listed Outlaw Motor Cycle Gangs are not permitted to be worn on these premises at any time –
 - Coffin Cheaters
 - Comancheros
 - Club Deroes
 - Finks
 - Gods Garbage
 - Gypsy Jokers
 - Outlaws
 - Rebels
 - Rock Machine

Submissions on behalf of the respondent

- 14 In response to police data on the number of offences reported at the premises, it was submitted that a detailed analysis of the data indicates that the premises

are not as problematic as asserted in the complaint. For example, two of the supposed offences relate to possession of drugs, however, in both instances the drugs were detected by crowd controllers and brought to the attention of police. Furthermore, some of the offences occurred outside the venue and there is no evidence that the persons involved were patrons of the licensed premises. When these types of offences are excluded from the police data, it was submitted that only 11 offences occurred at the venue after 12 midnight in the period January 2010 to January 2011. For similar reasons, during the same period, there are only four offences reported before 12 midnight.

- 15 In respect of police attendances at the venue, an analysis of this data indicates only four attendances after 12 midnight during 2010 with all occurring in the first four months of the year, and no recorded attendances from June 2010 to January 2011. There is also doubt whether all of these attendances directly relate to the operation of the premises with some occurring outside the venue by persons who were not patrons of the premises. This data also indicates that there were only four police attendances during this period prior to 12 midnight.
- 16 It was submitted that De Bernales Tavern is located within Kalgoorlie's entertainment precinct which consists of 9 hotels, 2 taverns, 6 restaurants and 1 nightclub. Therefore, there is a lot of movement outside the venue by persons passing by. The police data does not clearly identify that problems outside the venue are linked to the operation of De Bernales. This is particularly relevant in the case of move-on orders issued by the police. The material submitted by the police does not indicate that the persons to whom orders were issued were, or have ever been, patrons of De Bernales.
- 17 It was acknowledged that between September 2006 and April 2010 a total of eight infringement notices were issued to, and paid by, the licensee or the approved managers (four against the licensee and four against the approved managers). However, it should be noted that an infringement notice was generally issued to both the licensee and the approved manager for the same offence. The infringements relate to:
 - One count of permitting drunkenness in 2006;
 - One count of permitting a juvenile to enter licensed premises in 2007;
 - One count of permitting a juvenile to consume liquor on licensed premises in 2007;
 - One count of failing to display licence; and
 - One count of permitting a juvenile to enter or remain on licensed premises in 2010.

- 18 The complaint alleges that the police have detected a number of offences at the premises between January 2010 and February 2011. In response, it was submitted on behalf of the respondent that:
- Although an infringement notice was issued and paid in respect of the offence of 4 April 2010, it is denied that staff permitted the two girls to enter the venue. Management of the venue have a strict policy to ask to see ID, therefore either false identification was presented by the juveniles in question, or they entered the venue without the knowledge of security staff (i.e. when security were distracted);
 - The audit of the incident register on 22 April 2010 does not determine what information was missing from the register and the police provide no evidence to support this contention. All that can be determined is that the incident register was incomplete;
 - The allegation that a juvenile was permitted to enter the premises on 4 July 2010 after producing a valid driver's licence which correctly displayed his age (which was not properly scrutinised by security) is based upon hearsay and therefore this evidence should be treated with great caution;
 - It is accepted that a staff member was consuming alcohol with a person from another premises well after the venue had ceased trading for the night, however this staff member does reside at the tavern. In the circumstances, this is a trivial offence;
 - In respect of police being advised on 10 February 2010 by staff that food was not available at the premises at all times, the employees they spoke to were inexperienced and food is always available in accordance with the conditions of the licence;
 - In respect of the request by police on 12 February 2011 to inspect the incident register, it is the practice of the approved manager to complete the register at home and on this occasion, she had left the register at home. The register was provided to police after 12 February 2011;
 - The assertion by police that crowd controllers are not remaining on duty for 30 minutes after the cessation of trading appears to be based on the assumption that the venue always trades until 3.00am. If however the venue closes early, which does occur on occasion, crowd controllers remain on duty for a further 30 minutes as required under the licence. In these circumstances there is no requirement for them to remain until 3.30am.
- 19 The complaint asserts that there have been two recent serious incidents (fights) at the venue however notwithstanding that these incidents occurred after 12 midnight, there is little to suggest that the management of the venue contributed

in any way to the fights breaking out or that management failed to respond appropriately. The incident involving OMCG's erupted very quickly and there was no indication that a fight was about to commence and crowd controllers intervened within seconds. Given the involvement of the Gypsy Jokers and their reputation for both criminal behaviour and unprovoked violence it would be inappropriate to draw any adverse inference against the licensee from this fight. In respect of the incident on 12 February 2011, what started as a simple push and shove appears to have quickly escalated to violence which is a problem faced by many licensees whereby patrons all too quickly resort to weapons when a fight breaks out. These two incidents were beyond the control of the licensee; however they do reveal that crowd controllers are vigilant and respond quickly to aggressive incidents.

- 20 Although police conducted observations of the premises on 12 February 2011, no evidence has been provided to support these observations. Insufficient information has been submitted by the complainant to enable the respondent to deal with these allegations.
- 21 The Commissioner of Police is seeking a number of penalties be imposed on the licensee as a result of this complaint, including the cancellation of the special facility licence and the issuing of a hotel restricted licence in its place. Although the Commission is empowered to cancel a licence under section 96(1)(e) of the Act, it does not have the power to cancel a licence and substitute a licence of another class. Accordingly, the variation in trading hours sought to be achieved by the complainant could only be achieved by the variation of the trading hours condition attached to the special facility licence. It is submitted however that a variation of the trading hours condition is beyond power when sections 64, 46(2) and 46A of Act are considered.
- 22 The respondent however does not oppose the general conditions sought by the complainant to be imposed on the licence, subject to there being no request to upgrade the existing CCTV system.

Determination

- 23 The Commission may, on a complaint lodged under section 95 of the Act, take disciplinary action.
- 24 Pursuant to section 96 of the Act, if the Commission is satisfied, on the balance of probabilities, that the ground upon which the complaint was, or complaints, were made has been made out so that a proper cause for disciplinary action exists, the Commission may exercise its discretion as outlined in section 96(1).
- 25 The respondent concedes that grounds 3 and 4 of the complaint have been made out insofar as the infringement notices listed in the complaint have been

issued and paid. It was submitted however, that while eight infringement notices have been issued they only relate to four different incidents. The respondent also conceded that the approved manager consumed alcohol with a person from another licensed premises on the venue outside permitted trading hours, however it was submitted that in the circumstances, this was a trivial breach of the Act.

- 26 At the hearing before the Commission, ground 5 of the complaint was withdrawn by the complainant.
- 27 In respect of the assertion by the police that the licensee breached a condition of its licence by not providing food during all its trading hours, the Commission accepts the police submission which is supported by statements from the officers who queried different staff on separate occasions. The Commission is also satisfied that the police evidence establishes, on the balance of probabilities, that the licensee failed to maintain the incident and training registers of the premises, as required by its licence and failed to have security engaged until 30 minutes after trading ceases also contrary to the licence conditions. The evidence also supports the conclusion that the licensee has permitted intoxicated persons to remain on the licensed premises.
- 28 The Commission accepts the respondents 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 orders issued to persons in the vicinity of the premises cannot all be attributed to patrons of De Bernales due to its proximity to other licensed premises in the 'Entertainment Precinct'.
- 29 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. The respondent submitted that in respect of an incident involving OMCG members, OMCG's have a reputation for both criminal behaviour and unprovoked violence. However if this is the case, the Commission is surprised that the licensee would allow these persons, who according to police are known to the licensee, onto the licensed premises in the first instance.
- 30 Accordingly, pursuant to section 96 of the Act, the Commission is satisfied that the grounds of the complaint have been established and there is proper cause for disciplinary action. It is now a matter to determine how the Commission should exercise its discretion as outlined in section 96(1).
- 31 The Commissioner of Police was seeking, amongst other penalties, that the special facility licence be cancelled and a Hotel Restricted licence issued in its

place in order to reduce the trading hours of the venue. Alternatively, this could be achieved by varying the trading hours of the premises so that trading ceases at 12 midnight. The respondent submitted that it was beyond power for the Commission under section 96 to cancel a licence and issue a licence of another class in its place. The respondent also submitted that the Commission cannot in the alternative vary the trading hours of the premises due to the prohibition imposed on the licensing authority by section 46A of the Act. The Commission is of the view that the respondent is correct in both aspects of its submissions, and either substituting the licence for a licence of another class or varying the trading conditions to reduce the trading hours of the venue is beyond power. The Commission notes that Section 46B of the Act was inserted into the Act in May 2007 to allow the licensing authority to replace special facility licences which effectively trade as a licence of another class; however this has not occurred in the case of De Bernales. Consequently, the Commission is of the view that its options under section 96(1) have been significantly curtailed in this instance.

32 Notwithstanding, the Commission is satisfied that the complaint can be properly disposed of by imposing a monetary penalty on the licensee of \$10,000 and imposing the following conditions on the licence:

- i. All twelve (12) installed video surveillance systems must be in place and all operational in compliance with the Director of Liquor Licensing's Policy on 'Minimum Standards Closed Circuit Television CCTV Security System';
- ii. Crowd controllers licensed under the *Security and Related Activities (Control) Act 1996* are to be employed at a ratio of two (2) for the first 100 patrons and one (1) crowd controller for each additional 100 patrons or part thereof from 8.00pm (or the time of opening if after 8.00pm) until thirty (30) minutes after trading ceases on Friday and Saturday nights;
- iii. The licensee is to submit a revised Harm Minimisation Policy, including a House Management Plan and a Code of Conduct within two (2) months. This policy is to be approved by the Director of Liquor Licensing;
- iv. Management to refuse admission to any person failing to comply with the following requirements:
 1. Jackets, or any other clothing or accessory, bearing patches or insignia of any Outlaw Motor Cycle Gang not limited to, but including the listed Outlaw Motor Cycle Gangs are not permitted to be worn on these premises at any time –
 - Coffin Cheaters
 - Comancheros

- Club Deroes
- Finks
- Gods Garbage
- Gypsy Jokers
- Outlaws
- Rebels
- Rock Machine

33 In determining an appropriate monetary penalty, the Commission was mindful that the licensee has suffered significant financial loss due to the conditions imposed by the Director of Liquor Licensing under section 95(6) of the Act pending the determination of this complaint. At the hearing of this matter, it was submitted that the licensee had already incurred losses of approximately \$96,000. Consequently, the Commission is satisfied that a global monetary penalty of \$10,000 in addition to some conditions on the licence is the proper disposition of this matter.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, followed by a smaller, more distinct signature to its right.

JIM FREEMANTLE
CHAIRPERSON