

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Complainant: Commissioner of Police
(represented by Mr Sam Nunn of State Solicitor's Office)

Respondent: Tocoan Pty Ltd
(represented by Mr Ashley Wilson of Frichot & Frichot Lawyers)

Observers: Detective Superintendent James Migro
Sargeant Trevor Atkins
Sargeant Marcus Murray

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Member)
Mr Greg Joyce (Member)

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

Premises Zelda's Nightclub, 2 Kent Street, Rockingham

Date of Hearing: 7 June 2012

Date of Determination: 13 July 2012

Determination:

1. The following additional conditions are imposed on the licence:

- The licensee will no longer be permitted to be trade under the two names of "Zelda's Nightclub" and "Vibe Nightclub". The licensed premises will only be known by one name, "Zelda's Nightclub", and will have only one entry to the premises.
- The licensee shall install and operate *Scantek* or its equivalent system at the entry to the premises.

- Prior to the commencement of trading at the premises the licensee is required to undertake and pass a course in Management of Licensed Premises and lodge the certificate of training with the Director.
- Prior to the commencement of trading at the premises, the licensee is to submit for the approval of the Director, a revised Harm Minimisation Policy, including a House Management Plan and a Code of Conduct.
- Prior to the commencement of trading at the premises, the premises shall be adequately lit on all sides externally to the satisfaction of the Director.

SERVICE OF LIQUOR

- Liquor sold and supplied is restricted to one bottle of wine not exceeding 750ml or a maximum of four alcoholic drinks per person at any one time.
- No liquor is to be sold or supplied for consumption on the premises in any vessels with a measurement capacity exceeding 750ml, except vessels containing premixed drinks (e.g. RTDs) which shall not exceed 375ml.
- No spirits are to be sold or supplied for consumption on the premises in any non standard measure (i.e. no more than 30ml of spirits is permitted in any vessel).
- The licensee is prohibited from selling and supplying beverages in such a way that would encourage rapid consumption of liquor, for example, drinks known as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters', 'bombs' or any other emotive title.
- No liquor is to be supplied with energy drinks. *(For the purposes of this condition **energy drinks** has the same meaning as **formulated caffeinated beverage** within Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.)*
- No liquor is to be consumed on the licensed premises after the end of the permitted hours.

SECURITY REQUIREMENTS

- Crowd controllers, licensed under the *Securities and Related Activities (Control) Act 1996*, are to be employed at a ratio of four crowd controllers for the first 100 patrons, and two crowd controllers for each additional 100 patrons or part thereof, from 8 pm (or the time of opening of the premises if after 8 pm).
- All security personnel will be required to undertake fresh RSA training prior to commencement of the trading at the licensed premises.
- A certificate from an independent CCTV System operator is to be lodged on a monthly basis with the Director certifying that the system is fully operational.

ENTERTAINMENT CONDITIONS

The licensee or manager or agent of the licensee or manager shall not:

- be immodestly or indecently dressed on the licensed premises;
- take part in, undertake or perform any activity or entertainment on licensed premises in a lewd or indecent manner; or
- cause, suffer or permit any person employed or engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises.

2. The trading hours of the licence are varied as follows:

PERMITTED HOURS

- a) on a Monday, Tuesday, Wednesday or Thursday - from 6 pm to 12 midnight and then continuing to 2 am on the next day;
- b) on a Friday or Saturday - from 6 pm to 12 midnight and then continuing to 2 am on the next day;
- c) on a Sunday that is not New Year's Eve - from 8 pm to 12 midnight;
- d) on a Sunday that is New Year's Eve - from 8 pm to midnight and then continuing to 2 am on the next day;
- e) on Good Friday – from immediately after 12 midnight on the previous day to 2 am and there are no further permitted hours before 6 pm on the following day;
- f) on Christmas Day (other than a Monday) – from immediately after 12 midnight on the previous day to 2 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:

- (i) there are no permitted hours under a nightclub licence on that day; and
- (ii) there are no further permitted hours before 6 pm on the following day.
- g) on ANZAC Day – from immediately after 12 midnight on the previous day to 2 am and then in accordance with paragraph (a), (b) or (c), as the case requires.
- Persons (other than an “authorised person”) are prohibited from entering or re-entering the licensed premises 60 minutes prior to the close of trading hours prescribed on the licence.

3. The following condition imposed by the Director on 24 January 2012 is upheld:

DRESS STANDARDS

- 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 points of the licensed premises.

4. 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.
5. The licence is to remain suspended until the conditions are met to the satisfaction of the Director.

Authorities referred to in the Determination:

- *Executive Director of Health v Lily Creek International & Ors* [2000] WASC 258
- *Douglas Brown v Commissioner of Police* (1995) 13 WAR 441
- *Holden v Sainken* SCWA library no. 970700
- *O'Sullivan v Farrer* (1989) 168 CLR 210
- *McKinnon v Department of Treasury* [2005] FCAFC 142
- *Hogan and Hinch* [2011] HCA 4
- *Ventorin Pty Ltd* (LC 4/2009)
- *Liquorland (Australia) Pty Ltd* (LC 18/2012)
- *Commissioner of Police v Bremerton Pty Ltd & West Lander Pty Ltd* (LC 24/2011)
- *Commissioner of Police v Sylvester Pty Ltd* (LC 10/2012)
- *Commissioner of Police v Tocoan Pty Ltd* (LC 52/2011)
- *Briginshaw v Briginshaw* (1938) 60 CLR 336
- *Commissioner of Police v Tocoan Pty Ltd* (LC 20/2012)
- *Executive Director of Health v Lily Creek International & Ors* [2001] WASC 410
- *Re Gull Liquor, Gingers' Roadhouse, Upper Swan* (1999) 20 SR WA 321
- *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207
- *Interpretation Act 1984*

Introduction

- 1 On 23 March 2012 the Commissioner of Police (“the Police”) lodged a complaint with the Liquor Commission (“the Commission”) pursuant to section 95 of the *Liquor Control Act 1988* (“the Act”) against Tocoan Pty Ltd the licensee of Zelda’s Nightclub, located at 2 Kent Street, Rockingham (“the premises”), alleging that:
 - the continuation of the licence was not in the public interest (section 95(4)(j) of the Act); and
 - the safety, health or welfare of persons who resort to the licensed premises is endangered by an act or the neglect of the licensee (section 95(4)(k)).
- 2 The premises consists of two levels, downstairs known as Zelda’s, an adult entertainment club, and upstairs known as Vibe, a nightclub. Both operate under the one licence (6070021493). Mr Kevin Mann, a director of the licensee, and Ms Cassia Overton are the approved managers of the premises.
- 3 On 17 January 2011 the Director of Liquor Licensing (“the Director”) imposed additional conditions on the licence relating to security, issue of pass outs and improved CCTV, and on 24 January 2012 imposed further conditions on the licence inter alia requiring the licensee to refuse entry to any person displaying patches or clothing of any other means identifying them as members of an Outlaw Motorcycle Gang (“OMCG”).
- 4 On 3 May 2012 the Director suspended the licence of Tocoan Pty Ltd in respect of Zelda’s Nightclub pursuant to section 91(1) of the Act pending the determination of this complaint by the Commission.
- 5 On 16 May 2012, a review application of the suspension order issued by the Director was heard and dismissed by the Commission.
- 6 The complaint was heard by the Commission on 7 June 2012.

Submissions on behalf of the Commissioner of Police

- 7 On 4 December 2011 at about 1:30 am a number of known members of the Rebels OMCG were present in the premises. On the removal of one patron; Todd Raymond Bradshaw (who was wearing a black shirt with the insignia “REBELS NOMINEE”), the Rebels OMCG members departed the premises through a fire and emergency exit, as is evidenced by CCTV footage.
- 8 CCTV footage also reveals that, at approximately 1 am one Christopher Gakis was present on the premises in company with members of Rebels OMCG.
- 9 After purchasing drinks Gakis made an unprovoked attack on a patron into whom he had bumped when returning from the bar. Another person Matthew Kratiuk, a nominee of the Rebels OMCG, joined the attack against the patron who suffered facial injuries from the assault. Crowd controllers escorted the injured patron from the premises but made no attempt to remove the offenders Gakis and Kratiuk or seek assistance from the police.
- 10 A short time later on the 4 December 2011 CCTV footage reveals that Gakis attacked one Middlebos Manolito who at the time of the attack was talking with

Mark Rogers, a known member of the Rebels OMCG. The victim (Manolito) was carried, apparently unconscious, from the premises by the crowd controllers who subsequently stated to police that Manolito was drunk and had fallen over and hit his head.

- 11 Ms Cassia Overton, the approved manager stated to the police that she had not seen anything as she was on another floor, however CCTV footage reveals Ms Overton watching crowd controllers taking Mr Manolito down the stairs.
- 12 No attempt was made by either crowd controllers or the approved manager to remove Christopher Gakis from the premises or seek police assistance.
- 13 On 17 December 2011 at about 1:30 am a large brawl occurred in the Vibe area of the premises between 7 persons known to be members or associates of Rebels OMCG, and Richard, Elton and Santana Hokianga as a result of which serious injuries were sustained by Richard Hokianga and to a lesser extent by Santana and Elton Hokianga.
- 14 A witness to the incident was told in answer to her enquiry as to whether staff were going to call the police, that it wasn't their job and they didn't have a phone anyway. The witness summoned the police and an ambulance.
- 15 The attackers were permitted to drag the victims outside and continue the assault and were then allowed re-entry to the premises.
- 16 During the course of the assault on the Hokiangas, crowd controllers did not intervene and in fact held back those who were going to the victims aid.
- 17 Approved manager Ms Overton passed off the incident as "minor" when contacted by police. At no stage did she attempt to contact police.
- 18 Statements by Police Officers Galbraith and Vredenbregt were lodged as were statements by Richard, Elton and Santana Hokianga and the witness.
- 19 CAD reports covering incidents from 1 September 2011 to 10 December 2011 were also lodged as evidence.
- 20 A detailed written submission on relevant law and legal precedents was made and is dealt with as necessary in the determination beginning at paragraph 37 below.

Submissions on behalf of the respondent

- 21 The respondent made submissions concerning the statutory framework particularly the onus of proof, the standard of proof and the intent of sections 95, 100, and 165 of the Act. These will be dealt with as necessary in the determination beginning at paragraph 51.
- 22 The complainant places heavy reliance on the evidence concerning the licensee permitting Rebels OMCG members entry to the premises, neglecting to properly manage patrons notably Rebels OMCG members and associates and failing to call police and paramedics when patrons have been subjected to violence.
- 23 It was submitted that prior to the imposition of the clothing condition on 24 January 2012, there was no lawful basis to refuse entry to Rebels OMCG

members. In any event there has been no attendance of Rebels OMCG members since the Director imposed the clothing condition.

- 24 CCTV footage evidences that crowd controllers engaged appropriately in difficult circumstances giving priority to evacuating injured patrons.
- 25 Approved manager Cassia Overton in her statement submitted in evidence explains her incomplete knowledge of the incidents of 4 December 2011 due to being misinformed by crowd controllers. She also justified her actions on 17 December 2011 as appropriate and it is unfair (and inaccurate) to describe her as standing around doing nothing.
- 26 There was no opportunity to request paramedic attention for the victim of the initial assault of 4 December 2011 as he was removed from the premises under protest and subsequently left the area.
- 27 Irrespective of any blood alcohol reading, CCTV footage evidences that the victim of the recorded assault on 4 December 2011, Mr Manolito, was not exhibiting any signs of drunkenness and refused treatment by the paramedics called by the police.
- 28 The incident of 17 December 2011 quickly escalated into a brawl which initially overwhelmed crowd controllers. However they did react appropriately to try to bring the situation back under control and Ms Overton, who could see what was occurring, could not have been expected to intervene or do more than she did.
- 29 Statistical evidence indicates that alcohol was a factor in 37% of assaults in Rockingham, well below that for WA as a whole at 45.2%. Furthermore the largest proportion of assaults in Rockingham were non domestic and not alcohol related. Rockingham recorded lower crime rates than the South West Metropolitan Sub Division and the state of WA as a whole in most offence categories. Offences in Rockingham decreased markedly in 2009/10 including offences against the person. Police data indicates Rockingham assault numbers reported were 268 compared with Fremantle 384 and Northbridge 471.
- 30 Just because antisocial behaviour occurs in the proximity of licensed premises it does not automatically follow that this is alcohol related and caused by inadequate management of the premises.
- 31 The nexus between the violent incidents at or near the premises and the supply of liquor by the licensee is tenuous. The claim that proximate violence is due to an act or neglect by the licensee is even more tenuous.
- 32 The licensee has analysed in detail the CAD information submitted by Police and concluded that the vast majority of incidents are not related to the premises.
- 33 There is no evidentiary basis that cancelling the licence would contribute to minimising harm caused by alcohol.
- 34 Any penalty imposed should be commensurate with the grounds that have been established and proportionate to the act(s) being penalised with the maximum penalty being reserved for the worst cases.

- 35 The essence of the complaint is that by admitting Rebels OMCG related persons, the licensee demonstrates a wilful disregard for the safety and well being of the majority of patrons and staff have little control over OMCG when on premises.
- 36 This is disputed as it was the approved manager and the crowd controllers who dealt with the situation on each occasion and not any director of the licensee company. Thus it cannot be said that the licensee wilfully failed to properly conduct the business under the licence.

Determination

- 37 Section 95 of the Act provides that the Commission may take disciplinary action in respect of a complaint laid under the section.
- 38 Section 96 of the Act provides that the Commission may exercise its disciplinary powers as set out in section 96(1)(a) to (n) of the Act if satisfied on the balance of probabilities (section 16(1)(b)(ii)) that the grounds of the complaint have been made out.
- 39 The primary objects of the Act are set out in section 5(1) as:
- (a) *to regulate the sale, supply and consumption of liquor;*
 - (b) *to minimize harm or ill health caused by the use of liquor; and*
 - (c) *to cater for the requirements of consumers for liquor having regard to the proper development of the liquor industry, tourism and other hospitality industries in the state.*
- 40 The secondary objects as set out in section 5(2) are:
- (a) *to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of requirements of consumers; and*
 - [(b) (c) deleted]*
 - (d) *to provide adequate controls over, and over the persons directly and indirectly involved in, the sale, disposal and consumption of liquor; and*
 - (e) *to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act.*
- 41 Where there is conflict between different objects of the Act the licensing authority needs to weigh and balance those competing interests (refer *Executive Director of Health v Lily Creek International & Ors [2000] WASC 258*).
- Notably, Ipp J also stated that it is significant that the primary object 5(1)(b) is to minimise harm or ill health not to prevent it absolutely.
- 42 The complaint alleges there is proper cause for disciplinary action on two grounds:
- (i) continuation of the licence is not in the public interest [section 95(4)(j)]; and

- (ii) 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)].
- 43 The onus is on the complainant to make out the grounds of the complaint lodged pursuant to section 95 of the Act. No onus of proof to the contrary rests on the respondent.
- 44 Dealing with the second ground first; there is common ground between the parties that two violent incidents took place on 4 and 17 December 2011 respectively. Each of these events had a series of sub events. The 17 December 2011 incident is of particular concern as serious assaults resulting in significant injury occurred and a brawl developed. The events of 4 December 2011 also resulted in facial injuries to the victim.
- 45 It is also common ground between the parties that the perpetrators of the assault on 4 December 2011 remained on the premises and were not removed nor was any attempt made to remove them.
- 46 The Commission accepts that the security personnel lied to the approved manager (Cassia Overton) which may have contributed to her apparent inaction in having the perpetrators of the attack removed. Furthermore the Commission accepts that the security personnel lied to the police who later attended.
- 47 Whether the security personnel lied to cover up the fact they had not taken appropriate action or whether they lied to avoid a confrontation with perpetrators is unknown. However, deliberately misleading the approved manager and the police in these circumstances is a serious matter. The CCTV footage supports the contention that there was a lack of appropriate response to the incidents.
- 48 In respect of the events on 17 December 2011 the Commission accepts the Police evidence that security staff and the approved manager failed in their duties in not seeing that police and paramedics were called promptly. The Commission also concludes that there is little or no real evidence to refute the statement of the patron present at the premises when the incident occurred, that staff refused to take responsibility for the incident, claiming they had no phone and it wasn't their job.
- 49 The Commission finds that no action was taken to remove the perpetrators of the assault on the Hokianga nor was there any attempt to prevent their re-entry after they had taken the Hokianga outside.
- 50 The Commission formed the view that Ms Overton, the approved manager, was in all probability overwhelmed by the events. The Commission acknowledges that it would have been unreasonable to expect her to intervene personally and that she was indeed intimidated by the Rebels OMCG members and associates present.
- 51 However, the Act clearly states that a licensee is to be held directly responsible for the acts or omissions on the licensed premises. It is apparent from its submissions that the respondent does not accept responsibility for the events that led to the complaint.

- 52 Section 100(1) of the Act requires that the conduct of business under a licence is always the responsibility of the licensee and shall be personally supervised and managed by a natural person, in accordance with this section and confirmed in *Douglas-Brown v Commissioner of Police* (1995) 13 WAR 441 at 447-8 Pidgeon J.
- 53 Further, the construction of section 100(8), (9) makes it clear that the licensee is to be held responsible for acts and omissions in licensed premises. Section 165 of the Act specifies that the licensee is liable for acts of employees.
- 54 Scott J in *Holden v Sainken SCWA library no. 970700* stated “Those cases reveal the history of equivalent legislation and show the extent to which the legislation has imposed upon licensees particular obligations with respect to the conduct of licensed premises that cannot be delegated to employees so as to absolve the licensee from responsibility.”
- 55 Section 165 also specifically includes persons engaged under service contracts including a person holding a crowd controller’s licence.
- 56 The Commission therefore rejects the contention that the act or neglect of an employee (such as crowd controllers) who is not an approved manager or a temporary manager appointed by the licensee is not an act or neglect of the licensee.
- 57 The Commission does not accept that section 165 has no application as the grounds of complaint do not allege any offence in contravention of the Act. The Commission’s opinion is that it is drawing a very long bow to maintain that a breach of section 95(4)(k) does not contravene the provisions of the Act.
- 58 The Commission also does not accept that the licensee did not have grounds or power to deny entry to the Rebels OMCG members until the Director imposed the dress conditions on 24 January 2012.
- 59 The licensee at the hearing tendered in evidence a notice for dress standards displayed prominently at the premises and the right of management to refuse admittance. There was therefore no basis for the argument that the licensee could not have barred people from entering the premises. Furthermore the licensee of any licensed premises has absolute discretion to refuse entry to his premises.
- 60 The Commission is convinced that the safety and welfare of patrons resorting to the premises had been endangered because of the act and neglect of the approved manager, the crowd control staff and the licensee. Ground 2 has therefore been made out.
- 61 The Commission now turns its attention to the first ground viz that the continuation of the licence is not in the public interest (section 95(4)(j) of the Act).
- 62 Section 95(4)(j) has two relevant and important aspects.
- (i) it is prospective in its effect rather than retrospective which distinguishes it from the remaining parts of section 95 i.e. it requires a view of future conduct rather than a review of events past; and
 - (ii) it is extremely general and unqualified leaving it open to the Commission

to take a very broad view of relevant considerations in determining whether it is in the public interest to continue the licence.

The Commission is required to be guided in establishing this view by the objects and content of the Act and the established precedents in case law.

- 63 When used in a statute the term public interest normally implies a discretionary value judgement confined only by the subject matter and the purpose of the statute (refer *O’Sullivan v Farrer* (1989) 168 CLR 210 at 216-217).
- 64 The expression “in the public interest” directs attention to that conclusion which best serves the advancement of the interests or welfare of the public, society or the nation and its content will depend on each set of circumstances (refer *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142). The High Court in *Hogan and Hinch* [2011] HCA 4 held that applying a public interest criterion may require a balancing of conflicting interests and is a question of fact and degree.
- 65 The Commission may also be guided by extrinsic material in confirming the meaning of a provision (section 19 of *Interpretation Act 1984*) taking account inter alia of the object of the laws.

The long title of the Act makes the purpose of the Act clear.

“An act to regulate the sale, supply and consumption of liquor, the use of premises in which liquor is sold and the services and facilities provided in conjunction with or ancillary to the sale of liquor to minimize harm or ill health caused to people or any group of people due to the use of liquor”

- 66 As the Commission observed in *Ventorin Pty Ltd* (LC 4/2009), and again in *Liquorland (Australia) Pty Ltd* (LC 18/2012) “a matter often overlooked in presenting arguments is that the Commission must look at the whole of this Act to gain an understanding of the intention of the legislature. In terms of section 5(1)(c) of the Act, the first of the primary objects of the legislation is to regulate the sale, supply and consumption of liquor. There is an expectation in the Act that the Commission will regulate the supply of liquor subject to the various provisions of the Act weighed up against the particular merits of each application. The disposition of the Act read as a whole, is to regulate.”
- 67 The then Minister for Racing Gaming and Liquor stated on 29 September 2006 in the Second Reading Speech to the Bill to amend the Act “*The 2005 review of the Liquor Licensing Act concluded that our liquor laws need to provide greater flexibility while promoting the consumption of liquor in low risk drinking environments* (emphasis added).
- 68 Whilst from time to time there may be occasions where the primary objects of the Act may conflict, particularly 5(1)(b) and 5(1)(c), it is the view of the Commission that there is no conflict arising in this case. The requirements of consumers cannot be properly catered for, nor the proper development of the liquor industry be accommodated, where inadequate efforts are being made to minimize harm due to the use of liquor.
- 69 The Commission accepts that the general area or vicinity in which the premises are located is problematic with high levels of antisocial behaviour, littering and graffiti.

- 70 The Commission further accepts the respondent's submission that the CAD data does not always clearly link alleged problems with the operation of the venue and with the patrons of the venue but a number of incidents do demonstrably relate to the premises.
- 71 The Commission also notes that in spite of their reputation, the licensee permitted the Rebels OMCG members and their associates onto the licensed premises.
- 72 The Commission held in *Commissioner of Police v Bremerton Pty Ltd & West Lander Pty Ltd (De Bernales Tavern; LC 24/2011)* "that despite accepting that licensees cannot always prevent some violent incidents occurring at their premises, where there is a frequency of antisocial behaviour in and about the licensed premises, this may reflect on the licensee's permissive attitude towards intoxication or poor management practices."
- 73 In *Commissioner of Police v Sylvester Pty Ltd (LC 10/2012)* the Commission stated "The Commission considers it reasonable to expect that the licensee being aware of the nature of the entertainment precinct and the management challenges it presents would demonstrate a high level of vigilance and care in conduct of the premises."
- 74 The Commission is not convinced that this is being achieved in respect of these premises. There is a lack of cogent evidence to suggest that the licensee does any more than the bare minimum to address security and behavioural issues at and in the venue. The replacement of Ms Overton as approved manager and the replacement of the security personnel is a start but it is purely reactive. It is the Commission's view that Ms Overton (who the Commission found earlier to have been overwhelmed by the situation) should not have been left to manage on her own in the critical post midnight period.
- 75 In *Commissioner of Police v Tocoan Pty Ltd (LC 52/2011)* the Commission stated at paragraph 50 "Mr Mann readily admitted to a lack of respect bordering on contempt for certain individual officers but denied a lack of respect for police generally. The breakdown of the relationship between the police and the licensee is a cause of concern for the Commission and it urges Mr Mann to work with police to develop a more constructive working relationship." This Mr Mann claims to have done.
- 76 Mr Mann stated in evidence that he had developed a special relationship with the police however Police Officer Vredenburg in his statement dated 10 May 2012 stated that the level of cooperation by Mr Mann was no more than he would have expected of any licensee.
- 77 Constable Vredenburg makes the point that the dealings he has had with Mr Mann had predominantly been as a result of existing inquiries and the actions taken by police and not a result of Mr Mann's assistance as implied. He further states that at no point has Mr Mann provided information or assistance on his own volition.
- 78 There is no evidence to suggest that there has been any real effort by Mr Mann to remedy the relationship with police.
- 79 This again leaves the Commission with the strong sense that, notwithstanding numerous complaints being lodged against the licensee, his obvious (and declared) knowledge of the difficulties of the vicinity in which the premises are

situated and since the determination of the Commission in *Commissioner of Police v Tocoan Pty Ltd* (LC 52/2011) very little has been done and certainly much less than the Commission would have expected in the circumstances.

- 80 The Commission has lost a considerable amount of confidence in Mr Mann as a director of the licensee company and as an approved manager. The Commission is not at all convinced that his relationship with the police is as was presented at the hearing.
- 81 In assessing the evidence, the Commission has been guided by the principle stated by Latham CJ in *Briginshaw and Briginshaw* [(1938) 60 CLR 336] ... *"the standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness and importance of the issue"*.
- 82 The harm contemplated by the Act extends to harm caused to people other than the consumer of liquor. This includes harm which may occur through an increase in anti-social or injurious behaviour due to the use of liquor and is not limited to physical harm (*re Gull Liquor, Gingers' Roadhouse, Upper Swan* (1999) 20 SR (WA) 321 at 340).
- 83 In *Director of Liquor Licensing v Kordister Pty Ltd* (2011) VSC 207 Bell J concluded that *"harm minimisation encompasses harm to health and well-being of individuals, families and communities, as well as social, cultural and economic harm. It encompasses harm to personal safety and freedom to move in the streets without hindrance, disturbance or molestation..."*
- Whilst this judgement was made under the Victorian Act the principle is equally relevant under the WA Act and consistent with the construction and thrust of the WA Act.
- 84 In *Commissioner of Police v Tocoan Pty Ltd* (LC 52/2011) the Commission found at para 44 *"... on the balance of probabilities that there is a sufficient link between alcohol related antisocial and violent behaviour and the failure of management to properly conduct and manage the premises."*
- 85 In *City of Rockingham v Tocoan Pty Ltd* (LC 20/2012) whilst finding that the complaint had not been properly made out the Commission stated *"(it) was not so naive as to determine there were no issues with Zelda's. This determination (LC 20/2012) should not in any way be construed as a validation of the manner in which the nightclub is operated"*.
- 86 In *Commissioner of Police v Tocoan Pty Ltd* (LC 23/2012) the Commission again found there were serious inadequacies in the management of the premises and imposed a penalty of \$5000 on the licensee company.
- 87 Following the general principle laid down by Wheeler J in *Executive Director of Public Health v Lily Creek International Pty Ltd & Ors* [2001] WASC 410 at 59 that where there is already a high and serious level of alcohol related harm in a community, it maybe that a relatively small increase in that level of harm is unacceptable, the Commission believes there is a significant risk of increased harm as a result of these premises continuing to operate in their present form (emphasis added).
- 88 The Commission, in reaching its determination, has considered the extensive list of complaints and actions taken against the licensee over a long period of time, including:

- a) a section 95 complaint lodged by the Commissioner of Police and heard by the Commission on 17 August 2011 wherein a penalty of \$15000 was imposed along with several conditions being imposed on the licence;
 - b) a section 95 complaint lodged by City of Rockingham and heard by the commission on 24 February 2012 and dismissed on grounds of insufficient evidence;
 - c) a section 117 application made by the City of Rockingham and referred to the Commission by the Director, dismissed on grounds of insufficient evidence on 29 June 2012;
 - d) a section 95 complaint lodged by the Commissioner of Police and heard on 4 May 2012 wherein a penalty of \$5000 was imposed.
- 89 Whilst the police grounds of complaint based on the incidents of 26 November 2011, 4 December 2011 and 17 December 2011 reflect serious shortcomings in the licensee's management of the premises, they do not, on their own, necessarily demand the maximum penalty of a licence cancellation. However, when taken into consideration in conjunction with the matters the subject of the complaints listed in paragraph 88 above, it is clear that there are significant shortcomings in the management structure and approach to the operation of the licence. More-so as it is apparent that the licensee has taken little action over a period of two years to respond to the issues raised and there is little evidence to demonstrate a preparedness to introduce preventative measures to avoid a repetition of the problems that have occurred.
- 90 Therefore, given the numerous complaints lodged before the Commission evidencing serious concern for safety, health or welfare of persons who resort to licensed premises, the Commission finds that ground 1 of the complaint, that the continuation of the licence is not in public interest, is made out.
- 91 A logical progression of this conclusion would be cancellation of the licence. However, the Commission believes that by imposing a range of conditions on the licence, the operation of the licensed premises could be sufficiently improved to avoid the more drastic step of cancellation, thereby ensuring a safe continuation of catering to the requirements of consumers for liquor and related services.
- 92 Accordingly, by restricting the hours of operation and imposing a 60 minute lock out condition, the premises will not be trading at the time most of the problems at, in and around the premises regularly occur.
- 93 Better training of the managers and security staff and an increased number of security personnel should prevent the occurrence of the sort of incident on which this complaint is based and if such incidents do occur, deal with them more expeditiously.
- 94 Similarly restrictions of alcohol in the manner liquor is supplied will in some way discourage rapid intake of alcohol by patrons.
- 95 Prohibiting the style of entertainment provided particularly the adult entertainment currently provided in the downstairs area will assist in offering more sober and safer entertainment to patrons.

- 96 Conducting the premises as one rather than two distinctive areas and confining ingress and egress to one point should assist in significantly reducing the poor behaviour too often evident in these premises.
- 97 The following conditions are hereby imposed/varied on the licence of Tocoan Pty Ltd trading as Zelda's Nightclub:

1. The following additional conditions are imposed on the licence:

- The licensee will no longer be permitted to be trade under the two names of "Zelda's Nightclub" and "Vibe Nightclub". The licensed premises will only be known by one name, "Zelda's Nightclub", and will have only one entry to the premises.
- The licensee shall install and operate *Scantek* or its equivalent system at the entry to the premises.
- Prior to the commencement of trading at the premises the licensee is required to undertake and pass a course in Management of Licensed Premises and lodge the certificate of training with the Director.
- Prior to the commencement of trading at the premises, the licensee is to submit for the approval of the Director, a revised Harm Minimisation Policy, including a House Management Plan and a Code of Conduct.
- Prior to the commencement of trading at the premises, the premises shall be adequately lit on all sides externally to the satisfaction of the Director.

SERVICE OF LIQUOR

- Liquor sold and supplied is restricted to one (1) bottle of wine not exceeding 750ml or a maximum of four (4) alcoholic drinks per person at any one time.
- No liquor is to be sold or supplied for consumption on the premises in any vessels with a measurement capacity exceeding 750ml, except vessels containing premixed drinks (e.g. RTDs) which shall not exceed 375ml.
- No spirits are to be sold or supplied for consumption on the premises in any non standard measure (i.e. no more than 30ml of spirits is permitted in any vessel).
- The licensee is prohibited from selling and supplying beverages in such a way that would encourage rapid consumption of liquor, for example, drinks known as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters', 'bombs' or any other emotive title.
- No liquor is to be supplied with energy drinks. (*For the purposes of this condition **energy drinks** has the same meaning as **formulated caffeinated beverage** within Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.*)
- No liquor is to be consumed on the licensed premises after the end of the permitted hours.

SECURITY REQUIREMENTS

- Crowd controllers, licensed under the *Securities and Related Activities (Control) Act 1996*, are to be employed at a ratio of four (4) crowd controllers for the first 100 patrons, and two (2) crowd controllers for each additional 100 patrons or part thereof, from 8 pm (or the time of opening of the premises if after 8 pm).
- All security personnel will be required to undertake fresh RSA training prior to commencement of trading at the licensed premises.
- A certificate from an independent CCTV System operator is to be lodged on a monthly basis with the Director certifying that the system is fully operational.

ENTERTAINMENT CONDITIONS

The licensee or manager or agent of the licensee or manager shall not:

- be immodestly or indecently dressed on the licensed premises;
- take part in, undertake or perform any activity or entertainment on licensed premises in a lewd or indecent manner; or
- cause, suffer or permit any person employed or engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises.

2. The trading hours of the licence are varied as follows:

PERMITTED HOURS

- a) on a Monday, Tuesday, Wednesday or Thursday - from 6 pm to 12 midnight and then continuing to 2 am on the next day;
- b) on a Friday or Saturday - from 6 pm to 12 midnight and then continuing to 2 am on the next day;
- c) on a Sunday that is not New Year's Eve - from 8 pm to 12 midnight;
- d) on a Sunday that is New Year's Eve - from 8 pm to midnight and then continuing to 2 am on the next day;
- e) on Good Friday – from immediately after 12 midnight on the previous day to 2 am and there are no further permitted hours before 6 pm on the following day;
- f) on Christmas Day (other than a Monday) – from immediately after 12 midnight on the previous day to 2 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:

- (i) there are no permitted hours under a nightclub licence on that day; and
 - (ii) there are no further permitted hours before 6 pm on the following day.
- g) on ANZAC Day – from immediately after 12 midnight on the previous day to 2 am and then in accordance with paragraph (a), (b) or (c), as the case requires.
- Persons (other than an “authorised person”) are prohibited from entering or re-entering the licensed premises 60 minutes prior to the close of trading hours prescribed on the licence.

3. The following condition imposed by the Director on 24 January 2012 is upheld:

DRESS STANDARDS

1. 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 points of the licensed premises.

4. 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.
5. The licence is to remain suspended until the conditions are met to the satisfaction of the Director.
- 98 The above conditions imposed should not only result, of themselves, in the required improvement in the conduct of the premises but assist the licensee in seeing that the licence is conducted in accordance with its terms and the

requirements of the Act and attendant regulations.

- 99 The Commission does not consider that imposition of a further monetary penalty is appropriate as the economic loss resulting from the suspension of the licence is sufficient in this regard. However, in order to adequately address the concerns of the Commission in respect of the activities at the licensed premises, the suspension of this licence will continue until the imposed licence conditions are met by the licensee to the satisfaction of the Director.

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

MR JIM FREEMANTLE
CHAIRPERSON