

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Complainant: Commissioner of Police
(represented by Mr Edward Fearis of State Solicitor's Office)

First respondent: Ash Promotions Pty Ltd
(represented by Mr John Prior, instructed by Mr Peter Fraser of Dwyer Durack Lawyers)

Commission: Mr Seamus Rafferty (Chairperson)
Mr Michael Egan (Member)
Dr Eric Isaachsen (Member)

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

Premises: An Sibin Pub, 147 James Street, Northbridge

Date of Hearing: 3 February 2016

Date of Determination: 3 February 2016

Reasons of Determination: 29 March 2016

Determination: Pursuant to section 96(1)(b) of the *Liquor Control Act 1988*, conditions as set out in paragraph 22 of these reasons are to be imposed on the licence.

Background

- 1 By way of a complaint dated 28 October 2015, the Commissioner of Police (“the Police”) commenced disciplinary proceedings pursuant to section 95 of the *Liquor Control Act 1988* (“the Act”) against Ash Promotions Pty Ltd, the licensee of An Sibir Pub (“the licensee”) located in Northbridge.
- 2 The grounds for disciplinary action alleged against the licensee were as follows:
 - a) Ground (1) - The licensed premises are not properly managed in accordance with the Act;
 - b) Ground (2) – The licensee has contravened a requirement of the Act or a term or condition of the licence;
 - c) Ground (3) – The licensee has been given an infringement notice under s.167 of the Act and the modified penalty has been paid in accordance with that section;
 - d) Ground (4) – The licence has not been exercised in the public interest;
 - e) Ground (5) – The safety, health or welfare of persons who resort to the licensed premises is endangered by an act of neglect of the licensee.
- 3 The licensee commenced operating the licensed premises on 4 December 2014. The complaint covers the period between 1 January 2015 and 1 October 2015.
- 4 On 30 June 2015 the licensee was issued with Liquor Infringement Notice number 389092 alleging an offence contrary to section 115(2)(b) of the Act. The licensee admitted the breach and the \$1000 fine was paid on 28 July 2015.
- 5 Given the issuing of the infringement notice and the payment of the modified penalty, counsel for the licensee properly conceded that grounds (2) and (3) of the complaint had been made out and that there were proper grounds for disciplinary action.
- 6 It was apparent to the Liquor Commission (“the Commission”) prior to the hearing on 3 February 2016 that the parties were close to agreement as to the remedy that should be imposed in respect to this disciplinary proceeding. At the hearing, the parties were given the opportunity to confer in respect to the remedy to be imposed. With a couple of exceptions, the parties agreed as to the conditions that should be imposed on the licence, given that there were proper grounds for disciplinary action.
- 7 Following discussions between the parties, Counsel for the Police advised that the Commissioner of Police did not seek a ruling in respect to grounds (4) and (5) but wished to proceed in respect to ground (1).
- 8 Having regard to the concessions made by the parties, the only ground of complaint that required determination was ground (1), that being that the licensed premises were not managed properly in accordance with the Act.

Evidence relied upon in respect to ground (1)

9 In submitting that the licensed premises were not properly managed in accordance with the Act, the Police relied upon the following alleged incidents:

a) Incident (1) – on 1 January 2015 at 10.45pm, police observed three male patrons consuming alcohol in the al fresco area whilst not consuming a meal. This was a requirement of the extended trading permit in existence at the time. The evidence relied upon in respect to this incident was:

- Police IMS Incident Report 010115 2245 13769;
- statement of Constable Michael Gibbons;
- statement of Constable Phillip Hayes;
- Police IMS venue running sheet 050115 0000 14114; and
- two photographs.

b) Incident (2) – on 18 January 2015 at 1.30am, police attended the licensed premises and identified that the majority of patrons appeared drunk. The evidence relied upon in respect to this incident was:

- Police IMS Incident Report 180115 0130 14114;
- Statement of Constable Adam Smith; and
- Statement of Senior Constable John Brunet.

c) Incident (6) – on 1 May 2015 at 8.30pm, police observed two males arguing over a set of keys. One of the males was stopped by police 15 minutes later whilst driving in Northbridge. He gave a blood alcohol reading of 0.225. Closed Circuit Television (“CCTV”) footage showing staff serving and interacting with the drunken man was obtained. The evidence relied upon in respect to this incident was:

- Police IMS Incident Report 010515 2050 12518;
- statement of Constable Nathan Hicks;
- Summary Action Report;
- copies of Liquor Infringement Notices 389077 and 389078;
- photographs captured from CCTV footage;
- Statement of Material Facts (briefcase 1344450-1); and
- CCTV footage.

d) Incident (10) – Police viewed CCTV footage taken on 8 August 2015. It is alleged that staff served an obviously drunk male. It is further alleged that security staff ignored the obviously drunken state of the male and when he was later refused entry, no entry was made in the licensee’s Incident Register. The evidence relied upon in respect to this incident was:

- CCTV footage timeline;
- CCTV still photographs;

- Incident Report – Nightlife (An Sibin) 8 August 2015; and
 - CCTV footage.
- e) Incident (11) – Police viewed CCTV footage taken on 8 August 2015. The footage shows an ongoing incident involving staff, security staff and patrons. It is alleged that a patron who intervened in the incident should not have been re-allowed entry to the premises given his disorderly behaviour. The evidence relied upon in respect to this incident was:
- CCTV footage timeline;
 - CCTV still photographs;
 - Incident register – Nightlife (An Sibin) 8 August 2015;
 - CCTV footage (City of Perth); and
 - CCTV footage (An Sibin).
- f) Incident (12) – On 29 August 2015 at 12.20am police attended the licensed premises to conduct covert observations of the management practices of staff and management. It is alleged that a number of patrons were showing overt signs of drunkenness and that security staff failed to take action in this regard. Further, a patron who was refused service by a staff member was subsequently served alcohol by another staff member. The evidence relied upon in respect to this incident was:
- Police IMS Incident Report Number 170915 1520 13783;
 - Police IMS running sheet 051115 0000 14114;
 - statement of Constable John Greer;
 - statement of Constable Benjamin Butler;
 - CCTV time log;
 - CCTV still images;
 - CCTV footage (Police LEU covert footage); and
 - CCTV footage (An Sibin).
- g) Incident (14) – On 19 September 2015 at 1.05am police attended the licensed premises. It is alleged that the security staff allowed a drunken woman to enter the premises. The evidence relied upon in respect to this incident was:
- Police IMS Incident Report Number 190915 0105 13769;
 - statement of Constable Michael Gibbons;
 - statement of Senior Constable Jon D’Souza;
 - LEU Running Sheet;
 - CCTV time log;
 - CCTV still images; and
 - CCTV footage.
- h) Incident (15) – On 20 September 2015 at 1.00am police were monitoring the entrance to the premises. It is alleged that patrons who had been removed from

the premises were able to sneak back into the premises without being noticed by security staff. The evidence relied upon in respect to this incident was:

- Police IMS Incident Report Number 200915 0053 10867;
- statement of Senior Constable Jon D'Souza;
- statement of Constable Michael Gibbons;
- time log between 1.02am and 1.04am;
- CCTV still images; and
- CCTV footage.

10 Reference was also made to the licensee's Incident Register between December 2014 and September 2015. This showed that 911 patrons had been removed from the premises or refused entry due to:

- a) drunkenness;
- b) disorderly behaviour;
- c) dress;
- d) refusal; and
- e) unknown.

11 A number of witness statements were provided on behalf of the licensee in response to the complaint.

Determination of ground (1)

12 The words "not properly managed in accordance with the Act" are not defined in the Act. Accordingly, those words are to be given their ordinary meaning consistent with the primary and secondary objects, and the scope of the Act.

13 The issues for the Commission to determine are:

- a) whether the eight discrete incidents alleged to have occurred over a period of nine months actually occurred; and
- b) if so satisfied, do those incidents lead to a conclusion that the licensed premises are not properly managed in accordance with the Act.

14 In relation to the first issue, the Commission is satisfied that each alleged incident actually occurred. There is no evidence before the Commission that would adversely impact upon the credibility of the police officers who attest to certain incidents occurring and in certain instances, there is corroboration provided by other evidence such as CCTV footage.

15 The real issue is whether the incidents amount to such wrong doing on the part of the licensee that a conclusion can be reached that the licensed premises are not properly managed in accordance with the Act. This requires a consideration of a number of factors which include:

- a) an assessment of the nature of the incidents;
 - b) an assessment of the location in which the licence is operated; and
 - c) any steps taken by the licensee to rectify issues that have arisen.
- 16 An objective assessment of the evidence relied upon by the Police reveals the following relevant matters:
- a) an allowing of the consumption of alcohol by three patrons in an area where this was not permitted unless food was also being consumed on one occasion;
 - b) an occasion early in the existence of the licensed premises in which a number of persons were identified as being intoxicated;
 - c) an occasion where a person had driven whilst significantly over the legal limit after consuming alcohol at the licensed premises;
 - d) the service of alcohol to an obviously drunk patron;
 - e) the allowing of re-entry to the premises to a person who had been involved in an earlier incident; and
 - f) failure by security staff to take action when required and a failure to record relevant information.
- 17 The licensee's premises are in a busy entertainment precinct. The evidence before the Commission establishes that those who operate the business are relatively inexperienced and have had a steep learning curve since the business commenced. It should be noted that those involved in the operation of the business have completed further courses in accordance with the interim conditions imposed by the Director, in order to overcome their inexperience and to better understand their obligations in conducting the business.
- 18 The totality of the evidence reveals eight discrete incidents in a busy entertainment precinct over a period of nine months. On average, that amounts to approximately one issue per month. The most serious of the incidents involves the service of alcohol to intoxicated persons, of which there are three alleged incidents over a period of nine months.
- 19 Serving alcohol to an intoxicated person is a very serious matter. On the occasions when the service of alcohol to intoxicated persons is alleged to have occurred, the licensee disputes that the patrons were drunk and vigorously disputes the allegation that it has demonstrated a permissive attitude towards drunkenness or poor management practices.

20 On balance, whilst it is apparent that there have been issues relating to the operation of the business that has attracted the attention of police, the Commission is not satisfied that the management of the premises has fallen below a standard upon which a conclusion could be reached that the licensed premises are not properly managed in accordance with the Act.

21 Accordingly, ground (1) of the complaint is dismissed.

Determination of grounds (2) and (3)

22 Given that these two grounds of complaint were conceded by the licensee, there is a proper cause for disciplinary action. The parties were in agreement that the proper course of action was to impose further conditions on the licence pursuant to the power conferred by section 96(1)(b) of the Act. With a minor exception, which shall be referred to, the conditions that were agreed upon were as follows:

- a) the licensee is prohibited from selling and supplying liquor for consumption on the premises:
 - i. in any vessel with a measurement capacity exceeding 600ml except bottles of wine and no spirit or spirit based beverages are to be supplied in vessels with a measurement capacity exceeding 375ml;
 - ii. in any non-standard measure (in the case of spirits, measures exceeding 30ml);
 - iii. presented in such a way that would encourage the rapid consumption of liquor (for example, but not limited to, unadulterated spirits or liqueur in a shot glass);
 - iv. by virtue of their 'emotive' titles such as, but not limited to, 'laybacks', 'shooters', 'slammers', 'test tubes', and 'blasters'.
 - v. Further the licensee is not to permit any liquor to be mixed with energy drinks by any person within the premises (for the purpose of this condition, "energy drink" has the same meaning as "formulated caffeinated beverage" within the Australia New Zealand Food Standards Code with a composition of 145mg/L of caffeine or greater);
 - vi. The licensee is not to engage in advertising, promotions or offers of cheap or discounted liquor, including happy hours.
- b) The licensee is required to only engage crowd controllers who have successfully completed a recognised RSA course (SITHF AB009A).
- c) Crowd controllers licensed under the *Securities and Related Activities (Control) Act 1996* are to be employed Fridays, Saturdays and Sundays from 6:00pm

through until close of trade at a ratio of two (2) crowd controllers for the first 100 patrons and one crowd controller for each additional 50 patrons or part thereof.

- d) An approved manager is to be present on premises on Fridays, Saturdays and Sundays from 6:00pm through until close of trade, with a primary role of RSA management.
- e) Crowd controllers are required to wear a high visibility style uniform allowing for easy identification and better security for patrons.
- f) The licensee is to comply with conditions set out in the Director of Liquor Licensing'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:
 - i. images recorded via the video surveillance system must be retained for a minimum of 28 days and the licensee shall ensure that no person is able to delete or alter any recordings within the 28 day period;
 - ii. access to and copies of recordings from the CCTV system are to be immediately made available upon request to any sworn member of the WA Police, Department of Racing, Gaming and Liquor and Liquor Inspector and any authorised officers as defined by section 3 of the Act;
 - iii. a certificate from an independent licensed CCTV system installer is to be lodged on a monthly basis with the Director certifying that the system is fully operational; and
 - iv. images recorded must allow for patron identification.
- g) An approved identification scanning device, which will scan all patrons entering the venue, is to be installed and used on Fridays, Saturdays and Sundays from 6:00pm through until close of trade. This will be made available at all times to an authorised officer.

23 Counsel for the Police requested that an order be made that bottles of wine be served ancillary to a meal. The Commission could see no basis for the ordering of such a condition as it would prevent a group of people attending the licensed premises from sharing a bottle of wine.



SEAMUS RAFFERTY
CHAIRPERSON