**LC 17/2019**

 **Liquor Commission of Western Australia**

***(Liquor Control Act 1988)***

**Complainant:** Director of Liquor Licensing

# (represented by Ms Emily O’Keefe of State Solicitor’s Office)

**Respondent** Mr Darryl Raymond Sewell

# (represented by Mr Gary Rodgers, Barrister and Solicitor)

**Commission:** Mr Alex Zilkens (Presiding Member)

Dr Eric Isaachsen (Member) Ms Emma Power (Member)

**Matter:** Complaint for disciplinary action pursuant to section 95 of the

# Liquor Control Act 1988

**Premises:** Porkies 2 Bar-B-Que

**Date of Hearing:** 29 April 2019

**Date of Determination**: 5 June 2019

**Determination**:

In considering all of the evidence before it, the Commission finds that the complaint has been made out to a satisfactory standard such that proper cause for disciplinary action exists in the following terms:

Pursuant to section 96(1)(g) of the *Liquor Control Act 1988*, Mr Darryl Raymond Sewell is disqualified for a period of four (4) years from the date of this determination from:

* being a holder of a position of authority in a body corporate that holds a licence; or
* being interested in, or in the profits or proceeds of, a business carried on under a licence.

**Authorities referred to in the determination**

* *Australian Broadcasting Tribunal v Bond and others (1990) 94 ALR 11 at 56*
* *Simonsen v Rossi, the Registrar, Real Estate and Business Agents Supervisory Board [2005] (WADC 76)*
* *Tavelli v Johnson, Unreported, WADC Library No 960693, 25 November 1996*
* *Hughes and Vale Pty Ltd v New South Wales [No 2] {1955} (HCA 28)*
* *Mavaddat v Real Estate and Business Agents Supervisory Board [2009] WASCA 179 [73].*

**Background**

1. At the time of the Incidents, Darryl Raymond Sewell **(“the Respondent”)** was:
	1. a director of Low & Slow BBQ (WA) No. 2 Pty Ltd ACN 622 168 325 **(“Licensee”);** and
	2. a beneficiary under the Sewell Adams Family Trust **(“the Trust”)** which is a shareholder of 20% of the shares in the Licensee.

1. On 6 February 2018, the Director of Liquor Licensing **(“the Complainant”)** lodged a complaint under section 95 of the *Liquor Control Act 1988* **(“the Act”)** alleging that there is proper cause for disciplinary action as the Respondent was no longer a fit and proper person pursuant to section 95(4)(h) of the Act to:
	1. be a person holding a position of authority in a body corporate that holds a licence;
	2. be a person interested in the business or the profits or proceeds of the business to which the licence relates.
2. On 7 December 2018, the Respondent gave notice and duly retired as a director of the Licensee.
3. On 25 March 2019, the Complainant lodged an outline of submissions.
4. On 15 April 2019, the Respondent lodged outline of submissions.
5. On 17 April 2019, the Complainant lodged responsive submissions.
6. A hearing of the Commission was held on 29 April 2019.
7. At the date of the Hearing, the Respondent was not a director of the Licensee, but remains a beneficiary under the Trust.

**Submissions on behalf of the Complainant**

1. The Complaint arises out of three separate incidents as follows:
	1. incident occurring on 23 July 2018, as a result of which the Respondent pleaded guilty in the District Court of Western Australia on 13 November 2018 to a breach of a violence restraining order pursuant to section 61(1) of the *Restraining Orders Act 1997 (WA)* and common assault pursuant to section 313 (1)(b) of the *Criminal Code (WA)* **(“the Assault”).** The Respondent was sentenced to concurrent nine-month community based orders;
	2. an alleged incident of family violence that occurred on 7 March 2018 where the partner of the Respondent made a report to the police of a domestic assault **(“the Family Violence”).** Thevictim told Police that she did not want the Respondent charged and no further action was taken; and
	3. an alleged incident that occurred on 19 August 2018 in respect to which the Respondent has been charged with an act or omission causing bodily harm pursuant to section 304(2)(a) of the *Criminal Code* (WA) **(“the Act of Bodily Harm”).** It is alleged that during such incident the Respondent stabbed a third party. The relevant charge has not yet been heard in court,

 (together **“the Incidents”).**

1. The following submissions comprised part of the Complaint:
	1. in addition to the Incidents, the Respondent has 10 criminal court convictions and 32 traffic convictions;
	2. as a result of the Incidents and his prior convictions, the Respondent is no longer a fit and proper person to hold a position of authority in, be interested in the business or the profits or proceeds of the Licensee under the Act;
	3. the Incidents are serious and reflect adversely on the character of the Respondent;
	4. the Family Violence involving the Respondent’s partner had alcohol as a contributing factor;
	5. the behaviour demonstrates that the Respondent is incapable of acting in a rational manner without resorting to acts of violence;
	6. the Respondent’s actions indicate that he is unlikely to adequately deal with drunk or disorderly patrons in an appropriate manner if required to do so;
	7. even though the Respondent was not undertaking his duties as a person in authority at the time of the Incidents, his conduct was entirely inconsistent with the conduct and standards expected of a person of his standing as a director of the Licensee;
	8. a secondary object of the Act s 5(2)(d) is to provide adequate control of the persons directly or indirectly involved in the sale, disposal and consumption of liquor. The Act requires that such people are of a high moral standard and capable of upholding standards expected of the public and the liquor industry;
	9. there is a proper cause for disciplinary action as evidenced in the Complaint. The Commission should exercise its powers under s 96 of the Act to permanently disqualify the Respondent from:
2. being a person holding a position of authority in the Licensee, pursuant to section 96(1)(g)(i) of the Act; and
3. being a person interested in the business or the profits or proceeds of the Licensee pursuant to section 96(1)(g)(ii) of the Act;
4. the Complainant provided a detailed description of each of the Incidents and also supplied the following additional evidence in the Complaint:
	1. certificate of Registration of the Licensee corporation;
	2. historical company extract of the Licensee;
	3. copy of Porkies 2 Bar-B-Que Restaurant Liquor Licence;
	4. copy of disclosable Court Outcomes;
	5. copy of Incident Report 190818 0005 12666;
	6. Statement of Victim;
	7. photographs of injuries to victim;
	8. Statement of Material Facts 1843163-1;
	9. copy of Incident Report 150818 1100 133315;
	10. copy of Violence Restraining Order;
	11. Statement of Victim;
	12. copy CCTV footage;
	13. photographs of injuries to victim;
	14. Statement of Material Facts 1844666-1
	15. copy of Incident Report 070318013516077; and
	16. copy of photographs of victim’s injuries.
5. The Complainant made the following further written submissions:
	1. The Respondent was, at the time of the Incidents, a person who held a position of authority in a body corporate that holds a licence and is also clearly interested in the business or the profits or proceeds of the Licensee. The Respondent is also employed as a chef at the Licensed Premises. The Respondent’s de-facto partner also works at the Licensed Premises.
	2. The past convictions of the Respondent and the assault charge demonstrates the Respondent’s significant anger management issues and his tendency to resort to violence to settle perceived grievances as well as a tendency to breach court orders and disrespect for the law.
	3. The Commission may be satisfied on the balance of probabilities that the Family Violence occurred and that the Respondent’s violent behaviour is linked with alcohol.
	4. The Respondent made certain admissions in respect to the Act of Bodily Harm and this, along with the witness statements, is sufficient for the Commission to be satisfied that the Respondent did stab the victim and further demonstrates the Respondent’s tendency to lash out with violence in situations of conflict or provocation and, in addition, indicates a link between his violence and alcohol.
	5. On the basis of the evidence provided, the Commission should conclude that the Respondent has perpetrated violent assaults on three recent occasions.
	6. The Respondent was not performing any duties under the Act or at licensed premises at the time of the violent conduct, although on at least two occasions he appears to have been drinking beforehand. Nonetheless, the nature of the Respondent's conduct is highly relevant when considering whether the Respondent is "fit and proper" for the purposes of s 95(4)(h) of the Act’.
	7. This is not a case where the Respondent has engaged in one ill-advised altercation. He has (over a short period of time) repeatedly engaged in serious violent conduct, in some cases involving alcohol, which is the type of behaviour expressly contemplated as undesirable under the Act.
	8. In light of the legislative context, the Respondent is of such poor character that he cannot be considered to remain "fit and proper" for the purposes of s 95(4)(h) of the Act.
	9. The Respondent's repeated violent conduct, although it did not occur in the ordinary course of carrying on business at the Premises, is relevant to whether the Respondent is a 'fit and proper person' because it manifests the presence of qualities incompatible with carrying on business at the Premises.
	10. The safe and successful operation of the liquor industry requires that consumers and regulators can have some level of confidence in those persons that are entrusted with operation of licenses or hold positions of authority in companies responsible for the operation of licenses. The Respondent's offending behaviour demonstrated a lack of judgement and good character and is a serious departure from the standards of propriety expected in the community.
	11. By his conduct, the Respondent has demonstrated that he is not someone whom the Commission can trust, or whom the public can trust, to adhere to the standards of behaviour set out in the Act;
	12. The Respondent has also been convicted of breaching a restraining order and driving without a licence on multiple occasions, suggesting an ongoing disrespect and disregard for the law. In the liquor licensing context, where licensees have onerous responsibilities, a course of disregard for the law indicates the person is not "fit and proper" to exert control over, or hold an interest in, the business of a licensee.
	13. By engaging in serious criminal conduct, the Respondent has shown that he lacks the integrity necessary to enjoy the privilege and discharge the obligations associated with the provision of liquor in the public interest.
	14. The Commission should permanently disqualify the Respondent from holding a position of authority in the Licensee, or from otherwise being interested in, or in the profits or proceeds of, the business of the Licensee carried on under Restaurant Licence number 6060042259.
	15. The Respondent is not the sole director and shareholder of the Licensee and does not stand to lose his livelihood as a chef as a result of this action.

**Submissions on behalf of the Respondent**

1. The Respondent’s legal representative makes the following submissions:
	1. There is not proper cause to take disciplinary action against the Respondent on the basis he is not a “fit and proper person” and the Commission should not take any further action.
	2. The Respondent is no longer in a position of authority in the Licensee as he has resigned as a director and therefore the consideration of whether he is a fit and proper person should not apply to the Respondent and need not be considered;
	3. The Respondent is only a beneficiary of the Trust that holds 20% of the shares in the Licensee.
	4. The Respondent’s role in the business is that he is a chef and undertakes food preparation, cleaning and ordering food. He does not have a role in the alcohol side of the business.
	5. It is accepted that the Respondent has a history of offending that goes back to 1985. The Respondent however maintains that at all times he has been upfront about his record and until this application, however:
		1. the vast majority were traffic violations which do not equate to criminal conduct; and
		2. all but the most recent offences of the Respondent do not have a sufficient nexus to his position with the company and therefore are not relevant to the determination of whether he is a fit and proper person.
	6. The offences pursuant to section 115, section 115AA and section 152E do not apply to the relevant recent offences and therefore this alludes to the fact that the Respondent falls short of being the type of person who should be so disqualified.
	7. Since the Respondent resigned from being a Director of the company, effective from 7 December 2018, the Respondent’s relationship with the company is only to the extent that he is an employee of the company as a Chef. This position is invaluable to the company in that the kind of food preparation the business undertakes for this type of business is rather unique. The basis of the business is to sell American Pit styled BBQ which the Respondent states is a niche market and not a common style of cooking. Therefore, there is a small number of people that are trained in the art of cooking in this style and there would be an adverse impact on the business should the Respondent be no longer permitted to work at the premises;
	8. In respect to the Assault, he was advised by his lawyer to plead guilty and there were some mitigating factors due to the circumstances.
	9. In relation to the Family Violence, it is submitted that the injuries photographed are not congruous with the alleged assault and therefore this should not be given significant weight when making an assessment of the Respondent.
	10. In respect to the Act of Bodily Harm, this matter is still before the courts and the Respondent does not wish to implicate himself and he fully intends to defend this charge.
	11. The Assault and the Act of Bodily Harm are the only record of violence by the Respondent.
	12. The Respondent is no longer a director of the company and therefore does not hold a position of authority with the company. The Respondent is employed by the Licensee as a Chef in a niche market, whereby his only form of recompense is as a beneficiary of the family Trust.
	13. For the Respondent to earn an income from his employment, the company must make a profit so that a dividend can be paid to the shareholders. It is submitted that it would be incumbent on the Respondent to ensure that the business and the company make a profit and to jeopardise the business by committing acts of violence in, on or near the premises would be detrimental to not only the business but to the Respondent and his partner.
	14. Given that there are no recorded incidents of behaviour at the premises of the business that would be detrimental to the business and invoke the oversight of the Commission and the length of time the Respondent has been involved with the business, it is submitted that the Respondent should not be disqualified from the business in any manner.

**Determination**

1. The Commission may, where a complaint has been lodged under section 95 of the Act, take disciplinary action provided it is satisfied, on the balance of probabilities, that the ground(s) upon which the complaint is based has, or have, been made out.
2. The purpose of the disciplinary action contemplated in section 95 of the Act is to protect the public by maintaining the standards of behaviour for licensees, or a person holding a position of authority in a body corporate that holds a licence, or who is interested in the business or the profits or proceeds of the business. The object of disciplinary proceedings is not to punish those against whom a complaint has been made out.
3. It is a primary responsibility of the licensing authority to provide adequate controls over the persons directly and indirectly involved in the sale, disposal and consumption of liquor and that the professional standards of the industry and the creditworthiness of the persons in responsible positions must be maintained at the highest level.
4. Section 95(4) of the Act specifies that there shall be proper cause for disciplinary action if:
	1. *“the licensee has been convicted of an offence in any jurisdiction, that, in the opinion of the Director may imply that the person is unfit to be the holder of a licence”* (section 95(4)(f)(ii));
	2. *“the licensee otherwise is, or becomes, an unsuitable person to hold a licence under the Act”* (section 95(4)(g));
	3. *“a person holding a position of authority in a body corporate that holds a licence, or who is interested in the business or the profits or proceeds of the business, is or becomes not a fit and proper person to hold that position or to be so interested”* (section 95(4)(h)).
5. Where there is a wide discretion as to the disciplinary sanction to be imposed, as specified in section 96(1) of the Act, the Commission is required to consider all of the circumstances surrounding the conduct which is the subject of the complaint and to exercise its discretion accordingly.
6. The Complaint arises out of:
	1. the conviction of the Respondent in the District Court of Western Australia on 13 November 2018 in respect to the Assault, being a breach of a violence restraining order pursuant to section 61(1) of the *Restraining Orders Act 1997* (WA) and common assault pursuant to section 313 (1)(b) of the *Criminal Code* (WA);
	2. the alleged Family Violent Incident that occurred on 7 March 2018; and
	3. the charge against the Respondent relating to the Act of Bodily Harm, being an act or omission causing bodily harm pursuant to section 304(2)(a) of the Criminal Code (WA) arising from an incident that occurred on 19 August 2018.
7. Although section 33(6) of the Act sets out the matters for consideration when determining whether an applicant is a fit and proper person to hold a licence, it also provides some guidance to a determination of a complaint under section 95:

*“Where the licensing authority is to determine whether an applicant is a fit and proper person to hold a licence or whether approval should be given to a person seeking to occupy a position of authority in a body corporate that holds a licence, or to approve a natural person as an approved unrestricted manager, an approved manager or a trustee:*

1. *the creditworthiness of that person; and*

*aa) the character and reputation of that person; and*

1. *the number and nature of convictions of that person for offences in any jurisdiction; and*
2. *the conduct of that person in respect to other businesses or to matters to which this Act relates; and*
3. *any report submitted, or intervention made, under section 69,*

*are relevant and amongst the matters to which consideration may be given.”*

1. There are many authorities concerning the meaning of ‘fit and proper’ and when deciding whether a person is ‘fit and proper’, many factors may be considered including:
	1. character and reputation *(Australian Broadcasting Tribunal v Bond and others (1990) 94 ALR 11 at 56);*
	2. honesty (*Simonsen v Rossi, the Registrar, Real Estate and Business Agents Supervisory Board [2005*] *(WADC 76)); and*
	3. previous convictions *(Tavelli v Johnson, Unreported, WADC Library No 960693, 25 November 1996).*
2. The purpose of the words ‘fit and proper’ is to give the decision maker the widest possible scope for judgement *(Hughes and Vale Pty Ltd v New South Wales [No 2] {1955} (HCA 28)).*
3. In *Tavelli and Johnson (supra*), a case relating to an Inquiry Agent Licence under the *Agents Licensing Act 1954,* Wheeler J noted:

*“…some factors relevant to prior convictions could be listed. ‘Convictions will, in my view, generally be regarded as more serious in the statutory context if:*

1. *they occur in the course of or relate to the carrying out of the occupation of inquiry agent;*
2. *they are offences of dishonesty, broadly understood. This is so because, as I apprehend it, the Act is concerned with the integrity of the gathering and presenting of material in Court and that material may be suspect, where the character of the agent suggests dishonesty;*
3. *they occur whilst the person is the holder of a licence under the Act;*
4. *they are otherwise so serious, either in themselves or as representing a course of disregard for the law, as to reflect particularly adversely on the character of the person committing them.”*
5. The Commission also refers to *Australian Broadcasting Tribunal v Bond (supra)* where Toohey and Gaudron JJ held that:

*“The expression ‘fit and proper’, standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of ‘fit and proper’ cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct or reputation (because it provides indication of likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.”*

1. The Commission’s primary considerations in deciding whether the Respondent is a “fit and proper” person are therefore:
	1. the relationship between the Incidents and the Respondent’s roles and responsibilities under the *Liquor Control Act 1988*;
	2. whether the Incidents are of such a nature that they reflect adversely on the character and reputation of the Respondent to a serious degree; and
	3. whether the actions of the Respondent show a course of disregard for the law and/or provide an indication of likely future conduct.
2. It is accepted by the Commission that the Incidents did not occur in the conduct of the business of the Licensee.
3. However, a person’s conduct will be relevant to his or her fitness and propriety to carry on an occupation if, despite the fact the conduct did not occur in the ordinary course of carrying on that occupation, the conduct manifests the presence or absence of qualities which are incompatible with, or essential for, the carrying on of that occupation: *Mavaddat v Real Estate and Business Agents Supervisory Board [2009] WASCA 179 [73].*
4. Although the Commission appreciates that the charge relating to the Act of Bodily Harm is still before the courts and the Respondent does not wish to implicate himself, there is no evidence presented of remorse or contrition or any explanation of why the Respondent engaged in the offending conduct over a relatively short period of time, where he has had no previous record of violent offences.
5. Neither has the Commission been presented with any evidence as to what measures the Respondent has put in place, or programs or education he has engaged in, to prevent any further occurrences of a violent nature.
6. Despite the fact that:
	1. it is alleged that the Family Violence incident did not occur as alleged by the Police;
	2. such Family Violent matter was not taken further;
	3. the Respondent has not yet been convicted in respect to the Act of Bodily Harm, the Commission finds, on the balance of probabilities, that there is enough evidence to support the contention that:
	4. the Respondent did engage in violent behaviour against his partner which resulted in injury; and
	5. based on the admissions made by the Respondent (but without commenting on the possible outcome of the upcoming trial) the Respondent was closely involved in the Act of Bodily Harm and did engage in serious violent behaviour on that occasion.
7. The question then remains as to whether the Incidents are of such a nature as to render the respondent not a fit and proper person to hold a position of authority under section 95(4)(h) of the Act and therefore warrant disciplinary action in accordance with section 96 of the Act.
8. In particular, the Commission comments that despite the findings set out in paragraph 30, the Assault conviction alone would give rise to the Commission considering that the Respondent is not a “fit and proper” person in accordance with the Act.
9. The fact remains that the Respondent has been convicted of a serious offence and has been charged with another. This brings into question his character and reputation, regardless of whether those offences have not taken place on the licensed premises or be directly related to the consumption of alcohol.
10. The Commission considers that the Incidents reflect poorly on the character of the Respondent and that the actions relating to the Incidents represent a course of disregard for the law and that disciplinary action is necessary.
11. However, the Commission does not find to the required standard that the Incidents are of such a nature to warrant permanent disqualification. As the Incidents all occurred within a limited timeframe and the Respondent has not had prior convictions for violent behaviour, it is reasonable that, after a suitable period of time, he should be given the opportunity to demonstrate that he is again a “fit and proper person” as required under the Act.
12. The fact that the Respondent has already resigned as a director at this stage does not unduly influence the Commission. It is still in the public interest to make suitable orders or disciplinary action to protect the public in the future rather than take the Respondent’s assurances that he does not wish to reinstate his position as director.
13. Further, an order that prevents the Respondent from being a holder of a position of authority or being interested in the proceeds of the Licensee will not prevent the Respondent from continuing his occupation as chef within the restaurant business operated by the Licensee, nor will it have an overly negative effect on the operation of the Licensee company.
14. In considering all of the evidence before it, the Commission finds that the complaint has been made out to a satisfactory standard such that proper cause for disciplinary action exists in the following terms:

 Pursuant to section 96(1)(g) of the *Liquor Control Act 1988*, Mr Darryl Raymond Sewell is disqualified for a period of four (4) years from the date of this determination from:

* being a holder of a position of authority in a body corporate that holds a licence; or
* being interested in, or in the profits or proceeds of, a business carried on under a licence.

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**ALEX ZILKENS**

**MEMBER**