

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Complainant: Commissioner of Police
(represented by Ms Dianne Scaddan of WA Police)

Respondent: That's Entertainment (WA) Pty Ltd T/A The Clink
Nightclub
(represented by Mr Ian Curlewis of Lavan Legal)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling
Ms Helen Cogan

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

Date of Hearing: 1 September 2010

Date of Determination: 6 September 2010

Date of Reasons Published: 15 October 2010

Introduction

- 1 This is a complaint, pursuant to section 95 of the *Liquor Control Act 1988* (“the Act”), lodged by the Commissioner of Police against That’s Entertainment Pty Ltd, the licensee of premises known as The Clink Nightclub and located at 14-16 South Terrace, Fremantle.
- 2 It is alleged that pursuant to section 95(4) of the Act there is proper cause for disciplinary action on the following grounds:
 - I. The licensed premises are not properly managed in accordance with the Act [section 95(4)(b)];
 - 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)];
 - III. 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)]; and
 - IV. The licensee has contravened a requirement of the Act or a term or condition of the licence [section 95(4)(e)(i)].
- 3 On 1 September 2010, the Commission conducted a hearing to determine the complaint.
- 4 On 6 September 2010, the Commission published its determination in respect of the complaint and indicated to the parties that the reasons supporting the determination would be published in due course. These are those reasons.

Submissions on behalf of the Commissioner of Police

- 5 It was submitted that the Western Australian Police Incident Management System has 51 offences linked to The Clink Nightclub between January 2009 and April 2010, with these offences being reported as occurring inside the premises or in the immediate vicinity of the premises, with alcohol being a contributing factor. These offences consist of:
 - Assault (19)
 - Assault Occasioning Bodily Harm (15)
 - Wounding (1)
 - Disorderly (2)
 - Possess Weapon (1)
 - Damage (2)
 - Other (6)

Notably, thirteen of these reports involve allegations of assault by crowd controllers or doorman; three involve allegations of assault while in the queue waiting to enter the premises; and one involves an allegation of assault against a police officer.

- 6 During the period January 2008 and April 2010 reported offences by victims indicate that 44% of offences occur between 10.00pm and 2.00am, 41% between 2.00am and 5.00am and 15% between 5.00am and 6.00am. Consequently, extensive police resources are required to deal with offences in and around these premises.
- 7 The large number of reported offences linked to the venue indicates that the premises are not being effectively managed. Patrons who attend the venue intoxicated or patrons who become intoxicated inside the venue are at risk of being a victim of alcohol-related offending and therefore the safety, health and welfare of these patrons is endangered.
- 8 The current licensee, That's Entertainment Pty Ltd, took over the operation of the venue in November 2008. An analysis of police Computer Aid Dispatch (CAD) data shows an increasing trend in police call outs to the premises after the licence was transferred to the current licensee. In 2007 there were 29 CAD jobs, in 2008 there were 49, in 2009 there were 56 and 2010 (year to date) there were 12. This indicates a 51% increase in police attendances/call outs in 2009 compared to 2007.
- 9 Observations by officers of the Police Licensing Enforcement Unit raise concerns about the effective management of the premises, which includes:
 - disorderly and anti-social behaviour by patrons who are queued in line, often for an extended period, to enter the venue;
 - disorderly and general anti-social behaviour by patrons who are given pass outs to utilise the smoking area at the rear of the venue. The smoking area is not part of the defined licensed premises, however patrons have been seen removing drinks from the licensed premises for consumption in the smoking area;
 - liquor being served to a patron (on 7 November 2009) who, according to police, was displaying obvious signs of intoxication, contrary to the provisions of section 115(2) of the Act. Inquiries by police revealed that the bar staff member involved had been given instructions by management to serve drinks quickly and to make sure customers are not kept waiting, consequently she was not able to conduct a thorough assessment of the patron's level of intoxication; and
 - on 23 April and 24 April 2010, police observed patrons in the premises displaying signs of intoxication resulting in the licensee removing 40 and 15 patrons from the premises on these respective nights. An analysis of data for removing intoxicated patrons from the premises on the weekends before and after 23 and 24 April 2010 shows that significantly less patrons were removed from the premises when police were not in attendance, which indicates that the licensee is only prepared to

manage the premises in accordance with the Act and remove intoxicated patrons when the police are present.

- 10 On 19 April 2010, three female complainants attended Fremantle Police station and alleged they were assaulted by crowd controllers at the nightclub. Whilst those inquiries are ongoing, it was noted that all three complainants were intoxicated and one of the complainants, who had been consuming liquor at the venue, was only 17 years of age.
- 11 On 15 July 2010, a patron, after exiting the licensed premises was punched and struck by a jagged glass bottle retrieved by an assailant from a bin. Both the assailant and the victim are alleged to have been drinking at The Clink and the Newport Hotel and were heavily intoxicated at the time of the incident.
- 12 In addition to the above incidents, the licensee or its staff have been issued with five infringement notices under section 167 of the Act and the modified penalty for each infringement notice has been paid in accordance with that section.
- 13 It was therefore submitted on behalf of the Commissioner of Police that the evidence submitted demonstrates that:
 - the level of intoxication within the licensed premises is not properly managed;
 - the level of intoxication prior to entry to the licensed premises is not properly assessed or managed;
 - the consumption of alcohol off the licensed premises is not managed or overseen;
 - the principles of responsible service of alcohol are not adhered to;
 - employees and agents are associated with a significant number of incidents at the licensed premises;
 - juveniles gain entry to the licensed premises; and
 - significant police intervention is required to manage intoxicated patrons.

Submissions on behalf of the respondent

- 14 The respondent was of the opinion that it had a good working relationship with the Liquor Enforcement Unit and the Fremantle Police, who had encouraged the respondent to report every incident which occurred at The Clink no matter how minor it was. Prior to May 2010, the police gave no indication to the respondent that the operation of its venue was of concern. If the issues complained about by the police are so serious, why did it take them so long to institute these proceedings? It is therefore submitted that the issues relied upon by the police are not collectively as serious as the applicant seeks to portray them.

- 15 The respondent disputes the probative value of much of the evidence presented by the police to support their complaint. For example, in respect of the 51 incidents linked to The Clink Nightclub, these incidents are reflected in 36 Incident Reports, which equates to approximately one incident report every two weeks over the period of investigation. In many cases no person was charged in respect of the perceived offences. A number of the Incident Reports were generated as a result of The Clink staff refusing entry to intoxicated patrons, which is a requirement of the licensee under the Act. It is unfair for the police to use these incidents against the licensee.
- 16 Similarly, reliance upon the untested allegations in the incident reports is unreasonable given that some of the incidents may not be linked to the operation of The Clink Nightclub.
- 17 The respondent, in its submission of 27 August 2010, takes issue with a number of matters relied upon by the police to support their grounds of complaint, including:
- the incident on 30 May 2010, when three infringements were issued to the licensee and its staff for allowing an intoxicated person on the licensed premises. A male patron was asked to leave the licensed premises on the basis of perceived intoxication; however as the security agent was escorting the patron to the stairs the security agent received an urgent call on his radio reporting smoke coming from the ladies toilet. Fearing a fire may have started the security agent made the assessment that a fire on the premises was potentially more harmful than evicting a person who was co-operating with security to exit the premises. The respondent paid the infringements simply because it was too costly to defend them in court;
 - the operation and monitoring of the smoking area, which only operates on Friday and Saturday nights from approximately 12 midnight. A licensed crowd controller is stationed at the exit of the licensed premises to the area to issue pass outs and to ensure that no drinks are taken outside. There is signage at the exit to this effect and staff from the premises physically go outside and monitor the smoking area at least every 15 minutes during trading hours;
 - the incident on 15 July 2010, where police claim that both the victim and offender were heavily intoxicated. There is no evidence that either the victim or the offender were heavily intoxicated as alleged by the police and furthermore the incident occurred off the licensed premises approximately 25 minutes after The Clink had closed. The incident needs to be assessed fairly in its proper context: it did not occur on the licensed premises; it did not occur while the venue was trading; and the injuries suffered by the victim were caused by a bottle obtained by the offender from a public rubbish bin on South Terrace;
 - the allegation relating to an intoxicated juvenile on the premises. CCTV footage showed the individuals being asked for identification at the front entrance to the

premises, speaking to an acquaintance and entering the toilets before being evicted. At no point were the two individuals sold or supplied liquor by the licensee.

- 18 In response to police assertions that the respondent is only vigilant in evicting intoxicated patrons when police are present, the licensee's incident reports from the venue on the evening of 31 July/1 August 2010 shows the respondent refused entry to 54 persons due to intoxication and removed 33 patrons from the premises due to perceived intoxication on that particular evening. It is asserted that this is clear evidence of the respondent's responsible management of the licensed premises and its commitment to the responsible service of liquor, its compliance with the Act and its continuing efforts to reduce any harm and ill health that may flow from the consumption of liquor.
- 19 As a token of the licensee's commitment to harm minimisation, it has already agreed to voluntary restrictions, and is not opposed to these restrictions being imposed on the licence:
- on Saturday and Sunday, from 4.30am until 6.00am, persons (other than an 'authorised person') are prohibited from entering or re-entering the licensed premises (i.e. a 4.30am lockout);
 - employing one additional security agent above the DRGL policy requirement on Friday and Saturday from 9.00pm until closing of the premises, to monitor the laneway leading to the premises from South Terrace (i.e. increasing the number of security agents from five to six);
 - only selling spirits in standard measures (i.e. no more than 30ml in each vessel). This does not apply to bona fide cocktails;
 - not selling or supplying 'laybacks', 'test tubes', 'jelly shots', or 'blasters' at the premises at any time; and
 - not selling or supplying 'shooters' after 3.00am.

Determination

- 20 The Commission may, on a complaint lodged under section 95 of the Act, take disciplinary action.
- 21 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 take action as outlined in section 96(1).
- 22 The Commission accepts the general thrust of the evidence and submissions lodged by the Commissioner of Police in support of the complaint, but acknowledges that not all the Incident Reports negatively reflect on the operation of the venue or can be

attributable to a failure on the part on the licensee. However, the significant increase in reported incidents at this venue after this licensee commenced trading in November 2008 is a significant factor.

- 23 The Commission also accepts that there is a degree of mitigation surrounding the incident of 30 May 2010 resulting in three infringement notices being issued to the licensee and its staff.
- 24 Nonetheless, in consideration of the evidence as a whole, the Commission has real concerns about general levels of intoxication in and around this venue, patron behaviour and the licensee's inaction to deal with these issues. Instructing bar staff to serve patrons quickly should not be at the expense of properly assessing a patron's level of intoxication.
- 25 The fact that 33 patrons and 40 patrons, on separate occasions, are removed from the venue in the space of several hours for perceived intoxication is not a reflection of good management, but an indictment on the drinking culture that prevails at this venue. This is further reinforced by the licensee offering "shooters" at the venue, when the provision of these types of drinks, which are rapidly consumed by patrons, is not only contrary to the policy of the Director of Liquor Licensing on the "Responsible Promotion of Liquor for Consumption on Premises and for Take-away Packaged Liquor", but lacks insight and forethought on the part of the licensee as to the impact that providing liquor in this manner can have on patrons who may have been consuming liquor at other licensed premises prior to resorting to this venue. The Commission views the licensee's self imposed condition to prohibit the provision of "shooters" after 3.00am as disingenuous. This licensee has clearly failed to recognise and respond to the high levels of intoxication occurring in and around its licensed premises.
- 26 National and international research reinforces the principle that drinking environments with permissive management standards regarding excessive drinking and antisocial behaviour will have higher levels of violence.
- 27 A licensee who takes its obligations under the Act seriously and is committed to the responsible service of alcohol and minimising alcohol-related harm in the community would have implemented appropriate strategies to deal with a very clear emerging trend long before this complaint was lodged by the police. The Commission rejects the respondent's submission that the police should have provided some warning to the licensee prior to submitting this complaint. The licensee's own management and incident reports should have been sufficient warning that early intervention and action by the licensee was necessary.
- 28 Having considered the evidence of the applicant and respondent, the Commission is satisfied on the balance of probabilities that the grounds of the complaint have been made out.

29 The Commissioner of Police submitted that an appropriate penalty is the suspension of the licence for three months; cancellation of some extended trading permits; and the imposition of conditions on the licence. The respondent submitted that such an outcome would be unreasonably harsh.

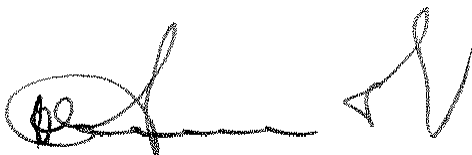
30 The suspension of the licence for a period of time was very much a consideration, however given that this licensee has not appeared before this Commission previously and has taken some steps to address the problems at the venue, the Commission is of the view that the proper disposition of this matter is with a monetary penalty and the imposition of conditions on the licence to address the issues surrounding intoxication and anti-social behaviour in and around the licensed premises. Accordingly, the Commission imposes the following penalty:

- Pursuant to section 96(1)(m) of the *Liquor Control Act 1988* That's Entertainment (WA) Pty Ltd is to pay a monetary penalty of \$7,500. The licensee is to lodge with the Commission within 28 days evidence of payment of the penalty; and
- Pursuant to section 96(1)(b) of the *Liquor Control Act 1988* the following conditions are imposed on the operation of the nightclub licence:
 - (1) Patrons are prohibited from entering or re-entering the premises after 3.00am.
 - (2) In respect of the "smoking area" at the rear of the premises the licensee is to:
 - Install a CCTV camera to monitor and control the area; and
 - Install adequate lighting in the area to monitor patron behaviour.
 - (3) The licensee is to engage two security persons licensed under the *Securities and Related Activities (Control) Act 1996*, who are additional to the number of security required under the existing condition of the licence headed "Security Requirements", to monitor and control patron behaviour in the queue at the front of the venue from 9.00pm Friday and Saturday evenings until 3.30am (i.e. 30 minutes after the commencement of the 'lock out' condition).
 - (4) No liquor is to be sold or supplied for consumption on the premises in any of the following ways:-
 - (a) in any vessel with a measurement capacity exceeding 750ml and no spirits or spirit based beverages are to be supplied in vessels with a measurement capacity exceeding 375ml.
 - (b) in either –
 - (i) any non-standard measures; or
 - (ii) presented in such a way that would encourage the rapid consumption of liquor (for example, but not limited to, unadulterated spirit or liqueur in a shot glass); or

- (iii) by virtue of their emotive title, such as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blaster' or 'bombs'; or
- (c) with energy drinks.

(for the purpose 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).

- (5) The provision of drink tokens to patrons is prohibited.

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a series of loops and a final vertical stroke.

JIM FREEMANTLE
CHAIRPERSON