

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Commissioner of Police
(represented by Mr James Bennett of State Solicitor's Office)

Respondent: That's Entertainment (WA) Pty Ltd
(represented by Mr Ian Curlewis of Lavan Legal)

Commission: Mr Jim Freemantle (Chairperson)
Ms Helen Cogan (Member)
Dr Eric Isaachsen (Member)

Premises: The Clink Nightclub
14 – 16 South Terrace
Fremantle

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

Date of Hearing: 28 August 2013

Date of Determination: 16 October 2013

Determination: 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 \$3,000 within 30 days of the date of this determination.

Authority referred in the determination:

That's Entertainment (WA) Pty Ltd ([2013] WASC 75

Background

1. On 12 October 2010, the authorised delegate of the Commissioner of Police (“the Police”) made a complaint pursuant to section 95 of the *Liquor Control Act 1988* (“the Act”) against That’s Entertainment (WA) Pty Ltd, the licensee of the Clink Nightclub which operates at 14 – 16 South Terrace, Fremantle.
2. On 14 December 2010, the Liquor Commission (“the Commission”) determined that the hearing of the matter be deferred pending the outcome of proceedings against the respondent and certain of its employees in the Magistrates Court.
3. Following a trial in the Magistrates Court on 2 June 2011, the charges against the respondent and its employees were dismissed.
4. On 18 October 2011, an application by the respondent for a strike out of ground 1 which was dismissed by the Magistrate in the Criminal proceedings but included in the section 95 complaint was refused by the Commission.
5. On 11 March 2013, an appeal by the respondent against the Commission’s refusal of the strike out application was dismissed by the Supreme Court of Western Australia.
6. On 28 August 2013, a hearing of the matter was held before the Commission as constituted in accordance with section 95(7a) of the Act.

Submissions of behalf of the Commissioner of Police

7. The complaint lodged was in respect of activities that have occurred at the premises and identified the following grounds for disciplinary action:
 - a) the licensee has contravened a requirement of the Act or a term or condition of the licence [section 95(4)(e)(i)];
 - b) the safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee [section 95(4)(k)].
8. The Police rely on the events of both 11 September 2010 and 3 October 2010 to support grounds 1 and 2 of the complaint.
9. In relation to the incident on 3 October 2010, police officers from the Liquor Enforcement Unit (“LEU”) attended the premises and observed a female patron who appeared to be severely intoxicated in that:
 - she was unsteady on her feet including swaying from side to side and knocking into other patrons;
 - she fell to the ground twice in the space of approximately five minutes and then required physical assistance from other patrons to stand up again;
 - it appeared she needed to lean on the bar to remain on her feet after being picked up the first time and then required other patrons to hold her arms in an attempt to keep her upright when she was picked up a second time;
 - she made unsuccessful attempts to operate her mobile while leaning against the bar;

- after LEU officers alerted management to her presence, the officers view that she was intoxicated was reinforced as she fell down again numerous times including twice again at the bar, once while exiting the premises and once outside the premises;
 - she was unable to find her identification in her purse when requested to do so by police officers;
 - she had difficulty communicating with the police officers, including displaying difficulty paying attention when spoken to, repeating herself in conversation and general lack of awareness of what was happening around her.
10. This behaviour leads to the irrefutable conclusion that the subject patron was under the influence of some substance. She also admitted to police officers that she was intoxicated and informed police officers that she had had only 'a couple of glasses of wine' but hardly ever drinks and had not taken any drugs.
11. The evidence relating to the matters referred to in paragraph 10 above appears from the statements of police officers:
- First Class Constable George Adrian Kershaw Kopsen;
 - First Class Constable Clinton Lee Vredembregt
 - Constable Andrew James Galbraith;

and from CCTV footage from the premises bar area and the entry/exit points, as well as from mobile footage provided by WA Police.

12. The subject patron was only removed from the premises when Police Officer Vredembregt alerted the approved manager of her presence, this despite the fact that her behaviour described in paragraph 10 above was clearly observed by two other employees of the respondent prior to the approved manager being alerted. Those two employees took no action whatsoever, save for providing her with a glass of water. It was one of these employees who later admitted to police that he did consider the subject patron to be intoxicated whilst inside the nightclub.
13. By permitting the subject patron to remain on the premises whilst intoxicated, the respondent licensee through its employees not only permitted drunkenness on the premises and therefore contravened a 'requirement of the Act' in accordance with ground 1 but also placed patron's safety at risk as per ground 2 of the complaint.
14. In relation to the incidents on 11 September 2010:
- on that date police officers attended the premises and witnessed numerous breaches of the licence conditions;
 - following relevant conditions were imposed pursuant to a decision of the Commission (LC 33/2010):
 - (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).

15. The conditions referred to above were imposed effective from 9 September 2010. At 12:10 hours on 11 September 2010, a copy was served on the approved manager by Sergeant Trevor Atkins who explained the new conditions to Mr Hollands who indicated he was aware of them and a copy of the licence with the new conditions was already out on display in the premises.
16. On 11 September 2010, between 2:30 hours and 3:00 hours the police officers from the LEU observed bar staff serving patrons:
 - double shots of unadulterated "Chartreuse spirit" in shooter style tumblers which patrons then consumed in a "shot style" manner (i.e. by sculling them);
 - standard shots of spirit alongside cans of Red Bull instructing patrons to "mix them yourselves" which the patrons then did in a "bomb style" manner (i.e. by sculling them);
 - shots of liquor over small amounts of ice.
17. The evidence relating to the matter referred to in paragraph 16 appears from the statements of:
 - Sergeant Trevor Ewan Atkins;
 - First Class Constable Paul Joseph Bermudo;
 - Constable Andrew James Galbraith.
18. By serving alcohol in the manner described in paragraph 19, the respondent breached the conditions of the licence in that it sold and supplied liquor for consumption:
 - a) in a non-standard measurement;
 - b) presented in such a way which would encourage the rapid consumption of liquor; and
 - c) with energy drinks.
19. As such the respondent has contravened a term or condition of its licence contrary to section 110(1) of the Act and by doing so the respondent has also contravened a 'requirement of the Act' in accordance with ground 1 of the complaint.
20. If it is accepted that the respondent has committed those acts then it would be open for the Commission to conclude that the safety, health and welfare of persons who resort to the licensed premises have been endangered by acts of the respondent through the actions of their employees.

21. In particular, it is immediately apparent that allowing the subject patron to become as intoxicated as she had posed significant dangers to her and others – she fell down on a number of occasions and it is fortunate that she did not injure herself on any of the occasions. Young women are especially vulnerable if they reach a level of intoxication where they become disoriented and confused. It appears the subject patron was displaying a high level of intoxication in the clear line of sight of two employees of the respondent over a period of some 10 – 15 minutes. These employees took no action whatsoever, other than to provide her with a glass of water. CCTV footage from the premises of the bar area supports this contention.
22. In relation to the respondent's submission concerning the Magistrate's finding with reference to the video footage, it should be observed that the Magistrate at trial:
- was required to find whether an offence under section 115 of the Act was made out beyond reasonable doubt;
 - did not have regard to the audio from the video footage from the mobile phone provided by the WA Police from the 3 October 2010 as it was hearsay evidence;
 - did not have put before him conversations police officers had with two of the accused on the night in question as it was hearsay evidence.
23. Taking into account the audio material and the evidence of the conversations it is open for the Commission to find:
- the subject patron admitted to being intoxicated;
 - she had been at "Little Creatures" before attending the premises and had consumed alcohol on the premises;
 - the barman who gave her a glass of water admitted that he did think at the time that she was drunk but took no action as he thought the head glassy was nearby and would take some action in regards to her;
 - the subject patron was not under the influence of drugs.
24. In relation to the events of 11 September 2010, the police acknowledge that it is unclear whether the CCTV footage corresponds to the incident as described by Sergeant Atkins in his statement. The CCTV footage does not provide clear evidence that only a single shot was served as the barman's hand obscured the glasses that he is pouring liquor into and it is therefore not clear which glasses the barman is pouring liquor into and how much is being poured into the glasses.
25. In any event, the barman did admit to Sergeant Atkins that he had served a double shot of "Chatreuse" to the patrons.
26. Furthermore the statement of Ms Lee, a member of the staff involved in the incident, is limited in its usefulness and her evidence does not deny the crux of the breach of licence conditions observed by police officers Galbraith and Bermudo i.e. that patrons consumed alcohol mixed with energy drinks on the premises.
27. The Police accept that no police officer states that a staff member instructed patrons to mix drinks themselves but the evidence of police officers Galbraith and Bermudo clearly establish that a patron did just that in full view of employees of the licensee.
28. The Police submit that it would be wholly inappropriate to impose no penalty on the

basis of the lapse of time since the complaint was lodged and no further infringements being issued during that period. However, they do seek only the imposition of a monetary penalty and not any harsher penalties as the breaches of licence conditions on 11 September 2010 and 3 October 2011 were blatant and took place only days after the new conditions had taken effect prohibiting such conduct.

Submissions of behalf of the Respondent

Submissions in relation to Ground 1:

29. This ground alleges that the licensee contravened a requirement of the Act namely section 115(1)(a) by permitting a patron to remain on the premises whilst intoxicated.
30. Matters arising from infringement notices issued to the respondent's bar staff, approved manager and the respondent in relation to the events on 3 October 2010 went to trial in the Fremantle Magistrates Court in June 2011 and all three accused were acquitted.
31. Whilst the level (standard) of proof in the Magistrates Court is different from that in the Commission, the evidence before the Magistrate is the same as before the Commission and observations and findings about behaviour and demeanour by the Magistrate are relevant to the Commission's determination. As a matter of natural justice the Commission should not disregard such observations by a Court.
32. The Magistrate found with reference to video footage that the behaviour of the patron was unexceptional and no alcohol was consumed by the patron at the licensed premises. Furthermore, unless they actually saw her fall down there is nothing to attract their attention to her. She was just another young lady in a bar, there were many there, she was jiggling and dancing around like the others.
33. None of the police state that they saw the patron drinking any liquor on the premises.
34. Even if the Commission were to find that the patron was intoxicated that does not in itself constitute a breach of section 115(1) of the Act in that the licensee must have permitted such drunkenness in the sense of being reckless or turning a blind eye to the drunkenness. The Commission should find that the licensee did not serve any liquor to the subject patron so that any trigger for the licensee and it's staff to have observed the patron in a crowded noisy bar is significantly diminished.
35. There is no evidence in any of the police statements that within the crowded dance floor area, any member of the licensee's staff was aware of the intoxicated state of the subject patron but turned a blind eye to her conduct.
36. The extent of the Police evidence is :
 - a) the allegation that two of the licensee's staff "were present" when the patron's female companion held her by the arms in order to keep her standing upright. Officer Kopsen however does not allege that the two staff members present actually saw what had occurred and relevantly neither officers Vredembregt, Kopson or Galbraith state that they asked the licensee's staff whether they observed the behaviour of the patron or not;
 - b) that various members of the licensee's staff were in the locality;
 - c) that in the context of the evidence that the premises were crowded, dimly lit, subject to strobe dark lighting and dancing people, the Police evidence does not show, even on a balance of probabilities that any of the licensee's staff were

reckless / turned a blind eye towards the behaviour of patrons.

Submissions in relation to Ground 2

37. This ground alleges that the licensee has endangered the safety, health or welfare of persons who resort to the licensed premises and in support the Police state that on 11 September 2010, the licensee:
- served 'double shots' to patrons contrary to a licence condition and sections 95(4)(b)(i) and (ii) of the Act;
 - served liquor mixed with energy drinks contrary to a licence condition and section 95(4)(b)(iii) of the Act.
38. No infringement notices were issued in relation to these two allegations and no double shot of Chartreuse was served to patrons on 11 September 2010 as alleged in the statement by Sergeant Trevor Atkins.
39. The respondent relies on the statement of bar staff involved in the incident and the CCTV footage provided to the Commission which provides clear evidence that only a single serve of Chartreuse was poured into each respective glass and a 'double shot' would necessitate two serves being poured into each respective glass which the respondent says CCTV evidence shows did not occur.
40. Liquor was not served mixed with energy drinks as alleged in the statements of police officers Bermudo and Galbraith and in support of this denial the respondent relies on the statement of Ms Lee, the member of staff involved in the incident.
41. Facts supporting the complaint namely "a staff member was heard to comment that 'you need to mix them yourselves'" are not supported by the statements of either of the police officers Bermudo and Galbraith and the facts as set out in the complaint are inconsistent with the evidence provided by the police officers.
42. In summary the respondent submitted:
- it did not permit drunkenness on the licensed premises on 3 October 2010 and the police evidence does not prove otherwise;
 - the respondent has not contravened any condition of its licence in respect of 'double shots' and energy drink allegations;
 - the safety, health or welfare of persons who resort to the licensed premises is not endangered by an act or neglect of the licensee;
 - even if the drunkenness, 'double shots' and energy drinks episodes are found to have taken place (which is denied) the police have provided no evidence before the Commission that each single alleged incident has endangered either the safety, health or welfare of the patrons associated with the different events.
43. Even if either ground 1 or ground 2 has been made out (which is denied) this is not a case in which any penalty should be imposed on the respondent because:
- the respondent did not provide liquor to the patrons in the premises – at worst the licensee was slow to identify the signs of intoxication; and
 - the respondent has since the date of the complaint (12 October 2010) not received

any infringement notices and has traded responsibly and without incident for almost 3 years.

44. In its responsive submissions the respondent states that the conclusion in the police submissions indicates that some uncertainty exists about which substance it actually was that might have affected the patron. There is no evidence from the police officers or other witnesses that the patron was seen to consume liquor on the premises. If the Commission were to find on a balance of probabilities that the patron was drunk (which is not admitted) such a finding is not open where there is no evidence about the service of liquor, for the Commission to conclude that the drunkenness was caused by the service of liquor on the premises.
45. There are various possibilities as to why the patron could have been drunk on the premises including the possibility that the patron consumed liquor at other premises, entered the Clink premises without exhibiting signs of intoxication but sometime after entry started to exhibit such signs.
46. Relevantly none of the police, according to their statements, asked the patron at which licensed premises she had been consuming liquor.
47. While ground 1 of the complaint is that the respondent permitted drunkenness, if the respondent's staff did not cause that drunkenness the respondent says that its alleged conduct in permitting drunkenness is unlikely because it was not aware that the patron had even been consuming liquor.

Determination

48. Section 95 of the Act empowers the Commission to take disciplinary action in respect of a complaint lodged under this section.
49. Section 96 of the Act sets out the action the Commission may take if it is satisfied on the balance of probabilities that the grounds have been made out.
50. The complaint is made on two grounds; first that the licensee contravened section 115(1)(a) of the Act in that it permitted an intoxicated patron to remain on the premises and; secondly that it endangered the safety, health and welfare of persons resorting to the licensed premises by serving double shots and liquor mixed with energy drinks contrary to its licence conditions in section 95(4)(b) of the Act.
51. The first ground related to an incident on 3 October 2010. In proceedings before the Magistrates Court arising out of the incident the approved manager, a member of bar staff and the licensee, were acquitted and the respondent argues that the Commission should not disregard this finding as a matter of natural justice.
52. A protective purpose is manifest in the disciplinary provisions of the Act. There is no reason why the same conduct cannot be relied upon for both criminal and disciplinary proceedings irrespective of the fact that prosecution of the licensee resulted in a conviction or acquittal (refer *That's Entertainment (WA) Pty Ltd ([2013] WASC 75)*).
53. The Commission applies a different standard of proof and may have regard to evidence which would not be admissible in the Magistrates Court where the rules of evidence apply and the Commission has to decide if the conduct which is alleged constitutes a proper cause for disciplinary action rather than whether criminal charges have been made out beyond reasonable doubt (refer *That's Entertainment (WA) Pty Ltd ([2013] WASC 75)*).

54. The respondent also argues that even if the patron was intoxicated it did not permit the drunkenness in the sense of being reckless or 'turning a blind eye' to the drunkenness of the patron.
55. The Commission is satisfied from the evidence provided by the Police, that on the balance of probabilities, the patron was intoxicated and the responsible staff should have been well aware of it as the patron was in full view of these staff notwithstanding that the bar was crowded.
56. In doing so, the Commission does not apply the higher standard of proof necessary to obtain a conviction in the Magistrates Court (beyond reasonable doubt) but simply on the balance of probabilities.
57. Although, the Commission accepts the respondent's argument that there is some inconsistency in the evidence of police officers it is of the view that it is only to a relatively minor extent and in the detail rather than the substance.
58. The second ground of complaint relates to an incident on 11 September 2011 where it is alleged that double shots and liquor mixed with energy drinks were served to a patron.
59. The allegation of serving double shots is flatly denied by the Respondent and CCTV evidence is not conclusive. The Respondent also denies serving liquor mixed with energy drinks.
60. However, the Commission gives more weight to the evidence of Sergeant Atkins which confirms that the barman informed him that he had served a "double shot of Chatreuse" to the patrons.
61. Similarly, there is sufficient evidence to clearly establish that, irrespective of whether or not the patron was told to "mix the drink himself" by the bar staff, the simultaneous service of neat alcohol with accompanying energy drink establishes to the satisfaction of the Commission that the intent of the licence condition was being circumvented.
62. The Commission thus finds that both grounds of the complaint are made out.
63. In setting a penalty pursuant to section 96 of the Act the Commission takes cognisance of the fact that these infractions took place approximately 3 years ago and there have been no complaints concerning the conduct of the premises in the intervening period.
64. Consequently in the exercise of its discretion under section 96 of the Act, the Commission imposes a monetary penalty of \$3,000 upon That's Entertainment (WA) Pty Ltd payable within 30 days of the date of this determination.



MR JIM FREEMANTLE
CHAIRPERSON