

**Liquor Commission of Western Australia
(Liquor Control Act 1988)**

- Applicant:** Lynette McDougall
(Represented by Mr. Ashley Wilson, Frichot & Frichot)
- Intervener:** The Commissioner of Police
(Represented by Ms. Leanne Atkins of WA Police)
- Observer:** Sergeant T. Atkins of WA Police
- Commission:** Eddie Watling (Deputy Chairperson)
- Matter:** Application for a Review under Section 25 of the *Liquor Control Act 1988* of a Decision by the Delegate of the Director of Liquor Licensing, dated 20 July, 2011, to withdraw approval of Ms. Lynette McDougall as a manager under the Act and to disqualify Ms McDougall from being a holder of a position of authority at a business carried on under a licence, for a period of three (3) years.
- Date of Hearing:** 22 September, 2011
- Date of Determination:** 19 October 2011
- Determination:** The decision of the Delegate of the Director of Liquor Licensing is varied and pursuant to section 102F of the Act, the approval of Ms McDougall as a manager under the Act is withdrawn for a period of twelve (12) months from the date of this determination.

Background

- 1 On 18 March 2011, the Commissioner of Police (WA Police) wrote to the Delegate of the Director of Liquor Licensing ("the Director") for the purpose of introducing evidence and making representations pursuant to section 35B(3)(b) of the *Liquor Control Act 1988* ("the Act"), that Ms. Lynette McDougall's conduct is such that she is not a suitable person to manage licensed premises and it would not be in the public interest for her to remain as an approved manager of the De Bernales Tavern ("the premises") or any other licensed venue.
- 2 The WA Police submitted that:

- Ms McDougall failed to fully disclose personal identifying information and her criminal records in her 2008 LLD5 Personal Particulars form;
 - Ms McDougal's spouse not only lives on site at the premises, but has also been involved in a violent assault at the premises;
 - Ms McDougall is associated with people known to be involved in criminal activity and known as Outlaw Motor Cycle Gang ("OMCG") members;
 - Concerns about the conduct of the business at the licensed premises comprise matters the subject of which are the basis of a section 95 complaint determined in June 2011 by the Liquor Commission. Ms McDougall's activities as manager have contributed to the problems at these premises;
 - Ms McDougall's conduct shows that she is not a suitable manager for licensed premises, due to:
 - Demonstrated disregard for the law;
 - Failure to disclose relevant information in lodging her application;
 - The number and nature of criminal convictions recorded against her; and
 - Reduced control over the management of De Bernales Tavern as a consequence of her relationship with her spouse and OMCG members.
- 3 Following receipt of the WA Police submission, on 24 March 2011 the Director wrote to Ms McDougall and invited submissions to show cause why, under the circumstances, her approval as manager under the Act should not be withdrawn. The response time was set as close of business Friday 15 April 2011.
 - 4 Ms McDougall's representative Macdonald Rudder Solicitors lodged a responsive submission on 15 April 2011.
 - 5 On 2 June 2011 the WA Police lodged a responsive submission to the material submitted and referred to in 4 above.
 - 6 On 1 July 2011 Macdonald Rudder Solicitors lodged a closing submission on behalf of Ms McDougall.
 - 7 On 20 July, 2011 the Director determined that, on the balance of probabilities, reasonable grounds exist to show that Ms McDougall had failed to conduct the business under the licence in a proper manner and her conduct as a manager was such to show that she is not a suitable person to manage the licensed premises. As a consequence of this finding the approval of Ms McDougall as a manager under the Act was withdrawn and Ms McDougall was disqualified from holding a position of authority at a business carried on under a licence for a period of three (3) years.
 - 8 On 19 August 2011 Frichot & Frichot, solicitors for Ms McDougall, lodged an application for a review of the decision by the Director, under section 25 of the Act with the Liquor Commission ("the Commission").
 - 9 A Hearing was held on 22 September 2011.

Submissions of the Applicant

- 10 In association with the application for review lodged 19 August, 2011, the Applicant sought:
 - (a) A direction under section 25(4)(c) of the Act that the Director's decision does not have effect pending the determination of these review proceedings by the Liquor Commission; and/or
 - (b) An interim order in these review proceedings pursuant to section 25(4)(d) and/or section 26 of the Act that the operation of the Director's decision be stayed and that effect shall not be given to the Director's decision, pending the determination of these review proceedings by the Commission.
- 11 The Applicant submitted that under the Act, the Director does not have the power to make orders disqualifying a person from holding a position of authority at a business carried on under a licence; such power being reserved to the Commission under section 96(1)(g) of the Act, once the Commission has heard a complaint brought against a person by the Director or the Commissioner of Police under section 95(4)(h) of the Act.
- 12 In the present case there has been no section 95 complaint against the Applicant and the Commission has made no order under section 96(1)(g) in respect of the Applicant. Therefore the Director's decision, to the extent that it purports to disqualify the Applicant from holding a position of authority at a business carried on under a licence, is beyond the Director's power.
- 13 Over the period 24 August 2011 to 2 September 2011 there had been an exchange of correspondence between Frichot & Frichot and the Director concerning the interpretation of section 26 of the Act, with the resultant decision by the Director on 2 September 2011 to allow the Applicant to work in the capacity of approved manager pending the outcome of proceedings before the Commission (subject to the necessary registration procedure being completed by 30 September 2011). In a letter to the Frichot & Frichot, dated August 29, 2011 the Director also advised that the order disqualifying Ms McDougall from being the holder of a position of authority, was revoked.
- 14 In response to the evidence submitted by the WA Police that Ms Lynette McDougall was no longer a suitable person to manage licensed premises, the Applicant submitted that the Director, in reaching her decision, was not satisfied that the failure to disclose criminal convictions, her alleged associations and those of her partner with OMCG members and her relationship with her partner were sufficient to result in a finding against her.
- 15 The decision to withdraw Ms McDougall's approval as a manager and to disqualify her from being a holder of a position of authority at a business carried on under a licence was therefore solely based on an assessment that she has failed to conduct the business under the licence in a proper manner and her

conduct as a manager is such to show that she is not a suitable person to manage licensed premises. An assessment disputed by the Applicant.

16 The Applicant denies that she is not a suitable person to manage licensed premises, or that she observes inadequate management strategies or practices at the premises. Instead, the Applicant asserts that she endeavours at all times to observe appropriate management practices at the premises and to ensure that staff likewise observe proper practices whilst carrying out their duties, including:

- The introduction of a zero tolerance policy in respect to staff consuming alcohol whilst working at the premises;
- Setting up training modules to familiarise staff with signs that a patron may be intoxicated, and other aspects of responsible service of alcohol;
- The holding of regular weekend meetings with staff to review management policies and practices;
- Implementation of uniforms for staff;
- Being a member of and regularly attending the volunteer Kalgoorlie-Boulder Liquor Accord meetings;
- Voluntarily refusing to serve double shots of alcohol, shooters and similar drinks at the premises;
- Adoption of a voluntary “lock in/lock out” practice at the premises near closing times;
- The employment of crowd controllers who are subject to clear procedural instructions;
- Adoption of a zero tolerance policy in relation to illicit drug use by patrons;
- The development of a management plan to stop juveniles or other persons attempting to enter the premises with false ID;
- A process for recording incidents and the maintenance of the incident register;
- Maintenance of a complete training register;
- Not permitting members of OMCG’s to wear “patches” or other accessories on the premises;
- Making sure that staff are aware of the conditions of the licence in force at the premises.

17 It was submitted that the Police have not, in the section 35B application, rebutted the Applicant’s evidence as to the management practices which the Applicant has put in place and observes at the premises as part of her management duties. Instead the Police seek to rely on generic Police attendance/call-out figures, general observations as to the operations of the premises and a small number of isolated instances.

18 The Applicant has responded to the Police data and observations in a candid and credible manner, and the Applicant’s responses establish that for the majority of incidents relied upon by Police, there is a reasonable explanation.

- 19 It was submitted that the decision against Ms McDougall was based solely on the findings made by the Liquor Commission in its decision in the section 95 proceedings brought against the licensee of the premises, however, it does not automatically flow that a manager's approval must be withdrawn, even when grounds for disciplinary action are established.
- 20 As part of the proceedings before the Director, the Applicant lodged extensive references from members of the public, which demonstrate the very high regard in which consumers and members of the public hold the Applicant and the Applicant's demonstrated management practices at the premises. These references clearly indicate that the Applicant effectively and properly manages the licensed premises and achieves a standard of management of licensed premises which accords with the public interest.
- 21 The Applicant submitted that the Commission may be satisfied, in the light of all the evidence presented in the section 35B Application that:
- The Commissioner of Police has not established to the relevant standard of proof that there are reasonable grounds for withdrawing the Applicant's manager approval;
 - The public interest does not require that the Applicant's manager approval be withdrawn; and
 - The public interest would be served by the continuation of the Applicant's manager approval in respect of the premises.
- 22 It was further submitted that even if the Commission is satisfied that the Police has established reasonable grounds which are sufficient to enliven the Director's discretion under section 35B of the Act, the Commission should exercise its discretion in favour of the Applicant and quash the Director's decision.
- 23 Alternatively, if the Commission maintains concerns about the management of the premises, order that the withdrawal of the Applicant's manager approval be suspended for a specified period, say 12 months, subject to the condition that provided the Applicant does not breach a provision of the Act during that period, the suspended withdrawal of the Applicant's manager approval is revoked at the end of that period. This course of action would enable a period of time for the conditions imposed on the licence by the Commission to have effect and for that effect to be evaluated at these premises.

Submissions on behalf of the Commissioner of Police

- 24 The WA Police submission relies upon the report of First Class Constable J Stern, dated 18 March 2011, in which it is submitted that Ms McDougall's conduct is such that she is not a suitable person to manage licensed premises and it would not be in the public interest for her to remain as an approved manager of the De Bernales Tavern or any other licensed venue due to:
- Demonstrated disregard for the law;

- Failure to disclose details providing false and misleading information in her application for approved manager;
- The number and nature of criminal and traffic convictions;
- Reduced control over the management of De Bernales Tavern due to the relationship with her spouse and OMCG Members;
- As a result of poor management of De Bernales Tavern, a section 95 application for disciplinary action has been submitted by Police to the Liquor Commission.

25 It was submitted that whilst the Director was not satisfied that a number of the allegations made by the Commissioner of Police were sufficient to result in a finding against her, it was found that the Applicant's management of the licensed premises, namely De Bernales Tavern in Kalgoorlie, had contributed to the problems on and in the vicinity of the licensed premises.

26 The Director's determination was based on the section 95 complaint against the licensee of De Bernales Tavern in which it is alleged that Ms McDougall had contributed to the grounds of complaint as follows:

- She has been the approved manager of premises where it is alleged that the safety, health and welfare of patrons is not monitored such that patrons are allowed to become intoxicated before being ejected and a number have been assaulted;
- She paid a modified penalty for an infringement notice that alleged that she had permitted a juvenile to enter and remain upon licensed premises on 15 April 2010;
- She failed in her duties to ensure that incidents were fully recorded in the incident register on 22 April 2010 and 12 February 2011. Further, on the latter occasion she was unable to produce the incident register when requested by officers;
- On 4 July 2010 she was the approved manager when a crowd controller failed to check properly the identification of a 17 year old youth who was allowed to enter and remain on the premises;
- On 12 December, 2010 she allowed a person who was not a staff member to remain on the premises consuming alcohol approximately 2.5 hours after trading hours ended.

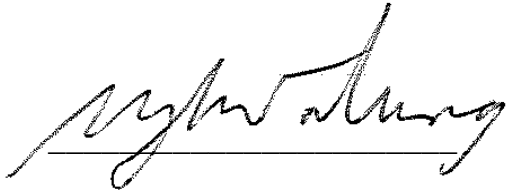
27 Taking into consideration the submissions and evidence filed by the parties relevant to the section 35B inquiry, The Director had determined, on the balance of probabilities, that reasonable grounds existed to show the Applicant had failed to manage the premises in a proper manner and her conduct as a manager was such to show that she was not a suitable person to manage licensed premises.

28 It was submitted that it was therefore open to the Commission, upon reviewing the material that was before the Director, to come to the same decision as the Director when regard is had to the objects of the Act contained in section 5.

Determination

- 29 The situation whereby Ms McDougall could continue to work in the capacity of an approved manager pending the outcome of the proceedings of this review, was confirmed. To this extent, the correspondence referred to in paragraph 13 above has been referred to.
- 30 Having considered all of the material that was before the Director when making the decision, The Commission concurs with the finding that the evidence presented in relation to Ms McDougall's failure to disclose criminal convictions, her alleged associations and those of her partner with OMCG members and her relationship with her partner is insufficient to result in a finding against her.
- 31 The matter to be considered is therefore Ms McDougall's capacity and capabilities as an approved manager at licensed premises that have been the subject to recent disciplinary action under section 95 of the Act.
- 32 The Commission is persuaded by the evidence of the Police that the levels of public disorder, anti-social behaviour, serious assault offences and general public risk associated with De Bernales Tavern are such that the conduct of the business under a liquor licence has not been in a manner consistent with the public interest and the objects of the Act. A situation confirmed in the section 95 determination (LC 24/2011) of the Commission, which imposed a global monetary penalty and additional conditions on the licence.
- 33 As an approved manager for the premises over the period the subject of the section 95 complaint, Ms McDougall has not demonstrated a level of responsibility and/or capacity to address a pattern of anti-social behaviour, disturbances and assaults that occurred inside or in the immediate vicinity of the premises. A failure to adhere to conditions of the licence on a number of occasions over this 12 month period also indicates a deficiency in management control.
- 34 On this basis it is difficult to accept that, as an approved manager, Ms McDougall will be able to make a positive contribution to the implementation of the new conditions imposed on the licence as a consequence of the disciplinary action resulting from the section 95 complaint against De Bernales Tavern.
- 35 The Commission is satisfied on the balance of probabilities that reasonable grounds exist to show that Ms McDougall has failed to conduct the business under the licence in a proper manner and her conduct as a manager is such to show that she has not demonstrated that she is currently a suitable person to manage licensed premises.
- 36 In reaching this determination the Commission is aware that De Bernales Tavern is in the process of implementing a number of operational changes as a consequence of new conditions imposed on the licence to improve the management approach at the premises.

- 37 However, the Commission is of the view that the public interest will be best served by Ms McDougall not being an approved manager at the premises whilst the new conditions are being implemented.
- 38 Section 25 (2c) of the Act does not allow the Commission to consider any progress that might have been made in this regard since the section 95 determination, therefore this section 102F determination is made through a review of all the material that was before the Director when making her decision of 20 July 2011. Specifically, evidence provided in paragraph 21 of the Applicant's submission lodged 15 September 2011 has not been taken into consideration.
- 39 As a consequence, the Commission has determined that, in accordance with section 25(4)(a) of the Act it is appropriate to vary the decision of the Director and, pursuant to section 102F of the revised Act, to withdraw the approval of Ms McDougall as a manager under the Act for a period of twelve (12) months from the date of this determination.

A handwritten signature in black ink, appearing to read 'Eddie Watling', written over a horizontal line.

Eddie Watling
Deputy Chairman