

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Hermal Pty Ltd
(represented by Mr John Prior, instructed by
Mr Peter Fraser of Dwyer Durack Lawyers)

Respondent: Director of Liquor Licensing
(not represented)

Commission: Mr Eddie Watling (Deputy Chairperson)
Ms Helen Cogan (Member)
Mr Greg Joyce (Member)

Premises: Roebuck Bay Hotel, Broome

Matter: Application, pursuant to section 25 of the *Liquor Control Act 1988* for a review of a decision by the Director of Liquor Licensing to reinstate full entertainment condition upon the licence for the Roebuck Bay Hotel

Date of Hearing: 31 October 2011

Date of Determination: 31 October 2011

Date of Reasons published: 25 November 2011

Determination:

1. The Director's decision is quashed.
2. The following additional conditions are imposed on the licence on days when adult entertainment is provided:
 - Crowd controllers, licensed under the *Securities and Related Activities (Control) Act 1996* are to be employed at a ratio of two (2) crowd controllers for the first 100 patrons and one (1) crowd controller for each additional 100 patrons or part thereof from one

hour before the commencement of the entertainment until 30 minutes after the entertainment ceases.

- Compliance with conditions set out in CCTV (Closed Circuit Television) Security Systems – Minimum Standards Policy of the Director of Liquor Licensing.
- Barriers between the stage and patrons to be placed and security to be posted on the ground to ensure that participants in any event are at a distance of at least 1 metre from the front of the stage and any physical contact is prohibited.

Authorities referred to in Determination:

- *Hancock v Executive Director of Public Health [2008] WASC 224*
- *Kapinkoff Nominees Pty Ltd v Director Liquor Licensing [2010] WASC 345*
- *Re Nippon Inn LLC08/00*

Preliminary Matter

Ms Leanne Atkins, representing WA Police, attended the hearing. However as the Commissioner of Police did not lodge a notice of intervention, he is not deemed to be a party to this proceeding.

Background

- 1 On 24 January 2011, Detective Superintendent J M Migro (“the Superintendent”) of the Liquor Enforcement Unit, Western Australia Police, wrote to the Director of Liquor Licensing (“the Director”) advising him that on 30 December 2010 a 16 year old female (“the juvenile”) gained entry to the Oasis Bar at the Roebuck Bay Hotel (“the licensed premises”) under a false identity and participated in and won a Wet T-Shirt competition (“the main incident”). The Superintendent stated: *“This incident causes concern to Police that the licensee is not taking enough measures to prevent such incidents and it is requested the licensee be made to show cause why the amended entertainment condition should not be removed, and the full entertainment condition re-instated, as per the licence condition.”*
- 2 As a consequence of the main incident the police took the following action:
 - issued Hermal Pty Ltd (the applicant and licensee) with infringement notice No. 272971;
 - cautioned the licensee against acting in a way that contravenes the *Liquor Control Act 1988* (“the Act”);
 - issued Scorch Security Services with infringement notice No. 272972;
 - issued Ms Kellie Bullen with infringement notice No. 272970;
 - cautioned the juvenile in respect of the incident and for subsequently fraudulently cashing the winning cheque.
- 3 The Director wrote to the licensee on 17 February 2011 pursuant to section 64 (2a) of the Act stating that he proposed to remove the amended entertainment condition and reinstate the full entertainment condition. The licensee was given the opportunity to show cause why the amended entertainment condition should not be removed.
- 4 The applicant advised the Director on 11 March 2011 that the infringement notice would be contested and asked that the section 64 enquiry be stayed until the hearing before the Magistrates Court in Broome had concluded. The applicant would otherwise be prejudiced.
- 5 On 18 May 2011, the Superintendent advised the Director of three incidents that took place on the licensed premises prior to the subject incident:

- on 18 June 2009 officers attended at the Oasis Bar and found a juvenile drinking beer and escorted him outside after he failed to produce identification. The juvenile was found to be 15 years of age. The licensee was infringed and the modified penalty was paid;
 - on 5 November 2009 an entrant to the Wet T-Shirt competition was groped by a male patron;
 - on 9 December 2010, it was alleged that during a Wet T-Shirt competition, a water girl sucked the nipple of a competition contestant.
- 6 Sometime after 18 July 2011 in an undated letter the Director advised the Superintendent that given the contrasting evidence submitted by the juvenile he would agree to the request of the applicant to stay the proceedings pending the charges being heard in the Broome Magistrates Court.
- 7 On 24 August 2011 the Liquor Enforcement Division of the Western Australian Police advised the Director that the charge against the applicant pursuant to section 121(4) of the Act would be discontinued on 29 August 2011 [*sic*].
- 8 The Director in his decision No. 219224 of 26 September 2011 determined that in the public interest the amended entertainment condition be cancelled immediately.
- 9 The applicant on 27 September 2011 sought a review by the Liquor Commission ("the Commission") of the Director's decision pursuant to section 25 of the Act.
- 10 A hearing of this matter was held before the Commission on 31 October 2011.

Submissions of the applicant

- 11 The applicant conceded that on 30 December 2010 the juvenile, who was 16 years old at the time, gained entry to the Oasis Bar of the licensed premises using the driver's licence of Ms Kellie Bullen. The juvenile subsequently entered and won the Wet T-Shirt competition and the next day collected the \$500 prize. In addition there were three other incidents the subject of the hearing. These are outlined in paragraph 5 above and another incident was referred to in the statement of the juvenile which records that, on the night of Saturday 8 January 2011, again using the driver's licence of Ms Kellie Bullen, she gained entry to the Oasis Bar. On being detected at 11.00pm the juvenile was evicted. This incident was not recorded in the register.
- 12 In respect of the main incident the applicant submitted that the juvenile's admittance to the licensed premises was based on an honest and reasonable mistake and made the following points supporting this position:
- the statement of the juvenile dated 16 July 2011 indicates her intention to gain entry by deceit. The juvenile obtained the drivers licence of a person she resembled. She wore a black dress, did her hair to look like Ms Kellie Bullen

and put on make up to look older. The juvenile went to the Oasis Bar with a large group of older people;

- photographic evidence indicates that on any objective view the juvenile seemed to be about twenty years of age;
- the evidence of Nicole Williamson, who was the promotions manager at the Roebuck Bay Hotel and whose duties included assisting with the enrolment of participants in the Wet T-Shirt competition supported the assessment that the juvenile appeared older than her years. She recalled that the juvenile appeared very confident, projected an air of maturity and estimated her age at 19 or 20 years of age;
- the juvenile was screened by the crowd controllers at the Dampier Terrace entrance and was not detected due to her appearance;
- there are inconsistencies in the two statements of the juvenile dated 13 January 2011 and 16 July 2011 about how she obtained entry.

13 In respect of the remaining three incidents the applicant stated:

- the incident in 2009 of the 15 year old evicted from the Oasis Bar was dealt with at that time and the licensee paid the fine;
- in regard to the allegations of groping and the sucking of a contestant's nipple by the water girl the licensee has taken action by altering the physical layout of the bar to avoid contact and changed the rules for the event.

14 The applicant referred to the object contained in section 5(1)(c) of the Act concerning the requirements of consumers. The Wet T-Shirt competition is an established event in Broome and is a tourist attraction. It has been running for many years and attracts approximately 400 patrons in January and February, 500 patrons in March and 700 in April-July at each event.

15 The applicant provided 8 witness statements from various people working and residing in Broome as to the popularity of the Wet T-Shirt competition and its positive status within the community.

16 The applicant indicated that it has been responsive to any matters raised by the police and as a consequence of the main incident it will ensure greater scrutiny of patrons in the future.

17 Evidence was provided by the applicant that infringement notice No. 272972 was incorrectly served on Scorcher Security Services and should have been served on NZA Security which was providing crowd controllers on the night of the main incident. No evidence of guilt can be drawn from the fact that Scorcher Security Services paid the fine.

Determination

- 18 The Commission is bound by the principle established in *Hancock v Executive Director of Public Health [2008] WASC 224* paragraph 54 that in conducting a review under section 25 of the Act it is not constrained by a finding of error by the Director but is to undertake a full review of the materials before the Director and make its own determination based on that review.
- 19 The Director has identified the materials that were before him when making his decision and has provided these materials to the Commission as required by the principle set out in *Kapinkoff Nominees Pty Ltd v Director Liquor Licensing [2010] WASC 345* paragraph 38 and section 25(2)(c) of the Act.
- 20 The Commission adopts the summary provided by the applicant in regard to *Nippon Inn LLC08/00*. The extent of the powers of the Commission under section 64 of the Act were considered in that case and the following guiding principles were formulated:
- The power under section 64 of the Act must be exercised in accordance with the public interest;
 - When exercising the power under section 64, the tenor of each licence and the circumstances in relation to which the Commission intends that it should operate must be examined in the context of the public interest;
 - The discretion of the Commission is confined to the scope and objects of the Act and is not arbitrary and unlimited.
- 21 In addition to the inclusive definition of the public interest at section 38(4) various case laws provide the following principles:
- it is of wide import and not exclusively defined by the Act;
 - the proper meaning is taken from the subject matter and the legislative framework;
 - it imports a value judgement confined by the subject matter and the scope and purpose of the Act;
 - it is a balancing and weighing exercise between the private interests of the individual and the public good;
 - it is for the decision maker to determine what is relevant and what weight is given to these matters;
 - the Commission shall have regard to the objects of the Act.

- 22 By section 5(2) of the Act the Commission is required to have regard to the primary and secondary objects of the Act. In particular the object at section 5(1)(c) provides:
- “to cater for the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State”.*
- 23 Similarly Part 4, Division 9 of the Act, together with the object at section 5(1)(a) of regulation and supply and the long title of the Act provide a strict framework to ensure juveniles are restricted in access to licensed premises and prohibited from consumption of liquor.
- 24 Section 64(1) of the Act provides that the licensing authority may at its discretion impose conditions, or vary or cancel previously imposed conditions, having regard to the tenor of the licence and the circumstances in relation to which the licensing authority intends that it should operate.
- 25 On 24 April 1998 the entertainment condition was varied so that reference to the word “immodest” was removed in respect of that part of the premises known as the Oasis Room. The entertainment condition was amended primarily to enable the Wet T-Shirt competition to be staged as a regular part of the hotel entertainment program. The competition has endured the test of time and continues to be a popular event for a relatively large sector of the Broome community (locals and visitors alike).
- 26 Adult entertainment is not prohibited in licensed premises, however, needs to strictly conform to the licensing conditions. The probity of conducting a Wet-T-Shirt competition is not the subject of scrutiny by the licensing authority, but rather the breach (as acknowledged by the Applicant) of the conditions applicable to juveniles.
- 27 In assessing the application, the Commission is not satisfied that the evidence before it establishes, on the balance of probabilities, that an employee or agent of the licensee was aware that the juvenile was under the age of 18, or acted in such a way as to permit or not care about allowing entry of that juvenile. Of particular significance is the evidence that clearly shows that the juvenile went to great lengths to disguise her age and identity in a deliberate act of deception.
- 28 The Commission accepts the applicant’s submission that the admittance of the juvenile was through mistaken identity and that there has only been three reported incidents of a juveniles in the Oasis Bar over the time the Wet T-Shirt competition has been held.
- 29 The Commission notes that there have been three lapses by the licensee in complying with the terms of the entertainment condition :
- First, when the juvenile returned on Saturday 8 January 2011 to the Oasis Bar of the licensed premises she should have been detected by the crowd controllers at the entry.

- Secondly, whilst the juvenile was detected and evicted the incident was not recorded in the incident register which is a requirement of the Act.
- Thirdly, on the night of the main incident, the promotions manager, Nicole Williamson, ought to have known she was not dealing with Ms Kellie Bullen given her previous involvement with the juvenile.

30 In regard to the three further incidents raised by the Police, action was taken by the licensee to rectify the situation and prevent a reoccurrence. There is evidence that the licensee through its managers, crowd controllers and surveillance has satisfactory management practises.

31 The Commission is mindful of the fact that the Act requires a strict adherence to the requirements for juveniles and the responsibility lies clearly with the licensee to ensure it complies with the Act in respect of juveniles. However, under the circumstances, it is the Commission's view that, after evaluating all of the evidence, it is in the public interest to allow the licensee of the Roebuck Bay Hotel to maintain what is a long-standing entertainment activity.

32 Further, aligned with this is the public interest of ensuring juveniles cannot access this type of entertainment on licensed premises and that the licensee manages its responsibilities as prescribed by the Act and in accordance with the conditions of the liquor licence. Accordingly, following additional conditions are imposed on the licence on days when adult entertainment is provided:

- Crowd controllers, licensed under the *Securities and Related Activities (Control) Act 1996* are to be employed at a ratio of two (2) crowd controllers for the first 100 patrons and one (1) crowd controller for each additional 100 patrons or part thereof from one hour before the commencement of the entertainment until 30 minutes after the entertainment ceases.
- Compliance with conditions set out in CCTV (Closed Circuit Television) Security Systems – Minimum Standards Policy of the Director of Liquor Licensing.
- Barriers between the stage and patrons to be placed and security to be posted on the ground to ensure that participants in any event are at a distance of at least 1 metre from the front of the stage and any physical contact is prohibited.



EDDIE WATLING
DEPUTY CHAIRPERSON