

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Complainant:** Commissioner of Police
(represented by Mr Warren Fitt of State Solicitor's Office)
- First respondent:** Mr John Walter Luckman
- Second respondent:** Justluck Pty Ltd
(both represented by Ms Catriona Macleod of Cullen Babington Macleod)
- Commission:** Mr Eddie Watling (Presiding Member)
Ms Helen Cogan (Member)
Mr Alex Zilkens (Member)
- Matter:** Complaint for disciplinary action pursuant to section 95 of the *Liquor Control Act 1988*
- Premises:** Luckies Liquor Store
855 Albany Highway, Victoria Park
- Date of Hearing:** 15 August 2014
- Date of Determination:** 10 February 2015
- Determination:**
1. Mr Luckman is disqualified for a period of three (3) years from the date of this determination from being:
 - a) the holder of a position of authority in a body corporate that holds a liquor licence;

- b) interested in, or in the profits or proceeds of, a business carried on under a liquor licence whether as a natural person or as a partner in an unincorporated body or otherwise;
- c) an approved manager in any licensed premises.

2. Licence Number 60300026667 is suspended for a period of six (6) months from the date of this determination or until the licence is transferred or Mr Luckman removes himself as a director and shareholder of the licensee company, whichever is earlier.

Failure to do either of the above shall result in the cancellation of the licence.

3. No monetary penalty is applied.

Authorities referred to in Determination:

- *Plomp v R* (1963) 110 CLR 234
- *R v Hillier* (2007) 228 CLR 618
- *Hughes and Vale v New South Wales (No 2)* (1955) HCA 28
- *Australian Broadcasting Tribunal v Bond* (1990) HCA 33
- *That's Entertainment (WA) Pty Ltd v Commissioner of Police* (2013) WASC 75
- *Briginshaw v Briginshaw* (1938) 60 CLR 336
- *Ms AB and Commissioner of Police* (LC 13/2014)
- *Mavaddat v Real Estate and Business Agents Supervisory Board* [2009] WASCA 179

Background

- 1 On 30 June 2011, Justluck Pty Ltd became the licensee of the “Luckies Liquor Store” (“the premises”) situated at 855 Albany Highway, Victoria Park. The sole shareholder, Director and the only approved manager of the premises is Mr John Walter Luckman (“the first respondent”).
- 2 On 28 May 2014, the Western Australian Police Liquor Enforcement Division (“LEU”) executed a search warrant at the first respondent’s residence at 22 Endeavour Road, Hillarys, resulting in the first respondent being charged with a number of criminal offences.
- 3 On 13 June 2014, the Commissioner of Police (“the Police”), pursuant to section 95 of the *Liquor Control Act 1988* (“the Act”), lodged a complaint against each of respondents with the Liquor Commission (“the Commission”).
- 4 Submissions and responsive submissions were subsequently lodged by each party.
- 5 Following a listing for a hearing on 15 August 2014, the respondents, by letter dated 18 July 2014, sought an adjournment pending the resolution of criminal proceedings against the first respondent. The Police opposed that application by letter dated 22 July 2014.
- 6 In *That’s Entertainment (WA) Pty Ltd v Commissioner of Police (2013) WASC* at 75, it was held that 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.
- 7 On 24 July 2014, the Commission rejected the respondents’ “request” for an adjournment.
- 8 A hearing of the Commission was held on 15 August 2014.

Submissions on behalf of the Commissioner of Police

- 9 On 1 August 2014, the primary submission of the Police was lodged with the Commission, together with further evidence in the form of a statement made by a Detective Senior Constable attached to LEU relating to text messages contained in an I-Phone bearing serial number 7T106585A45 and belonging to the first respondent.
- 10 The evidence in this matter is that on 28 May 2014, police investigating the sale and supply of cannabis, executed a search warrant at both the premises and the first respondent’s residence in Hillarys. The search of the premises located nothing of interest; however the search of the first respondent’s

residence located, among other things, a significant quantity of cannabis. The first respondent was subsequently charged with:

- 1) two counts of cultivating a prohibited plant, namely cannabis, with intent to sell or supply, contrary to section 7(1)(a) of the *Misuse of Drugs Act 1981 (WA)* (“MDA”);
- 2) one count of possessing a prohibited drug, namely cannabis, with intent to sell and supply, contrary to section 6(1)(a) of the MDA; and
- 3) one count of possessing a prohibited drug, namely cannabis, contrary to section 6(2) of the MDA.

- 11 The complaint, under section 95 of the Act, is lodged on the ground that proper cause for disciplinary action exists if:

A person holding a position of authority in a body corporate that holds the 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) of the Act).

- 12 It was submitted that the gist of the complaint is that the first respondent cultivated/was in possession of a prohibited plant/drug with the intent to sell and supply, and is therefore not a fit and proper person to hold a position of authority in the second respondent.

- 13 The evidence relied upon by the Police includes:

- 1) a police incident report in relation to the search of the first respondent’s Hillarys residence;
- 2) the statement of material facts;
- 3) individual statements made by two Detective Senior Constables of the LEU.

- 14 The uncontradicted, and mostly admitted, evidence establishes the following facts:

- 1) the first respondent was in possession (and admitted to being in possession) of a hydroponic cannabis set-up which consisted of grow tents, timer-controlled grow lights, an automatic watering system and numerous hydroponic growth chemicals;
- 2) the first respondent was in possession (and admitted to being in possession) of two cannabis plants located in pots outside; two larger semi-mature cannabis plants located in grow tents in a locked bedroom;

and six smaller clone plants located under a grow light in an en suite bathroom;

- 3) the two plants located in pots outside had (by the first respondent's own admission) been recently harvested and yielded approximately 240g of cannabis head material;
- 4) the first respondent was in possession (and admitted to being in possession) of 240g of cannabis head located drying on flyscreens in the locked bedroom where part of the hydroponic set-up was situated; 200g of cannabis head located in a plastic container in the kitchen; 30g of cannabis head located in a clipseal bag in the top draw of the dishwasher; and 20g of cannabis head located in various clipseal bags in the kitchen drawers;
- 5) the first respondent was in possession (and admitted to being in possession) of approximately 800g of cannabis leaf which was wrapped in newspaper and located in the freezer;
- 6) the first respondent was in possession of numerous unused clipseal bags;
- 7) the first respondent was in possession of a set of digital scales;
- 8) an analysis of the first respondent's mobile telephone disclosed numerous text messages which appeared to be discussing the supply of cannabis. In particular several messages sent from the first respondent's phone indicated that he leaves cannabis in various places at his home for collection, including the dishwasher- refer paragraphs 14 to 19 below;

Mobile phone text messages

- 15 The evidence of the text messages found on the first respondent's phone is not disputed by the first respondent.
- 16 The Police submit that the text messages found on the first respondent's phone appear to discuss the supply of cannabis, and show that the first respondent "leaves cannabis in various places at his home for collection, including the dishwasher" (Police outline of responsive submissions dated 8 August 2014).
- 17 On various occasions the first respondent and his correspondents refer to a "bag," "bags," "a 50," "a fifty," "one", "2," "4," "something" and "goodness" being left by the first respondent at a particular location for collection by the other party. The correspondents refer to "\$" or "coin" being left by them in exchange. There is also a reference to one of the correspondents being "short," which the Police submit is a clear reference to money: para 37 of the Police outline of responsive submissions dated 8 August 2014.

- 18 The items were regularly left in what is described as the first respondent's "washer," "dishwasher," or "d / washer." Undisputed evidence shows that a clipseal bag containing 30g of cannabis was located in the first respondent's dishwasher: paragraph 38 of the Police outline of responsive submissions dated 8 August 2014.
- 19 The Police submit that although some of the text messages are vague, the text messages relate to the supply of cannabis. "Bag" is slang for a bag of drugs, particularly cannabis, and "a fifty" is slang for a \$50 bag of cannabis: para 38 of the Police outline of responsive submissions dated 8 August 2014.
- 20 The Police further submit that the text messages support the inference that the first respondent was in possession of cannabis with intent to sell or supply and that the first respondent had been engaged in the sale of cannabis for at least a year: para 39 of the Police outline of responsive submissions dated 8 August 2014.
- 21 The first respondent submits that the text messages refer to "various things including alcohol that I bring home from my liquor store, and to dishes that I am returning to my daughter after she has cooked me dinners." Refer to paragraph 7 of the first respondent's second witness statement dated 8 August 2014.
- 22 It was submitted that the Commission should infer that the first respondent was engaged in the ongoing supply of cannabis on a significant commercial scale, an inference supported by:
 - 1) the quantity of cannabis in his possession, which was sufficient to give rise to a presumption of intent to sell and supply under the MDA;
 - 2) the presence of digital scales and clipseal bags, both of which are indicia of drug dealing;
 - 3) the text messages indicating that, in exchange for money, the first respondent would leave cannabis in various places around his home for collection, including the dishwasher;
 - 4) in conjunction with (3) above, the fact that clipseal bags containing cannabis were found in the first respondent's dishwasher and kitchen drawers;
 - 5) the sophisticated hydroponic set-up found in the first respondent's residence which included grow tents, lights, timers, an automatic watering system and flyscreens for drying cannabis head material; and
 - 6) the fact that the bedroom and en suite bathroom in the first respondent's residence were dedicated wholly or partly to the growing of cannabis,

suggesting that the residence exceeded the first respondent's needs and was itself evidence of capital invested in the drug dealing venture.

- 23 It was submitted that the only evidence to the contrary is the first respondent's self-serving assertion that the cannabis was for personal use. That assertion is not believable as it is at odds with the evidence and should not be accepted by the Commission, particularly in the absence of a smoking implement.
- 24 The provisions of the Act manifest a clear legislative intention that persons involved in the supply of unlawful drugs should not be permitted on licensed premises. By inference such persons should also not be permitted to manage, or otherwise be interested in, a body corporate holding a liquor licence.
- 25 It was submitted that the first respondent's conduct reflects particularly adversely upon his character and reputation and can only be a result of a conscious decision to disregard the law. Such behaviour is clearly incompatible with the onerous responsibilities of a licensee, and a person in a position of authority under the Act.
- 26 It was submitted that the following disciplinary action be imposed on the licensee, Justluck Pty Ltd, and the first respondent as director of the licensee company:
- 1) Pursuant to section 96(1)(g) of the Act the first respondent, Mr John Walter Luckman, is permanently disqualified from being –
 - a) The holder of a position of authority in a body corporate that holds a liquor licence; or
 - b) being interested in, or in the profits or proceeds of, a business carried on under a licence.
 - 2) Pay a monetary fine as the Commission sees fit.

Submissions on behalf of the respondents

- 27 It was submitted that the starting point of the respondents position is that the purpose of the Act in respect to disciplinary proceedings is, largely, the protection of the public, by maintaining the standards of behaviour expected of licensees as set out in the Act. It is not to 'punish' licensees, rather it is to promote the behaviours of those involved in the supply and sale of liquor that achieve the objects of the Act.
- 28 In this case the operation of the licensed premises is entirely separate from the conduct the subject of the allegations and therefore has no impact at all (positive or negative) on the operations of the business or the supply and sale of liquor. In those circumstances there is nothing to 'protect' the public from.

- 29 It was submitted that in contrast the evidence shows that;
- 1) The first respondent operates the licensed premises in a professional, sound and responsible manner, which conduct has resulted in an entirely clean record under the Act at Luckie's Liquor and earned him the praise of surrounding businesses and professional acquaintances who attest to his character and reputation.
 - 2) He is a successful businessman who after successfully running two other businesses, took over Luckie's Liquor approximately three years ago, employs 8-9 people and has entirely transformed the store, increasing turnover by over 50% and creating a successful local business that is appreciated by customers, staff and the local community.
- 30 It was submitted that for a complaint under section 95(4)(h) of the Act to be upheld it must first be determined that the respondent is not a fit and proper person under section 115 of the Act, the relevant sections being 115(4a)(e) and 115(1)(b).
- 31 As section 115(4a)(e) is merely a permissive provision with no sanction, offence or contravention relating to that section, the relevant provision is therefore section 115(1)(b) which stipulates that where a licensee, whether personally or by an employee or agent –
- permits any reputed thief, prostitute or supplier of unlawful drugs to remain on licensed premises*
- that licensee, and the employee or agent concerned, commits an offence, the penalty for which is:
- a) for the licensee or manager, a fine of \$10,000;
 - b) for an employee or agent, a fine of \$4,000.
- 32 Such a finding is predicated on a finding that the first respondent himself is a supplier of drugs based on the presumption of possession of over 100g of cannabis, deeming supply unless proven otherwise, under the MDA, and the circumstantial evidence of the presence of kitchen scales in the kitchen and plastic bags.
- 33 In response, the respondents submit that:
- a) the first respondent's evidence in his statement is persuasive in that; he only grew for his own personal use and that was to self-medicate for chronic painful medical conditions and sleep problems; that there were indeed smoking implements in the home that he had used; that the kitchen scales were in the kitchen to be used as kitchen scales; and the plastic bags were used for a variety of things including bagging his

sandwiches for work and bagging cannabis for his own personal use so that he could control how much he was smoking;

- b) the respondents' full time manager's evidence is persuasive in that he has never seen or heard the first respondent have anything to do with unlawful drugs or be under the influence of same, or seen or heard anything that could potentially be related to unlawful drugs; and
- c) such evidence, on the balance of probabilities, serves to rebut the statutory presumption as to supply and outweighs the circumstantial case against the first respondent.

34 It was submitted that the complainant fails to reach the evidential standard to enable the conclusion that the first respondent was supplying drugs, as prescribed by section 115(1)(b) of the Act, therefore, the allegation remains unproven. As a consequence, section 95(4)(a) of the Act is not enlivened.

35 Further, it was also submitted that the correct interpretation of the relevant 'supplier of unlawful drugs' in section 115(1)(b) of the Act is that the reference is to the act of supplying drugs on the premises, not to the noun of being such a person.

36 Given the rebuttal evidence regarding supply, the separation between residence and business and the total lack of any unlawful drugs or supply at the licensed premises, it was submitted that section 115 of the Act is not made out on either ground and accordingly there can be no finding under section 95(4)(a) of the Act that the first respondent is not a fit and proper person.

37 It was submitted that a review of the matters in which the Commission has determined that a person is not a fit and proper person to hold a licence, both temporarily and permanently, illustrates that disqualification is only merited in cases of serious allegations of criminal conduct or serious conduct contravening the Act, usually involving a series/repetition of such conduct, which conduct signifies a high degree of disregard for the law.

38 In summary it was submitted that the following factors are relevant to the Commission's determination as to whether the first respondent is no longer a fit and proper person:

- 1) the allegations are merely that; allegations. However, the first respondent's honesty is such that he immediately admitted to the possession and personal use rather than to try to explain it in any other way. The possession is the only relevant offence. It was personal and private in nature and is relatively minor on the scale of criminal offences;
- 2) since the events on 28 May, 2014, the respondent has not used cannabis, has sought medical assistance with regard to his medical problems and in relation to ensuring he does not use cannabis again,

including counselling. He has voluntarily offered to undergo drug screening;

- 3) the licensed premises in question are highly successful, operated well, and the complaint is unrelated to the management of these premises, nor are the allegations in any way related to his management;
- 4) as the evidence of the first respondent provides, the potential impact of a disqualification would go beyond hardship for the respondents, as there is no one else to take over the business, therefore it would trigger a sale of the business and potential loss of employment to 9 employees, plus the potential loss of, or at least substantial change to, a successful local business.

39 It was submitted that the complaint should be dismissed.

Determination

40 The Commission may, where a complaint has been lodged under section 95 of the Act, take disciplinary action. Pursuant to section 96 of the Act, if the Commission is satisfied, on the balance of probabilities, that the ground(s) upon which the complaint is based have been made out so that a proper cause for disciplinary action exists, the Commission may take action pursuant to section 96(1) of the Act.

41 It is not clear from the complaint or any of the materials filed in support why the complaint was also brought against the second respondent. There is a reference in the complaint to section 115(1)(b) of the Act and a suggestion, contrary to a statement that nothing untoward has been found in relation to the second respondent or the way its business was run that the licence under which the liquor store operates is not being run in the public interest but no relief is sought against the second respondent either in the complaint or at the hearing. Accordingly, the Commission has dealt with the matter as a complaint against the first respondent only.

42 The Commission has examined the evidence and considered the submissions from both parties and concurs with the view of the Police that the central fact in issue between the parties is whether the cannabis in the first respondent's possession was intended (at least in part) for sale or supply to others.

43 Evidence provided by the Police relating to the quantity of cannabis, the role of the "dishwasher", the text messages on the first respondent's mobile phone, the sophisticated hydroponic set-up and the juxtaposition of the kitchen scales and cipseal bags is compelling. The police report of the absence of a smoking implement is also an indication that the prohibited drug was being cultivated for other than personal consumption, albeit that the first respondent has provided photographs of smoking implements that he claims were in the residence at the

time of the police inspection. The Commission does not accept the first respondent's argument that the police simply did not observe these items.

- 44 The degree to which the supply and sale has been carried out is uncertain and may be limited to a small circle of family and friends (the text message evidence indicates two family members and one friend) as an adjunct to personal use for the claimed medical requirements. Regardless of the distribution network and the quantity involved, the fact remains that it is a criminal activity to supply and sell a prohibited drug.
- 45 Furthermore, the first respondent's explanation of the text messages found on the first respondent's phone is simply not plausible in the context of the materials found and in consideration of the wording of the text messages. The Commission infers that the text messages and materials found at the first respondent's residence are all related to or deal with the supply of cannabis.
- 46 In summary, the Commission, having regard to the circumstantial evidence submitted, is not persuaded that the cannabis found in the residence of the first respondent was solely for his personal use. The extent of resources dedicated for cultivating cannabis is inconsistent with the submission that it was being used exclusively for personal use.
- 47 Where a case is based on circumstantial evidence, all of that evidence must be evaluated simultaneously and it is an error to assess each piece of evidence independently: *Plomp v R* (1963) 110 CLR 234; *R v Hillier* (2007) 228 CLR 618.
- 48 The Commission finds that based on the accumulation of all the materials found at the first respondent's residence and the text messages, in the context of the materials found, on the balance of probabilities, the first respondent was engaged in the supply of cannabis, and that the first respondent intended to use at least part of the cannabis in his possession for that purpose. The Ground of the complaint is therefore made out.
- 49 The question then remains as to whether this criminal act is such 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.
- 50 Although the first respondent expressed remorse for his conduct, the Commission must have regard to the objects of the Act and the public interest in determining the appropriate disciplinary action. The Commission cannot allow persons who are or have been engaged in the supply of cannabis to hold a position of authority of a body corporate that holds a licence or otherwise be interested in or in the profits or proceeds of, a business carried on under a licence.

- 51 Whilst the term “fit and proper” is not defined in the Act, section 33(6) of the Act provides some guidance in this regard. This provision of the Act enumerates the various criteria the licensing authority can have regard to when granting an application:

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 a manager or trustee –

- (a) the creditworthiness of that person; and*
- (aa) the character and reputation of that person; and*
- (b) The number and nature of any convictions of that person for offences in any jurisdiction;*
- (c) The conduct of that person in respect to other businesses or to matters to which this Act relates; and*
- (d) Any report submitted, or interventions made, under section 69*

shall be taken to be relevant and amongst the matters to which consideration should be given.

- 52 The term “fit and proper” was deliberated upon by the High Court in *Hughes and Vale v New South Wales (No 2) (1955) HCA 28* and it was found that the purpose of using the expression “fit and proper” is to give “the widest scope for judgement and indeed rejection” and in *Australian Broadcasting Tribunal v Bond (1990) HCA 33* it was found that it is not a concept which is to be narrowly construed or confirmed.

- 53 More recently in *That’s Entertainment (supra at 67)*, Pritchard J observed that...“*the purpose of disciplinary proceedings is quite different from the purpose of criminal proceedings. The object of criminal proceedings includes the punishment of those who disobey the law, while the object of disciplinary proceedings is to protect the public by maintaining standards of behaviour of persons permitted to work or carry on business in a particular industry or profession. The maintenance of those standards of behaviour which are set out, or contemplated, in the LC Act is of fundamental importance in achieving the objects of the LC Act, particularly the object of minimising harm or ill-health to people as a result of the use of liquor. In those circumstances, the pursuit of both prosecution and disciplinary proceedings arising from the same conduct would not, of itself, bring the administration of justice into disrepute*”.

- 54 In assessing the evidence the Commission is guided by the principles set out by Latham CJ in *Briginshaw v Briginshaw (1938) 60 CLR 336* – “*The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness and importance of the issue.*”

Dixon J in the same judgement (*supra, at 362*) stated “*the seriousness of an allegation made, the inherent likelihood of an occurrence of the given*

description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal”.

- 55 Notwithstanding that:
- 1) there is no evidence to suggest that there was any direct association with the supply and sale of a prohibited drug, namely cannabis, and the operation of Luckies Liquor Store.
 - 2) the first respondent’s supply and selling of a prohibited drug, namely cannabis, has not been shown to go beyond a small circle of family and friends,
 - 3) The first respondent has had no previous charges or convictions against him relating to prohibited drugs; has offered to willingly and voluntarily submit to drug screening; has made a commitment to cease the offending action; and has shown to have maintained responsible management practices in relation to the operations of Luckies Liquor Store.
- 56 The Commission, none the less, strongly denounces the actions of the first respondent especially in light of his role and responsibilities as an approved manager and director of the licensee company.
- 57 A person who is employed as an approved manager is required to exhibit high standards of honesty and integrity.
- 58 In its decision LC13/2014 (*Ms AB and Commissioner of Police*), the Commission at paragraph 28 observed: *Although there is no evidence that the applicant has committed any offences while working on licensed premises, the nature of offences as referred above are nonetheless highly relevant when considering an application for approval to hold a position of responsibility within a licensed premises.*
- 59 A person’s conduct will be relevant to his or her fitness and propriety to carry on an occupation if, although 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].
- 60 Based on the evidence before the Commission, the Commission is of the view that, on balance of probabilities, Mr Luckman has fallen well short of the standards expected of a manager of licensed premises and is worthy of disciplinary sanction as sought by the complainant pursuant to section 96(1)(g) of the Act.

- 61 Accordingly;
1. Mr Luckman is disqualified for a period of three (3) years from the date of this determination from being:
 - a) the holder of a position of authority in a body corporate that holds a liquor licence;
 - b) interested in, or in the profits or proceeds of, a business carried on under a liquor licence whether as a natural person or as a partner in an unincorporated body or otherwise;
 - c) an approved manager in any licensed premises.
 2. Licence Number 60300026667 is suspended for a period of six (6) months from the date of this determination or until the licence is transferred or Mr Luckman removes himself as a director and shareholder of the licensee company, whichever is earlier.

Failure to do either of the above shall result in the cancellation of the licence.
 3. No monetary penalty is applied.
- 62 The Police sought permanent disqualification of the first respondent from being a holder of a position of authority in a body corporate that holds a liquor licence or otherwise being interested in, or the profits or proceeds of a business carried on under a licence and a monetary fine being imposed.
- 63 Additionally, the respondents submitted that a monetary penalty would carry out the required intention of the disciplinary proceedings under the Act.
- 64 The Commission must consider the public interest and the protection of the public in enforcing the Act and maintaining an acceptable standard of behaviour for licensees and other persons involved in the sale of liquor. It is of the view by disqualifying Mr Luckman for a period of three years, the required intention of the disciplinary proceeding has been achieved and no further monetary penalty is warranted.



EDDIE WATLING
PRESIDING MEMBER