

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Complainant:** Director of Liquor Licensing
(represented by Mr Edward Fearis of State Solicitor's Office)
- Respondent** Graham Gavin Kenworthy
(represented by Mr Dan Mossenson of Lavan)
- Commission:** Mr Eddie Watling (Deputy Chairperson)
Dr Eric Isaachsen (Member)
Ms Mara Barone (Member)
- Matter:** Complaint for disciplinary action pursuant to section 95 of the
Liquor Control Act, 1988
- Premises:** Australind Tavern, Old Coast Road, Australind
- Date of Hearing:** 21 August 2017
- Date of Determination:** 21 December 2017
- Determination:** The Commission finds that the complaint has been made out to a satisfactory standard such that proper cause for disciplinary action exists in the following terms:
- Pursuant to section 96(1)(g) of the *Liquor Control Act 1988*, Mr Graham Gavin Kenworthy is disqualified for a period of two (2) years from the date of this determination from being a holder of a position of authority in a body corporate that holds a licence, or from being interested in, or in the profits or proceeds of, a business carried on under a licence.

Authorities referred to in the determination

- *Australian Broadcasting Tribunal v Bond and others* (1990) 94 ALR 11 at 56
- *Briginshaw v Briginshaw* (1938) 60 CLR 336
- *Simonsen v Rossi, the Registrar, Real Estate and Business Agents Supervisory Board* [2005] (WADC 76)
- *Tavelli v Johnson, Unreported, WADC Library No 960693, 25 November 1996*
- *Hughes and Vale Pty Ltd v New South Wales [No 2] {1955} (HCA 28).*
- *Good v Medical Board of WA; unreported: SCt of WA; Library No 940678; 6 December 1994 at 31*
- *Kenworthy v The Queen [No2] {2016} WASCA 207 para 132*

Background

- 1 Graham Gavin Kenworthy (also known as Graham Gavin Coatz) (“the respondent”) was at all material times and remains the sole director and secretary, and the major shareholder, of Singold Pty Ltd (“Singold”).
- 2 Singold was at all material times and remains a major shareholder of the Bridge Bar Pty Ltd (“the Bridge”) which is the licensee of the Australind Tavern at Old Coast Road, Australind.
- 3 On 16 February 2017 the Director of Liquor Licensing (“the complainant”) lodged a complaint under section 95 of the Liquor Control Act, 1988 (“the Act”) alleging that there is proper cause for disciplinary action due to the respondent:
 - a. being a person holding a position of authority in a body corporate that holds a licence;
 - b. being a person interested in the business or the profits or proceeds of the business to which the licence relates; and
 - c. as a result of personal misconduct (specified in paragraph 9 below), becoming not a fit and proper person to hold that position or to be so interested, pursuant to section 95(4)(h) of the Act.
- 4 On 7 August 2017 the respondent lodged primary submissions together with a personal statement and three character references. On that same date, the complainant lodged an outline of submissions.
- 5 On 15 August 2017, the complainant lodged an outline of responsive submissions and the respondent lodged responsive submissions.
- 6 A hearing of the Commission was held on 21 August 2017.

Submissions on behalf of the Complainant

- 7 The complaint arises out of the 5 February 2016 conviction of the respondent in the District Court of Western Australia, of seven counts of using a carriage service to access or transmit child pornography, contrary to section 474.19 of the *Criminal Code* (Cth).
- 8 On 30 November 2016, the Court of Appeal dismissed an appeal by the respondent against his conviction, but upheld an appeal against his sentence. His total effective sentence of 3 years and 9 months was reduced to 2 years and 9 months, with release after serving 22 months on entering into a recognisance, in the sum of \$10,000, that he will be of good behaviour for 11 months

9 It was submitted that the following is relied upon as part of the complaint:

- a. the respondent engaged in email communication with persons holding themselves out as fathers of very young children who were willing to trade in child pornography by swapping images;
- b. the emails were sent and received using two accounts which the respondent registered under false names, designed to disguise his identity while actively seeking out child pornography material;
- c. the respondent was not motivated to offend by way of profit and the offending appeared to have been over an eight-week period;
- d. the offending behaviour involved some material with extremely young children who were little more than babies, and some material involved bondage;
- e. the trial judge agreed with the respondent's counsel that the material was "vile";
- f. Count 1 dealt with the respondent accessing an email from an account operated in the United States which attached 15 child pornography images;
- g. Count 2 dealt with the respondent sending an email to the United States account attaching two child pornography images;
- h. Count 3 dealt with the respondent sending an email to an undercover police operative in Queensland attaching two child pornography images;
- i. Count 4 dealt with the respondent sending an email to an undercover police operative in the United States, attaching one image of child pornography;
- j. Count 5 dealt with the respondent accessing an email from an account referred to by the Court of Appeal as "Account D", attaching six child pornography images. It appears the respondent was encouraging the operator of Account D to provide pornographic material of his daughter and niece;
- k. Count 6 dealt with the respondent sending an email to Account D attaching an unidentified number of child pornography images;
- l. Count 7 dealt with the respondent sorting child pornographic material he had already acquired into different locations by emails, rather than obtaining that material or providing it to a third party;
- m. the respondent's only prior convictions were for driving offences and resisting arrest in 1988 when he was 19 years of age; and
- n. the respondent was assessed as having a low to moderate level of risk for future sexual offending.

10 It was submitted that the purpose of the disciplinary action contemplated in section 95 of the Act is to protect the public by maintaining the standards of behaviour for licensees (or a

person who holds a position of authority in a body corporate that holds a licence, or who is interested in the business or profits or proceeds of the business of the licence).

- 11 The respondent is clearly a person who holds a position of authority in a body corporate that holds a licence and is also clearly interested in the business or the profits or proceeds of the business of The Bridge, licensee of the Australind Tavern.
- 12 The respondent was convicted of seven counts of using a carriage service to access or transmit child pornography and whilst it is acknowledged that this conduct was not linked to the business of The Bridge, nonetheless, the nature of the offending behaviour is such that it retains relevance to whether he is a fit and proper person to continue in such roles. This is because a person's personal 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 out that occupation, the conduct manifests the presence or absence of qualities which are incompatible with, or essential for, the carrying on of that occupation.
- 13 It was submitted that the safe and successful operation of the liquor industry requires that consumers and regulators can have some level of confidence in those persons that are entrusted with operation of licenses, or hold positions of authority in companies responsible for the operation of licenses. The offending behaviour demonstrated an abject lack of judgement and good character and is a serious departure from the standards of propriety expected in the community.
- 14 It was further submitted that there is no evidence of the respondent's genuine remorse and contrition, insight or understanding of his offending conduct; an observation also made by the Court of Appeal.
- 15 It is therefore considered that the respondent cannot be considered a fit and proper person for purposes of s 95(4)(h) of the Act and the complainant seeks his disqualification, for a minimum period of 10 years, from being a holder of a position of authority in a body corporate that holds a licence, or from being interested in, or in the profits or proceeds of, a business carried on under a licence.
- 16 In the circumstances of this case, a disqualification for a minimum of 10 years would ensure that appropriate protection of the public and the liquor industry through an order which will assure the public that appropriate standards are being maintained.

Submissions on behalf of the Respondent

- 17 The respondent has been employed in the hospitality industry since he was 14 years of age and his skills and expertise are almost entirely based in the liquor and hospitality industry. The respondent's sole source of income and livelihood are obtained from the industry.
- 18 It was submitted that if the respondent were to be deemed unfit to hold and be disqualified from holding a position within a licensed business, he would be deprived of his only source of income. Such a finding would have a severe impact on him personally, his ability to meet his financial obligations and his capacity to contribute meaningfully to the economy and society.

- 19 The offences have been adequately described by the complainant as constituting “personal misconduct”, not commercial, financial or public misconduct. This description is very relevant to the complaint because it highlights the fact that the offences had nothing whatsoever to do with the conduct of the business carried on under any licence.
- 20 It was submitted that it is also relevant that the Western Australian Supreme Court of Appeal upheld the respondent’s appeal against the length of his original sentence and concluded that the offences were “...*not in the most serious category*” and reduced the sentence.
- 21 It was submitted that the risk of re-offending is a relevant factor for the Commission to consider, with a psychological report completed as part of the sentencing process concluding that the respondent was considered to be in the low to moderate level of risk for future re-offending.
- 22 Whilst the phrase “fit and proper” is not defined in the Act, guidance can be taken from *Australian Broadcasting Tribunal v Bond and others (1990) 94 ALR 11 at 56* asserting that there needs to be a connection between an individual’s improper conduct and the activities that require them to be fit and proper.
- 23 It was submitted that the conduct of the respondent is entirely divorced from his role as a director of a licensee company and the conduct of the business carried on under the liquor licence. Therefore the Commission will need to determine whether the respondent’s conduct impacts upon his ability to operate and manage a licensed business and specifically his ability to do that particular role in a responsible and proper manner.
- 24 The respondent’s convictions relate to personal misconduct and do not impact upon his ability to responsibly and properly manage licensed premises. The respondent’s conduct of business under any licence has not been questioned in the complaint.
- 25 It was submitted that the respondent should not be punished in a professional capacity for offences that are of a personal nature and the following mitigating circumstances are very relevant:
 - a. the offences did not involve any tavern staff, patrons or other invitees to the licensed premises;
 - b. the offences had nothing to do with the operation and management of the licensed premises;
 - c. the offences had no connection with the selling and supplying of liquor at the licensed premises;
 - d. none of the provisions of the Act have been breached by the respondent;
 - e. all indications are that the respondent is most unlikely to offend again and he certainly presents no risk, based on the evidence, of breaching the Act or mismanaging licensed premises;

- f. the respondent's good reputation within the hospitality industry;
 - g. the respondent's previous positive contribution to the liquor industry and proven track record; and
 - h. the safety, health and welfare of the public patronising the Australind tavern is not at risk.
- 26 Although the matter is to be determined on the civil standard of proof, the fact that an adverse finding will seriously impact on the respondent means the respondent's fitness must be determined at the upper end of the civil standard according to *Briginshaw v Briginshaw (1938)* 60 CLR 336 where Dixon J stated that:
- "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a 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."*
- 27 It was submitted that the character references in support of the respondent establish that his professional conduct has at all times been maintained to a high standard and that this is a relevant consideration for the Commission when determining whether the respondent remains fit and proper to be involved in licensed premises.
- 28 With regard to the Complainant's submission that there is no evidence of the respondent's genuine remorse as to his offending conduct, it would have been incongruous to have displayed such sentiments in either of the Court proceedings where he was presenting his defence against the charges.
- 29 In conclusion, it was submitted that there is a clear line of authority to support personal misconduct being viewed in an entirely different manner than misconduct that occurs in the course of conducting business, when determining whether a person remains fit and proper to be involved in their particular field.
- 30 The Commission should readily find that:
- a. the respondent is fit and proper to continue to hold a position of authority in a body corporate that holds a licence;
 - b. the respondent is fit and proper to continue to be interested in the profits or proceeds of a business carried on under a licence;
 - c. the respondent should not be disqualified for any period pursuant to section 96 of the Act;
 - d. the complaint should be dismissed; and
 - e. no action should be taken against the respondent.

- 31 Alternatively, the Commission may find that proper cause for disciplinary action exists but take no further action in the matter on the basis the respondent's imprisonment has served as a sufficient deterrent and absence from the business equivalent to a disqualification.
- 32 Again, alternatively, if the Commission is of the view that proper cause for disciplinary action exists and disciplinary action should be taken, it is submitted that based on the comparable case law the Commission should:
- a. Issue the respondent with a reprimand; and
 - b. require the Respondent to enter into a bond or give security for future conduct;
- without any further action being taken.

Determination

- 33 The Commission may, where a complaint has been lodged under section 95 of the Act, take disciplinary action provided it is satisfied, on the balance of probabilities, that the ground(s) upon which the complaint is based has, or have, been made out.
- 34 The purpose of the disciplinary action contemplated in section 95 of the Act is to protect the public by maintaining the standards of behaviour for licensees, or a person holding a position of authority in a body corporate that holds a licence, or who is interested in the business or the profits or proceeds of the business. The object of disciplinary proceedings is not to punish those against whom a complaint has been made out.
- 35 The Commission is cognizant that it is a primary responsibility of the licensing authority to provide adequate controls over the persons directly and indirectly involved in the sale, disposal and consumption of liquor and that the professional standards of the industry and the creditworthiness of the persons in responsible positions must be maintained at the highest level.
- 36 Section 95(4) of the Act specifies that there shall be proper cause for disciplinary action if:
- a. *"the licensee has been convicted of an offence in any jurisdiction, that, in the opinion of the Director may imply that the person is unfit to be the holder of a licence"* (section 95(4)(f)(ii));
 - b. *"the licensee otherwise is, or becomes, an unsuitable person to hold a licence under the Act"* (section 95(4)(g));
 - c. *"a person holding a position of authority in a body corporate that holds a 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)).
- 37 Where there is a wide discretion as to the disciplinary sanction to be imposed, as specified in section 96(1) of the Act, the Commission is required to consider all of the circumstances

surrounding the conduct which is the subject of the complaint and to exercise its discretion accordingly.

- 38 The complaint arises out of the conviction of the respondent in the District Court of Western Australia, on 5 February 2016, of seven counts of using a carriage service to access or transmit child pornography, contrary to section 474.19 of the *Criminal Code* (Cth).
- 39 The Commission has considered all the facts and the central issue to be determined is whether the conviction of the respondent is such that he is not a “fit and proper” person in accordance with the Act.
- 40 Although section 33(6) of the Act sets out the matters for consideration when determining whether an applicant is a fit and proper person to hold a licence, it can also provide some guidance to a determination of a complaint under section 95:

“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 an approved unrestricted manager, an approved manager or a trustee:

- a) the creditworthiness of that person; and*
- aa) the character and reputation of that person; and*
- b) the number and nature of convictions of that person for offences in any jurisdiction; and*
- 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 intervention made, under section 69,*

are relevant and amongst the matters to which consideration may be given.”

- 41 Also, there are many authorities concerning the meaning of ‘fit and proper’ and when deciding whether a person is ‘fit and proper’ to hold a licence, many factors may be considered including character and reputation (*Australian Broadcasting Tribunal v Bond [supra]*, honesty *Simonsen v Rossi, the Registrar, Real Estate and Business Agents Supervisory Board [2005] (WADC 76)* and previous convictions (*Tavelli v Johnson, Unreported, WADC Library No 960693, 25 November 1996*). The purpose of the words ‘fit and proper’ is to give the decision maker the widest possible scope for judgement (*Hughes and Vale Pty Ltd v New South Wales [No 2] {1955} (HCA 28)*).
- 42 In *Tavelli and Johnson (supra)*, a case relating to an Inquiry Agent Licence under the *Agents Licensing Act 1954*, Wheeler J noted:

“...some factors relevant to prior convictions could be listed. ‘Convictions will, in my view, generally be regarded as more serious in the statutory context if:

- (1) they occur in the course of or relate to the carrying out of the occupation of inquiry agent;*
- (2) they are offences of dishonesty, broadly understood. This is so because, as I apprehend it, the Act is concerned with the integrity of the gathering and presenting*

- of material in Court and that material may be suspect, where the character of the agent suggests dishonesty;*
- (3) they occur whilst the person is the holder of a licence under the Act;*
- (4) they are otherwise so serious, either in themselves or as representing a course of disregard for the law, as to reflect particularly adversely on the character of the person committing them.”*

The Commission accepts that these factors are applicable under the *Liquor Control Act 1988*.

- 43 In relation to the respondent, the offences did not occur in the conduct of his business as a licensee. There was a degree of dishonesty in the attempts to disguise his actions, however, the offences are not of dishonesty as broadly understood and there is no evidence of dishonesty by the respondent in performing his duties as a licensee. He did hold the relevant licence as required under the Act.
- 44 The Commission does consider that the conviction reflects poorly on the character of the respondent, that the actions leading to the conviction represent a course of disregard for the law as evidenced by the measures taken to disguise his identity as observed by the trial Judge (*Kenworthy v The Queen [No2] {2016} WASCA 207 para 132*).
- 45 The offences under consideration occurred between September and October 2013 with a search of the respondent's residence, vehicle and office occurring in December 2013. No offending is known to have occurred since that time (which includes his incarceration since 3 February 2016). During the incarceration, he has undertaken several educational activities including those related to personal and social awareness, first aid and occupational health and safety legislation related to the liquor industry.
- 46 The trial judge in February 2016 found that the respondent appeared to show no repentance or remorse, and had attempted to minimise his involvement by seeking to pass the blame onto others. The trial judge also found that the respondent has a reasonable understanding of the impact of sexual abuse on children who are unable to make decisions regarding sexual activity. The activities referred to above (paragraph 45) indicate that further education and awareness has taken place since that time.
- 47 There is very little information on the respondent's personal circumstance at the time of the offences and no relevant current comparisons with respect to his living arrangements and support, given his detention since February 2016. Three character references attest to his professional attributes and reputation for maintaining consistently high standards as an operator of licensed premises.
- 48 In considering this application the Commission is presented with the following assertions:
- a. The complainant:
 - i. the nature of the offending behaviour is such that it retains relevance to whether the respondent is a fit and proper person to continue in the roles he has in the liquor industry. This is because a person's personal 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;

- ii. the safe and successful operation of the liquor industry requires that consumers and regulators can have some level of confidence in those persons that are entrusted with operation of licenses, or hold positions of authority in companies responsible for the operation of licenses;
- iii. the offending behaviour demonstrated an abject lack of judgement and good character and was a serious departure from the standards of propriety expected in the community;
- iv. the attempts to disguise his identity and avoid detection demonstrate that the respondent's behaviour was premeditated and calculated. His trustworthiness is correspondingly diminished;
- v. the offending conduct, resulting as it did in a term of imprisonment, is serious both of itself and as representing a course of disregard of 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; and
- vi. there is no evidence of remorse and contrition, insight or understanding of his offending conduct.

b. The respondent:

- i. the complainant has acknowledged that the respondent's conduct was not linked to the business of The Bridge, or his role as Director of The Bridge;
- ii. it is not the Commission's role to punish the respondent for being convicted of accessing material described as "vile" and nor should the Commission have regard to extrinsic factors not "set out in and contemplated by the Act";
- iii. the respondent's behaviour did not:
 - adversely affect the proper regulation of the sale, supply or consumption of liquor;
 - cause any harm or ill-health to any person, or group of people, due to the use of liquor; or
 - negatively impact upon the ability of the licensed premises under his control to cater to the requirements for consumers of liquor and related services.
- iv. there is no suggestion that any member of the public that attended the licensed premises was in any way affected by the behaviours for which the respondent was convicted;

- v. the sale, supply or consumption of liquor is not linked in any way to the respondent's conduct; and
- vi. the respondent's statement demonstrates that he:
 - accepts that he has been found guilty of the offences;
 - has gained a real understanding and genuine insight into the social problems that liquor can create; and
 - has attempted to use his time in prison to better himself as a person and as an operator of licensed premises.

49 In weighing and balancing the positions presented in paragraph 48 above the Commission's primary consideration is directed to the relationship of the respondent's criminal convictions to his roles and responsibilities under the *Liquor Control Act 1988*.

50 The Commission acknowledges the complainant's position that the very nature of the offences are such that they retain relevance as to whether he is a fit and proper person under the Act, albeit that the respondent submits that they were committed as personal misconduct and not linked to the business conducted under the licence.

51 The Commission has considered the authorities referred to by the complainant, however, these are of little assistance as there is no direct comparison from which a precedent can be drawn. The circumstances of each case require individual assessment.

52 The Commission also takes note of the reference to fit and proper person in *Australian Broadcasting Tribunal v Bond (supra)* where Toohey and Gaudron JJ held that:

"The expression 'fit and proper', standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of 'fit and proper' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct or reputation (because it provides indication of likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question."

53 In this instance the Commission considers the following factors, particularly in relation to the preceding paragraph, to have a bearing on the determination:

- a. disciplinary action under the Act is to provide protection to the public, not to impose punishment;
- b. the Court of Appeal concluded that the offences were not in the most serious category;

- c. a psychological report completed as part of the sentencing process concluded that the respondent was considered to be in the low to moderate level of risk for future re-offending; and
 - d. the Court of Appeal Order reducing the sentence to enable the respondent to be released after serving 22 months on entering into a recognizance, in the sum of \$10,000, that he will be of good behaviour for 11 months.
- 54 Whilst the Commission acknowledges that the offences committed by the respondent to be most serious in nature, he has been punished through imprisonment and has been deemed to be in the low to moderate level of risk for future re-offending. His offences are not related to his responsibilities in the liquor industry where, on the balance of probabilities, he could not be considered to present a risk to the public.
- 55 However, the fact remains that the respondent has been convicted of serious offences that bring into question his character and reputation, regardless of whether those offences might be categorised as being personal misconduct and not commercial, financial or public misconduct.
- 56 In fact, the Commission has observed that despite the fact that the complainant and the respondent have taken the position that the offences committed were not linked to the business of The Bridge, they did in fact have an association with the Hungry Hollow Tavern which was owned and operated by the respondent at the time.
- 57 In *Kenworthy v The Queen (supra)* it was reported at paragraph 72 that in a search under warrant of the Hungry Hollow Tavern the police located:
- a. two Dodo broadband modems;
 - b. a 2007 diary;
 - c. a blue 2010 Collins diary;
 - d. a handwritten note on a loose page of paper found inside the 2010 diary, between the paged for the week beginning 4 October 2010 and ending on 10 October 2010, and
 - e. an Acer Aspire 4752 laptop computer and an Acer Aspire 5920 laptop computer, both located in the office of the tavern.
- 58 These materials, found on licensed premises owned and operated by the respondent, were significant factors in his conviction. In particular it was considered relevant that the Acer Aspire 5920 laptop computer had been found to have been used to store child pornography and had made a Google search and had other features suggestive of child pornography.
- 59 Whilst not directly linked to business responsibilities and operations, nor the public that attended those licensed premises, this material was nonetheless on licensed premises under the control of the respondent.

60 In considering all of the evidence before it, the Commission finds that the complaint has been made out to a satisfactory standard such that proper cause for disciplinary action exists in the following terms:

- Pursuant to section 96(1)(g) of the *Liquor Control Act 1988*, Mr Graham Gavin Kenworthy is disqualified for a period of two (2) years from the date of this determination from being a holder of a position of authority in a body corporate that holds a licence, or from being interested in, or in the profits or proceeds of, a business carried on under a licence.

61 This disciplinary action has taken into account the fact that the respondent has been punished by law and is scheduled to be released from prison after serving 22 months on entering into a recognizance, in the sum of \$10,000, that he will be of good behaviour for 11 months. The disciplinary action also takes into consideration the fact that insufficient time has elapsed to enable the respondent to demonstrate that he is able to undertake roles and responsibilities in the liquor industry in a responsible manner.



EDDIE WATLING
DEPUTY CHAIRPERSON