

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Complainant: Commissioner of Police
(represented by Mr Jesse Winton of State Solicitor's Office)

Respondents: Peter Craig Kennedy and Julie Elaine Kennedy
(represented by Mr Jarrod Ryan of Murfett Legal)

Commission: Mr Jim Freemantle (Chairman)
Mr Evan Shackleton
Dr Eric Isaachsen

Matters:

1. Complaint for disciplinary action pursuant to section 95 of the *Liquor Control Act 1988*.
2. Application pursuant to section 25 of the *Liquor Control Act 1988* for a review of the decision of the Director of Liquor Licensing to impose conditions on the licence.

Date of Hearing: 27 November 2013

Date of Determination: 28 January 2014

Premises: Narembeen Hotel

Determination:

- (1) Pursuant to section 96(1)(m) of the Act, the respondent is to pay a monetary penalty of \$2,000 within 30 days of the date of this determination.
- (2) The entertainment condition on the licence is confirmed as follows:
 - (i) A person resorting to, or on the premises, including the licensee or manager, or an employee or agent of the licensee or manager, shall not-
 - a) be immodestly or indecently dressed on the licensed premises; and/or
 - b) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
 - ii) Except for music provided by the particular specified jukebox provider, the licensee or manager, or an employee or agent of the licensee or manager, is prohibited from:

- (a) playing or exhibiting or showing, or causing, suffering or permitting to be played or exhibited or shown on the licensed premises, any classified “R18+”, “X18+” or “RC” publication, or any music or any film or computer game or extract there from;
- (b) causing, suffering or permitting any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises, or
- (c) causing, suffering or permitting any person to take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.

(3) In this condition:

“**licensed premises**” includes any premises, place or area which is appurtenant to the licensed premises but does not include any part of the premises which is reserved for the private use of the licensee, manager or employees of the licensee and to which the public does not have access;

“**particular specified jukebox provider**” is Peter Proposch Electronics (ABN 48 497 327 248).

Background

1. On 2 April 2013, the authorised delegate of the Commissioner of Police made a complaint pursuant to section 95 of the Liquor Control Act 1988 (“the Act”) against Peter Craig Kennedy and Julie Elaine Kennedy, the licensees of the Narembeen Hotel, Narembeen.
2. The Director of Liquor Licensing (“the Director”) notified the licensee on 11 April 2013 that amended entertainment condition (comprising A1-A3, and B) was to be imposed on the licence pending the determination of the section 95 complaint, with the licensee being afforded until close of business on 29 April 2013 to show cause why the proposed conditions should not be imposed.
3. Correspondence was received from the licensee on 29 April 2013 agreeing to the temporary imposition of the proposed conditions relating to dress, the definition of ‘licensed premises’ and the maximum number of persons permitted in the area of premises to which the entertainment condition was applicable. Submissions were made by the licensee to the Director on the possible misinterpretation of the drafted condition which related to the playing of any music or providing any style of entertainment. The Director amended the relevant condition to permit music to be played by way of a specified digital jukebox provided by a specified supplier. By letter dated 6 May 2013, the Director confirmed that all the proposed conditions would apply on and from Monday 13 May 2013 pending determination of the section 95 complaint.
4. On 15 May 2013, the licensee lodged an application pursuant to section 25 of the Act seeking review of the decision of the Director made on 6 May 2013 to impose conditions on the licence. It was submitted that the Director had pre-empted the decision of the Commission in the section 95 hearing, and that there is no evidence to support the decision to impose the conditions sought, or any evidence that imposing the conditions will have any impact on patron behaviour.
5. The complainant’s outline of submissions in relation to the section 95 complaint were received on 13 November 2013. Submissions on behalf of the licensee were received on 13 November 2013 in relation to both the section 25 review application and the section 95 complaint.
6. Responsive submissions in relation to the section 95 complaint were received from each party on 20 November 2013.
7. A hearing was held on 27 November 2013 before the Liquor Commission as constituted in accordance with both section 25 (2)(b) and section 95 (7a) of the Act .
8. It was agreed that the section 25 and section 95 matters would both be considered at this hearing. The section 25 review solely involved counsel for the respondent whilst the section 95 complaint involved counsel for both the complainant and the respondent.

Submissions by the Commissioner of Police

9. It is alleged pursuant to section 95(4) of the Act that there is proper cause for for disciplinary action against the licensee on the following grounds:
 - i) the business is not properly conducted in accordance with the licence (section 95 (4)(a)) (*Ground 1*);
 - ii) the licensed premises are not properly managed in accordance with the Act (section 95 (4)(b)) (*Ground 2*);
 - iii) the licensee has contravened a requirement of the Act or a term or condition of the licence (section 95 (4)(e)(i)) (*Ground 3*).
10. The complaint is supported by documents which outline that a large number of incidents involving alleged indecent behaviour were observed on 10 September 2013 (“indecent behaviour”).
11. In respect of Ground 1, the statements of Messers David Taylor and Wayne Muller establish that the respondents suffered or permitted three males to engage in activities in a lewd and indecent manner. The CCTV footage further supports the conclusion that the respondents suffered or permitted three males to engage in activities in a lewd and indecent manner.
12. In addition, the statements and CCTV footage displaying the indecent behaviour also show that Peter Craig Kennedy encouraged and participated in the indecent behaviour.
13. In respect of Ground 2, it is alleged that the respondents have committed three kinds of breaches of the Act. These are: permitting indecent behaviour on the premises; failing to keep, and produce on demand, a copy of the plans of the premises; and failing to keep a register of prescribed incidents.
14. Statements by police officers, CCTV footage, and interview statements were provided in support of these three breaches. The complainant submits that the evidence is more than adequate to establish, on the balance of probabilities, that the premises are not being managed in accordance with the Act.
15. In respect of Ground 3, the complainant refers to the evidence adduced in relation to Ground 1 and Ground 2 and submits this evidence is more than adequate to establish, on the balance of probabilities, that the respondent has breached both the provisions of the Act and the terms and conditions of the licence.
16. The complainant notes that during the course of an investigation on the premises, police officers were offered the opportunity to attend a ‘fruit and veg’ show that was to be held on the premises. It is understood that a ‘fruit and veg’ show is a colloquial term describing a lewd and/or indecent adult performance involving the use of fruits and vegetables.

17. Statements by three police officers establish that the respondents were organising a 'fruit and veg' show, that the respondents permitted the purchase of tickets to the show and that the officers were issued with wristbands by one of the respondents. Although there is no evidence that the unlawful entertainment occurred on the premises, it is submitted that the respondents' intention to organise such entertainment is clearly established. The complainant submits that the Commission should have regard to these circumstances in considering the appropriate orders to be made.
18. The Orders sought by the complainant included an imposition, in addition to any existing conditions, to prohibit the sale, or supply for consumption on the premises, of liquor - in vessels beyond a prescribed size relative to the beverage ; in non-standard measures ; through presentation in a way that would encourage rapid consumption of liquor ; mixed with any 'energy drink' , and the licensee not to engage in promotion of cheap or discounted liquor.
19. It was submitted that these conditions may assist management of the premises by prevention/reduction of the likelihood of excess alcohol consumption where such consumption may in turn lead to indecent behaviour.

Submissions by the Respondent

20. The respondent submitted that Narembeen is an isolated small town of approximately 460 people, where the customers are personally known, and Mrs Kennedy shoulders the main responsibility for managing the premises as Mr Kennedy has other enterprises including a farm and a construction business. Mrs Kennedy has a reputation in the town of not tolerating rowdy or untoward behaviour by the patrons.
21. The incident on 10 September 2012 was consequent to the successful grand final performance of the Narembeen Football Club the previous day and ought to be considered as a one off event, and that some of the behaviour on the day could be viewed as being intentionally concealed from the respondents. It is submitted that as Mr Kennedy was also a member of the football team this added to the complexities of managing the premises on the day.
20. It was noted that the complainant agreed that there was no evidence that a 'fruit and veg' show was held on the premises and the respondents submitted that they could not be held accountable for the actions of others in this regard.
21. It was reiterated that the indecent behaviour occurred over a relatively confined period on a single trading day and was not indicative of a permissive attitude in general, nor reflective of the degree to which the licensee, and its employees, made endeavours to curtail or prevent inappropriate behaviour on that day.
22. The respondents were compliant with the police during the investigations including handing over the CCTV footage, whilst noting that the CCTV was installed at their own instigation and was not a condition on the licence.
23. The respondents acknowledge that they should have done more, however in general they consider themselves to be caring and conscious of their patrons' welfare detailing

several instances of precautionary interventions. They submit that the premises are not a problem venue as evidenced by examination of the Police Incident Management System over the prior twelve months.

24. In respect of Ground 2, the respondent disputes that the current plans were not available on the premises and submits that a copy was provided to the Police on the morning of the inspection.
25. Further in respect of Ground 2, it is recorded that the indecent behaviour took place at 2130 hours on 10 September 2012 and that the audit of the incident register took place at 1030 hours on 11 September 2012. It is submitted that during the time interval between the incident and the inspection it was not practicable to complete the incident report. The report was in fact completed soon after the 1030 opening on 11 September 2012 which is well within the reasonableness of completion on the next working day (as per the Director's Policy – Incident Register at Licensed Premises).
26. In respect of the remedies sought, it is submitted that the licensee has already spent a considerable amount of money on legal fees, made very little on the event, and is representative of small country hotels struggling to be financially viable. Further, it is suggested that if the Commission decided that a monetary penalty was warranted, then perhaps it could be suspended.
27. Mr and Mrs Kennedy each completed the Management of Licensed Premises course on 15 October 2013 and supplied copies of the certificates.
28. It is submitted that conditions on the type or volume of liquor are usually imposed in section 95 complaints where it is alleged that patrons were intoxicated on licensed premises and the licensee or staff continued to serve them alcohol. This is not alleged in this complaint and therefore there is no justification for imposing the conditions proposed.
29. It is noted that the premises has four CCTV cameras installed and that these already comply with the Director's CCTV policy.
30. In respect of the section 25 review against the decision of the Director to impose amendments to the Entertainment Condition as from 13 May 2013, it is submitted that these conditions are not sought by the Commissioner of Police as part of the section 95 complaint. The licensee has a concern that the current wording of the condition effectively prohibits any form of entertainment on the premises and that the scope of the condition imposed by the Director would impact on what staff could do in their private accommodation rooms. This is considered to be unnecessarily restrictive. The licensee proposed amendments to the existing entertainment condition that would (a) permit music to be only provided by a specified jukebox provider whose content, both audio and visual, is not rated any higher in restriction than 'PG', and (b) clarify the distinction between the licensed and private areas of the Premises.

Determination

31. The Commission may, on a complaint lodged under section 95 of the Act, take disciplinary action.

32. Pursuant to section 96 of the Act, if the Commission is satisfied, on the balance of probabilities, that the grounds upon which the complaint was, or the complaints were, made has been made out so that a proper cause for disciplinary action exists, the Commission may take action.
33. The Commission has examined the evidence and considered the submissions which relate to the events, and circumstances of the events, which occurred on 10 September 2012. It notes that this was a celebration of the grand final win by the Narembeen Football team on the prior day.
34. Ground 1 of the complaint is found to have been made out, on the balance of probabilities, and rejects the respondent's submission that the wording was intended to only apply to the nature of paid entertainment and thus is a technical breach only.
35. Ground 2 of the Complaint is found to have been made out, on the balance of probabilities, and the Commission considers that permitting indecent behaviour is not consistent with proper management of the licensed premises under the Act.
36. The allegation of failing to keep a register of prescribed incidents under Ground 2 is not accepted by the Commission. The production, or otherwise, of the plans was equally put by both parties. The failure to have recorded the incidents of the prior evening by 1030 the following day was not viewed as unreasonable in the timeline and in the face of the investigations taking place.
37. Ground 3 is found to have been made out, on the balance of probabilities, in that the respondent has breached both the provisions of the Act and the terms and conditions of the licence.
38. Submissions were made by the complainant and the respondent as to the appropriate penalty, under section 96(1) of the Act, in the event that the grounds of complaint were made out. These covered monetary penalty, imposition of conditions relating to the supply of liquor; the imposition of conditions requiring compliance with the Director's policies on CCTV and security and amendments to the entertainment condition. The Commission has directed its attention to the central elements of this event in terms of the management of the premises and clarification of the entertainment condition.
39. The section 25 review was heard in conjunction with the section 95 complaint. The Commission notes that the entertainment condition proposed by the Director under section 25, was amended after submissions were lodged by the licensee, and the amended condition took effect on and from Monday 13 May 2013. Submissions were made by the licensee in the review proceedings that the entertainment condition ought to be clarified as to the type of entertainment that was permitted and the areas of the premises to which it applied. The Commission accepts the submissions and has drafted the entertainment condition in accord with them.
40. The Commission is of the opinion that the nature of the breaches will be adequately reflected in the penalty imposed in the following orders pursuant to section 96(1) of the Act:

- (1) that the licensee pays a monetary penalty of \$2,000 within 30 days of the date of this determination.
- (2) The entertainment condition on the licence is confirmed as follows:
 - (i) A person resorting to, or on the premises, including the licensee or manager, or an employee or agent of the licensee or manager, shall not-
 - (a) be immodestly or indecently dressed on the licensed premises; and/or
 - (b) take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.
 - (ii) Except for music provided by the particular specified jukebox provider, the licensee or manager, or an employee or agent of the licensee or manager, is prohibited from:
 - (a) playing or exhibiting or showing, or causing, suffering or permitting to be played or exhibited or shown on the licensed premises, any classified "R18+", "X18+" or "RC" publication, or any music or any film or computer game or extract there from;
 - (b) causing, suffering or permitting any person employed, engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be immodestly or indecently dressed on the licensed premises, or
 - (c) causing, suffering or permitting any person to take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner.

(3) In this condition:

"licensed premises" includes any premises, place or area which is appurtenant to the licensed premises but does not include any part of the premises which is reserved for the private use of the licensee, manager or employees of the licensee and to which the public does not have access;

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**MR JIM FREEMANTLE
CHAIRPERSON**