

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

- Appellant:** Tocoan Pty Ltd trading as Zelda's Nightclub
(represented by Mr Ashley Wilson of Frichot & Frichot)
- First Respondent:** Commissioner of Police
(represented by Ms Leanne Atkins of WA Police)
- Second Respondent:** City of Rockingham
(represented by Mr Gavin Crocket of G D Crocket & Co)
- Commission:** Mr Jim Freemantle (Chairperson)
Ms Helen Cogan
Mr Greg Joyce
- Matter:** Appeal against following orders numbered 3 and 4
respectively made on 26 October 2010 by Commissioner
Mr Eddie Watling:
3. No witnesses will be required to attend the hearing for the purposes of providing oral evidence or be subject to cross examination; and
 4. Mr Gavin Crocket representing the City of Rockingham shall provide to the Liquor Commission and Mr Ashley Wilson, solicitor representing the licensee, Zelda's Nightclub details of the survey respondents by close of business Friday, 5 November 2010. Mr Wilson is prohibited from disclosing this material to any third party including his client or any person associated with his client. Prior approval of the Liquor Commission is required for any disclosure of this information.
- Date of Hearing:** 18 February 2011

Date of Determination: 8 April 2011

Determination: In relation to order 3 of Commissioner Watling's orders the Appeal is allowed in part to the extent as appears in the following orders now made by the Commission:

1. Limited examination and cross-examination of witnesses will be allowed subject to the following:
 - 1.1 Persons other than the Commission will not be permitted to cross-examine any witness unless and until they have provided the Commission with a signed statement of evidence advancing material contrary to the evidence of that witness.
 - 1.2 The witness will be called by the Commission and asked to adopt the witnesses signed statement and may be subject to examination by the Commission in the first instance.
 - 1.3 Cross examination by other parties may then take place but is limited to the matters in dispute and may otherwise be restricted by the Commission.
2. The parties are to advise the Commission which witnesses they wish to cross-examine and comply with 1.1 above within 21 days of this order.
3. In relation to order 4 of Commissioner Watlings orders the appeal is dismissed.

Authorities referred to in Determination:

Re Black Betty's Nightclub; Director of Liquor Licensing 2007 LLC 2

Cooper v Director of Liquor Licensing (unreported) WASC; Lib No 990109C 1999

National Companies and Securities Commission v News Corporation (1984) 156 CLR 296

Kingham v Cole [2002] FCA 45

Wakim v Mathiew Pty Ltd t/as Dove Migration Services [2002] NSWSC 405

Ex Parte Steven Burns t/as Burns Corporation unreported, SCWA; Lib No 980154A; 6 April 1998

Lonergan Pty Ltd v The Commissioner of Police of the State of Western Australia SCWA; Lib No 960390B; 12 June 1996

Kioa v West (1985) 159 CLR 550

Hancock v Executive Director Public Health [2008] WASC 224

Veal v Minister for Immigration and Multicultural and Indigenous Affairs [2005] 225 CLR 88

Ex Parte Ratu [1977] HCA 35

Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation [1963] HCA 4

Australian Postal Commission v Hayes [1989] FCA 176; (1989) 87 ALR 283

Introduction

- 1 Two individual complaints pursuant to section 95 of the *Liquor Control Act 1988* (“the Act”) were lodged by the Commissioner of Police and the City of Rockingham respectively against Tocoan Pty Ltd, the licensee of Zelda’s Nightclub.
- 2 On 26 October 2010 a Directions Hearing in respect of the complaints was conducted by Commissioner Watling who subsequently issued the following orders:
 1. The individual section 95 complaints from the Commissioner of Police and the City of Rockingham in respect of the licensee of Zelda’s Nightclub will be heard consecutively in the following order:
 - a. Commissioner of Police
 - b. Respondent
 - c. City of Rockingham
 - d. Respondent
 2. Only those parties directly involved in the particular segment of each hearing will be eligible to attend that hearing i.e. the City of Rockingham and appointed officers will not attend the Commissioner of Police complaint hearing and vice versa.
 3. No witnesses will be required to attend the hearing for the purpose of providing oral evidence or be subject to cross examination.
 4. Mr Gavin Crocket representing the City of Rockingham shall provide to the Liquor Commission and Mr Ashley Wilson, solicitor representing the licensee, Zelda’s Nightclub details of the survey respondents by close of business Friday, 5 November 2010. Mr Wilson is prohibited from disclosing this material to any third party including his client or any person associated with his client. Prior approval of the Liquor Commission is required for any disclosure of this information.
 5. Each party will file and serve all evidence, including witness statements, that it intends to rely upon in response to the complaints by no later than Friday, 12 November 2010.
 6. Each party will file and serve responsive evidence and further submissions by no later than Friday 26 November 2010.
 7. Each party will file and serve responsive submissions no later than Tuesday, 30 November 2010.
 8. Each party is required to provide their available dates for December 2010 and January 2011 to the Liquor Commission by close of business Wednesday, 27 October 2010.

- 3 Pursuant to section 28(1) of the *Liquor Control Act 1988* (“the Act”) Tocoan Pty Ltd has appealed against orders 3 and 4 above.
- 4 An appeal against a decision of one member of the Commission, is, pursuant to section 28(4a) of the Act, required to be heard and determined by the Commission constituted by 3 members, including a member who is a legal practitioner.
- 5 A hearing before the Commission in respect of the appeal was held on 18 February 2011.

Submissions on behalf of Tocoan Pty Ltd

- 6 It was submitted that if the grounds of a complaint under section 95 of the Act are made out so that proper cause for disciplinary action exists, the Commission may exercise the disciplinary powers provided in section 96 for the Act, which are extensive and include taking no action at all; imposing a monetary penalty up to \$30,000; finding a person not fit and proper; or suspending or cancelling the operation of a licence.
- 7 In this case, the grounds of the complaints include assertions that the respondent has committed an offence against the provisions of the Act, which the respondent denies. A complainant must satisfy the Commission, on the balance of probabilities, that the ground or grounds of the complaint have been made out. The process under section 95 of the Act was described by Greaves J of the Liquor Licensing Court as “proceedings of a quasi criminal nature” (refer *Re Black Betty’s Nightclub; Director of Liquor Licensing 2007 LLC 2*). Similarly, Murray J in *Cooper v Director of Liquor Licensing (unreported) WASC; Lib No 990109C 1999* said in relation to section 95 that:
- “.....the disciplinary action which the court may take upon being satisfied that the complaint has been made out and that there has been a contravention of a condition of the licence includes powers of a punitive character. The power is akin to the imposition of a fine and proceedings have at least the flavour of quasi criminal proceedings, although it is accepted that to establish a contravention of the licence requires only proof on the balance of probabilities.”*
- 8 Both complainants (the Commissioner of Police and the City of Rockingham) rely upon evidence which alleges illegal and unlawful conduct by the licensee or the licensee’s director. The licensee contends that some of the allegations are both inaccurate and untruthful. Therefore, it is contended that where issues of credibility and conflict of evidence arise procedural fairness requires the Commission to permit the licensee to test the evidence of the complainant’s witnesses by cross-examination.
- 9 The licensee submits that the doctrine of natural justice and the duty to act fairly and extend procedural fairness dictates that the licensee’s interest should not be adversely

affected unless the licensee has had the opportunity to challenge and test the evidence upon which the complaints are made.

- 10 In respect of the disclosure direction (order 4 of Commissioner Watling's orders), it was asserted that the effect of this order deprives the licensee of a reasonable opportunity to present its case, and in particular, to inspect any document to which the licensing authority proposes to have regard in making a determination, as required under section 16(11) of the Act.
- 11 Although section 16(10) of the Act allows the Commission to restrict publication or disclosure of evidence, the starting point of that sub-section is that it is desirable that evidence before the Commission and the contents of documents should be made available to the parties. In deciding to restrict the disclosure of material, the Commission shall have regard to any reasons given to the licensing authority why the publication or disclosure of evidence should be restricted, however in this case, no basis was established for this direction except for the unsubstantiated allegations that disclosing the details of the survey respondents could result in an inappropriate interference with those persons by an officer of the licensee and an undertaking given to the respondents to the survey that they would remain anonymous. Such an undertaking by the complainant (City of Rockingham) should not deprive the licensee of its statutory right under section 16(11) of the Act.
- 12 Simply disclosing details of the survey respondents to the solicitor for the licensee is not justified by the public interest in this case and is not a substitute for the licensee knowing the evidence it has to meet. The licensee cannot properly check the veracity of the survey and would incur additional costs if the licensee's legal representative has to undertake this work rather than the licensee or its officer.

Submissions on behalf of the Commissioner of Police

- 13 Pursuant to section 16 of the Act, the Commission is empowered to proceed as it sees fit provided it does so according to equity, good conscience and the substantial merits of the case. Whilst section 16(11) requires the Commission to ensure that parties have a reasonable opportunity to present its case and section 18 permits the summoning of witnesses, the Commission is not required by the Act to permit any party to cross examine a witness to the proceedings.
- 14 It was submitted that the appeal appears to be predicated on the notion that the right to cross-examine a witness is required to ensure procedural fairness in the determination of the complaint. In the case of ***National Companies & Security Commission v News Corporation Ltd (1984) 156 CLR 295***, Gibbs CJ said:

"...I find it quite impossible to say that the rules of natural justice require the Commission to proceed as though it were conducting a trial. It seems to me in no way unfair that, at a hearing of the kind of which I have described, the

respondents should not be entitled to cross examine such witnesses as the Commission may call or to call evidence of their own. If proceedings are subsequently brought in the Supreme Court against the respondents, they will of course be able to test by cross examination the evidence adduced, and to call evidence themselves.”

15 Heerey J in **Kingham v Cole** [2002] FCA 45 found at paragraph 21 that the **National Companies & Securities Commission** (*supra*) case provided “no positive support for cross-examination being an inevitable concomitant of natural justice.”

16 Further, in **Wakim v Mathiew Pty Ltd t/as Dove Migration Services** [2002] NSWSC 405 O’keefe J said:

“There may, however, be cases in which the denial of an oral hearing or the right to cross-examine may constitute a denial of natural justice. In determining whether or not that is so in a given case, it is necessary to consider the whole circumstances including the legislation, the general practice as understood by the parties and any acceptance by them as to the way in which the proceedings are to be conducted.”

17 Also, Malcolm CJ discussed questions of oral evidence and cross-examination as they related to proceedings in the Small Claims Tribunal and the rules of natural justice (**Ex Parte Steven Burns t/as Burns Corporation** unreported, S Ct of WA; Lib No 980154A; 6 April 1998) and said:

“While the rules of natural justice do not generally require an oral hearing, in particular cases an oral hearing may be required where, for example, there is a real issue of credibility or a significant conflict of evidence...There is no general rule that natural justice requires a right to cross examine in all casesHowever, in proceedings which are adversarial in nature, the particular circumstances of the case may require the tribunal to permit a party to test the evidence of another party by cross examination ...the doctrine of natural justice was equated with a duty to act fairly or extend procedural fairness.”

18 The general practice of the Commission is to receive written submissions followed by oral submissions from the respective parties at a hearing without the calling of witnesses to give evidence in person. Because the appellant has not identified issues of credibility or a significant conflict of evidence, the Commission need not depart from its general practice regarding the determination of complaints under section 95 of the Act as understood by the parties.

Submissions on behalf of the City of Rockingham

19 The main focus of the submissions from the City of Rockingham relates to order 4 of Commissioner Watling’s orders (access to details of the survey respondents). It was submitted that proceedings under section 95 of the Act are not quasi criminal, but

disciplinary proceedings in which the Commission has broad powers to determine the procedure and manner in which it conducts those matters. By virtue of the orders issued by Commissioner Watling, the licensee has not been denied procedural fairness because all the information pertaining to the survey is within the possession of the licensee, through its solicitors, and the licensee is well able to give ample instructions.

- 20 It is standard practice and protocol throughout Australia that the names, addresses and personal information about participants in a survey are not disclosed to third parties. The survey evidence material is just one component of the section 95 complaint, with the City of Rockingham providing a range of evidence to support its case.
- 21 Pursuant to section 16(7) of the Act, the Commission is not bound by the rules of evidence or any practices or procedures applicable to courts of record, therefore the disclosure of the survey witnesses' personal details is not required. Furthermore, section 16(9) of the Act empowers the Commission to restrict the publication of any material.
- 22 There is evidence before the Commission that respondents to the survey may be subject to intimidation if their personal details are exposed.
- 23 In respect of the matter of the cross examination of witnesses, the City of Rockingham adopts the submissions of the Commissioner of Police on the following grounds:
- The proceedings before the Commission are not quasi criminal (refer ***Lonergan Pty Ltd v the Commissioner for Police of the State of Western Australia Sct WA Supreme Court Lib No 960390B: 12 June 1996***);
 - No issues of conflict of evidence and credibility aspects are identified by the licensee. The question therefore arises, from where does the alleged procedural unfairness arise; and
 - The licensee in disciplinary proceedings is required to respond to the complaint allegations. The "holding of its powder dry" is not an available remedy open to the licensee (namely the right to silence, is not appropriate when the City Complaint gives rise to a "show cause" procedure which demands a response)

Determination

- 24 Although the Commission is not bound by the rules of evidence and may determine its own processes and procedures (refer section 16 of the Act) it is nonetheless obliged to ensure that each party is given a reasonable opportunity to presents its case (section 16(11)) and must comply with the rules of procedural fairness (refer *Kioa v West* (1985) 159 CLR 550 per Mason J and *Hancock v Executive Director of Public Health* [2008] WASC 224). Procedural fairness is directed to giving a party a fair hearing.
- 25 The principles of natural justice focus on procedures rather than outcomes (refer *Veal v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] 225 CLR 88). There is no fixed or determinative rule of what processes must be adopted to ensure procedural fairness is met in each case. As stated by Brennan J in *Kioa v West* “It is not possible precisely and exhaustively to state what the repository of a statutory power must always do to satisfy a condition that the principles of natural justice be observed.” Also Barwick CJ in *Ex Parte Ratu* [1977] HCA 35 said, when discussing procedural fairness, “What would need to be done to satisfy that requirement may vary according to the circumstances, but the qualification will be universal.”
- 26 Mason J when considering the doctrine of natural justice said in *Kioa v West*:
- “In Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 4, Kitto J pointed out that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on ‘the particular statutory framework’. What is appropriate in terms of natural justice depends on the particular circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision maker is acting.
- In this respect the expression ‘procedural fairness’ more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.”*
- 27 In its submissions, the licensee contends that some of the allegations contained in the complaints under section 95 are both inaccurate and untruthful. In this context, in *Kioa v West* Gibbs CJ said:
- “If the rules of natural justice were applicable, the appellants were entitled to a fair opportunity to correct or contradict any relevant material prejudicial to them.”*
- 28 In *Australian Postal Commission v Hayes* [1989] FCA 176; (1989) 87 ALR 283, Wilcox J having referred to the above passage from Gibbs CJ said that the opportunity to cross-examine was important where there was a significant issue of credit in which acceptance of the evidence of an applicant was crucial.

- 29 With respect, the Commission is of the view that the case law references from the Commissioner of Police are generally narrow in their contextual flavour, particularly when each reference is considered in the totality of the individual decision. For example, ***National Companies & Security Commission v News Corporation Ltd (1984)*** was concerned with the processes adopted by the National Companies & Securities Commission (NCSC) when conducting an enquiry (also referred to as a hearing) for possible breaches of the Companies Code, which may result in an application to the Supreme Court for orders. In any subsequent hearing before the Supreme Court, the validity of any evidence presented by the NCSC could be tested by the calling and cross-examination of witnesses.
- 30 The Commission accepts the licensee's submission that there may be some dispute in the evidence relating to the complaints that have been lodged which seek the taking of disciplinary action against the licensee. The Commission is also cognisant of the fact that the applicants in the complaints under section 95 of the Act are seeking significant penalties to be imposed on the licensee and/or its officers and therefore potentially the outcome of the complaints may seriously impact on the interests of the licensee.
- 31 In considering this appeal, the Commission is also very much guided by the observations of Malcolm CJ in ***Ex Parte Steven Burns t/as Burns Corporation*** where he said:

While the rules of natural justice do not generally require an oral hearing, in particular cases an oral hearing may be required, for example if there is a real issue of credibility or a significant conflict of evidenceThere is no general rule that natural justice requires a right to cross-examine in all casesHowever, in proceedings which are adversarial in nature, the particular circumstances of the case may require a tribunal to permit a party to test the evidence of another party by way of cross-examination.

Malcolm CJ then went on to conclude:

"In my opinion, given the issues in this case combined with the issue of credibility, denial to Mr Burns of the right to cross-examine Mr Kriston Trehwella constituted a denial of procedural fairness. Having regard to the amount of the claim and the importance of the evidence of Mr Kriston Trehwella, it was essential that his evidence be tested by cross-examination. Giving due weight to the policy of the Act to provide a forum for the expeditious and inexpensive resolution of disputes, I do not consider that justice could be done in this case without giving the respective parties the right to cross-examine one another."

- 32 Consequently, the Commission is of the view, in this case, that the licensee is entitled to cross-examine witnesses where a dispute arises as to the veracity of the evidence. However, this does not mean that the examination of witnesses should not be without boundaries or limited in scope as accepted by Heerey J in ***Kingham v Cole***.

33 Accordingly, order 3 of Commissioner Watling's orders will be varied to allow limited cross-examination of witnesses. The amended order will now read:

1 Limited examination and cross-examination of witnesses will be allowed subject to the following:

1.1 Persons other than the Commission will not be permitted to cross-examine any such witness unless and until they have provided the Commission with a signed statement of evidence advancing material contrary to the evidence of that witness.

1.2 The witness will be called by the Commission and asked to adopt the witnesses signed statement and may be subject to examination by the Commission in the first instance.

1.3 Cross examination by other parties may then take place but is limited to the matters in dispute and may otherwise be restricted by the Commission.

2 The parties are to advise the Commission which witnesses they wish to cross-examine and comply with 1.1 above within 21 days.

34 The Commission is not persuaded by the licensee's arguments that it will be denied a reasonable opportunity to present its case, or be denied procedural fairness, if the personal details of the survey respondents are not disclosed to it.

35 In ***Veal v Minister for Immigration and Multicultural and Indigenous Affairs*** it was held there was no denial of procedural fairness by not providing a copy of a letter which made certain allegations against the appellant or revealing the name of the writer of the letter. It was stated:

"That public interest, and the need to accord procedural fairness to the appellant, could be accommodated. They were to be accommodated, in this case, by the Tribunal telling the appellant what was the substance of the allegations made in the letter and asking him to respond to those allegations. How the allegations had been given to the Tribunal was not important. No doubt the appellant's response to the allegations would then have to be considered by the Tribunal in light of the fact that the credibility of the person who made the allegations could not be tested. And that may well leave the Tribunal in a position where it could not decide whether the allegations made had substance."

36 The licensee may be made aware of the substance of the survey. The licensee's solicitor is aware of the personal details of the respondents, and may not disclose those personal details to the licensee. The Commission is satisfied that the licensee is able to give instructions to its solicitor regarding this matter and is able to respond to the survey

material. It is a matter of what weight the Commission then gives to the survey *“in light of the fact that the credibility of the person who made the allegations would not be tested.”*

- 37 Accordingly, ground (a) of the appeal in relation to order 4 of Commissioner Watling’s orders is dismissed.

A handwritten signature in black ink, consisting of a cursive 'J' followed by 'F' and 'M' and ending in a long horizontal stroke.

JIM FREEMANTLE
CHAIRPERSON