

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

Complainant: Commissioner of Police
(represented by Mr Cheyne Beetham of State Solicitor's Office)

Respondent: Tocoan Pty Ltd
(represented by Director, Mr Kevin Mann)

Commission: Mr Jim Freemantle (Chairperson)
Mr Eddie Watling (Member)
Ms Helen Cogan (Member)

Matter: Complaint pursuant to section 95 of the *Liquor Control Act 1988* referred back to the Liquor Commission by the Supreme Court.

Premises: Zelda's Nightclub
Rockingham

Date of Hearing: 14 February 2014

Date of Determination: 9 June 2014

Determination:

The following conditions, in addition to those imposed by the Director of Liquor Licensing on 1 February, 2013 (licence 6070021493), shall either be varied or apply as follows:

Scantek

1. The licensee shall install and operate Scantek or its equivalent system at the entry to the upstairs premises known currently as IBar.

Service of Liquor

2. Liquor sold and supplied is restricted to one bottle of wine not exceeding 750ml or a maximum of four alcoholic drinks per person at any one time.
3. No liquor is to be sold or supplied for consumption on the premises in any vessels with a measurement capacity exceeding 750ml, except vessels containing premixed drinks (eg RTDs) which shall not exceed 375ml.
4. No spirits are to be sold or supplied for consumption on the premises in any non standard measure (ie no more than 30ml of spirits is permitted in any

vessel).

5. The licensee is prohibited from promoting and advertising alcoholic drinks that suggest irresponsible or excessive consumption of liquor with emotive titles such as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters', 'bombs', or any other emotive title.
6. No liquor is to be supplied with energy drinks. (For the purposes of this condition energy drinks has the same meaning as formulated caffeinated beverage within Australia New Zealand Food Standards Code with a composition of 145mg/l of caffeine or greater.)
7. No service of liquor is permitted after closing time.

Security Requirements

8. Variance to Security Requirements, item 1, of current licence:

Crown controllers, licensed under the *Securities and Related Activities (Control) Act 1996*, are to be employed at a ratio of two crowd controllers for the first 100 patrons, and two crowd controllers for each additional 100 patrons or part thereof, from 8pm (or the time of opening of the premises after 8pm).

Permitted Hours

Variance:

9.
 - a) On a Monday, Tuesday, Wednesday or Thursday – from 6pm to 12 midnight and then continuing to 4am on the next day;
 - b) on a Friday or Saturday – from 6pm to 12 midnight and then continuing to 4am on the next day;
 - c) on a Sunday that is not New Year's Eve – from 8pm to 12 midnight;
 - d) on a Sunday that is New Year's Eve – from 8pm to 12 midnight and then continuing to 4am the next day;
 - e) on Good Friday – from immediately after 12 midnight on the previous day to 3am and there are no further permitted hours before 6pm on the following day;
 - f) on Christmas Day (other than a Monday) – from immediately after 12 midnight on the previous day to 3am, and there are no further permitted hours:
 - (i) before 6pm on the following day, or
 - (ii) if the following day is a Sunday – before 8pm on the following day.

If Christmas day falls on a Monday:

- i. there are no permitted hours under a nightclub licence on that day; and
 - ii. there are no further permitted hours before 6pm on the following day.
- g) on ANZAC Day – from immediately after 12 midnight on the previous day to 3am and then in accordance with paragraph (a), (b) or (c), as the case requires.

10. A lockout shall apply from 1 hour prior to closing time. No patrons shall be admitted nor patrons leaving be readmitted from 1 hour before closing time.
11. The licensee must refuse entry to the licensed premises to any person wearing a jacket or any other clothing bearing patches or insignia including accoutrements, jewellery, visible tattoos, branding or any other items that indicates membership or association with an Outlaw Motorcycle Gang, including but not limited to the following:
 - Club Deroes
 - Coffin Cheaters
 - Comancheros
 - Finks
 - Hell's Angels
 - God's Garbage
 - Gypsy Jokers
 - Outlaws
 - Rebels
 - Rock Machine
 - Mongols
 - Bandidos

A notice stating the condition is to be clearly displayed at each entry and exit point of the licensed premises.

12. If there is an inconsistency between these conditions and any other condition to which the licence is subject, the condition that is more onerous for the licensee prevails.

Authority referred to in determination:

- *Tocoan v Commissioner of Police [2013] WASC 318, Le Miere J*

Background

1. In its judgement of 23 August 2013 given in respect of an appeal by Tocoan Pty Ltd to the Supreme Court against a number of conditions imposed by the Liquor Commission in its determination LC 25/2012 on the licence of Tocoan Pty Ltd, the Court remitted the matter back to the Commission with directions to readdress the conditions imposed on the licence.
2. In his judgement Le Miere J found that the respondent had been denied procedural fairness to be extent that the Commission had imposed serious conditions on the licence without giving the respondent adequate opportunity to address these conditions and their impact.
3. His Honour further found that the Commission had given inadequate reasons for imposing the conditions particularly the issue of a nexus between the conditions imposed and the problems they were designed to redress.
4. The Commission therefore sought submissions from the respondent and complainant in respect of the issue of licence conditions.
5. A hearing of the matter took place on 14 February 2014.

Submissions by the Respondent

6. The respondent made a detailed submission much of which consisted of a reanalysis of the findings of the Commission in LC 25/2012 in relation to a number of matters of fact which do not appear to be in dispute.
7. The respondent also questioned the conclusions by the Commission in relation to the grounds established for disciplinary action to be taken.
8. The respondent also made submissions relating to specific conditions with which it disagreed and about which it was in dispute with the Complainant.
9. The respondent has already taken steps to comply with some of the conditions. The Commission will deal with these in its determination below.

Complainant's Submission

10. A proper cause for disciplinary action exists as it was so found by the Commission in LC 25/2012 and the Supreme Court held that this finding was open to the Commission and expressly refused to quash it.
11. The essential thrust of the Supreme Court's decision was that the Commission had failed to accord the respondent procedural fairness and inadequately articulated its reasons for imposing a number of the conditions it did impose.
12. The Commission should take account of the long history of non compliance by the respondent and of the significant shortcomings in management and the operation of the licence.
13. As a number of the conditions imposed have been agreed by the parties the Commission need only revisit those in dispute being:
 - a) Scantek and entry control
 - b) Sale of alcohol in a manner designed to encourage rapid consumption

- c) Energy drinks
- d) RSA training for security staff
- e) Adult entertainment
- f) Trading hours

Determination

14. Given that the Supreme Court did not upset the finding that a cause for disciplinary action exists the Commission's task was to readdress the action it took in respect of imposing conditions. In the light of further submissions by the respondent and complainant in order to address the finding of the Court that procedural fairness had not been accorded to the respondent by the imposition of serious conditions on the licence without the respondent being given the opportunity to respond to them.
15. A number of conditions have been accepted by the respondent and the complainant has agreed that it was prepared to concede removal of certain other conditions. Thus these conditions are to be either imposed or removed as the case may be from those imposed in LC25/2012.
16. Given the foregoing, the Commission addressed the conditions in dispute.

Scantek

17. Originally the Liquor Commission required the licensee to install and operate Scantek or its equivalent system at the entry to the premises.
18. The respondent submitted that Scantek had been installed at the entry to what is now called the IBar being the upstairs part of the premises separately accessed from the opposite side of the building from the entry to Zelda's Nightclub. From Zelda's there is no means of accessing the IBar other than to leave the premises and move around to the entrance to the IBar via the footpath. It was accepted by the parties that imposing a condition requiring there to be one entrance to the premises was impractical. Whilst the complainant was of the view that Scantek should be installed at the entrance to Zelda's it was prepared to rest on the installation at the entry to the upstairs area (IBar).

Sale of alcohol in a manner designed to encourage rapid consumption of alcohol or with energy drinks

19. The Commission imposed a condition prohibiting sale and supply of beverages in such a way that would encourage rapid consumption of liquor, for example, drinks known as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blasters', 'bombs', or any other emotive title.
20. The respondent claims that this condition was rejected by Le Miere J on the grounds that the incidents underpinning the complaint were not related to the consumption of liquor and furthermore that accepting this condition would be admitting that alcohol consumption was related to the incidents.
21. The Commission disagrees. Le Miere J did not reject the condition but stated that the respondent should have been given the opportunity to make

submissions in respect of that condition if it was not a condition that could reasonably have been foreseen by the respondent. He has now had that opportunity.

22. The Commission holds the view that this condition should be imposed. It is a widely used condition imposed on licences particularly those covering premises trading late into the night for the express purpose of discouraging rapid consumption of alcohol. The respondent's contention that patrons should have the right to choose how they take their alcohol is disingenuous.
23. The respondent mounts a similar argument in relation to the condition relating to energy drinks- *No liquor is to be supplied with energy drinks. (For the purposes of this condition **energy drinks** has the same meaning as formulated **caffeinated beverage** within Australian New Zealand Food Standard Code with a composition of 145mg/l of caffeine or greater.)*
24. Prohibiting the mixing of energy drinks with alcohol is an often applied condition on licences (as the respondent would be aware) as a result of increasing concern about the physiological impact of caffeine and alcohol in conjunction.
25. Both these conditions are consistent with those imposed on similar licensed premises and are directed at addressing the requirements of the objects of the Act concerning harm minimisation (section 5(a)(i)).

RSA training for security personnel

26. The Commission required all security personnel to undertake fresh RSA training prior to commencement of trading at the licensed premises.
27. Whilst the Commission believes that security personnel should undertake RSA training, it is prepared to remove this condition as it is not a general requirement of security personnel at licensed premises and they are not serving liquor. RSA training may assist security personnel identifying and responding to drunk patrons but is persuaded by the argument that it is not a general requirement of security personnel and could make unnecessary difficulties for the licensee in having non standard conditions imposed on security staff at this venue only.

Adult entertainment

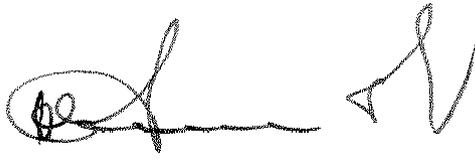
28. The following condition was imposed on the licence:
The licensee or manager or agent of the licensee or manager shall not:
 - be immodestly or indecently dressed on the licensed premises;
 - take part in, undertake or perform any activity or entertainment on the licensed premises in a lewd or indecent manner; or
 - cause, suffer or permit any person employed or engaged or otherwise contracted to undertake any activity or perform any entertainment on the licensed premises to be indecently dressed on the licensed premises.
29. The licensee asserts there have been no problems or complaints of any substance in respect of the discrete area where adult entertainment is provided.
30. He also cites Le Miere J who found the incidents on which the complaint was based could not be linked directly to the adult entertainment.

31. Given the lack of a direct causal relation the Commission has decided to remove the condition it originally imposed in respect of adult entertainment. The Commission however, makes the point that the long history of problems surrounding these premises indicates that it attracts a number of undesirable people and the licensee is therefore advised to establish more robust management practices to ensure that the business of these premises is operated in a more responsible manner which is consistent with the law.

Trading Hours

32. The trading hours of the licence were varied in LC 25/2012 as follows:
- a) on a Monday, Tuesday, Wednesday or Thursday – from 6pm to 12 midnight and then continuing to 2am on the next day;
 - b) on a Friday or Saturday – from 6pm to 12 midnight and then continuing to 2am on the next day;
 - c) on a Sunday that is not New Year’s Eve – from 8pm to 12 midnight;
 - d) on a Sunday that is New Year’s Eve – from 8pm to midnight and then continuing to 2am on the next day;
 - e) on Good Friday – from immediately after 12 midnight on the previous day to 2am and there are no further permitted hours before 6pm on the following day;
 - f) on Christmas Day (other than a Monday) – from immediately after 12 midnight on the previous day to 2am, and there are no further permitted hours:
 - i) before 6pm on the following day, or
 - ii) if the following day is a Sunday - before 8pm on the following day.If Christmas Day falls on a Monday:
 - (i) there are no permitted hours under a nightclub licence on that day; and
 - (ii) there are no further permitted hours before 6pm on the following day.
 - g) On ANZAC Day – from immediately after 12 midnight on the previous day to 2am and then in accordance with paragraph (a), (b) or (c), as the case requires.
33. The licensee is opposed to the condition imposed in LC25/2012 closing the premises at 2am.
34. Le Miere J found that there was insufficient or no evidence that the incidents that formed the basis of the complainant’s case occurred after 2am.
35. The Commission having regard to the fact the premises are licensed as a nightclub and there is insufficient nexus between closing time and the incidents giving rise to the complaint, resiles from the originally imposed closing of 2am and imposes the trading time as detailed in paragraph 9 of page 2 of this determination.
36. The lockout condition requiring no further entry or re-entry of patrons from 60 minutes before closing time shall apply in order to allow an orderly and staged

exit of patrons into the street thus assisting in mitigating the risk of large numbers of people who had been consuming alcohol disbursing at once.

A handwritten signature in black ink, appearing to read 'Jim Freemantle', written over a horizontal line.

JIM FREEMANTLE
CHAIRPERSON