

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Complainant:** Commissioner of Police
(represented by Ms Leanne Atkins of WA Police)
- Respondent:** Kimberley Accommodation (East) Pty Ltd trading as
Kununurra Hotel
(represented by Mr Peter Fraser of Dwyer Durack)
- Commission:** Mr Jim Freemantle (Chairperson)
Mr Eddie Watling
Mr Greg Joyce
- Matter:** Complaint for disciplinary action pursuant to section 95 of
the *Liquor Control Act 1988*
- Date of Hearing:** 13 April 2011
- Date of Determination:** 9 May 2011
- Determination:**
- (1) Pursuant to section 96(1)(m) of the Act Kimberley Accommodation (East) Pty Ltd is to pay a monetary penalty of \$15,000.
 - (2) The licensee is to submit to the Director of Liquor Licensing an amended Harm Minimisation Plan, Management Policy and Code of Conduct by 30 June 2011.
 - (3) The following conditions are imposed on the licence:
 - liquor is not to be sold or supplied for consumption on the premises in any of the following ways-
 - a) in any vessel with a measurement capacity exceeding 750ml and no spirit based beverages are to be supplied in vessels with a measurement capacity exceeding 375ml.
 - b) in either –
 - (i) any non-standard measure; or
 - (ii) presented in such a way that would encourage the rapid consumption of liquor

(for example, but not limited to, unadulterated spirit or liqueur in a shot glass); or

(iii) by virtue of their emotive title, such as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blaster' or 'bombs'; or

c) mixed with energy drinks (for the purpose of this condition "energy drink" has the same meaning as 'formulated caffeinated beverage' within the Australia New Zealand Food Standards Code with a composition of 145 mg/l of caffeine or greater).

- the licensee is not to engage in advertising, promotions or offers of cheap or discounted liquor, including happy hours.

(4) The licensee shall install the additional cameras by 30 July 2011 and the cameras and CCTV system is to be operated and maintained in accordance with the policy of the Director of Liquor Licensing on "minimum Standards closed Circuit Television CCTV Security System".

Introduction

- 1 On 3 December 2010, the Commissioner of Police lodged a complaint pursuant to section 95 of the *Liquor Control Act 1988* (“the Act”) against Kimberley Accommodation (East) Pty Ltd, the licensee of the Kununurra Hotel, situated at Messmate Way Kununurra.
- 2 A hearing before the Commission, constituted in accordance with section 95(7a) of the Act, was held on 13 April 2011.

Submissions on behalf of the Commissioner of Police

- 3 It is alleged by the Commissioner of Police that there is proper cause for disciplinary action under section 95(4) of the Act on the following grounds:
 - 1) The business conducted under the licence is not properly conducted in accordance with the Act [section 95(4)(a)];
 - 2) The licensed premises are not properly managed in accordance with the Act [section 95(4)(b)];
 - 3) The licensee has been given an infringement notice under section 167 and the modified penalty has been paid in accordance with that section [section 95(4)(fa)];
 - 4) The licensee has contravened a requirement of the Act or a term or condition of the licence [section 95(4)(e)(i)];
 - 5) The licensee has been convicted of an offence against this Act [section 95(4)(f)(i)]; and
 - 6) The safety, health and welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee [section 95(4)(k)].
- 4 Some of the material submitted by the Commissioner of Police to support the complaint relates to a period of time prior to when the current licensee took control of the premises. Kitmyth Pty Ltd (“Kitmyth”) was the licensee of the Kununurra Hotel from 28 February 2005 until the licence was transferred to Kimberley Accommodation (East) Pty Ltd on 6 July 2010. It was submitted on behalf of the Commissioner of Police that Kitmyth and the respondent have a common company officer being Martin Pierson-Jones who is a director and shareholder of both companies, which also have the same registered office. Although the corporate identity of the licensee changed, there was a continuity of approved managers at the premises before and after the transfer of the licence.
- 5 In respect of grounds (2) and (6) of the complaint it was submitted that police records indicate that there have been 29 reports to police of incidents occurring at the licensed premises or in close proximity to the premises. Nineteen of the reports pre-date the transfer of the licence to the respondent and 6 post-date the transfer of licence. These reports relate to assaults and ejections from the premises or refusal of entry due to intoxication. Four of these incidents occurred in November 2010 alone, which shows that

there has been little improvement in the management of the business under the licence by the respondent.

- 6 Computer Aided Despatch (“CAD”) data indicates that there were 96 calls for police assistance to attend the hotel between 1 February 2009 and 30 November 2010, with 18 of these calls post-dating the transfer of the licence. An analysis of this CAD data demonstrates that the nature of the calls to police is due primarily to anti-social behaviour, disturbances and assaults in and around the licensed premises. Consequently, it is submitted that the licensed premises are not managed properly in accordance with the Act and this failure on behalf of the respondent is placing the safety, health, and welfare of patrons at risk.
- 7 In respect of ground (3) of the complaint, both Kitmyth and the respondent have been issued infringement notices under the Act which have been paid. It was asserted that the infringement notices in respect of Kitmyth are relevant for the purposes of demonstrating the conduct of Kitmyth, the previous corporate licensee, which conduct has continued under the common directorship of Martin Pierson-Jones. On 8 December 2010, after the date of signing and service of the Complaint, infringement notices were issued for three matters that occurred on 20 November 2010. Two infringements (numbers 272960 and 272957) were issued to the respondent for permitting a drunken person to consume alcohol and not maintaining the incident register respectively, with the modified penalties for both infringements having been paid on 6 January 2011 and an infringement notice was issued to an approved manager for selling alcohol to a drunken person which was subsequently paid.
- 8 In support of grounds (1) and (4) of the complaint, evidence was provided that:
 - on 15 September 2010 police attended the licence premises and at two separate times observed drunken males in the licensed premises;
 - on 19 November 2010 police attended the licensed premises and observed an argument between an intoxicated man and crowd controllers who were refusing him entry because he was intoxicated and although the man appeared to leave the venue police later in the night observed the same man inside the licensed premises and displaying obvious signs of intoxication;
 - on 19 November 2010 police observed two men being ejected from the licensed premises by crowd controllers, one because of intoxication, and these incidents were not properly recorded in the incident register for the premises;
 - on 20 November 2010 police observed a group of five men at the premises being served several rounds of ‘jager bombs’ with one in the group becoming progressively more intoxicated, however this person was later served a ‘shooter’ contrary to the licensee’s own House Management Policy and Harm Minimisation Plan and observed another male patron who displayed signs of intoxication (these incidents resulted in the infringements notices referred to in para 7 above);

- on 20 November 2010 police inspected the incident register for the premises and noted that nine entries for the month of October 2010 were missing mandatory information;
 - on 20 November 2010 police attended the licensed premises and noted that the sound metre control device, required by a Special Condition imposed on the licence, could be easily accessed and unplugged by any person in breach of the condition; and
 - the licensee has failed to maintain its website in accordance with section 113A of the Act.
- 9 The respondent, on 10 December 2010, was fined \$1000 by the Kununurra Magistrate's Court for a breach of section 115(1)(a)(i) of the Act therefore ground 5 of the Complaint is established.
- 10 Finally, it was submitted by the Commissioner of Police that the following sanctions should be imposed on the licensee as a consequence of the complaint;
- the licensee is required to pay a monetary penalty of \$20,000;
 - the licensee to put in place a proper Harm Minimisation Plan, Management Policy and Code of Conduct;
 - the licensee to provide evidence that the installed sound control metre complies with the condition of licence;
 - liquor is not to be sold or supplied for consumption on the premises in any of the following ways-
 - a) in any vessel with a measurement capacity exceeding 750ml and no spirit based beverages are to be supplied in vessels with a measurement capacity exceeding 375ml.
 - b) in either –
 - (iv) any non-standard measure; or
 - (v) presented in such a way that would encourage the rapid consumption of liquor (for example, but not limited to, unadulterated spirit or liqueur in a shot glass); or
 - (vi) by virtue of their emotive title, such as 'laybacks', 'shots', 'shooters', 'test tubes', 'jelly shots', 'blaster' or 'bombs'; or
 - c) with energy drinks. Further the licensee is not to permit any liquor to be mixed with energy drinks by any person within the premises (for the purpose of this condition "energy drink" has the same meaning as 'formulated caffeinated beverage' within the Australia New Zealand Food Standards Code with a composition of 145 mg/l of caffeine or greater).

- the licensee is not to engage in advertising, promotions or offers of cheap or discounted liquor, including happy hours.
- the licensee is to comply with the conditions set out in the Director's Policy – Security at Licensed Premises and, in addition to the minimum requirements of the CCTV policy, the CCTV Plan must include a minimum of –
 - One camera with a field view covering each bar service area and each area where the consumption of liquor takes place and each patron entrance and exit up to 10 metres;
 - A minimum of one camera with a field view covering the Bottle Shop and entrance and exit up to 10 metres;
 - Each camera to be installed with suitable vandal damage resistant camera housing;
 - Images recorded via the video surveillance system must be retained for a minimum of 30 days and the licensee shall ensure that no person is able to delete or alter any recordings within the 30 day period; and
 - Access to, and copies of, recordings from the CCTV system are to be immediately made available upon request to any sworn officer of the WA Police, Department of Racing, Gaming and Liquor Inspectors and any other authorised officer, as defined by section 3 of the Liquor Control Act 1988.

Submissions on behalf of the respondent

- 11 The evidence presented in support of the complaint covers the period May 2008 to November 2010; however the respondent has only been the licensee of the premises since 6 July 2010. Therefore the actions of Kitmyth Pty Ltd, the former licensee and separate legal entity from the respondent, are irrelevant. For the purposes of a complaint under section 95 of the Act, a licensee cannot be held liable for the actions of a previous licensee. Consequently, the evidence relied upon by the Commissioner of Police in the form of reported offences at the licensed premises and excessive police attendances can only be considered for the period July 2010 onwards. An analysis of this offence data indicates that:
- the majority do not, on the face of them, involve patrons of the hotel;
 - the incidents do not give rise to a suggestion that there is a deficiency in management practices; and
 - there is no basis upon which a finding could be made that the offenders in question drank to the point of intoxication at the licensed premises.
- 12 Similarly, an analysis of police attendances at the venue from July 2010 indicate that there have only been 18, with 10 of these occurring off the licensed premises and not involving patrons of the hotel and 3 involved evictions from the hotel.

- 13 Also, it was submitted that much of the evidence relied upon by the Commissioner of Police relates to the behaviour of persons off the licensed premises and beyond the control of the licensee and symptomatic of broader problems in the community. In late 2010 the Director of Liquor Licensing initiated an inquiry under section 64 of the Act following concerns raised by the Commissioner of Police and the Executive Director of Public Health about the extent of alcohol-related harm in the towns of Kununurra and Wyndham. This inquiry resulted in the Director of Liquor Licensing imposing a number of liquor restrictions on relevant licences in the towns in November 2010. The focus of the restrictive conditions was to reduce the availability of liquor sold for consumption off the licensed premises which was contributing to street drinking and corresponding anti-social behaviour.
- 14 In respect of allegations that the licensee permitted drunkenness on the licensed premises, with the exception of one occurrence, no charges have been laid by the police in relation to the incidents and accordingly the licensee has been denied the opportunity of defending itself and testing the police evidence, which the licensee disputes.
- 15 The operation of the Kununurra Hotel presents the licensee with a number of unique challenges due to its remoteness, existing levels of harm and ill-health within the community and difficulties in attracting and retaining experienced staff and crowd controllers. However, since July 2010 the licensee has implemented a number of changes to improve the operation of the hotel, which includes:
- the appointment of Mr Van Baalen as the Operations Manager;
 - Mr Martin Pierson-Jones (jnr) has obtained a Crowd Control Agent Licence and has relocated to Kununurra;
 - the employment of permanent crowd control officers;
 - restrictions in relation to the sale of liquor on site;
 - use of a breathalyser as a deterrent to patrons attending the venue in an intoxicated state;
 - re-training of management;
 - new house management documentation; and
 - plans to upgrade the CCTV system.

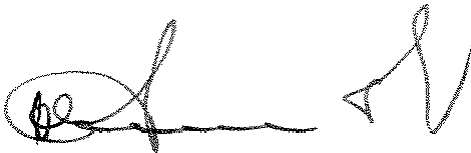
Determination

- 16 The Commission may, on a complaint lodged under section 95 of the Act, take disciplinary action. Pursuant to section 96, if the Commission is satisfied, on the balance of probabilities, that the ground upon which the complaint was, or complaints, were made has been made out so that a proper cause for disciplinary action exists, the Commission may take action as outlined in section 96(1).

- 17 At the hearing before the Commission, the respondent accepted that grounds 3, 4 and 5 of the complaint had been established; however it was submitted that there was insufficient evidence to establish grounds 1, 2 and 6. Also, the respondent is not opposed to the conditions proposed by the Commissioner of Police except for the requirement to maintain video recordings for 30 days as requested, when the Director's policy only stipulates 14 days.
- 18 On the basis of the respondent's concession and on the evidence submitted the Commission is satisfied that grounds 3, 4 and 5 of the complaint have been established so that proper cause for disciplinary action exists.
- 19 Although the licensee disputes the police assertions of alleged drunkenness on the licensed premises and provided witness statements to that effect, the Commission accepts the police evidence in respect of the alleged incidents. Section 3A of the Act defines the term "drunk" and provides that if an authorised officer decides that a person is drunk at a particular time, then, in the absence of proof to the contrary, that person is taken to be drunk. The evidence of the licensee is not sufficiently compelling to lead the Commission to the conclusion that it should not accept the police evidence. The Commission is therefore satisfied that the remaining grounds of the complaint have been made out.
- 20 The Commission accepts that the operation of these licensed premises gives rise to a number of significant challenges due to the remote location and the attendant difficulties of attracting and retaining suitable staff and crowd controllers.
- The Commission also accepts that there is a high existing level of alcohol-related harm and ill health in the town. However the Act imposes clear and specific obligations on a licensee and the conditions and the culture in the town and surrounding areas make it particularly important that the obligations on a licensee enshrined in the Act to minimise harm are met.
- 21 It is now a matter for the Commission to determine how it should exercise its discretion under section 96 of the Act. In this regard, the Commission acknowledges that the licensee appears to have responded positively and taken action to improve the management of the premises. Albeit that the licensee's actions are largely in response to the complaint lodged with the Commission, the Commission is nonetheless of the view that it should count towards ameliorating the penalty to be imposed.
- 22 In consideration of the submissions from the parties, the Commission, pursuant to section 96(1)(m) of the Act imposes a monetary penalty of \$15,000 on the licensee. Furthermore, the licensee is to submit to the Director of Liquor Licensing an amended Harm Minimisation Plan, Management Policy and Code of Conduct by 30 June 2011. At the hearing of this complaint the Commission was advised on behalf of the licensee that the installed sound control metre now complies with the condition of licence and the Commission accepts that advice as being correct and considers that no further action in this regard is necessary. The following conditions are imposed on the licence:

- liquor is not to be sold or supplied for consumption on the premises in any of the following ways-
 - d) in any vessel with a measurement capacity exceeding 750ml and no spirit based beverages are to be supplied in vessels with a measurement capacity exceeding 375ml.
 - e) in either –
 - (vii) any non-standard measure; or
 - (viii) presented in such a way that would encourage the rapid consumption of liquor (for example, but not limited to, unadulterated spirit or liqueur in a shot glass); or
 - (ix) by virtue of their emotive title, such as ‘laybacks’, ‘shots’, ‘shooters’, ‘test tubes’, ‘jelly shots’, ‘blaster’ or ‘bombs’; or
 - f) mixed with energy drinks (for the purpose of this condition “energy drink” has the same meaning as ‘formulated caffeinated beverage’ within the Australia New Zealand Food Standards Code with a composition of 145 mg/l of caffeine or greater).
- the licensee is not to engage in advertising, promotions or offers of cheap or discounted liquor, including happy hours.

23 Finally, at the hearing the licensee tendered a plan for the installation of new CCTV cameras at the venue. It is therefore a condition of the licence that the licensee installs the additional cameras by 30 July 2011 and that the cameras and CCTV system are operated and maintained in accordance with the policy of the Director of Liquor Licensing on “minimum Standards Closed Circuit Television CCTV Security System”.



JIM FREEMANTLE
CHAIRPERSON