

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Complainant: Commissioner of Police
(represented by Ms Dianne Scaddan of WA Police)

Respondent: Leohag Holdings Pty Ltd T/A the Kwinana Lodge Hotel
(represented by Mr Ashley Wilson of Frichot and Frichot Lawyers)

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: 10 August 2010

Date of Determination: 2 September 2010

Determination: Pursuant to section 96(1)(m) of the *Liquor Control Act 1988* Leohag Holdings Pty Ltd is to pay a monetary penalty of \$15,000.

The licensee is to lodge with the Commission within 28 days evidence of payment of the penalty.

Introduction

- 1 On 6 May 2010 the Commissioner of Police lodged a complaint, pursuant to section 95 of the *Liquor Control Act 1988* (“the Act”), against Leohag Holdings Pty Ltd, the licensee of the Kwinana Lodge Hotel situated at Meares Avenue, Parmelia.
- 2 It is alleged that pursuant to section 95(4) of the Act there is proper cause for disciplinary action on the following grounds:
 - I. 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)];
 - II. The licensee has been given an infringement notice under section 167 of the Act and the modified penalty has been paid in accordance with that section [section 95(4)(fa)];
 - III. The licensee has contravened a requirement of the Act or a term or condition of the licence [section 95(4)(e)(i)]; and
 - IV. The licensed premises are not properly managed in accordance with the Act [section 95(4)(b)].
- 3 A hearing before the Commission to determine the complaint was conducted on 10 August 2010.

Submissions on behalf of the Commissioner of Police

Ground I

- 4 It was submitted that between January 2009 and April 2010, six incident reports were made to police regarding offences occurring inside, or in the immediate vicinity of the Kwinana Lodge Hotel. In all incidences, the complainant and/or the offender had consumed liquor at the hotel. Also, between January 2009 and April 2010, police were called to attend the hotel 19 times in response to requests for police assistance.
- 5 Requests for police attendance at the venue generally arose from persons of interest being described as “very intoxicated” or “intoxicated” which appears to be associated with various acts of violence or other disturbances. On many occasions police have been called to the licensed premises because staff of the premises could not eject an intoxicated person from the premises without police involvement. In at least one instance, the hotel was required to be closed following a violent incident involving people fighting out the front of the venue.
- 6 It is therefore reasonable to infer that staff at the hotel continue to serve alcohol to intoxicated patrons and these patrons are then implicated in fights, assaults or other disturbances requiring police involvement. By continuing to serve alcohol to intoxicated persons, the licensee, approved manager and employees of the hotel have neglected to have regard to the safety and welfare of patrons.

7 Consequently, the licensee's actions or neglect endangering the safety and welfare of persons attending the Kwinana Lodge Hotel are that:

- approved managers and employees continue to serve alcohol to intoxicated patrons;
- these intoxicated patrons are implicated in fight or assaults or other disturbances requiring police attendance;
- in continuing to serve alcohol to intoxicated patrons, the licensee, via the approved managers and employees, neglected to have regard to the safety and welfare of all patrons of the hotel; and
- the approved managers and employees failed to implement the principles contained in the House Management policy and code of Conduct.

Ground II

8 On 4 April 2008 an infringement notice was issued for a breach of section 110(2) of the Act. The modified penalty of \$1,000 was paid in response to the infringement notice.

9 On 24 June 2008 an infringement notice was issued for a breach of section 110(1)(aa) of the Act. The modified penalty of \$1,000 was paid in response to the infringement notice.

Ground III

10 On 20 November 2009 officers from the Police Licensing Enforcement Unit attended the Kwinana Lodge Hotel and:

- observed two patrons visibly displaying signs of intoxication;
- noticed a patron in the beer garden of the premises wearing a sleeveless jacket with an insignia identifying that person as a member of the "Gypsy Jokers Motorcycle Club", commonly known as an Outlaw Motorcycle Gang (OMCG), in contravention of a condition of the liquor licence for the premises; and
- observed other breaches of conditions of the licence by failing to provide CCTV cameras in beer garden area of the premises and failure to erect dress and behaviour code signage at each entrance of the premises.

11 When police questioned the approved manager on the night, Ms Patton, concerning the intoxicated patrons and the breach of licence condition by allowing a member of an Outlaw Motorcycle Gang to wear their "colours" in the premises Ms Patton is alleged to have responded that she was too busy to assess and detect intoxicated patrons and she had no answer why OMCG members in "colours" were allowed in the hotel. At no time did Ms Patton or other any other employee of the hotel attempt to remove, or refuse service to, OMCG members who were wearing their "colours" in the hotel.

- 12 On 24 November 2009 police again attended the Kwinana Lodge Hotel to conduct enquiries regarding the incidents on 20 November 2009 and spoke to Mr Leon Hagan, director of the company, who provided police with a copy of CCTV footage from the front bar area of the hotel, but Mr Hagen could not provide CCTV footage of the beer garden because he claimed someone had stolen the camera. When queried why an Outlaw Motorcycle Gang member in “colours” was allowed in the premises in contravention of the conditions of his licence, Mr Hagen is alleged to have responded that “Umm, yeah but they were okay”. Subsequent enquiries by police could not find any reported stealing offence of a CCTV camera from the Kwinana Lodge Hotel.
- 13 It was therefore submitted on behalf of the Commissioner of Police that the events on 20 November 2009 demonstrated the following breaches of the Act and licence conditions:
- failure to install CCTV nominated by the licensee capturing all bars, entries and exits, namely the bar in the beer garden of the premises (condition of licence);
 - failure to retain all footage from the CCTV surveillance camera for a period of not less than 14 days (condition of licence);
 - failure to erect strict dress and behaviour code signage at each entrance of the premises, including a provision excluding patrons wearing Outlaw Motorcycle Gang patches or insignia and the code must reinforce the behaviour and dress requirement of the licensee to maintain a low risk family friendly venue (condition of licence);
 - failure to exclude patrons wearing Outlaw Motorcycle Gang insignia inside the venue (condition of licence);
 - failure to erect at each entrance of the hotel signage promoting the use of public transport, skippers and encouraging patrons to avoid drink driving (condition of licence); and
 - permitting drunkenness or disorderly behaviour in the front bar area of the hotel.
- 14 On 20 April 2010 police attended the Kwinana Lodge Hotel and observed that there was still no signage relating to the restriction on patrons wearing Outlaw Motorcycle Gang “colours” or insignia and no signage at the entrance of each premises as required under the licence. When questioned by police, the approved manager Ms Patton, stated that she did not know about the conditions of the licence and could not provide police with the current licence or extended trading permit. Consequently, the licensee was in breach of its conditions of licence and also in breach of sections 116(2) and (4) of the Act.

Ground IV

- 15 In view of the matters raised in grounds I to III above, and in particular the licensee’s failure to deal with intoxication and disorderly conduct in and around the licensed premises and the on-going breaches of the Act and licence conditions, it was submitted

that the licensee has failed to properly manage the licensed premises consistent with the objectives of the Act; which is to ensure a safe environment for patrons and minimising harm by encouraging the responsible consumption of alcohol.

- 16 In support of the complaint, the Commissioner of Police lodged various witness statements, photographs, incident reports, CCTV footage and police CAD data.

Submissions on behalf of the respondent

Ground I

- 17 It was submitted on behalf of the respondent that there was no act or neglect on the part of the licensee in the operation of the premises which can be said to endanger the safety, health or welfare of persons who resort to the licensed premises. Reliance by the Commissioner of Police on the incident reports and the number of police callouts to the premises does not of itself establish this ground of the complaint. An analysis of this material indicates that:
- half of the incidents and callouts alleged did not occur on licensed premises, but instead occurred off licensed premises;
 - three callouts do not appear to have been made by any staff or manager of the tavern;
 - police were ultimately not required to attend the tavern (ie problems were dealt with in their absence) in at least seven of the nineteen callouts, resulting in only twelve callouts to the premises which required police attendance over a fifteen month period;
 - in nine of the alleged incidents, the person initiating the alleged incident was not a patron of the tavern;
 - three callouts related to persons who were refused entry or re-entry to the premises;
 - five callouts related to a person who had refused to leave the premises when directed to do so by management; and
 - nine alleged incidents resulted in patrons being removed from the premises by management/staff.
- 18 Because a licensee or manager may call for police assistance does not constitute an act or neglect on the part of the licensee which endangers the health, safety or welfare of patrons – on the contrary, it indicates that the licensee and management are carrying out their responsibilities under the Act.

- 19 Letters of endorsement from patrons of the hotel indicate that those patrons have no concerns regarding their welfare, health or safety when patronising the premises and believe that the hotel is effectively and properly managed.

Ground II

- 20 This ground of the complaint alleges that the licensee has been given an infringement notice under section 167 of the Act and the modified penalty has been paid.
- 21 The two infringement notices relied upon by the Commissioner of Police to establish this ground of complaint were not issued to the licensee. Infringement notice No. 212457 issued on 4 April 2008 was issued to the Kwinana Lodge Hotel Social Club Inc whilst infringement notice No. 212571 issued on 24 June 2008 was issued to Leon Hagen, an approved manager of the premises.

Ground III

- 22 In respect of the breaches of licence conditions which are alleged to have occurred on 20 November 2009 and 20 April 2010, it was asserted that neither Mr Hagen, the director of the licensee company, or Ms Patton, an approved manager, were aware that these conditions had been imposed on the licence. The licensee did not receive notice of the conditions imposed on the licence on 19 February 2009 prior to 20 April 2010 and therefore both Mr Hagen and Ms Patton were acting under an honest and reasonable, but mistaken belief, regarding the applicable conditions of the licence.
- 23 Once it was brought to the attention of the licensee and the approved managers that the licence on display at the premises did not contain all relevant licence conditions, immediate steps were taken to obtain an updated copy of the licence and comply with the new licence conditions.
- 24 The licensee denies that on 20 November 2009, that either personally or by its employees or agents, it permitted drunkenness on the licensed premises. Statements from Mr Hagen, Ms Patton and Mr Underwood contradict the police evidence and on the night in question, neither Mr Underwood nor Mr McMinigal was intoxicated when police demanded that they be removed from the premises.

Ground IV

- 25 It is submitted that the evidence lodged by the respondent is sufficient to establish that the premises are properly and effectively managed and supervised in accordance with the provisions of the Act. There are management practices in place at the licensed premises for ensuring that anti-social behaviour at the premises is minimised and that instances of intoxication are also minimised.
- 26 The licensee's prompt response upon learning of the additional conditions of the licence and the subsequent enforcement of those conditions at the licensed premises evidences

the licensee's willingness to comply with the conditions of its licence and the provisions of the Act.

- 27 The respondent lodged various Statements of Evidence, letters of support, analysis of police callout data, staff training certificates, House Management Policy and Code of conduct and licence documents.

Determination

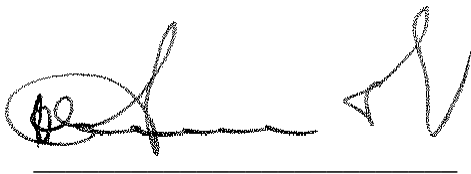
- 28 The Commission may, on a complaint lodged under section 95 of the Act, take disciplinary action.
- 29 Pursuant to section 96 of the Act, if the Commission is satisfied, on the balance of probabilities, that the ground upon which the complaint was, or complaints, were made has been made out so that a proper cause for disciplinary action exists, the Commission may take action as outlined in section 96(1).
- 30 In respect of ground II, the Commission finds that this ground of complaint has not been made out. Neither infringement notice was issued to the licensee company as required under section 95(4)(fa) of the Act. The first infringement notice was issued to the Kwinana Lodge Hotel Social Club Inc, which is a separate legal entity to the licensee company, and the second infringement notice was issued to Mr Hagen as the approved manager of the premises. However, pursuant to section 95(9) of the Act, the infringement notice issued to Mr Hagen may be used as evidence in respect of other grounds of the complaint.
- 31 The Commission finds that ground I of the complaint has been made out. Police attendance at the licensed premises or calls for police assistance due to intoxication and anti-social behaviour by persons resorting to the premises is unacceptably high and patron safety and welfare is at risk. The Commission accepts, on the balance of probabilities, that there is a sufficient link between the failure of the licensee to adhere to responsible server practices and its conditions of licence and many of the incidents occurring in and around the licensed premises. Repeated incidents where persons are refused re-entry or refused service or required to leave the premises and then engage in anti-social behaviour does not support the licensee's submission that the premises are well managed.
- 32 The Commission does not accept the submission of the licensee that it was not aware of the conditions imposed on the licence on 19 February 2009 until 20 April 2010. Whilst it was asserted, and may have been the case, that advice of those conditions was not originally sent directly to the licensed premises (it was asserted at the hearing that the decision imposing the new conditions was sent to the solicitor for the landlord), a letter from the Director Licensing states that a licence document was forwarded to the licensee at its postal address on 3 April 2009 and again on 4 September 2009. Furthermore, a call to police on 13 June 2009 from a security officer at the premises (refer attachment 3

- CAD search dated 13 June 2009) and Mr Hagen's response to police on 24 November 2009 implies some knowledge of the revised licence conditions particularly in respect of members of OMCG's wearing patches or insignias on the licensed premises. Based on the evidence submitted, the Commission finds, on the balance of probabilities, that the licensee was in breach of its licence conditions on 20 November 2009 and 20 April 2010 as alleged by the Commissioner of Police.

- 33 In respect of the allegation that on the night of 20 November 2009 the licensee permitted drunkenness or disorderly behaviour on the licensed premises, the Commission prefers the evidence of the police than that submitted by the licensee. Police officers who attend the venue made contemporaneous notes at the time to support their statements, which the Commission finds to be more credible than the later recollections of Mr Underwood and Ms Patton. The statements of Constables McDougall and Humphrey are supported by Constable Stephens who stated that three of the patrons were very intoxicated and two of these patrons started arguing with police with one of these patrons pointing at the female officer and abusing her. Constable Stephens intervened, with the patron then apologising before being escorted away from the entrance of the premises. According to Constable Stephens, the third male patron started yelling abuse and asking police to fight. This patron was detained in a police van until he had calmed down. Constable Stephens also observed other patrons who appeared intoxicated walk out of the hotel and try and converse with police; however the police could not understand these patrons because of their state of intoxication. Another patron was observed to lose balance and fall over when walking down the stairs.
- 34 Constable McDougall's statement also refers to a comment from an allegedly intoxicated patron, who said "Why are you kicking people out, people drink out of jugs here every week". This patron continued arguing with police.
- 35 Section 3A of the Act provides that if an authorised officer decides, in accordance with subsection (1) that a person is drunk at a particular time, then in the absence of proof to the contrary, that person is to be taken to be drunk at that time. The licensee has not provided sufficient proof to the contrary. The Commission also accepts the police evidence that on the night of 20 November 2009, the approved manager, Ms Patton stated to police that she was too busy to check for intoxicated, patrons. Counsel for the respondent contended that there was a difference between intoxicated, the description used in the police officers' statements, and drunk as defined in the Act at section 3A(1). The Commission is satisfied that the content of the police officers' statements makes it clear that the persons of interest were drunk within the meaning of section 3A(1).
- 36 In consideration of the evidence as a whole, the commission accepts the contention that the licensed premises are not properly managed in accordance with the requirements of the Act or consistent with one of the primary objects, being the minimisation of alcohol-related harm. The evidence reflects a permissive attitude by the licensee and its staff to unacceptable levels of intoxication. Having an approved manager on the premises and

staff trained in the responsible service of alcohol achieves little unless management promotes, and staff actively implement, responsible server practices.

- 37 Consequently, the Commission finds, on the balance of probabilities, that grounds I, III and IV of the complaint have been made out and there is proper cause for disciplinary action.
- 38 It was submitted on behalf of the Commissioner of Police that if the Commission found that the grounds of complaint had been made out that the appropriate penalty, under section 96(1) of the Act, was the cancellation of the licence. Cancellation of a licence is perhaps the most serious sanction that can be imposed by the Commission and in consideration of the evidence and all the circumstances of this case, the Commission does not believe that such an outcome is warranted.
- 39 In the alternative, it was submitted on behalf of the licensee at the hearing that if the Commission found that the grounds of complaint had been made out that the appropriate penalty is a reprimand. The Commission does not accept that this penalty properly reflects the seriousness of the licensee's failure to comply with its obligations and responsibilities under the Act.
- 40 The Commission considered the suspension of the licence, however because the licensee has not appeared before the Commission before, the Commission feels that it is not appropriate to suspend the licence in this instance. The Commission is satisfied that the licensee will in future comply with the Act and its licence conditions, and if it does not do so it may well face suspension or cancellation of the licence.
- 41 The Commission is of the opinion that the seriousness of the breaches will be adequately reflected in an order pursuant to section 96(1)(m) of the Act that the licensee pay a monetary penalty of \$15,000.

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

JIM FREEMANTLE

CHAIRPERSON