

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

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

Respondent: Mr Guy Peter Hodgson
(represented by Mr Tony van Merwyk,
Herbert Smith Freehills)

Commission: Mr Eddie Watling (Member)
Dr Eric Isaachsen (Member)
Mr Evan Shackleton (Member)

Matter: Complaint for disciplinary action pursuant to
section 95 of the *Liquor Control Act 1988*

Premises: Madrid Café Restaurant, Claremont

Date of Hearing: 7 November 2013

Date of Determination: 4 December 2013

Determination:

The Commission orders:

1. Pursuant to section 96(1)(m) of the *Liquor Control Act 1988*, the licensee is to pay a monetary penalty of \$3,000 within 30 days of the date of this determination.
2. The respondent, Mr Guy Peter Hodgson is required to complete within 60 days of the date of this determination, the core unit, MLP1 of the Course in Management of Licensed Premises [52473WA] provided by the Australian Hotels Association, Clubs WA and Access All Areas Training.

Introduction

1. The Madrid Café Restaurant (“the Premises”) commenced trading under a restaurant liquor licence (6060042283) on 4 June, 2011. An Extended Trading Permit (ETP No 30408) which had been in place for the premises since 28 November 2007 was at that time transferred from the previous owner. The ETP was due to expire on 28 November 2012.
2. On 5 November 2012, the licensee of the premises applied for a renewal of the ETP to be extended a further five (5) years.

On 14 November 2012, Mr Guy Peter Hodgson (“the respondent”) became the sole licensee of the premises and on 14 December 2013, an Interim Extension of ETP No. 30408 was issued pending the determination of the application to renew the ETP

3. On 10 April 2013, the Commissioner of Police (“the Police”) lodged a Notice of Intervention and Objection to the ETP renewal application on the basis:
 - If the particular application was granted, public disorder or disturbance would be likely to result, or as to any other matter relevant to the public interest [s 69(6)(c)(ii)];
 - If the particular application was granted and/or conditions not imposed, public disorder or disturbance would be likely to result, or as to any other matter relevant to the public interest [s 69 (6)(c)(iv)].
4. On 4 July 2013, the Delegate of the Director of Liquor Licensing (“the Director”) refused the application and advised the licensee that the ETP (No 30408) would expire on 18 July, 2013.
5. On 8 August 2013, the Police, under the provisions of section 95 of *the Liquor Control Act, 1988* (“the Act”), lodged a complaint against the respondent and sought disciplinary action on the grounds:
 - the business conducted under the licence is not being properly conducted in accordance with the licence (section 95(4)(a));
 - the licensed premises are not properly managed in accordance with the Act (section 95(4)(b));
 - the Licensee has contravened a requirement of the Act or a term or condition of the licence (section 95(4)(e)(i));
 - 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)).
6. A submission was lodged by the respondent and also the Police on 24 October 2013. A further responsive submission was lodged by the Police on 31 October 2013 and the respondent advised on 1 November 2013, that no further submissions would be lodged prior to the Hearing.
7. A hearing of the Commission, constituted in accordance with section 95(7a) of

the Act was held on 7 November 2013.

Hearing

8. In the submissions of 24 October 2013, the respondent advised that:

The licensee does not wish to dispute the facts presented in the Complaint or that a ground for disciplinary action pursuant to section 95(4) is made out. Rather, the licensee wishes to provide relevant context to the conduct in question that should be taken into account by the Liquor Commission in determining this matter.

All parties agreed that the hearing would relate to whether proper cause for disciplinary action exists.

Submissions on behalf of the Commissioner of Police

9. The Police submit that there is proper cause for disciplinary action on the grounds listed in paragraph 3 on the basis that the respondent contravened a requirement of the Act or a term or condition of the licence in four ways:
- permitted the sale of liquor to patrons other than by table service, contrary to condition four (4) of the ETP (grounds one and three);
 - permitted patrons to consume liquor that was purchased at the premises in area not forming part of the premises contrary to sections 50(1) and 110(3) of the Act (grounds two and three);
 - permitted patrons to consume liquor purchased at the premises other than while the patron was sitting at a table or a fixed structure used as a table (ground three); and
 - failed to notify the Director of Liquor Licensing of a change to the premises within 14 days of the change being completed, contrary to section 77(7) of the Act (grounds two and three).
10. Ground four alleges that the respondent has been given an infringement notice under section 167 of the Act and the modified penalty has been paid in accordance with that section. Consequently there is proper cause for disciplinary action pursuant to section 95(4)(fa) of the Act.
11. It was submitted that the respondent had failed to manage the premises in accordance with the requirements of the Act or a term or condition of the licence, despite the Police, over a period of seventeen months, having engaged the respondent a number of times to discuss management of the premises informally, formally, in person, by letter and by infringement notice.
12. Seven liquor infringements and two formal written cautions for breaches of the restaurant licence were issued to the licensee and Approved Managers over this period.
13. The tenor of the complaint is that during part of the period of the ETP the premises were managed in a way that was, fundamentally, inconsistent with its licensing as a restaurant. The premises were, in effect, being managed

more like a small bar.

14. The facts demonstrate that, on the balance of probabilities, a proper course for disciplinary action exists as the grounds of complaint have been made out.
15. The Police seek the following orders:
 - pursuant to section 96(1)(m) of the Act, the licensee pay a monetary penalty, the sum of which is to be determined by the Commission;
 - pursuant to section 96(1)(k) of the Act the licensee complete a full Course in management of Licensed Premises (52473WA), or any other course the Commission considers appropriate, within three (3) months of the date of the Commission's decision;
 - any other penalty the Commission considers appropriate.

It was advised that the Complainant does not press the order sought in the complaint prohibiting the licensee for applying for an ETP for five years.

Submissions on behalf of the respondents

16. In not disputing the facts presented in the complaint, the respondent submits that the conduct in question is at the least serious scale of conduct warranting a section 95 complaint and the Commission should give weight to the following:
 - the licensee has taken a number of steps in response to issues raised by the Police and has genuinely sought to prevent recurrence of the incidents identified in the complaint;
 - there is no easy fix to issues that stem in part from patron behavior. The success of the licensee's tiered response to the issues may not have been immediate, but, given time, the issues have now been resolved;
 - the licensee is committed to the responsible sale of alcohol and the premises have a positive history of trade as a low risk, safe and responsible venue;
 - the matters raised in the complaint have not caused harm or ill-health to any person nor had adverse impacts on the amenity of the locality or those who reside or work in the vicinity of the premises;
 - the licensee is a local small business owner, operating in a locality which is experiencing a notable economic downturn and has already been subject to significant financial penalties related to the complaint through infringements issued by the Police.
17. The respondent acknowledged experiencing challenges in managing the 'red line' incidents where patrons have been observed consuming alcohol purchased from the premises outside the licensed boundary. Generally the incidents relate to patrons exiting the venue to access smoking areas on the adjoining footpath and toilet facilities.

18. The complaint that patrons have been observed consuming alcohol while standing, which is not in accordance with the licence or the ETP, is no longer an issue as with the ETP now expired all alcohol consumption must be accompanied by a meal.
19. It was submitted that the licensee has made concerted efforts to respond to the issues raised by the Police and the following measures have been implemented:
 - additional staff management training has been provided and will be maintained on an ongoing basis;
 - customers are provided advanced notice of the premises closing and firm instructions to cease the consumption of alcohol upon closing time;
 - a crowd controller is engaged for peak periods and public holidays. This initiative commenced in March 2013;
 - toilet facilities were constructed within the premises. The toilets were completed and operational from March 2013;
 - screens have been installed to the open alfresco area to restrict patrons direct access between the licensed area and the unlicensed footpath. The screens were installed in December, 2012;
 - additional signage has been installed at key points around the premises advising that consumption of alcohol outside of the licensed area is prohibited. The signage was installed in December 2012;
 - entry and exit through an unmonitored side access point to the premises has been prevented by installation of timber structure in the area. The structure was installed in December 2012.
20. With regard to the complaint that the licensee failed to provide the licensing authority with written notification of completion of alteration to the premises, including provision of a section 39 Certificate, prior to trading in the area, this issue was a result of miscommunication between the licensee and his contractor and is a regrettable but an unintentional administrative oversight that has now been rectified.
21. It was submitted that the Commission, in exercising its discretion under sections 95 and 96 of the Act, should give weight to the following:
 - the licensee is committed to the responsible sale of alcohol. No material failure to accord with these requirements has occurred at the premises, nor are any alleged in the complaint, for example sale to minors or intoxicated patrons, failure to comply with training requirements etc.;
 - the premises has traded as a low risk, safe and responsible venue. It does not have a history of patron, employee or licensee violence, physical altercations, lewd behavior or anti-social conduct;
 - to the licensee's knowledge, the Police have never been called to attend the premises. Further, the licensee is not aware of any complaint to the Police or other authorities in respect to adverse

amenity or other impacts in the vicinity of the premises as a result of its operation, even though residents live directly opposite;

- at all times the licensee has been and remains a fit and proper person to hold the licence. Prior to the complaint, the licensee has no history of disciplinary action taken against him;
 - at all times the licensee has co-operated with the Police and has endeavored to follow advice and directions given in respect to management of the premises;
 - all infringement notices have been paid.
22. It was further submitted that the Commission should take account of the fact that the licensee is a local small business owner, operating in a locality which is experiencing a notable economic down turn and that a further financial penalty being imposed in addition to the infringements that have already been paid would be oppressive and disproportionate to the conduct in question.
23. The incidents in the complaint reflect shortcomings in the licensee's management of the premises but do not demand the remedy sought by the Police. It was submitted that the most appropriate remedy would be for the Commission to issue a reprimand to the licensee pursuant to section 96(a) of the Act.
24. The licensee does not, however, have any objection to completing the full Course in Management of Licensed Premises (52473WA) as proposed by the Police.

Determination

25. The Commission may, where a complaint is lodged under section 95 of the Act, take disciplinary action. Pursuant to section 96 of the Act, if the Commission is satisfied on the balance of probabilities that the ground(s) upon which the complaint is based have been made out so that a proper cause for disciplinary action exists, the Commission may take action pursuant to section 96(1) of the Act.
26. From the material before it, the Commission is persuaded that proper cause for disciplinary action exists in that the breaches of the Act or a term or condition of the licence have been occasioned over an extended period despite the issuing of infringement notices (seven) and regular engagement with the respondent by the Police to discuss management of the premises; informally, formally, in person, by letter and by infringement notice.
27. The facts presented in the complaint are not disputed by the respondent and indicate that the management of the premises regularly incorporated practices that went considerably beyond the province of a restaurant licence with an associated ETP authorizing the licensee to sell and supply liquor, whether or not ancillary to a meal.
28. In fact, during the periods of observation by the Police it is apparent that the premises operated more in accordance with a small bar licence or restricted tavern licence and whilst the patronage on these occasions might demonstrate a consumer requirement for such services, the licensee acted

contrary to the law i.e. contravened a requirement of the Act or a term or condition of the licence.

29. The fact that the respondent has taken remedial action (refer para 19) to address the issues listed in the complaint is recognized by the Commission. However, there have been two subsequent infringement notices and one liquor caution notice issued, demonstrating that the management of the premises has, to the point of the complaint being lodged, not been to the standard required under the Act nor in accordance with the conditions of the liquor licence and ETP.
30. Reference has been made by the respondent to the notable economic down turn of the locality of the premises, a factor that the Commission has no mandate to consider, either in the context of any related motivation by the licensee to operate beyond the authority of the restaurant licence/ETP or in respect to the extent of any disciplinary action to be applied.
31. The Commission does acknowledge that the fact that the ETP for the premises not being extended has decreased the potential for a breakdown in management practices similar to those the subject of the complaint and does also represent a financial penalty in the operation of the business.
32. None-the-less, given the nature and number of offences which have occurred at the premises over a prolonged period, the Commission is satisfied that the grounds of the complaint have been established and there is proper cause for disciplinary action pursuant to section 96 of the Act.
33. Accordingly the Commission makes the following orders:
 1. Pursuant to section 96(1)(m) of the Act, the licensee is to pay a monetary penalty of \$3,000 within 30 days of the date of this determination.
 2. The respondent, Mr Guy Peter Hodgson is required to complete within 60 days of the date of this determination, the core unit, MLP1 of the Course in Management of Licensed Premises [52473WA] provided by the Australian Hotels Association, Clubs WA and Access All Areas Training.



**MR EDDIE WATLING
ACTING CHAIRPERSON**