

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Complainant:** Commissioner of Police
(represented by Ms Patricia Femia of State Solicitor's Office)
- First Respondent:** Iconic Water Solutions Pty Ltd
(ACN 164 537 026)
- Second Respondent:** Mr Lee William Macrae
(Director, Iconic Water Solutions Pty Ltd)
- Commission:** Mr Seamus Rafferty (Chairperson)
Mr Paul Shanahan (Member)
Ms Elanor Rowe (Member)
- Matter:** Complaint for disciplinary action pursuant to section 95 of the
Liquor Control Act 1988
- Premises:** Subaru Karaoke Restaurant
74A Francis Street, Northbridge WA
- Date of Hearings:** 9 July 2019 and 19 July 2019
- Date of Determination:** 5 November 2019
- Determination:** Pursuant to section 96(1)(j) of the *Liquor Control Act 1988*,
conditions as set out in paragraph 28 of these reasons are to be
imposed on the licence.

Background

1. The First Respondent is the licensee of Subaru Karaoke Restaurant, situated at 74A Francis Street, Northbridge ("**Premises**") and has held a restaurant licence (number 606208120615) ("**Licence**") for the Premises since 21 July 2017. The business trades as a karaoke themed restaurant with eleven individual rooms for hire.
2. The Second Respondent has been the sole Director of the First Respondent since 12 October 2018 and Company Secretary of the First Respondent since 29 July 2013.
3. On 11 April 2019, the Commissioner of Police ("**the Complainant**") lodged a complaint ("**Complaint**") under section 95 of the *Liquor Control Act 1988 (WA)* ("**the Act**") against the First and Second Respondents alleging that there is proper cause for disciplinary action under section 95(4) of the Act.

Submissions on behalf of the Complainant

4. The Complainant submits as per their Complaint that there is proper cause for disciplinary action on the following four grounds ("**Grounds**"):
 - i. the Premises are not properly managed in accordance with the Act contrary to section 95(4)(b);
 - ii. the First Respondent has contravened a requirement of the Act and a term or condition of the Licence contrary to section 95(4)(e)(i);
 - iii. the continuation of the licence is not in the public interest or the Licence has not been exercised in the public interest contrary to section 95(4)(j); and
 - iv. the safety, health or welfare of persons who resort to the licensed Premises is endangered by an act or neglect of the First Respondent contrary to section 95(4)(k).
5. The Grounds for the Complaint relate to several recorded incidents that occurred at the Premises over the period of approximately one year from 1 March 2018 to 5 February 2019 involving:
 - inadequate and improper management of the licensed Premises leading to incidents of serious assault, property damage, drug and drug paraphernalia offences, food and health legislation breaches and tobacco legislation breaches which required the intervention of law enforcement authorities;
 - the service of large quantities of liquor, unaccompanied by or disproportionate to served meals, or the provision of types of food inconsistent with and in breach of the Licence; and
 - inadequate supervision of patrons and permitting violent, quarrelsome, disorderly or indecent behaviour to take place on the licensed Premises compromising the safety, health and welfare of staff and patrons.
6. The details of the incidents and interventions by law enforcement underlying the Complaint and Grounds for disciplinary action in this matter are summarised in a schedule ("**Schedule**") prepared for the hearing by the Complainant.

7. The main incidents from the Schedule are as follows:

#	Date	Description
1	1 March 2018	Liquor Enforcement Unit ("LEU") officers patrol venue – observe disproportionate amount of liquor to food. Liquor did not appear to be ancillary to meals.
2	2 March 2018	Physical altercation between two groups of patrons resulting in serious assault on two patrons.
3	22 March 2018	LEU officers patrol venue – observe disproportionate amount of liquor to food. Liquor did not appear to be ancillary to meals.
4	7 May 2018	An intoxicated individual enters Subaru Karaoke; staff request for him to leave. Individual refuses; starts disturbing patrons. Individual evicted from premises; kicks a glass panel, breaking it and causing criminal damage.
5	12 May 2018	LEU officers patrol venue – observe disproportionate amount of liquor to food. Liquor did not appear to be ancillary to meals and self-pouring of liquor by patrons.
6	29 December 2018	Patron of Subaru Karaoke punches a female staff member in the face and smashes the room up. Officers observed venue staff with insufficient control over the consumption of alcohol and the sale of unopened full bottles of spirits.
7	20 January 2019	Executed search warrant under Misuse of Drugs Act. Multi-agency response. Illicit substances and drug paraphernalia located and seized from patrons. Officers' observed large quantities of alcohol and empty whiskey bottles; food almost non-existent; freezers in kitchen full of frost affected snack-style food; kitchen quite dirty but relatively unused and an Uber Eats bag on one room. <ul style="list-style-type: none"> • Several patrons charged / issued with Cannabis / Other Drug Intervention Requirement Notices. • Two Tobacco infringements issued (WA Health Department) • Improvement notice and three infringement notices issued (City of Perth Environmental and Public Health). • One employee found working in breach visa conditions; five patrons not holding any visa (Australian Border Force).
8	5 February 2019	LEU officers observed one room with four patrons. On table were two unopened bottles and one half empty bottle of Hennessy Cognac. Two food orders for the room.

8. The Complainant also refers to six infringements issued to patrons and the Licensee in respect of breaches against the *Tobacco Products Control Regulations 2006 (WA)*

between 2 September 2018 and 15 December 2018 for smoking in enclosed public spaces offences.

9. In relation to each of the four Grounds, the Complainant submits as follows:

Ground 1: Premises are not properly managed in accordance with the Act

- a. The Licence is a restaurant licence with conditions imposed that are commensurate with the low risk presented by the focus of trade being the service of liquor ancillary to the service of substantial meals. Condition 2 of the Licence confirms that the First Respondent "is authorised to sell and supply liquor for consumption ancillary to a meal it has supplied to be eaten on the Premises in accordance with s50 of the Act" ("**Condition 2**"). The incidents and intervention by State and Federal law enforcement agencies demonstrate the First Respondent is not properly managing the Premises in accordance with the Act.
- b. On 21 June 2019, in the Perth Magistrates Court, the First Respondent pleaded guilty to and was convicted of an offence against s110(1)(aa) of the Act of acting, by its employee, in a way that contravenes the Act or any term or condition of the licence. The offence related to the incident on 5 February 2019 (Incident #8 above), when officers from the LEU attended the Premises and observed a disproportionate amount of liquor to food, inconsistent with the restaurant licence.
- c. Incident #8 occurred a matter of weeks after the search warrant executed on 20 January 2019 (Incident #7), and notwithstanding ongoing scrutiny by LEU officers and counselling of management and staff with respect to breaches of Condition 2. The First and Second Respondents failed to take any action to rectify the issues identified and ensure adequate measures were implemented to properly manage the Premises and minimise harm to people due to the sale, supply and consumption of liquor at the Premises.
- d. The incidents were not isolated in nature but rather continued over a considerable period of time and escalated in severity to serious assaults on patrons and property damage at the Premises, in part attributable to the consumption of liquor.

Ground 2: First Respondent has contravened the Act and Licence

- e. The incidents demonstrate that the First Respondent has, on multiple occasions and over a considerable period of time, contravened the requirements of the Act and the conditions of the Licence, in particular Condition 2.
- f. The contraventions continued to occur notwithstanding regular attendances at the Premises by LEU and other State and Federal law enforcement authorities from 1 March 2018 to 20 January 2019.

Ground 3: Continuation of the Licence is not in the public interest / the Licence has not been exercised in the public interest

- g. The First Respondent was not the original applicant for the Licence in respect of the Premises, acquiring the existing Licence on 21 July 2017. The initial grant of the Licence in respect of the Premises was based on a public interest assessment ("PIA") conducted in 2016.
- h. In support of its application for the restaurant Licence, the original applicant submitted

its intention to operate a genuine restaurant offering a broad range of high-quality food and a premium dining experience supplemented by karaoke.

- i. Since acquiring the restaurant Licence, the First Respondent has consistently not exercised the Licence in the public interest and the continuation of the Licence is no longer in the public interest.
- j. The Schedule and the evidence collated by LEU officers confirms the following at the Premises between 1 March 2018 and 5 February 2019:
 - i. a lack of restaurant infrastructure;
 - ii. the supply of large amounts of highly concentrated liquor rather than the supply of substantial restaurant meals;
 - iii. a failure to adequately manage and supervise patrons and adhere to Responsible Service of Alcohol requirements – including staff at the Premises permitting patrons to self-serve liquor;
 - iv. a dirty and relatively unused kitchen;
 - v. a lack of restaurant quality food being served (predominantly the service of pre-prepared / fried snack foods and fruit platters); and
 - vi. patrons eating food from other sources (e.g. food supplied by Uber Eats) at the Premises.

Ground 4: Safety, health or welfare of persons is endangered

- k. The safety, health and welfare of persons who resort to and work at the licensed Premises have been unacceptably compromised over a significant period of time and endangered by the acts of neglect of the First Respondent. Summarised in the Schedule are alleged criminal offences occurring at the Premises necessitating intervention by law enforcement.
- l. Evidence collated by officers of the LEU confirms the First Respondent engaged a security presence at the Premises notwithstanding the restaurant Licence conditions do not require it. Nevertheless, the evidence also confirms there are insufficient security personnel employed at the Premises to adequately manage and control patrons and their liquor consumption. This is exacerbated by a consistent oversupply of highly concentrated alcohol relative to food, transforming the nature of trade and patronage occurring at the Premises from that of a restaurant to a bar.
- m. Evidence collated by Australian Border Force officers during the multi-agency intervention at the Premises on 20 January 2019 confirmed the First Respondent employed as staff at the Premises, student and working holiday visa holders from Taiwan and Japan. The employment of persons with tenuous immigration status and limited English-speaking skills in an environment where highly concentrated liquor is being sold to patrons disproportionate to the service of food creates an unacceptable vulnerability with respect to the safety, health and welfare of persons employed at the Premises.

Conclusion

10. A proper cause for disciplinary action against the First and Second Respondents having been established, the Complainant submitted that the Commission should take the following disciplinary action:
 - i. pursuant to s96(1)(e) of the Act, cancel the licence; and
 - ii. pursuant to s164(1a)(a) and 96(1)(g) of the Act, disqualify the Second Respondent, for such a period as the Commission thinks fit, from being:
 1. the holder of a position of authority in a body corporate that holds a licence; or
 2. interested in, or in the profits or proceeds of, a business carried on under a licence.

Submissions on behalf of the First and Second Respondents

11. The First and Second Respondents have had the opportunity to consider the basis upon which the Complaint is made and all of the material submitted by the Complainant, including the Schedule of incidents. Overall, the Respondents take no issue with any of the materials submitted nor with any of the incidents relied on by the Complainant in support of the Complaint.
12. The Second Respondent submits that:
 - a. since he became the sole Director of the First Respondent in October 2018, he has worked on rectifying the problems within the business;
 - b. many of the issues occurred because of a previous manager who was a bad influence on staff;
 - c. significant changes have been made to the management of the Premises since that manager left in February 2019;
 - d. the Second Respondent and the primary manager, Ms Dayhum Lee ("**Primary Manager**"), have been able to instil a new culture at the Premises so that it now genuinely trades as a restaurant;
 - e. the Primary Manager has built a strong relationship with LEU officers and works closely with relevant government departments, including the Department of Racing, Gaming & Liquor and the City of Perth's Health Department, to implement changes immediately to ensure they comply with the Act and public health legislation;
 - f. the Respondents have introduced the following measures:
 - i. all infringements issued by the City of Perth's Health Department have been rectified within 48 hours of notification;
 - ii. the Primary Manager now completes a full audit of the kitchen on a weekly basis;

- iii. the number of managers has been increased to four;
 - iv. all previous managers (except the Primary Manager) have been replaced with new, competent managers;
 - v. weekly management meetings are held to ensure compliance with the terms of the Licence and to discuss matters such as harm minimisation and issues reported by LEU officers or the City of Perth's Health Department;
 - vi. those meetings are recorded in a diary;
 - vii. a weekly meeting is also held between the Primary Manager and the Second Respondent to discuss any issues arising from those management meetings, and to work on improvements to the operation of the business;
 - viii. changes have been made to the menu and the First Respondent has implemented new policies for food service;
 - ix. patrons are now charged per room and a certain amount of that room fee is allocated to food, which is served as patrons enter their room;
 - x. although it is not a requirement of the Act, the First Respondent employs two security officers to minimise potential harm to both patrons and staff;
 - xi. CCTV has been installed throughout the building and the feed from the CCTV cameras is displayed on screens located in the bar area so that all areas of the Premises can be monitored;
 - xii. that CCTV system complies with the relevant policies of the Director of Liquor Licensing;
 - xiii. the Second Respondent is also currently sourcing quotes to add additional CCTV cameras in each of the private rooms;
 - xiv. the eligibility of the staff to work within Australia is now monitored much more closely and no one is employed without the positive confirmation of their visa status;
 - xv. the First Respondent requires staff to provide evidence that they have passed RSA training before they are employed;
- g. the First Respondent has a zero-tolerance policy towards illicit drugs on the Premises, however the First Respondent is still considering how it may legally prevent patrons from bringing illicit substances onto the Premises concealed on their person in circumstances where the First Respondent does not have the power to conduct full body searches of patrons;
- h. the Second Respondent proposes to increase his involvement in the day to day operation of the business, including attending the weekly management meetings and holding offsite meetings with management to discuss matters such as employment checks, the implementation status of upgrades to the Premises and how to ensure conformity with all regulations;

- i. a meeting held between LEU officers and the First Respondent on 29 May 2019 confirmed that the changes the First Respondent has implemented have resulted in no further recorded infringements of the Licence;

Conclusion

13. Although the Second Respondent acknowledges that he and the management of the Premises had made mistakes, and although he accepts that he was not adequately involved with the business before, he also submits that:
 - a. he and the management have learnt from those mistakes and he now realises the level of commitment involved in running the business properly;
 - b. the First Respondent has not ignored the provisions of the Act, but has sought to comply and ensure the safety of patrons and staff;
 - c. any financial penalty would be extremely detrimental to the continued operation of the business in circumstances where:
 - i. the First and Second Respondents invested significant funds to acquire the business and to make it work, and are also investing all of the profits back into the business on an ongoing basis; and
 - ii. the last financial year was a challenge with the economic climate that, at best, will see the business break even; and
 - d. cancellation of the Licence would result in the loss of approximately fifteen jobs and in the closure of the business.

Determination

14. The Commission may, where a complaint has been lodged under section 95 of the Act, take disciplinary action provided it is satisfied, on the balance of probabilities, that the ground(s) upon which the complaint is based has, or have, been made out.
15. The purpose of the disciplinary action contemplated in section 95 of the Act is to protect the public by maintaining the standards of behaviour for licensees, or a person holding a position of authority in a body corporate that holds a licence, or who is interested in the business or the profits or proceeds of the business. The object of disciplinary proceedings is not to punish those against whom a complaint has been made out.
16. It is a primary responsibility of the licensing authority to provide adequate controls over the persons directly and indirectly involved in the sale, disposal and consumption of liquor and that the professional standards of the industry and the persons in responsible positions must be maintained at the highest level.
17. Where there is a wide discretion as to the disciplinary sanction to be imposed, as specified in section 96(1) of the Act, the Commission is required to consider all of the circumstances surrounding the conduct which is the subject of the complaint and to exercise its discretion accordingly.
18. In the present matter, the Commission has considered all of the evidence and the submissions from both parties and has determined that all four grounds of the Complaint

have been made out.

19. The Act specifically details the particular obligations and privileges attached to each class of licence. Subaru Karaoke operates under a restaurant licence and, in essence, the business should be focused on the regular supply of genuine meals. However, on approximately five occasions from 1 March 2018 to 5 February 2019, LEU officers observed what they deemed to be a disproportionate amount of liquor to food being served, and that the service of liquor did not appear to be ancillary to the provision of meals. On 5 February 2019, LEU officers observed in one room with four patrons, two unopened bottles (and one half empty bottle) of Hennessy Cognac. That incident was a serious breach of the Licence. That incident also followed a multi-agency attendance during the execution of a Misuse of Drugs Act search warrant at the Premises approximately three weeks earlier. The LEU officers who attended the Premises at that time also observed an excess of alcohol and a lack of food being served with that alcohol.
20. It is clear from the evidence that the Premises have not been managed in accordance with the Act and the Licence, and that the Respondents have been responsible for serious shortcomings in maintaining the acceptable standards of behaviour of those involved with the sale and supply of liquor. It was also apparent to the Commission at the first Hearing of this matter that, at that time, the Respondents still did not fully understand their obligations under the Act, did not understand that the primary focus of the business must be the supply of meals, and, particularly, did not understand that the service of alcohol could only be ancillary to that the supply of meals.

The First Respondent

21. In considering its wide discretion as to the action to be taken in this matter, the Commission does not find that there is sufficient evidence on which to justify the cancellation of the Licence for the following reasons:
 - a. The original restaurant licence was granted on 12 April 2016 to JC88 Pty Ltd ("**Original Licensee**"). On 21 July 2017, the licence name was changed to Subaru Karaoke and the licence transferred to the First Respondent. Prior to "*inheriting*" the Licence, the First and Second Respondents operated a specialist water and waste system business servicing the mining industry. Although this does not excuse the lapses by the Respondents in fulfilling their obligations under the Act, the disparity between their prior experience and that of running a unique business operating under a particular type of liquor licence goes some way to explaining the problems they have faced.
 - b. The Commission has considered the basis on which the original Licence was issued, and refers to the Public Interest Assessment ("**PIA**") submitted by the Original Licensee in 2016 in support of the application for the restaurant licence. The description of the business in the PIA was stated as being:

"1.4 The restaurant consists of several small rooms, each with a table surrounded by eating and facing a large TV system installed with modern KTV software and associated audio-visual equipment. The restaurant operates by the attention of wait staff to each room, catering to small separate groups wishing to relax over dinner or enjoy the use of the KTV system....."

4.5(c)(5) *The venue consists of private rooms, which are available with bottle service and a private host for client's functions.*"

- c. The business is a unique model for a restaurant, being a karaoke style of restaurant that was introduced to meet the changing and diversifying needs of consumers. It is therefore somewhat unfair to expect the business to be operated as a "traditional" restaurant with expectations of "napery" being present on tables and so on.
- d. The Complaint is largely based on incidents of the improper service of large quantities of high alcohol content liquor, unaccompanied by or disproportionate to served meals, in breach of the Licence. However, again, the Commission refers to the original PIA and the beverages menu that was relied on with the application. That menu included the following items for sale: "*Blue Label \$680*"; "*Chivas Royal Salute \$480*"; "*Louis XIII \$5500*". The sale of whole bottles of such liquor was clearly contemplated by the Director at the time the application was made, and the Licence was successfully granted on that basis.
- e. The Complainant submits that the Complaint arises out of a number of transgressions and an "*escalation*" in incidents over a period of eleven months. However, while the Grounds of the Complaint are made out, and while inferences can reasonably be drawn as to the relevance of one particular issue to another, the Commission does not accept that all of the incidents are relevant to the matter at hand. Nor does the Commission accept that there is a reasonable and sufficient nexus between some of the issues referred to and the sale and service of alcohol. In that regard:
 - i. Tobacco infringements are relatively minor in nature and an independent issue.
 - ii. The incident on 7 May 2018 (Incident 4), involved an intoxicated male individual who was "*allowed*" to enter the venue and who started opening doors and disturbing patrons of the business. However, that individual was not a patron of Subaru Karaoke and, while that incident was unfortunate, the Commission finds that it is unfair to hold the Respondents accountable for what occurred.
 - iii. The incident on 20 January 2019 (Incident 7) resulted in a number of infringements being issued by various government agencies. However it is apparent that a number of those infringements were not clearly alcohol related. For example, the fact that one employee was found working in breach of visa conditions does not relate to issues concerning the service of liquor. Similarly, the fact that five patrons did not hold Australian visas does not concern the service of liquor to those patrons.

The Second Respondent

22. With regard to the Second Respondent, the Commission does not find that the evidence warrants his disqualification from being the holder of a position of authority in the Licensee company or interested in, or in the profits or proceeds of, the business

23. Although section 33(6) of the Act sets out the matters for consideration when determining whether an applicant is a fit and proper person to hold a licence, it also provides some guidance to a determination for a complaint under section 95:

"Where the licensing authority is to determine whether an applicant is a fit and proper person to hold a licence or whether approval should be given to a person seeking to occupy a position of authority in a body corporate that holds a licence, or to approve a natural person as an approved unrestricted manager, an approved manager or a trustee:

- a) the creditworthiness of that person; and*
- aa) the character and reputation of that person; and*
- b) the number and nature of conviction of that person for offences in any jurisdiction; and*
- c) the conduct of that person in respect to other businesses or to matters to which this Act relates; and*
- d) any report submitted, or intervention made, under section 69.*

are relevant and amongst the matters to which consideration maybe given."

24. The Commission finds that the effect on the Second Respondent of disqualifying him from the business pursuant to s164(1a) and 96(1)(g) of the Act, could be catastrophic to his ability to maintain a livelihood. The Commission also finds that the Complainant has not provided sufficient evidence of the Second Respondent's personal conduct to warrant such an order.

Conclusion

25. A Licensee is obligated to conduct the business in a manner consistent with the public interest and within the interests of the local community. The Incidents reflect poorly on the First and Second Respondents, and the Complainant's submissions as to the Complaint are reasonably made. Where the standards of behaviour of those involved with the sale and supply of liquor falls short, then the credibility of the liquor industry is tarnished and disciplinary action is necessary.

26. However, it was clear at the Hearing that the Respondents were committed to finding a solution to the issues of managing the premises appropriately. The Commission acknowledges the significant steps that the Second Respondent has taken to try to make changes to the business since becoming sole Director, including restructuring the management.

27. In the circumstances, the Commission finds that the Respondents should be afforded

the opportunity to demonstrate that they can operate the business in the manner as required under the Act. This must involve immediate changes to the business to ensure that it genuinely trades as a restaurant.

28. Accordingly, having been satisfied that there are grounds for disciplinary action, the Commission makes the following orders pursuant to section 96(1)(j) of the Act and imposes the following conditions on the Licence:

CCTV Surveillance

- a. A CCTV surveillance system must be in place and operational. That CCTV system must comply with the relevant policies of the Director of Liquor Licensing.
 - i. Each karaoke room and entertainment area must have CCTV coverage.
 - ii. The CCTV system must also provide and record continuous images of all bars, karaoke rooms and entertainment areas, from time the business opens each day until one hour after trading ceases. The CCTV system must provide images of sufficient clarity to allow the easy identification of individuals, and must also record the times and dates on which those images were recorded.
 - iii. Images recorded via video surveillance must be retained by the Respondents for 28 days and must be made available for viewing and/or removal by the police or by other person authorised by the Director.

Doors to each karaoke room

- b. The door to each karaoke room must be fitted with fully transparent safety glazing to allow people in the corridor outside each room to have a good view of the whole of each room, and that glazing must not be obscured in any way (including by any curtain, blind or hanging).

Crowd control

- c. The following crowd control measures are to be implemented, monitored and reviewed by the licence holder and manager:
 - i. every Friday and Saturday, at least two crowd controllers must be employed at the Premises during all hours of trade and until 30 minutes after the end of trade; and
 - ii. from Sunday to Thursday each week, whenever four or more karaoke rooms are in use at the Premises, then at least two crowd controllers must be employed during all hours of trade and until 30 minutes after the end of trade.

Responsible Service of Alcohol ("RSA")

- d. At least one RSA qualified member of staff is to be assigned to monitor each karaoke room to:

- i. serve all liquor in that room; and
 - ii. ensure that liquor is consumed in a responsible manner.
- e. Liquor must be served by way of bar or table service to the karaoke rooms by the allocated RSA officer for that room. The RSA officer is to remain in the room unless collecting liquor. No bottles of spirits (opened or unopened) may be left unattended with patrons.
- f. There will be no self-service of alcohol by patrons.
- g. No unconsumed liquor purchased at the Premises may be taken from the Premises by patrons or staff.
29. Any transgression of these conditions will be viewed gravely by the Commission. Without pre-empting matters, if there were any transgression of these conditions and if the Commission were satisfied that there were grounds for disciplinary action in relation to that transgression, then there is a strong likelihood that the Commission would impose the penalties as advocated by the Complainant in this matter.



SEAMUS RAFFERTY
CHAIRPERSON