

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Complainant: Commissioner of Police
*(represented by Mr John Carroll and Mr Lachlan Geddes
of the State Solicitor's Office)*

Respondent: Sylvester Pty Ltd
*(represented by Mr Peter Fraser of Dwyer Durack
Lawyers)*

Commission: Mr Eddie Watling (Deputy Chairperson)
Ms Emma Power (Member)
Ms Pamela Hass (Member)

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

Premises: The Gold Bar
137 Hannan Street, Kalgoorlie

Date of Hearing: 16 March 2020

Date of Determination: 28 May 2020

Determination:

Having been satisfied that there are grounds for disciplinary action, the Commission makes the following orders pursuant to sections 96(1)(m) and 96(1)(c) of the Act:

- a. The Respondent, Sylvester Pty Ltd, is to pay a monetary penalty of \$1,500.00 pursuant to section 96(1)(m) of the *Liquor Control Act 1988* within 30 days of the date of this Determination and lodge with the Commission evidence of payment of the penalty within 28 days of making the payment.
- b. The interim conditions imposed on Licence 6070034199 by the Director on 3 February 2020 pursuant to the decision in respect to Investigation Number: INV69350, are suspended and the following variations to the licence imposed:
 - i. Condition 6d) replaced with the following condition:

“6d) two (2) crowd controllers or authorised persons, additional to those inside the premises, to be stationed at the entrance door of the premises from 11:00pm (or the time of opening the premises if after 11:00pm) and to monitor the licensed premises and persons departing the licensed premises until 60 minutes after trading ceases.”
 - ii. New conditions 6e) and 6f) are added:

“6e). The crowd controllers or authorised persons referred to in condition 6:

 - i. must be at least 50% comprised of crowd controllers licensed under the Securities and Related Activities (Control) Act 1996; and*
 - ii. may be up to 50% comprised of employees of the licensee who:*
 - A. are capable of acting as an approved manager of the Premises; and*
 - B. who have completed and passed the course "CPP20218 Certificate II in Security Operations" (or whichever course succeeds that course);*

6f). Crowd controllers and authorised persons referred to in condition 6 are required to wear a high visibility uniform, described as a full-sized florescent tabard style shirt so as to be completely distinguishable to patrons.”

iii. Security Requirements:

- A. Security Requirement 1 is deleted; and
- B. New Security Requirement 4 is added as follows:

“4. An identification system shall be installed and operated during all hours of trade and is to record details of all persons entering the premises and:

- i. check the personal details (including by reference to whether those personal details are recorded on a list of persons subject to barring notices or prohibition orders as defined in the Act); and*
- ii. record for a period of not less than 28 days the personal details (by means of them being retained by the identification system in a format that is able to be provided to a member of the Police Force) of every person (other than an authorised person) entering the premises; and*
- iii. The operation and use of the identification system device is to be fully monitored by the licensee's CCTV system.”*

Authorities referred to in Determination:

- *Commissioner of Police v Sylvester Pty Ltd* (LC 10/2012)]
- *Jackson v Dyball* (Unreported SCWA. 930640)
- *Douglas-Brown v Commissioner of Police* (1995) 13 WAR 441 at 446 per Kennedy J.

Submissions on behalf of the Complainant

1. The Complainant supplied to the Liquor Commission of WA ("the Commission):
 - a. Complainant's Outline of Submissions dated 3 March 2020 with attachments including:
 - i. Annexure 1 – Table of Incidents;
 - ii. Annexure 2 – Table of Police Engagement;
 - iii. Annexure 3 - Statement of Senior Constable Fullgrabe dated 14 January 2020;
 - iv. Annexure 4 – Certificates issued under section 92 of the *Security and Related Activities (Control) Act 1996*;
 - v. Annexure 5 – Infringement notice and evidence of payment;
 - vi. Annexure 6 – Police incident report 240919 1045 13425; and
 - vii. Annexure 7 Extract of Sentencing Transcript.
 - b. Complainant's Reply Submissions dated 9 March 2020.
2. The Complainant submitted that there is proper cause for disciplinary action on the following four grounds ("**Grounds**"):
 - a. **Ground 1** - the Premises are not properly managed in accordance with *the Liquor Control Act 1988* ("the Act") contrary to section 95(4)(b);
 - b. **Ground 2** - the Respondent has contravened a requirement of the Act and a term or condition of the Licence contrary to section 95(4)(e)(i);
 - c. **Ground 3** - the safety, health or welfare of persons who resort to the licensed Premises is endangered by an act or neglect of the Respondent contrary to section 95(4)(k);
 - d. **Ground 4** – withdrawn; and
 - e. **Ground 5** - the Respondent has been given an infringement notice under section 167 of the Act and the modified penalty has been paid in accordance with section 95(4)(fa).
3. The remaining Grounds for the Complaint relate to 16 incidents that occurred at the Premises over the period from 10 August 2017 to 31 October 2019 involving:
 - a. employees of the Licensee assaulting patrons of the Premises;
 - b. utilising approved managers as crowd controllers, rather than licensed crowd controllers, in contravention of condition 6 of the Licence;
 - c. juveniles entering, remaining and consuming liquor on the Premises; and
 - d. other miscellaneous breaches of the Act and the conditions of the Licence.
4. The details of the incidents and interventions by law enforcement underlying the Complaint and Grounds for disciplinary action in this matter were summarised in Annexure 1 ("**Annexure 1**") of the Complainant's Outline of Submissions dated 3 March 2020.

5. It was submitted that in the various incidents, all references to “staff” are to employees of the Respondent and who were approved managers of the Premises who at the relevant time were purporting to act in the capacity as crowd controllers at the Premises.
6. Further, the Commission can be satisfied that the incidents occurred, for the following reasons:
 - a. Firstly, generally speaking, the incidents are recorded on CCTV and are self-evident from the footage. The time stamps for the relevant events are include in Annexure 1.
 - b. Secondly, many of the incidents are corroborated by documentary evidence, such as incident reports, witness statements and photographs, as identified in Annexure 1.
7. Via the Goldfields-Esperance Liquor Enforcement Unit (GELEU), the Complainant has had considerable engagement with the Respondent, its staff, including Ms Justine O'Meara (the then General Manager of the Premises), another employee of the Respondent, and the sole Director of the Respondent company. The Complainant provided an annexure setting out the dates and content of such engagement which is not replicated here.
8. Therefore, the Commission can be satisfied that the Respondent was, by its employees and agents, aware of the incidents set out in Annexure 1.
9. It was submitted that the Premises was the subject of a previous section 95 complaint [*Commissioner of Police v Sylvester Pty Ltd (LC 10/2012)*] which resulted in a fine being issued to the Respondent and various conditions being imposed on the Licence including the following condition 6:

“Crowd controllers, licensed under the Security and Related Activities (Control) Act 1996 (or persons authorised to undertake crowd control activities on licensed premises but who are exempted from the requirement to obtain and hold a crowd controller's licence by virtue of Regulation 4 of the Security and Related Activities (Control) Regulations 1997) are to be employed inside the premises;

- a) at a minimum ratio of two (2) crowd controllers for the first 100 patrons or part thereof;*
- b) at a minimum ratio of one (1) crowd controller for the first additional 100 patrons or part thereof; and*
- c) at a minimum ratio of one (1) crowd controller for the first additional 100 patrons or part thereof; from 8 p.m. (or the time of opening the premises if after 8 p.m.) until trading ceases;*
- d) two (2) crowd controllers, additional to those inside the premises, to be stationed at the entrance door of the premises from 11 p.m. (or the time of opening the premises if after 11 p.m.) and to monitor the licensed premises and persons departing the licensed premises until 60 minutes after trading ceases on Thursday, Friday and Saturday night.”*

10. It was submitted that since these conditions were imposed in 2012, the Respondent has ceased using licensed crowd controllers almost entirely. The Respondent has instead employed, for the purposes of providing crowd control services, persons who are authorised to act as an Authorised Manager of the Premises.
11. Part of the qualification to obtain a licence as a crowd controller under the *Security and Related Activities (Control) Act 1996* (“the SRA Act”) is the completion of the course “*CPP20218 Certificate II in Security Operations*”. This course requires at least 120 hours of study and has various core units.
12. Pursuant to section 37 of the SRA Act, a person must not act as a crowd controller unless they hold a licence issued under the SRA Act. Relevantly, one requirement in order to obtain a crowd controller’s licence is to undertake the prescribed training course.
13. However, regulation 4(4) of the *Security and Related Activities (Control) Regulations 1997 WA* (“the SRA Regulations”) creates an exemption from the requirement under section 37 of the SRA Act. Regulation 4(4) provides that:

“A natural person who is the licensee or manager of licensed premises is exempt from the requirement under section 37 to hold a crowd controller’s licence to the extent that he or she performs crowd control activities on those premises in compliance with the Liquor Control Act 1988.”
14. It was submitted that it is clear from the text of the Act that whilst multiple persons may, at a particular point in time, concurrently hold qualification to act as an approved manager of a particular venue, and may together be present and working at a venue, there can only be one person acting as a manager at any point of time. Only that person is entitled to the exemption under regulation 4(4).
15. The Commission can be satisfied based upon the content of course CPP20218 that a licensed crowd controller would have reacted more effectively to, and not exacerbated the incidents, as compared to untrained employees of the Respondent. By contrast, a person does not require any comparable training to obtain approval as an approved manager.
16. It follows that the Commission can be satisfied that the Respondent has consistently been in breach of Condition 6 of the licence.
17. It was submitted that the following breaches of the Act have also occurred:
 - a. Section 121(1) (sell or supply liquor to a juvenile) and/or section 121(2) (permit a juvenile to consume liquor): July 2019 incident;
 - b. Section 121(4) (allowing a juvenile to enter and remain on licensed premises): 30 June 2019 incident and 20 July 2019 incident;
 - c. Section 116A(1) (maintaining an incident register); 24 September 2019 incident; and

- d. Section 115 (permitting drunkenness or violent, quarrelsome, disorderly or indecent behaviour to take place on licensed premises): 10 August 2017 incident. In this case, an employee or agent of the Respondent engaged in violent or disorderly behaviour on the Premises – he therefore permitted the behaviour to occur because he had knowledge of the behaviour and did not prevent the behaviour from occurring, despite having the authority to prevent the behaviour occurring. Through section 165(1) of the Act, the Respondent is also deemed to be liable for such conduct.
18. Therefore, it is submitted that there are four grounds of disciplinary action against the Respondent:

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

19. It was submitted that the incidents establish:
- a. That the Respondent consistently employed unqualified security staff who consistently acted inappropriately and prejudiced the welfare of patrons, but that when this harm was highlighted to the Respondent, it refused to change its practices;
 - b. Instances of juveniles gaining entrance to the Premises, in one instance buying alcohol; and
 - c. Other miscellaneous breaches of the Act and licence,

amply demonstrating that the Premises are not being managed by the Respondent in accordance with the Act.

Ground 2 – Respondent has contravened the Act and Licence Conditions

20. The breaches of the Act and the conditions of the licence referred to above establish that the Respondent has contravened the Act and licence conditions.

Ground 3 – Safety, health or welfare of persons is endangered

21. It was submitted that in the incidents involving assaults on patrons by staff members, many of the incidents involved the use of excessive force as well as reckless, violent behaviour. In a number of instances, actions by staff members are disproportionate and/or unprovoked. Patrons sustained injuries, including injuries which required stitches and staples to suture lacerations to the head. A number of incidents required immediate police attendance and resulted in convictions of particular staff members.
22. During each of these incidents, the safety, health and welfare of these patrons was clearly imperilled, with the Respondent being aware of these incidents, aware of options suggested by GELEU officers which would have minimised the harm to patrons going forward, but took no effective action.

Ground 5 – Infringement notices

23. The Respondent was issued with an Infringement Notice under section 167 of the Act and paid the modified penalty in respect of the following incidents:
- a. 20 July 2019 – allowing a juvenile to enter and remain on licensed premises, contrary to section 121(4) of the Act;
 - b. 24 September 2019 – failing to adequately maintain an incident register, contrary to section 116A of the Act; and
 - c. 3 December 2019 – failing to keep its video surveillance system operational, contrary to Security Requirement No. 2 of the licence.
24. It was submitted that the following remedy is sought:

Fine

25. Proper cause for disciplinary action against the Respondent having been established, the Complainant submits that the Commission should issue a fine.
26. A fine should be issued because this is not the Respondent's first transgression, and the present complaint evidences continued transgressions over a period of time even where the Respondent, through its staff, were clearly put on notice by Police engagement of the issues at the Premises. In order to protect the public, a fine would offer both specific and general deterrence to ensure the Respondent will in future meet its obligations under the Act.

Licence Conditions

27. Impose conditions to which the Licence is to be subject, pursuant to section 96(l)(b) of the Act, in the following terms:
- I. On Thursday, Friday, Saturday and Sunday nights from 8pm, the Licensee must engage crowd controllers in the following ratios;
 - i. two crowd controllers for the first 50 patrons or part thereof;
 - ii. one crowd controller for the first additional 100 patrons or part thereof;
 - II. Crowd controllers, at the prescribed ratios, must remain on the premises until 60 minutes after trading ceases, where trade commenced on Thursday, Friday, Saturday or Sunday.

Crowd controllers are required to wear a high visibility uniform, described as a full-sized fluorescent tabard style shirt so as to be completely distinguishable to patrons.

For the purposes of this condition, only crowd controllers, licensed under the *Security and Related Activities (Control) Act 1996 (WA)* are to be engaged at the Premises.

- II. The practice of bar tabs or lines of credit at the premises is prohibited (i.e., payment for liquor must be received before the consumption of liquor takes place).

- III. The Licensee shall ensure that a person designated as a Responsible Service of Alcohol Marshal ('RSA Marshal') shall be employed at all times the premises is open for trade.

The RSA Marshal is to monitor both the practice of staff in serving liquor and patron alcohol consumption to ensure that responsible service liquor practices are being followed and that liquor is being consumed responsibly.

The RSA Marshal is required to wear a high visibility uniform, being a full-sized fluorescent tabard style shirt so as to be completely distinguishable to patrons. The uniform is to have 'RSA Marshal' in large letters embossed on the back.

The RSA Marshal is to have no other concurrent duties. The premises must maintain records which clearly identify the employee who is acting as the RSA Marshal at any particular point of time during which the premises are open for trade.

- V. An identification system shall be installed and operated during all hours of trade and is to record details of all patrons entering and re-entering the premises and:
- i. check personal details (including by reference to whether those personal details are recorded on a list of persons subject to Barring Notices and/or Prohibition Orders as defined in the Act);
 - ii. record for a period of not less than 28 days the personal details (by means of them being retained by the identification system in a format that is able to be provided to a member of the Police Force) of every person (other than an authorised person) entering or re-entering the premises; and
 - iii. the operation and use of the identification system device is to be fully monitored by the licensee's CCTV system.
- VI. order the First Respondent to pay to the Crown a monetary penalty not exceeding \$60,000, pursuant to section 96(l)(m) of the Act; and
- VII. make any other order that the Commission thinks fit, pursuant to section 96(l)(n) of the Act.

Submissions on behalf of the Respondent

28. The Respondent provided to the Commission:
- a. Submissions 3 March 2020 attaching:
 - i. Annexure A – Witness Statement of Ashok Aaron Parekh dated 16 December 2019;
 - ii. Annexure B – Witness Statement of Justine Louise O'Meara dated 16 December 2019;
 - iii. Annexure C – Table of Incidents and actions taken by Licensee; and
 - iv. Annexure D – Extract of section 115 and section 126 of the Act.
 - b. Responsive Submissions dated 10 March 2020;
 - c. Witness Statement of Ashok Aaron Parekh dated 3 March 2020; and
 - d. Witness Statement of Warren Clae Balgera undated but signed.

29. The Respondent concedes Ground 5.
30. In November 2019, the Director of Liquor Licensing wrote to the Respondent advising that he was considering imposing a number of conditions upon the Respondent's licence pending determination of the Complaint. Following responsive submissions and proposed conditions from the Respondent, the Director imposed certain interim conditions by a decision dated 3 February 2020.
31. The evidence relied upon by the Police primarily relates to approved managers acting in the role of a Crowd Controller.
32. The Police have primarily relied upon 13 incidents alleging that excessive force was utilised when removing patrons from the premises or when preventing persons from gaining entry to the premises.
33. With respect to 5 of the 13 incidents, criminal charges were laid and convictions recorded against the approved managers in question.
34. It was submitted that the Respondent is not liable for any criminal act committed by staff, whether that act resulted in charges being laid and successful convictions, or not. The provisions of section 65 of the Act do not apply to such offences, and the Respondent cannot be deemed to be liable for their actions.
35. In relation to 12 of the 13 incidents the behaviour the subject of the complaint occurred outside the venue.
36. The relevant incidents occurred from Augusts 2017 to November 2019 (being 23 months).
37. The Respondent, prior to receipt of the present Complaint:
 - a. Had knowledge of incidents 1, 2, 5, 6, 9, 10, 13 and 14 (Respondent's submission 3 March 2020, paragraph 44) at the time they occurred or promptly afterwards and took various actions in response summarised as follows:
 - i. Five staff members involved who were charged and convicted of criminal offence had their employment terminated by the Respondent;
 - ii. A further employee resigned from the employ of the Respondent immediately or promptly after the incidents in which they were involved;
 - iii. One other employee was a casual "temp" who was not permitted to be employed at the Venue again;
 - iv. All 6 staff members involved in the incidents are no longer employed by the Respondent, after having been terminated upon being convicted of a criminal charge or resigned;
 - v. Two Managers, prior to being terminated were taken off crowd controller duties or demoted pending the outcome of court cases (both were ultimately terminated); and

- vi. Further training was provided to crowd controllers with respect to the use of reasonable force. Such training was provided by service providers in Kalgoorlie and through Statewide Security.
 - b. Had no knowledge of incidents 3, 4, 7, 8, 11, and 12 with neither staff, the victim nor the Police advising Management of the Venue of the incident at the time.
38. No approved manager (or crowd controller) who was involved in an incident in 2017 or 2018, which allegedly involved an allegation that excessive force was used, or, alternatively, have been convicted of an assault or related offence, currently work for the Respondent.
39. The majority of the incidents complained of:
- a. Occurred outside the Venue;
 - b. Involved patrons who had been removed from the Venue, or denied entry to the Venue for a variety of reasons; and
 - c. Involved approved managers, a significant number of whom were also licensed crowd controllers.
40. With respect to incident 14 (which occurred in 2019):
- a. The Respondent alleges that the incident was an accident as a result of the staff member tripping;
 - b. It is denied that excessive force was utilised in the removal;
 - c. The patron made a complaint to the Police in relation to the removal;
 - d. The Police did not lay any charges; and
 - e. The Respondent or staff involved were not infringed by the Police.
41. It is submitted that:
- a. the majority of the incidents occurred in 2018;
 - b. the 2019 incident (which was a single incident) does not properly give rise to a complaint;
 - c. the majority of incidents did not occur on licensed premises; and
 - d. With respect to incident 1, 2 and 3, while the staff in question were employed as approved managers, they have also completed the requirements to be a crowd controller, notwithstanding they were not employed in that capacity.---
42. The position that appears to have been adopted by the Police is that approved managers should not be permitted to act as crowd controllers.
43. It is therefore relevant to consider the powers granted to a crowd controller by legislation and consider whether these powers are any greater than those granted to management and staff by the *Liquor Control Act 1988*.

44. A crowd controller is defined by section 35 of the SRA Act as follows:

“A crowd controller is a person who in respect of any licensed premises, place of entertainment, or public or private event or function, as part of his or her regular duties, performs for remuneration any function of -

(a) controlling or monitoring the behaviour of persons;

(b) screening persons seeking entry; or

(c) removing persons for behavioural reasons,

or any other prescribed function.”

45. The role of a crowd controller can be compared with the powers granted to an Authorised Person under the Act. Section 115(4) and Section 126 of the Act grants Authorised Persons the power to refuse certain persons entry to licensed premises----- or remove them using such force as is necessary.

46. It is submitted that for the purpose of monitoring and controlling patron behaviour, and ensuring compliance with the Act and the terms and conditions of a liquor licence, a crowd controller has no greater power than an Authorised Person.

47. Further, the obligations imposed upon licensees, managers, and employees are such that the obligation to ensure compliance with the terms and provisions of the Act where applicable remain, notwithstanding crowd controllers are employed.

48. Accordingly, while the Police submission appears to be prefaced upon the assertion that it is only because of the existing Crowd Control Condition that approved managers are acting as “crowd controllers” and as such vetting and removing patrons from the venue, the Act is quite clear in that Authorised Persons can exercise these powers on licensed premises regardless of whether there is a condition upon the licence recognising that they can fulfil this role or not.

49. There is no requirement under the Act for an Authorised Person to hold a Crowd Controller’s licence, notwithstanding that the powers that have been granted to them fall within the definition of "Crowd Controller".

50. Regulation 4 of the SRA Regulations provides:

“A natural person who is the licensee or manager of licensed premises is exempt from section 37 to the extent that he or she performs crowd control activities on those premises in compliance with the Liquor Control Act 1988.”

51. The question that arises is how the phrase "manager of licensed premises " should be interpreted for the purpose of regulation 4 of the SRA Regulations.

52. In the event that a strict interpretation is applied and only an approved manager is exempted from the requirement to hold a crowd controller's licence, the Respondent submits the exemption provided by regulation 4 cannot be reconciled with the powers granted to an Authorised Person, given that the employees and agents are also Authorised Persons.
53. The Respondent submits that to enable regulation 4 to be reconciled with the powers granted to an Authorised Persons, it is necessary to apply a broad definition to "manager of licensed premises" and not restrict it to an approved manager.
54. It is submitted that when an Authorised Person is exercising a power granted to them by the Act, such as evicting with the use of force a patron who falls within a requisite category, that person is actively involved within the management of the licensed premises, and as such, for the purpose of the SRA Regulations a "manager".
55. The Respondent submits that the evidence of unlawful and alleged assaults filed by Police does not establish Ground 2 of Complaint for the following reasons:
- a. The offence of assault, assault occasioning bodily harm, and grievous bodily harm are criminal offences under the Criminal Code and there are no corresponding offences under the Act.
 - b. The incidents complained of do not breach any of the conditions attached to the licence.
 - c. Many of the offences occurred outside of licensed premises (notwithstanding that the removal in some instances commenced inside licensed premises).
 - d. In some instances, the employee in question was a crowd controller. As such the Crowd Controller Condition proposed by the Police as an appropriate penalty would not have prevented the incident from occurring if it was in effect at that time.
 - e. Certain allegations made by the Police in respect to the incidents and staff actions are not supported by the evidence provided.
 - f. In *Jackson v Dyball (Unreported SCWA. 930640)* delivered 26 November 1993, the Supreme Court considered the meaning of "permitting" and identified the following basic principles:
 - i. Permitting involves some degree of knowledge.
 - ii. Knowledge is of two kinds, actual knowledge and imputed knowledge (otherwise known as "constructive knowledge").
 - iii. 'Imputed' knowledge arises from either from shutting one's eyes to the obvious or doing something (or failing to do something) not caring whether or not a contravention takes place (See also *Douglas-Brown v Commissioner of Police (1995) 13 WAR 441* at 446 per Kennedy J.).
 - iv. Mere negligence is not enough (*Douglas-Brown (supra)* at p.450).
 - g. The Respondent submits that in circumstances whereby a staff member committed the act which is alleged to be violent, quarrelsome or disorderly, that staff member cannot be said to have "permitted" that behaviour "to take place".
 - h. The Respondent submits that the Police have erred in placing reliance upon section 115 of the Act.

56. Ground 3 is not made out as:

- a. Section 95(4)(k) of the Act speaks in the present tense. The question to be determined is whether or not the safety, health or welfare of patrons “is endangered” by an act or neglect of the licensee, employee or agent.
- b. Evidence of acts or neglect on the part of the licensee and/or employees in the past are relevant to the determination of this question, however, they are not determinative.
- c. The Respondent submits that in order to find that this ground has been determined, it is not sufficient to identify incidents in the past whereby a patron’s health, safety or welfare was endangered. The licensing authority must determine that a risk to the health, safety or welfare of persons attracted to the licensed venue currently exists.
- d. In respect to the incidents relied upon by the Police:
 - i. They were due to the actions of a discrete number of employees.
 - ii. The relevant staff members were ultimately terminated or resigned upon the incident coming to light (with the exception of incident 14).
 - iii. No argument can be raised that the relevant employees are currently employing approved managers who have a propensity for violence when dealing with patrons.
- e. It is submitted that the questions that arise with respect to the incidents relied upon by the Police are as follows:
 - i. Has the Respondent created a culture at the venue whereby staff believe that the use of excessive force is tolerated by the Respondent?; and/or
 - ii. Is the use of approved managers in the role of “crowd controllers” a practice which inherently places the safety health or welfare of persons attracted to the licensed venue at risk?
- f. Various management practices were put in place with respect to using approved managers as crowd controllers.
- g. It has not been suggested by the Police that the Respondent:
 - i. Condoned such acts (such a position would be difficult to maintain, given the actions of the Licensee in terminating a number of staff involved in such acts).
 - ii. Created a culture by which such acts were tolerated or encouraged (once again such an argument is untenable given the Respondent’s acts of terminating the employment or services of individuals found to have used excessive force).
- h. The Respondent submits that the measures taken by the Respondent in 2018 were effective as evidenced by the fact that only one incident has been cited in 2019.
- i. In respect to utilising approved manager's as crowd controllers, the Respondent was acting in compliance with a condition that was imposed by the Liquor Commission in 2011. As such this cannot properly ground a complaint under section 95(4)(k) of the Act.

- j. This style of condition is not unique.
 - k. With respect to the incidents involving juveniles:
 - i. It is submitted that there is insufficient evidence to determine whether, on this occasion, the Respondent permitted a juvenile to enter and remain upon the licensed premises. The Respondent, the approved manager nor staff were infringed in relation to this incident.
 - ii. It would appear that the juvenile was permitted entry as a result of human error.
 - l. The Respondent submits that these isolated incidents are not sufficient to ground a finding that the safety, health and welfare of persons who are currently attracted to the Respondent's venue are at risk.
 - m. There is no evidence that would support a finding that:
 - i. juveniles do attempt to gain entrance to the Applicant's venue on a regular or semi-regular basis; or
 - ii. there is a culture at the venue whereby the Respondent and staff turn a "blind eye" to juveniles gaining entry to the venue.
 - n. These incidents would appear to ground the Police request for the imposition of a condition that an ID scanner be utilised at the venue during all hours of trade. It is submitted that the imposition of such a condition is a disproportionate response to these incidents.
57. It is not consistent with the Act and the usual function of managers that there is only ever one approved manager at a premises at one time.
58. In respect to the proposed required course for training of crowd controllers:
- a. There is no evidence before the licensing authority with respect to the efficacy of this course;
 - b. Licensed Crowd Controllers were involved in 3 of the 14 incidents relied upon by the Police involving an allegation of excessive force. Such crowd controllers would have received training under a similar course; and
 - c. Upon the evidence before the Commission there is no evidence that crowd controllers perform better than managers without training (particularly when regard is had to the trade at the Premises in 2019).
59. The incidents referred to by Police do not ground a finding that there is a culture of intoxication at the Respondent's Premises
60. It is entirely unclear from the Police submission why an RSA Marshal will be more effective than approved managers with respect to how an RSA Marshal could possibly monitor the sale of alcohol to patrons, given the premises has multiple bars that cater for up to 500 patrons.

61. The Respondent submits that the evidence before the Commission does not support the imposition of such a condition, and, further, that the condition would achieve no real purpose.

Determination

62. 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.
63. In determining whether there is proper cause for disciplinary action, the Commission needs to be satisfied on the balance of probabilities that one or more of the grounds of complaint alleged pursuant to section 95(4) of the Act have been made out.
64. Section 95(11) of the Act states that it is not a defence to a complaint lodged pursuant to section 95 of the Act to show that the licensee:
- a. did not know, or could not reasonably have been aware or have prevented the act or omission which gave rise to the Complaint; or
 - b. had taken reasonable steps to prevent the act or omission from taking place.
65. The policy of the Act is that a licensee is to be held personally responsible for acts or omissions on their licensed premises. This is illustrated by the following:
- a. the conduct of business under a licence is always the responsibility of the licensee and shall be personally supervised and managed by a natural person in accordance with section 100(1) of the Act;
 - b. it is a criminal offence for the licensee to fail to ensure that the conduct of the business at the licensed premises is supervised and managed in accordance with section 100 of the Act; and
 - c. a licensee is liable for offences committed on the licensed premises by an employee or agent of the licensee, or by a person acting, or purporting to act, on behalf of the licensee - even if the licensee did not know of and could not reasonably have been aware of or have prevented, the commission of the offence, in accordance with section 165 of the Act (see also sections 95(4)(f) and (k) of the Act).
66. 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 (although some protective action may have an incidental penal effect).
67. 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.

68. There is a wide discretion as to the disciplinary sanctions that may be imposed by the Commission. This includes the powers to impose conditions upon a licence, or to vary or cancel a condition upon a licence.
69. 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.
70. In the present matter, the Commission has considered all of the evidence and the submissions from both parties and has determined that Grounds 1, 2, 3 and 5 of the Complaint have been made out.
71. 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 Respondent and 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.
72. The fact that incidents 1-14 took place over a relatively short period of time and involved serious conduct by various employees of the Respondent (often acting in the capacity as crowd controllers) indicate that the Premises have not been managed in accordance with the Act and the Licence, and that the Respondent has been responsible for shortcomings in the manner they have permitted their staff to act in and immediately around the Premises.
73. It is fair to come to the conclusion that the Respondent, for a period of time, employed unqualified security staff who consistently acted inappropriately and prejudiced the welfare of patrons.
74. It is apparent from the material before the Commission that the Applicant conducted a number of engagement meetings with authorised representatives of the Respondent and that despite assurances from the Respondent that action would be taken to address those operational deficiencies, the adverse situation continued over a long period.
75. Whilst the majority of employees of the Respondent over this period have now resigned or had their employment terminated, the fact remains that the Licensee remains liable for actions by an employee or agent of the licensee, or a person acting, or purporting to act on behalf of the licensee where such actions are in contravention of the Act – section 165 of the Act.
76. The arguments that the Respondent:
 - a. was not aware of certain incidents; or
 - b. did not actively “permit” the relevant conduct by employees,are not compelling.
77. It is clear under the Act that a licensee is responsible for the acts of its manager and employees with respect to a licensed premises. Even where events may occur “outside” such premises, licensees are accountable for the actions of their employees, especially in relation to the patrons of a premise.

78. Further, the Respondent's argument that all of the incidents occurred in the past, and that only current events can give rise to disciplinary action is clearly misguided in the context of being able to make section 95 complaints under the Act.
79. The Commission is satisfied that the main issue to be determined is whether the imposition of additional or alternative conditions upon the Licence will have some protective purpose in light of the incidents that have given rise to the Complaint.
80. There must be an evidentiary foundation, and therefore a rational protective basis, for any conditions to be imposed.
81. Whilst crowd controllers are required to be licensed under the *Securities and Related Activities (Control) Act 1997*, an exemption to this requirement is provided under section 4(4) of that Act:

"A natural person who is the licensee or manager of licensed premises is exempt from section 37 to the extent that he or she performs crowd control activities on those premises in compliance with the Liquor Control Act 1988"

82. The Commission is satisfied that the correct interpretation of this section is that:
- a. "manager" refers to an "approved manager"; and
 - b. there is only permitted to be one such "manager" exempted at any one time.
83. However, this must be balanced with the relevant Director's Policy, which provides that:

"Crowd controller requirements will be determined on a case-by case basis depending on the nature of the licensed premises/event and the initiatives proposed by the applicant to mitigate risk. The licensing authority may determine that the security requirements can be met through the use of a combination of licensed crowd controllers, approved managers or responsible service of alcohol marshals. However, a minimum number of crowd controllers determined by the licensing authority may be required."

84. Given the above, there is some leeway that may be exercised in the requirements of crowd control conditions for the purposes of the Act.
85. The Commission acknowledges the difficulties experienced in sourcing crowd controllers in Kalgoorlie, however, the safety and security of people on and in the vicinity of the premises is a significant public interest issue that has to be addressed.
86. It is also acknowledged that the Respondent has initiated a regime of specialised training for authorised managers to improve their skills to assist in the role of crowd controller.
87. Because of the difficulties in being able to engage licensed crowd controllers in Kalgoorlie, the Respondent has applied the exemption to allow authorised managers to undertake the role of crowd controller.

88. It is the Applicant's submission that the lack of training that the Respondent's approved managers have in crowd controlling measures and actions is reflected in the number of incidents that have been listed in this complaint and that only licensed crowd controllers should be engaged for this role.
89. The Commission would agree that this would be the preferred position, however, practically this is difficult to apply in Kalgoorlie, as has been previously acknowledged.
90. Therefore, the Commission is tasked with finding a balance.
91. Pursuant to the relevant Director's policy, the licensing authority may determine that the security requirements can be met through the use of a combination of licensed crowd controllers, approved managers or responsible service of alcohol marshals. However, a minimum number of crowd controllers determined by the licensing authority may be required.
92. In finding that balance, the Commission is persuaded that the following condition in relation to the qualifications of persons acting as crowd controllers is appropriate:
- "6e). The crowd controllers or authorised persons referred to in condition 6:*
- i. must be at least 50% comprised of crowd controllers licensed under the Securities and Related Activities (Control) Act 1996; and*
 - ii. may be up to 50% comprised of employees of the licensee who:*
 - A. are capable of acting as an approved manager of the Premises; and*
 - B. who have completed and passed the course "CPP20218 Certificate II in Security Operations" (or whichever course succeeds that course);"*
93. This allows for both fully qualified crowd security staff to be present as well as suitably trained employees who are able to also act as approved managers under the Act. This will provide a higher level of protection to the public, while taking into account the Respondent's staffing difficulties.
94. In relation to the times crowd controllers must be employed, the Applicant has specified that crowd controllers must be engaged from 8:00pm on Thursday, Friday, Saturday and Sunday. The Respondent, whilst not currently trading on a Sunday, proposes to engage crowd controllers from 8:00pm every trading night.
95. The Commission accepts the conditions proposed by the Respondent on the basis that this approach provides for greater certainty in circumstances where trading hours may be varied.
96. The Applicant is seeking a condition for two crowd controllers for the first 50 patrons or part thereof, whereas the Respondent proposes two crowd controllers for the first 100 patrons or part thereof.
97. The Commission notes that the overwhelming majority of incidents over the period relevant to this application and also those listed at pages 30/31 on the 'Running Sheet Entry Detail of the Commissioner of Police section 95 complaint' have occurred after 12:00 midnight. On this basis, the Commission is not persuaded that an additional crowd controller is warranted above that specified in the Director's Safety and Security at Licensed Premises Policy which stipulates two crowd controllers for the first 100 patrons.

98. There is no evidentiary foundation to apply the condition proposed by the Applicant, i.e., two crowd controllers for the first 50 patrons or part thereof.
99. In respect to the proposed condition as to disallowing bar tabs, the Commission does not find that this condition would serve any substantial protective purpose and it is essentially a financial matter for the Respondent.
100. Given the nature of the conditions that are to be imposed by the Commission, the Commission further finds that having an RSA Marshal present (in addition to the required crowd controllers) in the Premises is not likely to provide further protection to patrons where the relevant incidents have largely arisen from the conduct of employees acting as crowd controllers.
101. The Commission does find, however, that the implementation of a suitable monitored identification program is entirely suitable and appropriate to put patrons on notice that inappropriate behaviours will not be tolerated in the Premises, and that offenders will not be permitted re-entry to the premises, and to further ensure that crowd controllers of the Premises are taking an active role in promoting appropriate conduct.
102. The Commission is of the view that for an identification system to be effective, all patrons at any time need to be identified and recorded, particularly due to the nature of the operation of the premises, i.e., a night club trading until the early hours of the morning.
103. In regard to a monetary penalty, the Commission finds that this is a suitable disciplinary action in the circumstances of repeated incidences where it is found the management of the Premises contributed to the conduct of the relevant employees.

Conclusion

104. Having been satisfied that there are grounds for disciplinary action, the Commission makes the following orders pursuant to sections 96(1)(m) and 96(1)(j) of the Act:
 - a. The Respondent, Sylvester Pty Ltd, is to pay a monetary penalty of \$1,500.00 pursuant to section 96(1)(m) of the *Liquor Control Act 1988* within 30 days of the date of this Determination and lodge with the Commission evidence of payment of the penalty within 28 days of making the payment.
 - b. The interim conditions imposed on Licence 6070034199 by the Director on 3 February 2020 pursuant to the decision in respect to Investigation Number: INV69350, are suspended and the following variations to the licence imposed:
 - i. Condition 6d) replaced with the following condition:

“6d) two (2) crowd controllers or authorised persons, additional to those inside the premises, to be stationed at the entrance door of the premises from 11:00pm (or the time of opening the premises if after 11:00pm) and to monitor the licensed premises and persons departing the licensed premises until 60 minutes after trading ceases.”

ii. New conditions 6e) and 6f) are added:

“6e). The crowd controllers or authorised persons referred to in condition 6:

- i. must be at least 50% comprised of crowd controllers licensed under the Securities and Related Activities (Control) Act 1996; and*
- ii. may be up to 50% comprised of employees of the licensee who:*
 - A. are capable of acting as an approved manager of the Premises; and*
 - B. who have completed and passed the course "CPP20218 Certificate II in Security Operations" (or whichever course succeeds that course);*

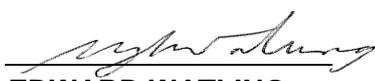
6f). Crowd controllers and authorised persons referred to in condition 6 are required to wear a high visibility uniform, described as a full-sized florescent tabard style shirt so as to be completely distinguishable to patrons.”

iii. Security Requirements:

- A. Security Requirement 1 is deleted; and
- B. New Security Requirement 4 is added as follows:

“4. An identification system shall be installed and operated during all hours of trade and is to record details of all persons entering the premises and:

- i. check the personal details (including by reference to whether those personal details are recorded on a list of persons subject to barring notices or prohibition orders as defined in the Act); and*
- ii. record for a period of not less than 28 days the personal details (by means of them being retained by the identification system in a format that is able to be provided to a member of the Police Force) of every person (other than an authorised person) entering the premises; and*
- iii. The operation and use of the identification system device is to be fully monitored by the licensee's CCTV system.”*


EDWARD WATLING
DEPUTY CHAIRPERSON