

Liquor Commission of Western Australia
(Liquor Control Act 1988)

- Complainant:** Commissioner of Police
(represented by Ms Leanne Atkins of WA Police)
- Respondent:** Circuit Nightclub Pty Ltd
(represented by Mr John Prior, instructed by Mr Peter Fraser of Dwyer Durack Lawyers)
- Commission:** Mr Jim Freemantle (Chairperson)
Ms Helen Cogan
Dr Eric Isaachsen
- Matter:** Complaint for disciplinary action pursuant to Section 95 of the *Liquor Control Act 1988*
- Premises:** Up Nightclub
- Date of Hearing:** 18 May 2011
- Date of Determination:** 24 June 2011
- Determination:**
1. Pursuant to section 96(1)(m) of the *Liquor Control Act 1988* Circuit Nightclub Pty Ltd is to pay a monetary penalty of \$15,000.

The licensee is to lodge with the Commission within 28 days evidence of payment of penalty
 2. Pursuant to section 96(1)(f) of the *Liquor Control Act 1988* Mr Shane Van Styn is disqualified from being the holder of a position of authority in a body corporate that holds a licence or otherwise being interested in, or in the profits or proceeds of a business carried on under a licence for a period of three years.

Introduction

- 1 On 13 February 2011 the Commissioner of Police lodged a complaint, pursuant to section 95 of the *Liquor Control Act 1988* (the Act), against Circuit Niteclub Pty Ltd, the licensee of premises currently known as the Up Nightclub (previously named 'The Nitey') and situated at 60 Fitzgerald Street, Geraldton. For the purposes of consistency, the licensed premises will be referred to under its former approved trading name of 'The Nitey' throughout this decision, which was the name of the venue at the time of the incident which forms the basis of the complaint.
- 2 Following the provision of written submissions on behalf of the parties, a hearing in respect of the complaint was held by the Commission on 18 May 2011.

Submissions on behalf of the Commissioner of Police

- 3 It was alleged by the Commissioner of Police that pursuant to section 95(4) of the Act there is proper cause for disciplinary action on the following grounds:
 - 1) The safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee;
 - 2) The licensed premises are not properly managed in accordance with the Act; and
 - 3) The licensee has contravened a requirement of the Act or a term or condition of the licence.
- 4 The complaint is predicated on an incident which occurred at the licensed premises on the morning of Sunday 11 January 2009.
- 5 It was submitted that after trading to the general public ceased on the morning of 11 January 2009, Mr Shane Van Styn, a director of the licensee company, hosted a private party at the premises under the guise of 'staffies', which is a colloquial term for staff drinks after work. However, an invitation to attend the party was not only extended to staff of The Nitey, but also to staff of the Vibe Nightclub, another licensed venue in close proximity to The Nitey. The party ran from approximately 4.30am to 9.25am and it is during this party that a staff member from the Vibe Nightclub died.
- 6 The following chronology of events was submitted:
 - The deceased commenced his shift at the Vibe Nightclub as a security guard/doorman at about 10.00pm and finished his shift at 4.40am the next morning. It is believed that the deceased consumed several drinks (double shots of spirits mixed with cola) at the Vibe Nightclub following the end of his shift before going to The Nitey, arriving at approximately 5.50am. The deceased then proceeded to consume numerous alcoholic drinks, including the rapid consumption of three large containers ('shakers' used in the making of cocktails) which can hold up to 500mls of liquid. Although it is not known how much alcohol was in each container, they usually contain between two and six shots of spirits combined with ice and a mixer.

- Shortly after 7.35am, the deceased became unsteady on his feet and slid to the floor where he was propped up in a seated position against the bar by other persons. A short time later the deceased became unconscious and witnesses believed him to be sleeping. At around 7.50am the deceased was moved away from the bar to a carpeted area a few metres away and placed in the 'recovery position'. The deceased was checked at intervals by various people to see if he was still breathing.
 - At around 9.16am it was discovered that the deceased was no longer breathing. Staff immediately commenced resuscitation until paramedics arrived at 9.27am. The deceased was unable to be revived and was pronounced dead shortly afterwards.
- 7 A post mortem examination revealed that the deceased weighed 218kgs and was 1.96 metres tall. The Forensic Pathologist determined that the causes of death were the combined effects of acute alcohol toxicity, cardiomegaly and obesity. A toxicology test indicated that the deceased had an alcohol level of 0.336% in his blood at the time of his death and 0.537% in his urine.
- 8 In support of the complaint the Commissioner of Police lodged various documents, including CCTV footage from the licensed premises; the Coronial Investigation Report; and various witness statements. These statements can be summarised as follows:
- Mr Van Styn stated that he went to The Nitey on 10 January 2009 at approximately 10.50pm and remained there until the premises closed at about 2.45am the next morning. Mr Van Styn and approximately ten staff members stayed after closing for staff drinks. At about 5.40am on 11 January 2009 the manager of the Vibe Nightclub called Mr Van Styn who invited him and his staff to The Nitey, which resulted in the manager of the Vibe and about six to eight of his staff, including the deceased, attending The Nitey for staff drinks. According to Mr Van Styn, after about one to two hours, the deceased asked if he could get some drinks and Mr Van Styn acknowledged that he could. The deceased then ordered three red shakers and Mr Van Styn watched him as he drank all three straight down within about thirty seconds and thought that he would have to keep an eye on him as it was a large amount of alcohol to drink so quickly. Although the deceased seemed fine at first, he started to become wobbly in the legs and ultimately fell to the ground. Mr Van Styn checked on him and could hear that he was breathing and he appeared to have just passed out whilst drunk. The deceased started snoring loudly and it was decided to move him to a more comfortable area nearby where he was placed in the recovery position and his airways, breathing and circulation checked and he appeared to be fine and just in a drunken sleep. Over a period of time, Mr Van Styn checked on the deceased on about four occasions and each time he was breathing and snoring loudly. Sometime later, someone said that the deceased was blue and Mr Van Styn went to him and started to administer CPR until the paramedics arrived and subsequently advised that the deceased had died.

- The manager from the Vibe stated that after arriving at The Nitey people were drinking a variety of drinks from soft drinks to beers and spirits. Later he saw the deceased drink two or three shakers made by the barman from The Nitey and about an hour after that he spoke to the deceased who looked pretty tipsy. Later he saw the deceased sitting on the floor up against the bar and slapped him on the face a few times and asked if he was alright and the deceased mumbled something. The deceased was moved from the bar area and placed in a coma position and he heard him snoring and could see that the deceased was breathing. People checked the deceased regularly and could see that he was still breathing, however at some stage it was noticed that the deceased was not breathing and CPR was applied while waiting for the paramedics to arrive.
 - A former employee of The Nitey, who was working at the Vibe Nightclub and attended The Nitey for staff drinks, stated that upon arriving at The Nitey she went straight to the bar and was served a shot of vodka. She overheard the bar staff say “we’re going to get you guys fucked up”, interpreting this to mean that they were trying to get them drunk. She also overheard a man behind the bar say to Mr Van Styn “Can we fuck them up?” with Mr Van Styn replying “Let them have whatever they want. Do whatever you want.” Also, when the deceased was sitting on the floor up against the bar, this witness claims she heard the bar staff saying “We did it. We fucked the bar staff up.”
 - Other witnesses provided information on the amount and type of alcohol that was consumed by the deceased both before and after arriving at The Nitey and the events surrounding the staff drinks at The Nitey.
- 10 It was submitted that the evidence presented indicates that the licensee and management of the premises breached the Act by allowing persons who were not employed at The Nitey to consume liquor on the premises outside permitted trading hours; allowed intoxicated persons on the premises and to consume liquor; engaged in the irresponsible supply of liquor and permitted the irresponsible consumption of liquor. The actions of the bar staff and the permissive behaviour of the licensee/manager to enable and permit the persons present to become intoxicated and consume liquor while intoxicated, to such an extent that a person is rendered unconscious is irresponsible and contrary to the Act. The tragic outcome may have been preventable if the licensee/manager had been more responsible on the day.
- 11 Consequently, the Commissioner of Police seeks to have a monetary penalty of \$30,000 imposed on the licensee and for Mr Van Styn, a director and approved manager of the premises, declared not fit and proper to be involved in the conduct and management of licensed premises.

Submissions on behalf of the respondent

- 12 It was submitted that the particulars in support of the grounds of the complaint are derived from an incident which occurred on Sunday 11 January 2009 whereby:
- a) at the cessation of trading, commencing sometime between 4.30am and 5.00am staff drinks were held at The Nitey;
 - b) a number of staff members from the Vibe Nightclub, which included the deceased, were invited to The Nitey by Mr Van Styn; and
 - c) at approximately 7.41am the deceased collapsed and fell unconscious and was declared dead on the licensed premises at 9.35am.
- 13 Consequently, the particulars in support of the grounds for the complaint are:
- a) the circumstances surrounding the death of the deceased;
 - b) the excessive service to and consumption of liquor by the deceased and other persons present at the venue during the relevant times; and
 - c) an allegation that the licensee supplied liquor to employees of the Vibe Nightclub in contravention of section 111(1)(b) of the Act and that the licensee and approved manager committed an offence under section 115(1)(a) of the Act by permitting drunkenness.
- 14 The respondent concedes that it contravened section 111(1)(b) of the Act by trading outside the permitted hours of the premises and as such there is cause for disciplinary action to be taken against the respondent under ground 3 of the complaint, however, grounds 1 and 2 of the complaint and permitting drunkenness in ground 3 are denied.
- 15 The respondent submitted that the deceased had consumed alcohol prior to his arrival at The Nitey, where he then consumed a number of drinks. However, notwithstanding the statement of Mr Van Styn that the deceased ordered three red shakers and drank them all within about 30 seconds, CCTV footage from the venue reveals that the deceased only consumed two beverages from a container of the shape and dimensions which would be consistent with a cocktail shaker. When Mr Van Styn gave his original statement to the police he had not slept for approximately 26 hours and he was suffering from the shock and trauma of witnessing the death and being actively involved in attempts to resuscitate the deceased.
- 16 Consequently, in a statement dated 6 May 2011, Mr Van Styn denies hearing the deceased order any shakers of liquor and it is therefore suggested that the cocktails consumed by the deceased were pre-mixed, and not pre-ordered. Also, in his further statement Mr Van Styn denies that an employee said to him "Can we fuck them up?" or that he advised them that they could "Do whatever they want." Mr Van Styn also denies hearing any employee state "We did it. We fucked the bar staff up."

- 17 It was submitted that there was little evidence in relation to the amount of alcohol consumed by other persons at the premises and the various witness statements are not conclusive in this regard. According to Mr Van Styn, in his statement of 6 May 2011, he never observed any behaviour which led him to believe that people had drunk liquor to the point of intoxication. Furthermore, CCTV footage does not support the police contention that people were displaying signs of intoxication such as stumbling or swaying or experiencing difficulties with their co-ordination, rather some patrons were merely high-spirited.
- 18 The respondent denies that he committed an offence under section 115(1)(a) of the Act by permitting drunkenness to take place on the licensed premises. The reference to “permit” in section 115(1)(a) involves knowledge to some degree and demonstrating negligence is not sufficient to prove that a licensee “permitted” drunkenness to occur on the premises. In this context, ‘knowledge’ has two components – actual knowledge and knowledge which arises from shutting one’s eyes to the obvious thereby not caring whether a contravention takes place or not. In considering the issue of whether a person is drunk, the respondent quoted from *CLA Number 145 Pty Ltd trading as Tandara Motoring and Another v Motor Insurance Board [2009] HCA 47*, including where the Court said”In some the signs of intoxication are not readily apparent. With some there is the risk of confusing excitement, liveliness and high spirits with inebriation.”
- 19 It was therefore submitted that grounds 1 and 2 of the compliant and some of the particulars in ground 3 are denied for the following reasons:
- the CCTV footage shows that the deceased consumed two tumblers of cocktails and not three;
 - a period of some 4 1/2 minutes passed between the consumption of the first and the second cocktail shaker;
 - the evidence suggests that the deceased did not order the cocktail shakers in question, but, rather they had been pre-mixed and other attendees had been offered a cocktail from these shakers;
 - there is no evidence that the deceased was exhibiting any signs of intoxication prior to the consumption of the second cocktail shaker alerting either the licensee or its employees to his level of intoxication;
 - the CCTV footage shows that the deceased did not exhibit any signs of intoxication until shortly after the consumption of the second shaker;
 - there is no evidence of what was in the shakers;
 - the evidence of Mr Van Styn was that the standard practice was to include one shot of liqueur and one shot of spirits within the cocktails;

- the consumption of the cocktail shakers by the deceased was a spontaneous action and there is no indication that either the licensee through its employees, or Mr Van Styn had any pre-warning or knowledge of the deceased's intention to skoll the cocktail shakers in question; and
- no other attendees were displaying signs of drunkenness to such an extent that an objective person would have concluded that they were drunk.

20 In respect of the assertion that the licensed premises are not managed in accordance with the Act (ground 2 of the complaint) it was submitted that the question that arises is whether or not a single breach of the Act can lead to a finding that the premises are not well managed? It is submitted that it cannot and that a finding of improper management would require either a finding that there was no approved manager on duty and/or repeated breaches of the Act.

Determination

21 The Commission may, on a complaint lodged under section 95 of the Act, take disciplinary action.

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

23 The following facts do not appear to be largely in dispute:

- staff drinks were held at The Nitey on 11 January 2009 at the conclusion of trade;
- Mr Van Styn, a director of the licensee company and an approved manager of the premises, invited staff and crowd controllers from the Vibe Nightclub to attend the staff drinks at The Nitey, which they did;
- drinks were complimentary, at the expense of the licensee of The Nitey;
- it was an open bar;
- at least one member of staff from The Nitey was behind the bar for the course of the event for the purpose of providing drinks which included the making of cocktails;
- staff from the Vibe, including the deceased, arrived at The Nitey at approximately 5.51am;
- at approximately 7.34am the deceased collapsed in the main bar area and appeared to lose consciousness;

- the deceased was moved by a number of attendees, including Mr Van Styn, from the main bar area to a carpeted area nearby and placed in the 'recovery position';
- the deceased was periodically checked by attendees and at 9.17am he was found to have stopped breathing and CPR was commenced by Mr Van Styn and another attendee;
- at 9.28am paramedics arrived at The Nitey and a short time later the deceased was pronounced dead;
- a Coronial investigation into the cause of death indicated that;
 - the deceased was 218kgs and 1.96metres tall;
 - he suffered from a swollen heart;
 - his blood alcohol reading at the time of death was 0.336% and the alcohol level in his urine was 0.537%; and
- The cause of death was the combined effects of acute alcohol toxicity, cardiomegaly and obesity.

24 The respondent conceded that it contravened section 111(1)(b) of the Act by trading outside the permitted hours of its nightclub licence and as such there is proper cause for disciplinary action to be taken against the respondent in accordance with ground 3 of the complaint. However, the respondent denies the other allegations contained in the complaint.

25 Counsel for the respondent stressed at the hearing before the Commission that acute alcohol toxicity was not the single cause of death, with cardiomegaly and obesity being contributing factors. The Pathologist's report provides no greater emphasis on any one of these contributing factors as the cause of death. However, the deceased had a blood alcohol reading of 0.336% and the alcohol level in his urine was 0.537% which are extreme. Although there is evidence that the deceased consumed some alcohol prior to attending The Nitey, namely one full strength beer and two rum and cokes (double shots), the Commission is satisfied on the evidence that the majority of alcohol resulting in the deceased suffering from acute alcohol toxicity was consumed at The Nitey.

26 The evidence of the witnesses and the CCTV footage makes it clear that the deceased consumed a range of alcoholic drinks, including the skolling of at least two or possibly three cocktail shakers containing alcohol. One witness states that he saw the barman make a drink in a tall glass in which he put Frangelico, Lemoncello, Blue Curao, Tripple Sec and some other unnamed liquid, demonstrating that highly intoxicating drinks were being provided. Given the deceased's extremely high blood alcohol reading, the commission is of the view that the shakers skollled by the deceased contained a potent mix of alcoholic beverages. This view is supported by the CCTV footage from 7.07am to

7.34am when it is evident that the deceased rapidly consumes a large amount of alcohol in front of bar staff and in Mr Van Styn's presence.

27 The Commission has viewed the CCTV footage with particular emphasis on the period 7.07am to 7.34am and notes the following:

7.07.17 the deceased enters the bar area and gets a drink off the bar and drinks it

7.07.52 the deceased appears to be signalling with his arms in the air and pointing to his glass

7.08.32 the barman rushes over and jumps the bar and talks to the deceased. The barman then leaves the bar area and returns shortly after and starts to make a drink in a large container

7.09 the deceased is talking to Mr Van Styn at the bar

7.09.18 the barman commences to make a drink and mixes approximately seven shots in the container

7.11.03 the barman shakes the cocktail and taps the deceased on the shoulder and puts the drink in front of him while the deceased is talking to Mr Van Styn

7.19.42 the deceased skolls the drink in front of Mr Van Styn

7.20.35 the deceased gets another drink off the bar

7.22.15 the barman gives the deceased another (large) drink

7.25.30 the barman appears to signal for Mr Van Styn to come down the bar to where the deceased is standing

7.26.05 the deceased skolls this drink in front of Mr Van Styn

7.26.11 a girl appears to cheer the skolling of the drink

7.29.07 the deceased skolls a small drink

7.30.48 the deceased appears to skoll another large drink

7.31.41 the deceased skolls another drink

7.33.48 the deceased staggers and collapses a short time later

28 The Commission is satisfied that it has correctly identified Mr Van Styn in the above footage because:

- The Commission has had the advantage of viewing the CCTV footage on a large screen; and
- The various witness statements, including that of Mr Van Styn, provide some insight into people's interaction with the deceased.

29 A licensee is not absolved of its responsibilities simply because trading to the public has ceased at the premises. Mr Van Styn organised the 'staff drinks'; provided an open bar and invited staff from the Vibe nightclub to attend (in contravention of the Act). He was present when people were consuming a variety of alcoholic beverages including the rapid consumption of alcohol by the deceased. Mr Van Styn did nothing to intervene or restrict the consumption of alcohol by the deceased. It was suggested on behalf of the respondent that the cocktails consumed by the deceased were pre-mixed and not pre-ordered, however in view of the CCTV footage from 7.07am to 7.34am and in particular 7.08.32am to 7.11.03am, the Commission does not accept this submission.

30 At paragraph 10 of Mr Van Styn's statement of 6 May 2011 he states that the manager that night was (name withheld) who decided who would work behind the bar the night of staff drinks. (name withheld) placed himself behind the bar, and Mr Van Styn was not sure if any-one else served drinks during the period. When paragraph 10 was queried by the Commission the respondent advised that the person behind the bar was the bar manager, not the approved manager. However, this does not sit easily with paragraph 6 of Mr Van Styn's statement where he states that "Whenever staff drinks are held at Up Nightclub (The Nitey) one staff member, generally the Approved Manager, is nominated to 'run the bar'...."

31 The staff member left in charge of the bar was not an approved manager and had not been trained in the Responsible Service of Alcohol (according to the records of the Department of Racing, Gaming and Liquor this person did not complete RSA training until April 2009 apparently in contravention of section 103A of the Act and Regulation 14AD) and there is no evidence that this person received any instructions from Mr Van Styn on the responsible service of liquor during the staff drinks. The CCTV footage shows this bar person placing possibly seven shots of liquor into a large container (shaker) for consumption by the deceased, which is consistent with the evidence of one of the witnesses that large amounts of alcohol were placed in the cocktails. The Commission also gives some weight to the evidence of the witness who overheard the barman say to Mr Van Styn "can we fuck them up' with Mr Van Styn replying "Let them have whatever they want. Do whatever you want." This leads to a conclusion that there may have been an attempt to get the staff from the Vibe intoxicated. Although Mr Van Styn denies making these comments in his statement of 6 May 2011 and it was submitted that the evidence of this witness is hearsay, the Commission is not bound by the rules of evidence and is to act according to equity, good conscience and the substantial merits of the case (refer section 16 of the Act). The Commission has no

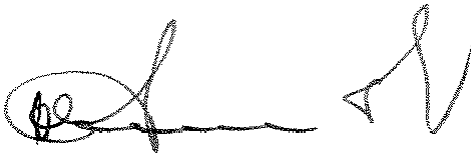
reason to doubt the veracity of this evidence, particularly when viewed in the context of the CCTV footage between 7.07am and 7.34am.

- 32 One of the primary objects of the Act is to minimize harm or ill-health caused to people, or any group of people, due to the use of liquor. To support and reinforce this primary object, the Act has been progressively amended over the years to include provisions for mandatory training in responsible service practices; the introduction of a public interest test; the ability of the licensing authority to impose conditions on licences to minimize alcohol related harm and ensure public order and safety; and ensure the proper supervision and management of licensed premises to name just a few. Through the regulation of the liquor industry, the Act clearly correlates the sale and consumption of alcohol in our community with the public interest and the protection of the community and therefore places obligations and responsibilities on persons who are entrusted with the privilege to operate and manage licensed premises.
- 33 Although the Commission acknowledges that the deceased must bear some of the burden for his own actions in rapidly consuming a large amount of alcohol on the day, the Commission cannot excuse Mr Van Styn's permissive attitude to the excessive consumption of liquor during the staff drinks and accepts the submissions from the Commissioner of Police that if Mr Van Styn had been more responsible on the day and ensured that liquor was supplied and consumed in a more appropriate manner, consistent with a licensee's obligations under the Act, the tragic outcome may have been prevented.
- 34 The respondent acknowledges in its written submissions that at approximately 7.34am the deceased collapsed in the main bar and appears to lose consciousness, and although it was thought that the deceased was merely in a "drunken sleep" (refer to the original statement of Mr Van Styn), the poor judgement exercised by Mr Van Styn and others present by continuing to socialise and drink and not immediately seeking medical assistance is also a matter of concern.
- 35 The Commission does not accept the respondent's submission that the CCTV footage does not show people at the premises displaying signs of intoxication. Although the Commissioner of Police specifically identified the period of 9.05am to 9.13.53am when persons present were displaying heavy signs of intoxication, the Commission is satisfied that the CCTV shows other incidents when persons on the premises stumble, sway or experience difficulties with their co-ordination consistent with persons affected by alcohol, and not merely being 'high-spirited'. Although Mr Van Styn states that he did not see anyone exhibit signs of intoxication, the Commission is not persuaded by this evidence. Mr Van Styn was present throughout the event; provided an open bar and witnessed the deceased skoll one or more large cocktails. As stated by Scott J in Holden v Sainken SCWA Library No: 970700:

"Those cases reveal the history of equivalent legislation and show the extent to which the legislature has imposed upon licensees particular obligations with

respect to the conduct of licensed premises that cannot be delegated to employees so as to absolve the licensee from responsibility.”

- 36 Overall, the Commission is satisfied, on the evidence and the circumstances that contributed to the death of the deceased, that the licensed premises were not properly managed in accordance with the Act as asserted in the complaint.
37. In weighing the evidence presented and arriving at this conclusion the Commission was guided by the principle stated by Latham CJ in *Briginshaw and Briginshaw* [(1938) 60 CLR 336]...”the standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness and importance of the issue.”
- 38 The Commission therefore finds that the grounds of the complaint have been made out and that there is proper cause for disciplinary action under section 96 of the Act. The Commission is mindful of the penalty that it imposed in the *Commissioner of Police v Golfing Pub Pty Ltd (LC 06/2010)* and consequently in the exercise of its discretion under section 96, the Commission imposes a monetary penalty of \$15,000 on the licensee company and disqualifies Shane Van Styn from being the holder of a position of authority in a body corporate that holds a licence or otherwise being interested in, or in the profits or proceeds of, a business carried on under a licence for a period of three years.



JIM FREEMANTLE
CHAIRPERSON