

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Complainant: Commissioner of Police
(represented by Ms Marina Georgiou of State Solicitor's Office)

Respondent: Mr Sean Spence
(represented by Mr Michael Perrella, Barrister and Solicitor, instructed by Mr John O'Connor of O'Connor Lawyers)

Commission: Mr Jim Freemantle (Chairperson)
Ms Belinda Lonsdale (Member)
Dr Eric Isaachsen (Member)

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

Premises: Evolution Lounge Bar, Lot 3891 Warambie Road
Karratha

Date of Hearing: 10 September 2012

Date of Determination: 17 October 2012

Determination: Pursuant to section 96(1)(m) of the *Liquor Control Act 1988*, Mr Sean Spence is to pay a monetary penalty of \$4,000.

Authorities Referred to in the Determination:

- *Director of Liquor Licensing v Hardi* LC 03/2010
- *Australian Broadcasting Tribunal v Bond* [1990] HCA 33
- *Simonsen v Rossi, the Registrar Real Estate and Business Agents Supervisory Board* [2005] WADC 76
- *Penketh v Commissioner of Police* [2010] WASC 254
- *Hughes & Vale Pty Ltd v New South Wales [No2]* [1955] HCA 28
- *Grover & Commissioner of Police* [2005] WASC 263
- *Briginshaw v Briginshaw* (1938) 60 CLR 336

Preliminary Matter

- 1 In the Commissioner of Police's ("the Police") submissions the term 'credit worthiness' appears. The context makes it apparent the term should be 'credibility'.

The Police submissions were amended accordingly by consent of the parties.

Introduction

- 2 On 3 April 2012, the Police lodged a complaint with the Liquor Commission ("the Commission") pursuant to section 95(4) of the *Liquor Control Act 1988* ("the Act") against Mr Sean Spence, the approved manager and director of SWS Evolution Pty Ltd and against SWS Evolution Pty Ltd, the licensee of Evolution Lounge Bar situated at Lot 3891 Warambie Road, Karratha.
- 3 On 20 August 2012, the Police withdrew the complaint against SWS Evolution Pty Ltd.
- 4 A hearing of the matter was conducted on 10 September 2012.

Submissions on behalf of the Commissioner of Police

- 5 On 21 December 2011, Mr Spence was involved in a violent incident with his former de facto wife which gave rise to charges of aggravated assault occasioning bodily harm being pressed against him. Whilst this incident is not given as a specific ground of complaint the Commission may take judicial notice of it.
- 6 On 19 February 2012, Mr Spence was involved in a serious assault against an evicted patron of Evolution Lounge Bar, such assault occurring in the adjacent car park.
- 7 Mr Spence later instructed staff to destroy CCTV images of the car park incident and caused the CCTV camera configuration to be altered for the purpose of misleading Police.
- 8 On 20 February 2012, Mr Spence was charged with grievous bodily harm, attempting to pervert the course of justice and aggravated assault occasioning bodily harm.
- 9 In showing poor judgement and lack of control in respect of the assault on an evicted patron causing life threatening injuries and in deliberately interfering with or causing others to interfere with and destroy evidence, Mr Spence has not shown the level of integrity and character necessary to hold the office of approved manager nor to hold an interest of any sort in the licence.
- 10 Statements were submitted from the following:
 - i. Jade Marie Saligari
 - ii. Karra Al Asadi
 - iii. Tanel Viik
 - iv. Tanel Vieberg
 - v. Matthew Brian Meldrum
 - vi. Philip Patrick Connolly
 - vii. Adrian Lee Richards
 - viii. Gregory James Cunningham
 - ix. Courtney Jade Solly

- x. Grant Andrew Wiltshire
- xi. Bryn James Papalia
- xii. Sally-Anne Joyce Gamble
- xiii. Michael Jonathan Bickford
- xiv. Leigh Vincent Carter; and
- xv. Jeramy Michael Davies.

11 The Police also submitted:

- i. CCTV stills of Evolution Lounge Bar;
- ii. a copy of the Evolution Lounge Bar incident sheets; and
- iii. a copy of handwritten notes relating to the incident seized from the respondent's house.

12 Pursuant to section 96 of the Act the Police seek:

- disqualification of Mr Spence from holding a position of authority including approved manager in an licensed premise (section 96(1)(g));
- disqualification of Mr Spence from holding a position of authority in a body corporate that holds a licence in any licensed premises. This is requested to apply for both Mr Spence's position as a director and member of; SWS Evolution Pty Ltd, Lualtasa Investments Pty Ltd and SWS Capital Pty Ltd (section 96(1)(g)(i));
- an order that Mr Spence pay a monetary penalty as the Commission sees fit (section 96(1)(m)); and
- disqualification of Mr Spence from being interested in, or in the profits or proceeds of, a business carried on under a licence (section 96(1)(g)(ii)).

Submissions on behalf of the respondent

- 13 The complaint is based on three alleged offences to all of which the respondent has pleaded not guilty and is currently on bail.
- 14 The respondent's bail conditions preclude him from attending Evolution Lounge Bar as he has been ordered not to approach or enter Karratha.
- 15 Comprehensive submissions were made on the relevant legislative provisions and the applicable test of "fit and proper" supported by reference to case law. This will be dealt with as necessary in the determination below.
- 16 Other than the three charges the respondent faces, there is no other evidence to support the contention he is not a fit and proper person for the purposes of the Act.
- 17 The Commission cannot be satisfied on the balance of probabilities that the Karratha charges can be sustained as the evidence against the respondent in respect of the incident in the car park is entirely circumstantial and there is no evidence from anyone who might have witnessed the incident.
- 18 The evidence of Karra Al Asadi refers only to him seeing the victim lying on the ground.

- 19 Both Tanel Viik and Tanel Veiberg in their statements claim the respondent told them (individually) that he had struck the victim. Both Vik and Veiberg had been arrested prior to giving their statements.
- 20 Whilst there is evidence the respondent told one person (also arrested over the incident) that he struck the victim, there is also evidence that four different persons were told by the respondent that he didn't know how the victim was hurt.
- 21 Turning to the charge of perverting the course of justice there is significant confusion as to the chain of events and the role of the respondent.
- 22 The evidence of Vik that the respondent told him to get Meldrum to destroy the tapes is questionable as Vik was arrested by the police on the same day. Similarly the evidence of Veiberg is equally questionable as to whether the respondent told him to lie to the police as he also was arrested for attempting to pervert the course of justice prior to giving his statement. The person who actually adjusted the tapes was Matthew Meldrum on the instruction of Veiberg. The respondent was not present when Meldrum altered the CCTV footage.

Determination

- 23 Section 96 of the Act provides for the Commission to determine the matter to which the complaint made under Section 95 relates on the balance of probabilities. If it is satisfied on the balance of probabilities that a cause for disciplinary action exists the Commission may then exercise its discretion as set out in section 96(i)

- 24 Section 3(4) of the Act provides:

For the purposes of the Act, a person occupies a position of authority in a body corporate if that person:

- a. is a director of the body corporate; or*
 - b. exercises or exerts, or is in a position to exercise or exert, control or substantial influence over the body corporate in conduct of its affairs; or*
 - c. manages, or is to manage, the business of the body corporate to be conducted under a licence; or*
 - d. occupies a position, in relation to the body corporate, prescribed to be a position of authority,*
- or, where the body corporate is a proprietary company, if that person is a shareholder in that proprietary company.*

- 25 Regulation 5B(3) of the *Liquor Control Regulations 1989 (WA)* provides that if a director is a shareholder of a body corporate and that body corporate is a shareholder of a proprietary company then that person occupies a position of authority in the proprietary company for the purposes of section 3(4)(d) of the Act.

Mr Spence is a director of SWS Evolution Pty Ltd and a director and shareholder of the proprietary company with a 50% share in the SWS Evolution Pty Ltd.

- 26 The basis of the complaint is that Mr Spence is no longer a fit and proper person within

the meaning of the Act as a consequence of the incidents described in the complaint.

27 Section 33(6) provides that:

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 restricted 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 any convictions 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 may be given.*

28 The term 'fit and proper' is not specifically defined in the Act however section 33(6) and an abundance of case law provide guidance. See *Director of Liquor Licensing v Hardi LC 03/2010 at p18, Australian Broadcasting Tribunal v Bond [1990] HCA 33, Simonsen v Rossi, the Registrar Real Estate and Business Agents Supervising Board [2005] WAOC 76, Penketh v Commissioner of Police [2010] WASC 254.*

The purpose of the words 'fit and proper' is to give the decision maker the widest possible scope for judgement (*Hughes & Vale Pty Ltd v New South Wales [No2] [1955] HCA 28*).

29 Johnson J held in *Grover v Commissioner of Police [2005] WASC 263* that "*evidence of pending charges does not substantiate a conclusion that the applicant is of bad character: it raises a serious doubt as to whether the person is of good character*" [43]. His Honour further stated at [47] that "*the fact that an allegation has been made which was not self evidently unsustainable, is sufficient to adversely impact on the licensing office's satisfaction as to the applicant's good character.*"

30 The complaint is based on two specific incidents being the assault on an evicted patron allegedly by Mr Spence and the tampering with CCTV camera angles and CCTV footage recorded at or around the time of the assault allegedly on the instruction of Mr Spence.

31 In assessing the evidence the Commission is guided by the principles set out by Lathan CJ in *Briginshaw v 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*".

Dixon J in the same judgement (*supra*, at 362) stated "*the seriousness of an allegation made, the inherent unlikelihood of an occurrence of the given description, or the gravity of the consequences flowing from a particular finding are considerations which*

must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal”.

- 32 Although the evidence of the alleged assault is circumstantial, the Commission is satisfied that on the balance of probabilities, the allegation is made out. The evidence of Vic and Veiberg establishes that Mr Spence made a significant admission that he was responsible for the assault. That coupled with the fact that he was in the vicinity at the relevant time leads the Commission to conclude that on the balance of probabilities he did commit the assault.

Whilst it is true that Mr Spence did tell people that he did not know how the victim got hurt, such statements are clearly self serving and therefore carry little weight.

- 33 In respect of the issue of the attempt to pervert the course of justice, the evidence is contradictory and largely based on hearsay. The respondent’s submissions that the witnesses Vik and Veiberg lack credibility or their statements are made with corrupt motives must be regarded as speculative. However there remains some residual doubt about the accuracy of some of the evidence of these witnesses.

On the balance of probabilities the Commission cannot on the evidence presented reasonably conclude that Mr Spence did attempt to pervert the course of justice in respect of the CCTV footage.

- 33 Notwithstanding the finding of the Commission at Para 31, the Commission is of the view that the assault alone is not a sufficient ground to declare Mr Spence not to be a fit and proper person to hold a licence solely on the basis of this isolated occurrence, given the circumstances of the case and no prior record of unnecessary force or violent behaviour.

- 34 However, the Commission is of the view that Mr Spence’s conduct on the night in question fell well short of that expected of a person in authority within the meaning of the Act. Irrespective of what provocation there may have been Mr Spence as a person in a position of authority should have exhibited greater control in respect of his actions and the Commission is disappointed that he did not do so. The Commission expresses its concern that Mr Spence has exercised poor judgement for a person entrusted with the privilege of being able to sell and supply liquor.

- 35 Accordingly the Commission imposes a monetary penalty of \$4,000 on the respondent and issues a formal reprimand pursuant to section 96(1)(a) of the Act.



**MR JIM FREEMANTLE
CHAIRPERSON**