

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

Complainant: Commissioner of Police
(represented by Mr David Leigh of State Solicitor's Office)

First Respondent: Tocoan Pty Ltd
(represented by Mr Kevin Robert Mann, Director of the licensee company)

Second Respondent: Mr Kevin Robert Mann
(approved manager of Zelda's Nightclub)

Commission: Mr Jim Freemantle (Chairman)
Ms Helen Cogan (Member)
Mr Evan Shackleton (Member)

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

Premises: Zelda's Nightclub, Rockingham

Date of Hearing: 12 March 2014

Date of Determination: 30 June 2014

Determination:

1. Pursuant to section 96(1)(e) of the *Liquor Control Act 1988*, the licence number 6070021493 held by the first respondent, Tocoan Pty Ltd is cancelled.
2. Pursuant to section 96(1)(g)(i) and (ii) of the *Liquor Control Act 1988*, the second respondent Mr Kevin Robert Mann is permanently disqualified from being the holder of a position of authority in a body corporate that holds a licence and from being interested in or in the profits or proceeds of, a business carried on under a licence.

Authorities Referred to in Determination:

- *Tocoan Pty Ltd v Commissioner of Police* [2013] WASC 318
- *Commissioner of Police v Tocoan Pty Ltd* (LC 52/2011)
- *Commissioner of Police v Tocoan Pty Ltd* (LC 23/2012)
- *Commissioner of Police v Bremerton Pty Ltd and West Lander Pty Ltd* (LC24/2011)
- *Commissioner of Police v Sylvester Ltd* (LC10/2012)
- *O'Sullivan v Farrer* (1989) 168 CLR 210
- *Hogan v Hinch* [2011] HCA 4 at [32] per French CJ
- *McKinnon v Secretary, Department of Treasury* [2005] FCAFC
- *Re Gull Liquor, Gingers' Roadhouse, Upper Swan* (1999) 20 SR (WA)321
- *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207
- *Briginshaw v Briginshaw* (1938) 60CLR 336
- *Hughes and Vale v New South Wales (No 2)* (1955) 93 CLR 127, 156
- *Australian Broadcasting Tribunal v Bond* [1990] HCA 33: (1990) 170 CLR 321, 348

Background

1. On 22 November 2013, the Commissioner of Police (“the complainant”) filed a complaint pursuant to section 95 of the *Liquor Control Act 1988* (“the Act”) alleging that there is a proper cause for disciplinary action against Tocoan Pty Ltd, the licensee of premises known as Zelda’s Nightclub (which also incorporates an area known as “iBar” at Zelda’s) (“first respondent”) and Mr Kevin Robert Mann, a Director of the licensee company and approved manager of the premises (“the second respondent”).
2. A hearing of this complaint was held on 12 March 2014.

Submissions by the Complainant

3. The complainant set out a comprehensive history of complaints laid against the respondents (particularly the first respondent) and a detailed summary of the various provisions of the *Liquor Control Act 1988* (“the Act”) applicable to this complaint.
4. Section 95(4) of the Act provides for various grounds of complaint for commencing disciplinary proceedings. The following four grounds were relied upon by the complainant in this matter:
 1. the continuation of the licence is not in the public interest (s 95(4)(j));
 2. the licence has not been exercised in the public interest (s 95(4)(j));
 3. the safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee (s95(4)(k)); and
 4. a person holding a position of authority in a body corporate that holds the licence, or who is interested in the business or the profits or proceeds of the business is not a fit and proper person to hold that position or to be so interested (s95(4)(h)).
5. The complaint was supported by a large volume of Computer Aided Dispatch (“CAD”) reports and Police Incident Reports together with an analysis of those reports by Senior Constable D’Souza.
6. In addition to evidence relating to serious assaults occurring at the premises, the material lodged by the complainant also included evidence relating to various reports relating to apparent criminal activities taking place at the licensed premises which had not been reported to the police. The complainant’s supporting material also included data on police and ambulance attendances at the licensed premises.
7. The complaint provided the details of three specific incidents that occurred at the licensed premises in grounds 1, 2 and 3 of the complaint.
8. Firstly, an assault occurred inside the iBar on 22 June 2013, where a patron had

been consuming alcohol and was approached by two (2) other males, resulting in an unprovoked assault. The victim in this case sustained a broken jaw and nose. It is submitted that both the offender and victim were drunk at the time. The following allegations were made in the complaint relating to this incident:

- (a) Attending police reported a lack of co-operation by the approved manager and staff at the premises, as well as noting that when police drove past the front of the premises, no security staff were seen positioned at the front door at 4:05am.
 - (b) Mr Blake the approved manager stated to police he did not have access to the CCTV or the ID scanner. He advised that the second respondent was the only person with access to the systems. Mr Blake gave the attending police the telephone number of Zelda's, in order to contact the second respondent Mr Mann.
 - (c) A statement taken from Mr Mann on 18 October 2013 in relation to the criminal proceedings against the patron who committed the assault reveals he was working on the night of 22 June 2013 and was made aware of the incident where a patron had been punched in the face.
 - (d) The police submit that the approved manager Mr Blake was negligent in his duties and hindered police undertaking enquiries into a serious criminal offence in not providing CCTV and scanner details on request. Furthermore, Mr Blake should have told Police that the second respondent was present at the venue at the time.
 - (e) The patron who was involved in the incident, is recorded in police intelligence records as being an associate of the Rebels OMCG.
 - (f) The police submit the licensee, by way of its primary company director (the second respondent) has failed to take any meaningful action to prevent entry of these kinds of persons, resulting in yet another serious assault at the venue.
 - (g) Despite having had police take action against the venue previously over cleaning up crime scenes (see LC 25/2012), the staff and management of the venue made no attempt to assist police in dealing with evidentiary matters. Instead, staff attempted to deny any knowledge of this incident and closed the premises for the night.
9. Secondly, on 23 November 2012, at 1.50am, approved manager Morgan Thompson recorded in the Zelda's Incident Register, an incident where a patron was caught selling drugs on the premises; the patron was removed and no attempt made to contact the police. Police submit this matter was significant and the approved manager neglected his duty by not contacting police. No effort was made to secure

CCTV footage or provide ID scanner details of the patron concerned.

10. Thirdly, on 17 August 2013, at 4.30am, the Security Register reveals a patron had dropped a bag of cannabis in front of crowd controllers when going outside the premises. Action taken was to dispose off the cannabis in a rubbish bin and the males were not permitted re-entry.
11. The above actions of crowd controllers constituted an offence by taking possession of the drugs and disposing of them. Furthermore, no attempt was made to contact police or provide any CCTV or ID scanner details of the patron involved.
12. In addition to the three specific incidents, the complainant notes that the Incident Register reveals that on at least four (4) separate occasions, patrons were removed for being found asleep either at the bar or in other areas at the venue, indicating high levels of drunkenness.
13. In general terms the complainant submits that notwithstanding a number of previous disciplinary actions taken by the complainant, the second respondent continues to engage in poor management practices, without having regard to the consequences of previous actions against the licensee.
14. For example, notwithstanding that on 2 July 2010, the complainant had lodged a complaint pursuant to section 95 of the Act, that among other things, the licensee was still conducting irresponsible promotions of alcohol and using “gimmicks” to lure patrons into consuming alcohol rapidly and in a risky way. As evidence it is submitted that on 19 October 2013, when plain clothes police officers from the Liquor Enforcement Unit attended the premises to conduct an inspection, on entering a female employee approached them and offered them a “shaker”.
15. Inside the police officers observed patrons being served shooters at the bar, and watched as bar staff placed four (4) shots of what appeared to be measures of spirits into each shaker. These shakers were then offered and sold to patrons.
16. It is submitted by the complainant that this kind of service of alcohol is contributing to the rapid consumption of alcohol and promoting drunkenness inside the venue, resulting in assaults and anti-social behaviour of patrons inside the venue. This flows onto the general community when patrons are ejected or leave of their own accord.
17. The complainant supplied detailed statistical evidence and various summaries of analysis of incidents over a protracted period (May – July 2011, May – July 2012, May – July 2013). These periods were relevantly used as the licence was suspended for the 3 months May – July 2012 and thus provides a basis for comparison.
18. The above analysis reveals that for an area of approximately 250m around the premises:

- i. Police attendances declined by 35% between 2011 & 2012 (after premises ceased trading) and increased 94% between 2012 & 2013 after trading resumed at the premises.
 - ii. Domestic assault figures declined by 16% between 2011 & 2012 (after premises ceased trading) and then increased by 69% on resumption of trading.
 - iii. Non domestic assaults declined by 72% between 2011 – 2012 (after premises ceased trading) and increased on the resumption of trading by 146%.
 - iv. Instances of criminal damage similarly declined (by 38%) then increased (by 18%).
23. It is therefore a reasonable inference for the Commission to draw that the premises plays a major role in contributing to criminal and antisocial behaviour in the vicinity of the licensed premises. The complainant submits that the variation in the rate of police call outs and other measures when all other factors remain equal is “of pivotal significance in consideration of the data” (complainant’s submission of 5 March 2014 at paragraph 85).
24. There is a consistency in the statistical evidence pointing to a high level of incidents in the immediate vicinity of, and inside the premises, including criminal acts, which sustain the view that violence and anti-social behaviour is occasioned by patrons of the premises.
25. A review of the Incident Register as well as Security Incident Registers required to be maintained by staff and security personnel also reveal disturbing discrepancies. “Refusal of entry” records show a discrepancy of 190 reports not being accurately transcribed in the registers during the period 10 August 2012 to 20 October 2013.
26. An examination of the Incident Registers indicates there have been at least thirty assaults recorded at the venue since re-opening, after the suspension of the licence by the Director of Liquor Licensing (“the Director”), during the trading period of fourteen months. This data is not consistent when compared to the reported assaults at the venue contained in the police IMS data. The IMS data only reflects eight reported offences to police giving rise to concerns management has not seen fit to contact police to report the majority of matters where an assault has occurred. Furthermore, the management of Zelda’s will generally fail to secure any closed circuit television system (“CCTV”) footage or provide any information from the identification scanning machine (“ID Scanner”), which may have led to the apprehension of offenders.
27. The complainant submits that there has been no genuine effort by the second respondent to reduce incidents at the premises, or to curb those considered undesirable from attending and gaining entry and service of alcohol. The Complaint

states:

“The lack of sound management practices, the culture of uncooperative staff when being dealt with by police investigating offences, the permissive attitude of excessive alcohol consumption and offending on the licensed premises has been the catalyst for several previous complaints against this licensee pursuant to Section 95 of the Act. This level of unprofessionalism has extended to the detriment of patrons resorting to the licensed premises by way of anti-social behaviour and assaults over a sustained period of time. There is nothing from the recent Incident Registers to suggest any improvement in this regard.” (complainant’s submissions dated 22 November 2013 at paragraph 52).

28. The incident reports show that Mr Mann was personally involved in a significant number of the incidents as well as being aware of the overall incidents recorded, it is apparent that no strategies or practices to reduce harm have been put in place to curb the assaults and anti-social behaviour at the venue by the licensee.
29. An assessment of the statistics relating to patrons removed from inside the venue after having been deemed suitable to enter demonstrates a total of four hundred and seventy seven recorded removals for drunken patrons. These patrons have arrived at the premises, been assessed for sobriety and permitted entry, then, having been served alcohol until such time they were deemed too drunk to remain at the premises, been ejected. This attitude exhibits high tolerance towards intoxication within the premises.
30. The director of the licensee company, Mr Mann, has been responsible for the running of the premises, either working inside the venue during the evenings or maintaining control and direct influence over staff while not at the venue.
31. Over the past three years the second respondent has been the face of the licensee company and responsible for the management of the premises. It is by his failings that the previous proceedings have been instigated by police.
32. It is the submission of the complainant that the unabated levels of offences and anti-social behaviour taking place at the premises show that the second respondent has been unable or unwilling to make the necessary changes to deal with those problems at the premises. The second respondent is either incompetent in respect of the management of the premises, or is deliberately putting his financial and business interests before that of community safety.
33. The second respondent’s lack of ability to manage the business in accordance with the Act by neglecting to put into place any real strategies which protect the general public who attend the premises, demonstrates he is not a fit and proper person to be in a position of authority in connection with a licensed premises, or to gain any profits or proceeds from a liquor licence.

Submissions by the Respondent

34. The four (4) grounds of the complaint are, in fact:
 - i) the premises continue to contribute to alcohol related harm in the area;
 - ii) there is no positive change in the premises manner of trade or incidents of violence;
 - iii) police have monitored the premises over 3 years in order to remedy the ongoing anti-social and violent behaviour particularly in the later hours; and
 - iv) continual police attendance is required at the premises to deal with offending patrons.
35. The respondent contends that various CAD reports are incorrect and the incidents recorded cannot be attributed to the respondents.
36. The claim that anti-social behaviour is taking place in the vicinity of the premises where no other businesses are trading is wrong. Late night food vending businesses are indeed trading in Railway Terrace where the nightclub is located.
37. Many of the reported incidents relate to preventing intoxicated persons entering the premises. In other words the licensee is actually doing what is required of it.
38. Given the presence of other licensed premises in the vicinity it is unreasonable to lay the responsibility for anti-social behaviour and violence on the respondents.
39. The police have commended the second respondent for his assistance and quick attention in respect of an assault in the premises (IMS9 refers).
40. Relative to the number of people who attend the premises the number of incidents in low.
41. The table (table 4 in the complaint) contradicts the information later in the complaint (at page 10) and table 4 greatly exaggerates the incidence of drunken patrons.
42. In respect of the complaint that 4 patrons were at different times found asleep at the bar or elsewhere, one of them was a shift worker who had just flown in and then came to the premises and there was nothing to support the contention he was affected by alcohol.
43. The respondents have a strict policy in identifying and removing any patron showing signs of intoxication and a strict policy on admission or more particularly refusal of admission to anyone showing signs of intoxication.

44. The “shakers” of which the complainant complains are in fact low alcohol fruit juice with 4% abv.
45. In respect of the specific incident of 22 June 2013 wherein the complainant claims the jaw of one of the victims was broken, the IMS indicates he already had a broken jaw as he had a titanium plate in his jaw. Furthermore, it was claimed the assailant was an OMCG associate however, he did not display any visible identification as such. It is unfair and untrue to state that the second respondent condones OMCG on the premises.
46. In any event the assault was minor and all that resulted was a blood nose.
47. The second respondent also claims that the assailant was aboriginal and the Rebels OMCG does not accept aboriginal members.
48. The staff were not uncooperative. They did not see the incident and the approved manager readily gave the police the second respondent’s phone number so access to CCTV footage could be arranged. The second respondent was not in the premises as claimed but had left by this time hence the supply of phone contact.
49. The respondent confirms that the security staff took possession of plant material in a small bag which could have been cannabis and disposed of it.
50. The respondents’ attitude to drugs is exemplified by the second respondent’s report to police that a male had tried to sell drugs to a staff member on 7 June 2013.
51. Other evidence concerning drugs is an attempt to “talk up” the drug issue and is very thin.
52. There were not 653 ejections over the period in question but only 528 which shows the respondent’s diligence in curbing excessive drinking.
53. Ambulance attendance statistics refer to Railway Terrace not Zelda’s specifically.
54. The complainant in his submissions concedes that there is another nightclub within 250 metres of the premises and the complaint fails to show any nexus between alcohol consumption at Zelda’s and the supposed detrimental effect on the locality of Rockingham. There is no evidence of nexus between anti-social behaviour in the area and the patrons of Zelda’s nightclub.
55. The figures used by the complainant are so flawed it is impossible to draw any conclusions that lead to the conclusion the complainant seeks.
56. The socio-economic conditions in the area are important – low income and high unemployment, presence of government housing and low cost homes which is reflected in the type of people who live and work in the area.

57. At paragraph 196 of the respondents submission filed on 28 February 2014, the second respondent states:
"The town has been declared the 'bogan' capital of Western Australia and as much as the city and some people in the area won't accept it, it is just how it is."
58. The complaint came about very quickly after the section 95 complaint was sent back to the Commission by the Supreme Court. The complaint is unsubstantiated and inconclusive.
59. CAD and IMS do not back up the complaints that there is a continual requirement for police to attend the premises- 85 calls to the area fail to show a nexus between anti-social behaviour outside the venue to the premises and its management practices.
60. The police are conducting a vendetta against the respondents for losing the last matter in the Supreme Court. At paragraph 211 of his submissions dated 28 February 2014 the respondent states: *"This is pay back for the decision of the Supreme Court."*
61. Copies of emails from police officers attached to the respondent's submission demonstrate the co-operative attitude of the second respondent and evidence the praise of police officers for second respondent's efforts.

Determination

62. Where a complaint is lodged pursuant to section 95 of the Act the complaint must allege that proper cause for disciplinary action exists and set out the grounds as specified in the Act on which the allegation is made.
63. If the Commission is satisfied, on the balance of probabilities, that the ground(s) upon which the complaint is based have been made out and proper cause for disciplinary action exists, it may take action pursuant to section 96(1) of the Act.
64. The complainant lodged a large volume of evidence in the form of written submissions, CAD and IMS data and witness statements and a detailed analysis of available CAD and IMS data.
65. The complainant relies on all of this evidence but singles out three recent incidents to make its case pursuant to all grounds of complaint against both respondents.
66. First incident is an assault which took place on 22 June 2013. A patron was struck and received a broken jaw and nose according to police data tendered in evidence.
67. The second respondent both on his behalf and on behalf of the first respondent denies the victim's jaw was broken claiming he simply received a minor injury (a bloodied nose). Whether the victim had a plate in his jaw from a previous injury, as submitted by the respondent, is not material for the Commission. The police report is

- quite specific in describing the injury sustained as a broken jaw in this particular assault and the Commission will determine this ground on the basis of the occurrence of the assault itself. The second respondent also submitted that this was an unprovoked attack coming “out of nowhere”, and thus there was nothing he or anyone else, such as security or bar staff, could do about it as it could not have been foreseen.
68. The Commission has difficulty accepting the submission that this incident could not have been foreseen as the complainant’s evidence includes a witness statement of a friend of the victim who states that she saw that there was the likelihood of an incident and alerted security staff who simply ignored her.
 69. The Commission accepts that the assailant alleged by the complainant to be an associate of an Outlaw Motorcycle Gang (“OMCG”) was not badged or patched and it was not known to the second respondent whether he was or could have been an OMCG associate.
 70. At the hearing, it was further submitted by the second respondent that it was a known fact that the Rebels OMCG does not accept aboriginal members and therefore there was no basis for the licensee to suspect that the assailant was an associate of an OMCG. There is no evidential basis for the Commission to accept this submission. In any event, for the Commission, the essential issue is the assault itself and its nature, not whether the perpetrator was or was not associated with an OMCG. Given the independent evidence relating to the incident as noted in paragraph 68, the Commission puts greater weight on the complainant’s evidence over the statement of the second respondent.
 71. Both aspects of this incident, i.e., the trivialisation of the assault and the claim by the respondents that the incident was unprovoked despite evidence to the contrary, concern the Commission.
 72. In any event, the second respondent conceded an assault took place and in the view of the Commission it was preventable and should have been foreseen particularly because the security staff had been alerted (also noted at paragraph 68).
 73. The second incident was the failure of the first and second respondent to report an apparent criminal offence (the attempted sale of drugs) where the person was simply evicted.
 74. The third incident was a patron offering what could, prima facie, have been cannabis and the security staff taking possession of it and disposing of it in the rubbish bin with no report being made to police.
 75. The second respondent agrees that those incidents did take place and submits that by the time police would have arrived the persons of interest would have been long

gone.

76. These incidents of themselves and especially given the absence of any rebuttal evidence by the respondents denying their occurrence are sufficient to prove grounds 1, 2 and 3 of the complaint. (The Commission will make detailed comment on ground 4 later in this determination).
77. On the basis that the grounds of complaint have been made out, the Commission turns its attention to any penalty which might be imposed on the licensee company.
78. The incidents particularly singled out by the complainant would bear a different penalty if they were isolated events or the only events which have given rise to this complaint. However, such incidents are a very apparent continuation of the type of events which have been the subject of frequent and continuing complaints over a long period of time.
79. This is evident from the history of the premises, notably also relied upon by the complainant in this complaint. The licensee company of these premises Tocoan Pty Ltd, the first respondent, has been the subject of two proven complaints (both serious) lodged by the complainant pursuant to section 95 of the Act before the Commission. Significant penalties were handed down by the Commission in its previous determinations which are summarised as under :
 - In LC 52/2011, a penalty of \$15,000 was imposed along with conditions being imposed on the licence.
 - In LC 23/2012, a penalty of \$5,000 was imposed.
80. The first respondent, through the second respondent relies heavily on a technique of attacking and attempting to cast doubt on the veracity of specific CAD and IMS reports and thereafter attempting to convince the Commission that on the basis that those specific reports are inaccurate, all of the reports are either wrong, or irrelevant or misleading.
81. The Commission however is not convinced about the doubts being raised in relation to the veracity of the CAD/IMS data primarily because the various data and reports are collated by different persons at different times thereby quashing any possibility of collusion to present false data.
82. Notwithstanding the inaccuracies established in the analysis of some of the incident reports by the complainant, the submissions dated 28 February 2014 by the first respondent provide evidence as to the relative seriousness of each assault reported in the CAD reports and general acceptance of violent behaviour in the premises by the first respondent. For example:

- [at paragraph 118] *we do not record indecent assaults as assaults and do not consider that our reports describe incidents of criminal nature. None of the indecent incidents recorded were deemed to be a sexual assault.*
- [at paragraph 119] *On table 6 on page 12 of the complaint some 24 assaults are recorded. There are 7 assaults listed as indecent and we say they are not assaults. There are 4 pushes, one grappled and a slap that was a domestic dispute recorded on page 1433. That brings the number to 11.*

83. The Commission accepts that there are CAD reports which are irrelevant or may well relate to the patrons of other premises but viewing the data and reports as a whole, a consistent pattern of problematic behaviour and lack of appropriate immediate response emerges along with a reluctance to adopt longer term measures aimed at preventing recurrence.
84. It is acknowledged that the second respondent has installed an ID scanning system but generally he has done the barest minimum, at best, to implement positive change and appears resistant to implement better management practices for greater patron safety.
85. Further there is a pattern of lack of real co-operation with the complainant and its officers. The second respondent however strongly denies this and supplied a copy of emails in his submission in this matter which he states shows a high level of co-operation with, and praise from, various police officers.
86. In the eyes of the Commission these emails are no reflection of a high level of co-operation as claimed by the respondent but are merely some instances of response on a few particular occasions. In fact it is particularly concerning that the licensee has not even deemed it appropriate to report five of the recorded incidents in the incident register which had an element of sexual assault.
87. The responses by the respondents as noted at paragraphs 82 and 85 are of grave concern to the Commission as it once again establishes the attitude of trivialising serious issues, exaggerating initiatives and creating a culture which encourages violent and anti-social behaviour endangering the safety of patrons within the premises.
88. The Commission accepts that these premises are located in an area presenting particular problems. Railway Terrace and its immediate environs are the “entertainment strip” of Rockingham and houses other licensed and unlicensed premises all of which might reasonably be accepted to contribute to the problems of the area, in particular as submitted by the second respondent, there is another nightclub within 250 metres of the premises.
89. The complainant submitted an analysis of the data from CAD and IMS for 3 periods

- being May – July 2011, 2012 and 2013. During the period May – July 2012 the licence was suspended. The analysis provides an extremely useful comparison of alcohol related anti-social behaviour in the vicinity of the licensed premises pre and post the suspension of the licence.
90. The analysis proves that the number of police CAD attendances in the 250m around the premises declined by approximately 35 percent year on year between 2011 and 2012 after the premises ceased trading on 3 May 2012.
 91. The number of police CAD attendances in the 250m around the premises then increased by approximately 94 percent year on year between 2012 and 2013 after the premises resumed trading.
 92. The trend results for the number of verified offences (for offences of assault both domestic and non-domestic and criminal damage) in the suburb of Rockingham between 2011 and 2013 show equally significant variations between the periods when the premises was trading and those when the licence was suspended:
 - a) the number of domestic assaults declined by approximately 16 % year on year between 2011 and 2012 after the premises ceased trading, and subsequently increased by approximately 69 %;
 - b) the number of non-domestic assaults declined by approximately 72 % year on year between 2011 and 2012 after the premises ceased trading, and subsequently increased by approximately 146 %;
 - c) the number of instances of criminal damage declined by approximately 38 % year on year between 2011 and 2012 after the premises ceased trading, and subsequently increased by approximately 18 %.
 93. The evidence for the complainant clearly demonstrates that when these premises are not trading, alcohol related crime and violence in the vicinity of the premises declines significantly. Conversely when the premises are trading, alcohol related crime and violence increases significantly.
 94. Furthermore, this analysis of the CAD data in addition to demonstrating a clear nexus between the premises and the level of violent and anti-social behaviour in the area leads the Commission to the conclusion that it is not the other premises in the close vicinity that are the major contributors of crime and alcohol related violence in the area.
 95. The respondents deny the veracity of this data and the situation it demonstrates, however, they did not provide any cogent evidence to refute the data and instead relied upon the technique of casting doubts on a few and proceeding to dismiss the remaining on that basis.

96. There is sufficient evidence provided before the Commission to show that the first respondent continues to use “gimmicks” to lure patrons into consuming alcohol rapidly. In particular, the Commission relies on the evidence of the officers inspecting the premises on 19 October 2013 and were approached by a person offering a “shaker”. In addition, persons inside the premises were observed to be drinking shots at the bar.
97. Furthermore, in the case of incidents which it does agree took place, the first respondent either attempts to trivialise them and/or lay blame elsewhere. For example the respondent attempts to justify the above activity by submitting that the “shakers” are said to have low alcohol volume. Similarly when it came to addressing the issue of “shooters” it was submitted that they were “very low alcohol” and that “shaker babes” are “a flavour of the club” (at paragraph 100 of respondent’s submissions dated 28 February 2014).
98. Similarly where the CAD reports records “a minor scuffle and POI took off on foot as soon as they saw police” the respondent’s response is again trivialising the occurrence of the incident and noting that the incident was of no greater significance than a “minor scuffle”. The respondent refuses to acknowledge that whilst there may be an absence of a melee *at the time* that police arrived, there was a significant problem *prior* to the police arriving which would have prompted a call for assistance from the police.
99. It is concerning to the Commission when other persons approach the police who arrive at the premises when called, and report that “security at the club is totally inadequate and they are unable to handle the crowds” (complainant’s submission dated 5 March 2014 at paragraph 93 (c)).
100. The second respondent also attempted to justify the premises current style of operation and trivialise the serious nature of offences by relying on the general premise that Rockingham is the bogan capital of Australia and “it is just how it is”.
101. At paragraph 43 of the first respondent’s submissions dated 7 March 2014, it is submitted that the *“licensee should not have any consequences for the number of refusals or for removing people for showing signs of intoxication. The licensee appears to be doing the right thing.”* Complainants records show that during the period 10 August 2012 to 20 October 2012, the total number of persons removed from the premises was 395 out of which 278 were removed for intoxication i.e, there were 278 people who had arrived at the premises, assessed for sobriety, permitted entry and then served liquor to the point where they were deemed to be too intoxicated to remain on the premises. Once again, allowing patrons to reach such levels of inebriation requiring ejection from the premises is reflective of poor management practices and permissive attitude towards service of alcohol to patrons. During the same period there were 117 refusals of entry for being intoxicated.

102. On the balance of probabilities, it can be concluded that the effect of a large number of ejections of drunk patrons and refusal of entry to intoxicated persons resorting to this premises would potentially give rise to alcohol related anti-social behaviour in the vicinity of this licensed premises. The decrease in police call outs and offending generally (refer paragraph 18) during the period when the premises was not operating supports this conclusion.
103. The above responses from the respondents clearly define the culture of the premises which appears to be one which encourages constant consumption of alcohol and actively engages with patrons in promoting drinks to customers through direct approaches. Presenting these drinks as a very low alcohol alternative is consistent with the permissive attitude of encouraging excessive consumption of alcohol, a constant feature at these premises.
104. More importantly, it shows complete disregard for adhering to good management practices and conforming to the provisions of the Act in spite of various disciplinary proceedings commenced by the complainant.
105. There is overwhelming evidence before the Commission from the previous complaints which display an ingrained culture of a lack of co-operation and hindrance to police by staff as well as non-compliance with the requirements of the Act. In LC 23/ 2012, the Commission at paragraph 49 stated:
- “In respect of Ground 2 above, the serious injury to a female patron resulting from a fight on the licensed premises and the lack of co-operation with and the hindrance to police by staff, particularly the two approved managers on duty, in misleading police is sufficient for the Commission to find that Ground 2 of the complaint has also been established.”*
106. In LC 52/2011 at paragraph 49, it is noted that *the licensee conceded there were shortcomings in the maintenance of the incident register*. In spite of the lapse of time since this determination was made, the evidence in this complaint establishes that there has been no attempt by the respondents to establish better management practices to comply with the requirements of the Act (refer paragraph 25).
107. Overall, the evidence before the Commission establishes that the measures proclaimed to have been undertaken have been ineffective as the violence remains unabated.
108. In relation to trustworthiness of the second respondent, the Commission further observed at paragraph 47(ii) in LC 52/2011:
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- This in the view of the Commission was disingenuous as it took no account of sight lines from eye level to the elevated screen inside the premises. Furthermore the window treatments had quite apparently been changed since*

the photos originally taken by officer Vredenburg.

109. Over the last 4 years the Director of Liquor Licensing and the Commission have imposed various conditions on the licence to try and assist the licensee in the management of the premises and the discharge of his duties under the Act. As a deterrent, the Commission also has imposed fines (refer paragraph 79)—yet serious incidents continue to occur.
110. Given the observations made by the Commission in previous determinations (refer paragraphs 105, 106 and 108), the question the Commission therefore has to address is whether in these circumstances it is in the public interest to allow the continuation of the licence.
111. The expression “in the public interest”, when used in a statute, classically imports a discretionary value judgement to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope and purpose of the statutory enactments may enable.
(refer, O’Sullivan v Farrer (1989) 168 CLR 210 at 216-17 per Mason CJ, Brennan, Dawson and Gaudron JJ).
112. The application of the public interest criterion may require a balancing of competing interests and “be very much a question of fact and degree.”
(refer, Hogan v Hinch [2011] HCA 4 at [32] per French CJ (see also at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
113. The expression “in the public interest” directs attention to that conclusion or determination which best serves the advancement of the interests or welfare of the public, society or the nation and its content will depend on each particular set of circumstances.
(refer, McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 per Tamberlin J).
114. One of the primary objects of the Act is (section 5(1)(b)) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor.
115. The harm contemplated by the Act is not confined to consumers of alcohol and extends to harm caused to people other than the consumers of liquor. This includes harm which may occur through an increase in anti-social or injurious behaviour due to the use of liquor and is not limited to physical harm.
(refer, Re Gull Liquor, Gingers’ Roadhouse, Upper Swan (1999) 20 SR (WA)321 at 340).
116. In *Director of Liquor Licensing v Kordister Pty Ltd [2011] VSC 207 at [271]*, speaking of a similar, but not identical, harm minimisation regime under the *Liquor Control*

- Reform Act 1988* (Vic), Bell J concluded that harm minimisation encompasses harm to health and well-being of individuals, families and communities, as well as social, cultural and economic harm. It encompasses harm to personal safety and freedom to move in the streets without hindrance, disturbance or molestation.
117. When the current Act was being amended, the then Minister for Racing Gaming and Liquor stated on 29 September 2006 in the Second Reading Speech to the Bill to amend the Act, *“The 2005 review of the Liquor Licensing Act concluded that our liquor laws need to provide greater flexibility while promoting the consumption of liquor in low risk drinking environments (emphasis added).*
 118. Whilst from time to time there may be occasions where the primary objects of the Act may conflict, particularly 5(1)(b) and 5(1)(c), it is the view of the Commission that there is no conflict arising in this case. The requirements of consumers cannot be properly catered for, nor the proper development of the liquor industry be accommodated, where inadequate efforts are being made to minimize harm due to the use of liquor.
 119. Although LC 25/2012 was the subject of appeal to the Supreme Court and was remitted back to the Commission, with certain directions, to rehear, it should be noted that Le Miere J in his appeal judgement stated *“ it was open for the Commission to find that the safety and welfare of patrons resorting to the nightclub had been endangered because of the acts and neglect of the approved manager and the licensee and to find that the continuation of the licence is not in the public interest”*.
 120. The above observation of Le Miere J, that the evidence in that matter was sufficient to support a finding that the complaint was made out is useful because it provides a guide as to the level of evidence sufficient to support a section 95 complaint.
 121. The weight of evidence in this complaint supports the view that the licensee continues to conduct the premises in a manner which is detrimental to the safety, health and welfare of persons resorting to it. Furthermore, the ongoing activities at the premises establish that there are little or no real signs of changing its modus operandi. The Commission therefore has come to the conclusion that on the balance of probabilities it is not in the public interest to continue with the operation of this licence and that the licence should be cancelled.
 122. The Commission has now to address the fourth ground of complaint and determine whether the second respondent is a fit and proper person to hold a position of authority in a body corporate that holds a licence or to have an interest in or in the profits or proceeds of the business carried on under a licence.
 123. In *Commissioner of Police v Bremerton Pty Ltd and West Lander Pty Ltd* (LC24/2011) at paragraph 29 (quoted again in *Commissioner of Police v Sylvester Pty Ltd*

(LC10/2012)), the Commission observed in relation to a similar “entertainment strip” in Kalgoorlie at paragraph 50:

“The Commission also accepts that licensees cannot always prevent some violent incidents occurring at their premises however where there is a frequency of anti-social behaviour in and about licensed premises, this may reflect on a licensee’s permissive attitude towards intoxication and poor management practices”.

124. The complainant submits and the Commission agrees that the frequency of anti-social behaviour in and about the premises is reflective of the licensee’s permissive attitude towards intoxication. Of even greater concern is the second respondent’s attitude toward the incidents which occur at the premises and his continual effort to downplay or shrug off serious incidents.
125. The evidence before the Commission indicates that a significant reason for the ongoing alcohol related problems in spite of previous section 95 complaints against this licensee and the chronic inability to reform the premises is the second respondent’s (who is effectively in control) anachronistic attitude to the manner in which a licensed premises should be run. Particularly, that he continues to hold the view that nightclubs are a place where people come to drink (as opposed to a place to come to socialise, dance, or enjoy music) and the level of violence in the premises is minor and acceptable.
126. The complainant submits and the Commission agrees that an attitude which accepts that violent and antisocial behaviour is “just how it is” is fundamentally incompatible with that required of a licensee under the Act in current day Western Australia. The second respondent’s understanding of his clientele and the events which occur in the premises, and his demonstrated inability to prevent the premises from being a significant source of alcohol related harm establish that he is not a fit and proper person to continue to hold a position of authority in the licensee company.
127. The complainant’s submission contains a significant body of evidence indicating the prevalence of assaults in and around the premises, a number of them serious. Significantly, the manner in which the second respondent describes the assaults is of concern. As noted in paragraph 82, indecent assaults are not recorded as assaults and are not considered to be sexual assaults by the respondents. Similarly, an assault of slapping of a female patron on her face is dismissed as a “domestic dispute”. This is unacceptable.
128. This indifferent response along with the other evidence enumerated above is consistent with the long ongoing anti-social behaviour associated with these premises and raises serious issues of the suitability of the second respondent to hold a position of authority in respect of licensed premises.
129. It is clearly evident that there is no attempt to shift the style of management by the licensee company to ensure better safety for the patrons, effectively address ongoing

problems and operate consistently with the requirements of the Act.

130. Whilst the term “fit and proper” is not defined in the Act, section 33(6) of the Act provides some guidance in this regard. This provision of the Act enumerates the various criteria the licensing authority can have regard to when granting an application:

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 a manager or trustee —

- (a) the creditworthiness of that person;*
- (aa) the character and reputation of that person;*
- (b) the number and nature of any convictions of that person for offences in any jurisdiction;*
- (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,*

shall be taken to be relevant and amongst the matters to which consideration should be given.

131. Indeed the High Court held in *Hughes and Vale v New South Wales (No 2)* (1955) 93 CLR 127, 156 that purpose of using the expression “fit and proper” is to give “the widest scope for judgement and indeed for rejection” and in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33: (1990) 170 CLR 321, 348 that it is not a concept which is to be narrowly construed or confined.
132. Mr Mann’s continuing trivialisation of relatively serious and indeed, some obviously very serious incidents, is of grave concern to the Commission. This attitude and approach has characterised his various appearances before the Commission.
133. The Commission is also concerned about his ongoing implication underpinning a number of submissions that Zelda’s (and Rockingham particularly Railway Parade) is different and different rules / standards should apply.
134. As noted above, Tocoan Pty Ltd has been the subject of two complaints for disciplinary action. The lack of sound management practices, the culture of uncooperative staff when being dealt with by police investigating offences, the permissive attitude of excessive alcohol consumption have all been the grounds for previous complaints and there is no evidence before the Commission to suggest that any attempts have been made to proactively manage the premises in a manner which is consistent with the provisions of the Act.

135. One of the secondary objects of the Act is to “*provide adequate controls over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor*” (section 5(2)(d)). It is therefore essential that the public confidence and professional standards in the industry are maintained and the interest of the public protected by providing adequate controls over the persons directly or indirectly responsible for the sale, disposal and consumption of liquor.
136. In the opinion of the Commission given that the second respondent is the director and unrestricted approved manager, he is the key element in the continuing complaints against the Zelda’s premises.
137. The Commission finds that the weight of evidence demonstrates and supports the view on the balance of probabilities that the second respondent lacks the ability to conduct or manage the licensed premises in the public interest. Accordingly, it determines that the second respondent, Mr Kevin Robert Mann is not a fit and proper person within the meaning of the Act either to hold a position of authority in a body corporate holding a licence or to be interested in, or in the profits or proceeds of a business carried on under a licence.
138. In arriving at its conclusions, the Commission is aware of the consequences of its determination for both respondents and is mindful of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 where he said, “*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*”.
139. The Commission is satisfied that the weight of evidence in respect of the conduct of both respondents over a considerable period of time justifies the determination at which the Commission has arrived.



**MR JIM FREEMANTLE
CHAIRPERSON**