

Licensing Board of Tasmania	Decision
Legislation	<i>Liquor Licensing Act 1990</i>
Applicant	Wayne Gannon
Nature of application	Appeal against Commissioner for Licensing's decision to suspend licence
Premises: name	Salt Lounge Bar
Premises: address	Shop 7/1 Fairway Crescent, Shearwater
Name of decision	Salt Lounge Bar v Commissioner
Date and place of hearing	24 January 2012, Hobart
Members of the Board	PA Kimber (chairman), K Sarten and D Logie (members)

Present:

For the Commissioner: Mr L Atkinson-MacEwen (Director) and Mr I Gullidge (Compliance Manager).

For the Licensee: the Licensee and his business partner Mr S Carter.

Reasons for decision

The Board had been provided with the written history of the matter comprising the following general papers:

1. commissioner's decision of 19 December 2011 suspending the licence for four days;
2. internal Commissioner's office memorandum stating relevant historical matters, background, issues, directions, declarations, and recommendation;
3. breach notices issued by the Commissioner to the licensee regarding failure to have patrons removed 15 minutes after the time when the sale of liquor on the premises under the authority of a licence has ceased (section 65(1)(a));
4. police officer declarations regarding absence of CCTV recordings and failure to have patrons removed;
5. notice to show cause from Commissioner to Licensee; and
6. submissions by Licensee in response.

Before the suspension was to take effect, the Licensee lodged an appeal to the Board. At a directions hearing, it was resolved by consent that the suspension would be deferred, and the Licensee, at his request, be given further opportunity to put submissions as to reduction of suspension (to nil). The Commissioner and Licensee conferred, and the Commissioner affirmed the decision to impose a four day (over the weekend) suspension.

The Licensee maintained his appeal. It was heard at noon on Tuesday 24 January 2012.

The Licensee did not argue that any of the written material was incorrect, or that the facts leading to the breach notices, directions by the Commissioner to the Licensee, or the determination to suspend were incorrect. His argument was that the penalty was inappropriate.

The Commissioner's representative addressed the Board, and stated that the decision made was based on the material before them, as now before the Board. He said that the decision was consistent with other matters, and that the Licensee's assertion that because there are other more serious offence or obligation provisions in the Liquor Licensing Act, with monetary penalties, that did not mean that a suspension was inappropriate for the present case. Indeed, suspension, via the process adopted, was the only remedy.

He asserted the financial consequences were consistent with the nature of the breach of obligation.

Mr Gannon in cross examination of the Commissioner's representative stated he felt it was a 'low end' matter, and admitted he had been 'slow to react' consequently causing there to be a number of breaches of the same nature before he put in process changes to avoid the breaches. He admitted failing to be aware in initial stages, and then having been made aware, having breached again. In response the Commissioner's

representative answered that in the Commissioner's view the gravity is that the statutory provision and the Commissioner's direction (which arose in each instance after the notice from the police had been served that the Licensee had breached the statutory provision) were directed at ensuring licensed premises generally did not serve liquor outside their licence hours, and to enable proper enforcement by ensuring that people with liquor on licensed premises were prohibited 15 minutes after licence hours ended. The provision is directed to ensuring no alcohol is served after licensing hours, and to ensure clearance of premises at the end of permitted trading.

The Licensee in further questioning stated that liquor was not being served after hours, but in response the Commissioner's representative stated, and which was not denied, that the rule is to avoid the issue of service when it is not meant to occur, and that on three occasions the licensee had failed in meeting the statutory provision and on one occasion in that process the business had served liquor after the licensed hours.

Questioning continued on the basis of endeavouring to establish from the Commissioner's representative that the Licensee was the first person penalised in this way for this breach. The Commissioner's representative referred to other instances within his knowledge of similar breaches and similar penalty.

In evidence in chief the Licensee stated that his view is that not all premises have all patrons out within 15 minutes after licensed hours, and that he now knows how to achieve that, having obviously failed in the past. He stated his impression that the enforcement impact had changed, from a position where the obligation was not enforced and that now it had been, and that he had suffered unreasonably by having his licence suspended. He called it a 'new phenomenon'.

The Board considered the evidence and submissions and the documents and determined that on the material it was evident that:

- the Licensee had failed on a number of occasions to obey the statutory obligation;

- that he had attracted police investigation, that the police had attended the premises on a number of occasions;
- that substantial effort had gone into preparing evidence and to issue breach notices;
- that the notices had been ignored, to the extent that the obligation was breached again after the breach notices;
- collateral to the breach of obligation, the seriousness was impacted by failure to maintain CCTV recording or to provide that when demanded, and adverse impact on the neighbourhood by the premises attracting people at a time when it should have cleared them out;
- that the Commissioner's office had issued an initial direction, and an attentive Licensee would have realised that in the context of the statutory provisions, the next stage, in the event of failure to comply, would be suspension;
- further breach followed;
- further Commissioner formal direction followed;
- opportunity to show cause was formally given; and
- suspension followed.

We do not consider this, in the context of recurrent breach and continuing failure to accept the obligation is important in the structure of liquor control, to be an insignificant offence.

Specific deterrence is necessary. Evidently if no penalty was imposed, the Licensee will continue with the impression that meeting statutory obligations is not an important component of the overall liquor licensing regime.

General deterrence is necessary: police and Commissioner should be able to inform licensees of apparent breach and expect an immediate and direct change in conduct. Failure to do so results in careful investigation, significant evidence gathering at inconvenient times, and a 'due process' which gives the licensee numerous additional

opportunities to cooperate. If at the end of such process, the aberrant licensee is only to have a warning, then there is little encouragement for licensees in general to react promptly to police and Commissioner directions and notices.

The community generally has an expectation that licensed premises will not cause undue annoyance or nuisance. Hours of operation are imposed in an endeavour to protect that expectation. Failure to adhere breaches that community faith, and individuals residing near licensed premises suffer the recurrent nuisance of later than reasonable annoyance. The Board's principal aim is to make decisions in the best interests of the community – that may or may not coincide with the best interests of the licensee, but clearly the legislation makes the general best interests of the community paramount in the decision making.

The Licensee suggested the four day suspension would cause a maximum \$750 profit reduction. No evidence was given to support that. We are aware that casual staff will not be engaged during a period of suspension, and fixed costs alone will continue to run on (eg rent).

The Licensee also advanced that closure by suspension will disadvantage the public by denying them access to the service offered. Weighed in the balance, with alternatives, and against the need to ensure compliance, and to support specific and general deterrence and denunciation of such actions by licensees, we think the risk of serious inconvenience being a relevant factor is negligible. The public will put up with closed premises, and will find others. In less well served areas, perhaps like the Shearwater area, they will at least become aware that they must vacate on time and contribute to the licensee obeying his obligations if they are to benefit from the hospitality and service available during licensed hours.

In conclusion, the Board considered that this breach was not at the lowest end. Although it is the Licensee's first such breach, it was nevertheless a course of conduct which required investigation, notices, directions, show cause notice, decision, and

appeal. At various stages the Licensee could, and should, have taken corrective action promptly – he did not. His explanations evidence lack of control of his own premises and failure to comprehend the importance of obeying the obligations imposed by the Act. As the matter came closer to suspension, the licensee took action to avert repetition of the breaches.

The available range of penalty is up to three months.

For a first breach perhaps the equivalent of a week suspension is appropriate. Where the issues are exacerbated by ongoing failure to fix, that is by a failure to make immediate, swift and effective changes, then we consider an appropriate starting point for suspension to be in the order of four weeks, that is, one third of the available maximum suspension.

However, giving credit for the Licensee in this instance ‘finally’ coming to grips with his obligations, and that unless met, the Commissioner and police would continue action in deterrence, we will reduce that period by a week.

Given that the Commissioner has apparently operated on a four day (effectively a one week) suspension regime in the past, it is not appropriate for the Board to elevate the penalty greatly without warning the public, notably licensees. On that account we will reduce the penalty by a further week. The result is a suspension of two weeks.

We consider that a suspension of two weeks is warranted and that the four days initially imposed is insufficient in the circumstances.

Before the appeal commenced, indeed at an early stage at the directions hearing, and before that via the Commissioner’s office, the Board alerted the Licensee that the hearing of the appeal brought with it the complete review of the penalty and whilst the suspension might be vacated, there was a possibility that it might be increased – with

particular and direct reference to the fact that at a casual glance, the range of penalty could be between no suspension to three months.

Decision

Under section 214(c) of the Liquor Licensing Act we direct the Commissioner to suspend the license of the Salt Lounge Bar for 14 days effective from midday Friday 27 January 2012 to 11.59am Friday 10 February 2012.

Dated: 25 January 2012

PA Kimber, Chairman

K Sarten, Member

D Logie, Member