

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Director of Liquor Licensing
(represented by Mr Zachary Clifford of the State Solicitor's Office)

Respondent: Perth City Enterprises Pty Ltd (in liquidation)
(not represented)

Commission: Mr Jared Brotherston (Presiding Member)
Ms Pamela Hass (Member)
Mr Paul Shanahan (Member)

Matter: Application for the forfeiture of illegal gains in accordance with section 147(1) of the *Liquor Control Act 1988*

Premises: The Library Nightclub
69 Lake Street, Northbridge, WA 6003

Date of lodgement of Application: 22 February 2024

Date of Hearing: On papers

Date of Determination: 24 October 2024

Determination:

The Commission finds that:

1. that there was a contravention of the liquor licence;
2. 'financial advantage' means any revenue received as a result of trading during a contravention but does not include the value of stock sold during that contravention but lawfully obtained; and
3. the cost of stock to be deducted from the any financial advantage during the contravention is estimated at 30% of revenue.

The Respondent is ordered to pay the sum of \$14,230.30 pursuant to section 147(1) of the *Liquor Control Act 1988* within 60 days of the date of this decision and lodge with the Liquor Commission evidence of payment within 28 days of making the payment.

Authorities referred to in determination:

- *Engwirda v Owners of Queens Riverside Strata Plan 55728* [2019] WASCA 190 at [16]-[17].
- *Mansfield v DPP* [2007] WASCA 39
- *The King v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23

BACKGROUND

1. Perth City Enterprises Pty Ltd (“the Licensee”) was the licensee of The Library Nightclub (“the Premises”) situated at 69 Lake Street, Northbridge. The Premises are subject to a nightclub liquor licence 6070007617.
2. The permitted trading hours under a nightclub licence are prescribed in section 98A of the *Liquor Control Act 1988* (“the Act”). Pursuant to section 98A(1)(e) of the Act, the permitted trading hours on Good Friday are “*from immediately after 12 midnight on the previous day to 3 a.m., and there are no further permitted hours before 6 p.m. on the following day.*”
3. On Saturday, 8 April 2023 (the day following Good Friday), The Library Nightclub held a Lollipop dance party event commencing at midnight on Saturday, 8 April 2023 and concluding at 5:00 am on Saturday, 8 April 2023. The Library Nightclub remained open during this event until 5:00 am on 8 April 2023, which breached the Good Friday trading conditions.
4. Western Australian Police Liquor Enforcement Unit (“LEU”) officers investigated the breach and obtained CCTV footage from the City of Perth, as well as body worn camera footage from police officers, which showed that The Library Nightclub was open and trading between the prohibited hours. Further inquiries identified that the Licensee did not have an appropriate extended trading permit or permission from the licensing authority to trade between these times.
5. LEU officers also seized copies of incident registers, staff sign on sheets and till receipts which corroborated that the Premises were open and trading at the time.
6. Interrogation of the till receipts seized from the Premises indicated that while the Premises was trading, two cash registers were in use. Records show that between the material time the total sales were \$20,329.
7. As a result of the investigation, the Licensee was issued with an infringement for the offence of trading outside of permitted hours contrary to section 111(1)(b) of the Act. The modified penalty for this offence is \$1,000. The Licensee paid the infringement on 17 June 2023.
8. On 1 August 2023, the Commissioner of Police (“the Commissioner”) applied under section 147 of the Act for the Director of Liquor Licensing (“the Director”) to refer the matter to the Liquor Commission for recovery of illegal gains. The Commissioner submitted that the illegal sales revenue that should be seized is the amount of \$20,329.
9. On 22 February 2024, the Director made an application to the Liquor Commission (“the Commission”) to determine the matter.
10. The Licensee entered voluntary administration on 12 March 2024 with Dye & Co. Pty Ltd appointed as liquidators. The liquidators confirmed they would not seek to be a party to the proceedings.

RELEVANT LAW

11. For the purposes of this decision, it is helpful to set out Section 147 of the Act in its full context:

Division 5 - Recovery of illegal gains

147. Illegal gains, estimation and recovery of

1. *Where a person by contravention of this Act or of a condition of a licence or permit gains any financial advantage, the Commission may, on the application of the Director, estimate the amount of that advantage and the amount so estimated may be recovered from that person as a debt due to the Crown.”*
 2. *Subsection (1) applies whether or not the contravention referred to is prosecution as an offence.*
12. An application under section 147 of the Act has two elements. First, the Commission must determine whether there has been a contravention of the Act or a condition of a licence. Secondly, the Commission must estimate the quantum of the financial advantage gained because of the contravention.
13. In considering an application for the recovery of illegal gains, the Commission may make its determination on the balance of probabilities.
14. Section 16 of the Act prescribes that the Commission:
- a) may make its determination on the balance of probabilities [section16(1)]; and
 - b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that the licensing authority adopts those rules, practices or procedures or the Regulations make them apply; [section 16(7)(a)]; and
 - c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; [section 16(7)(b)]; and
 - d) is to act speedily and with as little formality and technicality as is practicable: [section 16(7)(c)].
15. The Commission must make an estimate of the financial advantage gained by a person upon the satisfaction of the precondition that a contravention of the Act has occurred.
16. The key issue in this matter is the proper construction of “financial advantage”. ‘Financial advantage’ is not a defined term in the Act and has not been judicially considered. The issue has recently been considered by this Commission in *Republic Nightclub* – a matter with breach of trading terms, facts and circumstances that are indistinguishable from those the subject of this decision.
17. While section 147 provides that the Commission may make an estimate of the financial advantage gained by a person, this language does not import a discretion: *Engwirda v Owners of Queens Riverside Strata Plan 55728* [2019] WASCA 190 at [16]-[17]. Rather, the Commission must make an estimate of the financial advantage gained by a person upon the satisfaction of the precondition that a contravention of the Act has occurred.

DETERMINATION

18. The Commission finds that by trading between 12:00am and 5:00am on Saturday, 8 April 2023, the Licensee contravened a term of its licence.
19. It follows that the Commission must determine the quantum of the financial advantage gained by The Library Nightclub trading during those hours.

SUBMISSIONS

Submissions by the Applicant

20. The Applicant submitted that there are two constructions of financial advantage in section 147 that are open. Financial advantage must refer to either:
 - 1) the *revenue* gained from the contravention; or
 - 2) the *profit* (i.e., revenue less expenses) gained from the contravention.
21. The Applicant submits that the proper construction is “revenue”, based on the analysis of the High Court in *The King v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23.
22. The Applicant submits that, notwithstanding the above submissions, it is not necessary for the Commission to determine the question of financial advantage given an absence of evidence submitted by the Respondent.

Submissions by the Respondent

23. The Respondent is in liquidation and did not make submissions.
24. The liquidator of the Respondent advised the Commission that it would not seek to be a party or make any submissions.

ANALYSIS

25. The Commission, as constituted for this decision, is privy to the draft decision and analysis of the Commission (differently constituted) in the *Republic Nightclub* matter. As noted above, the *Republic Nightclub* matter considered Section 147 on facts indistinguishable to those in this matter. This analysis is, therefore, consistent with, and follows the same reasoning as the *Republic Nightclub*.
26. In *King v Jacobs*, the High Court held that ‘advantage’ referred to the gain received by a person, “*not any advantage less any concomitant disadvantage or burden or risk to which the offender was subject in obtaining the advantage*” and that “*money received, cash flow, itself is an advantage, irrespective of concomitant costs and expenses*” (at [27] and [29] per Kiefel CJ, Gageler, Gordon, Steward, Gleeson and Jagot JJ and at [61] per Edelman J).
27. Whilst submitting that the approach in *King* was the proper approach, the Applicant has also properly identified a basis for an alternative interpretation, based on the approach in *Mansfield v DPP* [2007] WASCA 39. There, Steyler P, considered the meaning of “*criminal benefit*” in the *Criminal Property Confiscation Act 2000* (WA).

28. Importantly, in *King*, the majority of the High Court held there that there was “*no meaningful comparison*” between the penalty provision it was construing, and a statutory scheme enabling the court to require a person to disgorge the benefit a person has obtained from certain crimes (at [54] per Kiefel CJ, Gageler, Gordon, Steward, Gleeson and Jagot JJ).
29. The majority referred to *Mansfield* as an example of a case where only part of a transaction is unlawful (e.g. selling legitimately owned shares using insider information) as distinct from a case where the whole transaction is unlawful (e.g. drug transactions). The majority held “*A legislative purpose of requiring the proceeds of crime to be disgorged, of its nature, calls for a targeted approach focusing on the funds tainted by illegality, albeit subject to any contrary provision. A maximum penalty for a crime of obtaining a benefit by bribery is a different context involving no such focus.*” (At [54]).
30. Section 147 of the Act is not a penalty provision. The section’s purpose is clear in its plain terms:

“Where a person by contravention of this Act or a condition of a licence or permit gains any financial advantage, the Commission may... estimate the amount of that advantage”.

The purpose of the provision being disgorgement of an illegal benefit is consistent with the title of Division 5 being “*recovery of illegal gains*” and the title of section 147 being “*Illegal gains, estimation and recovery of*”. It is also consistent with subsection (2) which provides: “*[s]ubsection (1) applies whether or not the contravention referred to is prosecution as an offence.*”

31. Accordingly, the Commission holds that the meaning of “financial advantage” in section 147 of the Act means a financial advantage received by a person by contravening the Act or a condition of a licence, but does not include the cost of stock that was purchased legally but sold illegally.
32. The Commission accepts the Applicant’s submission that general expenses (e.g. rent and insurance) are not deductible, and specific costs incurred in the course of committing the contravention (e.g. wages or the cost of hiring equipment) are not deductible.
33. The Applicant also submitted that the onus to establish any stock costs is on the Licensee, with reference to paragraph [55] of *Mansfield* at [30] of the Applicant’s Submissions. The Applicant further submitted that it is not necessary for the Commission to determine the question of financial advantage or estimate what that might be as the Respondent has put forward no evidence.
34. The Commission does not accept those submissions and holds that *Mansfield* is not authority for the proposition that the Licensee has an evidentiary onus. By section 147’s terms, it is for the Commission to determine whether there has been any financial advantage, and to estimate that financial advantage (including estimating the stock cost if required), based on the evidence before it.

ESTIMATES

The calculation of 'financial advantage'

35. Evidence before the Commission shows that the Licensee operated two registers during the contravening trading period. Those registers record the following receipts, by hour, beginning from 12:00am on Saturday, 8 April 2023:

Hour	Register 1	Register 2
12am	\$4,205.00	\$1,217.00
1am	\$6,635.00	\$1,043.00
2am	\$3,566.00	\$598.00
3am	\$2,523.00	\$0.00
4am	\$542.00	\$0.00
Sum	\$17,471.00	\$2,858.00
Total: \$20,329.00		

36. The revenue received by the Company in this case was therefore \$20,329.
37. Whilst there were expenses incurred by the business for operating during the contravention, these expenses will not be deducted from the revenue in determining the financial advantage.
38. The cost of stock purchased legally but sold illegally is to be deducted from the revenue above.
39. The Commission determines that stock purchased legally but sold illegally during the contravening trading period amounts to the cost of the alcohol and other supplies (food and non-alcoholic drink) sold during the illegal trading period. There is no evidence before the Commission in relation to actual stock levels, only the sales/revenue evidence noted above [para 35].
40. In the absence of evidence to as to actual stock levels, the Commission has used the following basis of estimate:
- Stock (or Inventory) Ratio is a standard industry metric to monitor financial health in the hospitality industry.
 - A standard or benchmark Stock Ratio is where Stock is between 15% (financially healthy) and 30% (less financially healthy) of Revenue (usually monitored over a period of a quarter or longer).
 - The period of trade in this matter is, necessarily, assumed to be reflective of a quarterly or longer period.

41. Using the above basis of estimate, the Commission has determined that its estimate of the cost of stock should conservatively use a ratio of 30% of revenue so as not to be at all punitive to the Respondent.

42. The estimate of the cost of stock purchased legally but sold illegally during the contravening trading hours is therefore:

30% of \$20,329 = \$6,098.70.

43. The Commission finds that the Respondent is required to repay \$14,230.30 (being \$20,329 - \$6,098.70) as the financial advantage gained by trading against the liquor licence.

CONCLUSION

44. The Commission finds:

- a) that there was a contravention of the liquor licence;
- b) 'financial advantage' means any revenue received as a result of trading during a contravention, but does not include the value of stock sold during that contravention but lawfully obtained; and
- c) the cost of stock to be deducted from the any financial advantage during the contravention is estimated at 30% of revenue.

45. As such, the Respondent is required to repay the amount gained during the contravention, not including the estimated cost of stock.


46. The Commission estimates the value of the financial advantage to be \$14,230.30.

ORDERS

47. The Respondent is ordered to pay the sum of \$14,230.30 pursuant to section 147(1) of the *Liquor Control Act 1988* within 60 days of the date of this decision and lodge with the Liquor Commission evidence of payment within 28 days of making the payment.



JARED BROTHERSTON
PRESIDING MEMBER



PAMELA HASS
MEMBER



PAUL SHANAHAN
MEMBER