

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

Complainant: Commissioner of Police
(represented by Mr Toby Bishop of the State Solicitor's Office)

First Respondent: Spinifex Holdings (WA) Pty Ltd
(represented by Mr Peter Fraser of Fraser & Associates Lawyers)

Second Respondent: Boab Inn Pty Ltd
(represented by Mr Peter Fraser of Fraser & Associates Lawyers)

Third Respondent: Mr Emanuel Richard Brian Dillon (Director of Spinifex Holdings (WA) Pty Ltd and Boab Inn Pty Ltd)
(represented by Mr Peter Fraser of Fraser & Associates Lawyers)

Commission: Ms Emma Power (Chairperson)
Mr Nicholas van Hattem (Deputy Chairperson)
Ms Elanor Rowe (Member)

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

Premises: Spinifex Hotel
Clarendon Street, Derby, WA, 6728

Derby Boab Inn
98 Loch Street, Derby, WA, 6728

Date of Hearings: 29 July 2021, 19 November 2021 and 11 February 2022

Date of Determination: 9 December 2024

Determination

The Liquor Commission finds the Complaint has been made out on Grounds (1), (2), (3), (4) and (6) to a satisfactory standard such that proper cause for disciplinary action exists on the following terms:

1. The First Respondent, Spinifex Holdings (WA) Pty Ltd is to pay a monetary penalty of \$60,000 pursuant to section 96(1)(m) of the *Liquor Control Act 1988* within four months of the date of this Decision and lodge with the Liquor Commission evidence of payment of the penalty within 28 days of making the payment.
2. The Second Respondent, Boab Inn Pty Ltd is to pay a monetary penalty of \$30,000 pursuant to section 96(1)(m) of the *Liquor Control Act 1988* within four months of the date of this Decision and lodge with the Liquor Commission evidence of payment of the penalty within 28 days of making the payment.
3. The Third Respondent, Mr Emanuel Richard Brian Dillon:
 - a) is reprimanded by the Liquor Commission for his conduct in relation to his operation as an officer of the First Respondent and the Second Respondent pursuant to section 96(1)(a) of the *Liquor Control Act 1988*; and
 - b) is to pay a monetary penalty of \$50,000 pursuant to section 164(1a) and section 96(1)(m) of the *Liquor Control Act 1988* within four months of the date of this Decision and lodge with the Liquor Commission evidence of payment of the penalty within 28 days of making the payment.

Authorities referred to in determination:

- *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11; [1990] HCA 33
- *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2020] WASCA 157
- *Hughes and Vale Pty Ltd v New South Wales [No 2]* 1955 HCA 28.
- *Simonsen v Rossi, the Registrar, Real Estate and Business Agents Supervisory Board* [2005] (WADC 76)
- *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70
- *Tavelli v Johnson, Unreported*, WADC Library No 960693, 25 November 1996

BACKGROUND

1. The First Respondent, Spinifex Holdings (WA) Pty Ltd (“**Spinifex Holdings**”), is the licensee for the Spinifex Hotel, a hotel which is located at Clarendon Street, Derby. The Spinifex Hotel sells both liquor for onsite consumption and packaged liquor for off-site consumption.
2. The Second Respondent, Boab Inn Pty Ltd is the licensee for the Derby Boab Inn (“**Boab Inn**”), a hotel which is located at 98 Loch Street, Derby. The Boab Inn sells both liquor for onsite consumption and packaged liquor for off-site consumption. The Derby Boab Inn is located 1.8 km from the Spinifex Hotel.
3. The Third Respondent, Emanuel Dillon, is the sole director of both Spinifex Holdings and Boab Inn (together, “**the Respondents**”).
4. By the Complaint dated 22 April 2021 signed by Superintendent Mark Gilbert as Delegate of the Commissioner of Police, the Complaint alleges that pursuant to section 95(4) of the *Liquor Control Act 1988* (“**the Act**”) there is proper cause for disciplinary action against the Respondents on seven grounds:
 - Ground 1 The licensed premises are not properly managed in accordance with the Act (section 95(4)(b)).
 - Ground 2 The licensee has contravened a requirement of the Act or a term or condition of the licence (section 95(4)(e)(i)).
 - Ground 3 The licensee has been convicted of an offence under the Act (section 95(4)(f)(i)).
 - Ground 4 The licensee has been given an infringement notice under section 167 and the modified penalty has been paid in accordance with that section (section 95(4)(fa)).
 - Ground 5 A person holding a position of authority in a body corporate that holds the licence, or who is interested in the business or profits or proceeds of the business, is or becomes not a fit and proper person to hold that position or be so interested (section 95(4)(h)).
 - Ground 6 The licence has not been exercised in the public interest (section 95(4)(i)).
 - Ground 7 The safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee (section 95(4)(k)).
5. The Complaint against the Respondents concerns breaches of certain liquor restrictions that were put in place over the Kimberly region.

Halls Creek Restrictions

6. On 11 May 2009, the Director of Liquor Licensing (“**the Director**”) made a decision pursuant to section 64 of the Act to place conditions on the Halls Creek Store licence that restricted the strength and quantity of liquor that can be sold or supplied from that store.

7. In the following years, the Police became aware of the sale of liquor in regions nearby to the Halls Creek Store which was being transported back to Halls Creek for consumption. This method of liquor acquisition became colloquially known as "sly grogging".
8. Despite Derby being almost 550 km from the Halls Creek Store, the vastness and remoteness of the area, together with Derby being a regional centre, made liquor outlets in Derby a target for those persons from Halls Creek seeking to obtain liquor for the purpose of sly grogging. The Spinifex Hotel is one of four premises licensed to sell packaged liquor in Derby. Police suspected that the Spinifex Hotel was targeted for the purpose of sly grogging.

Liquor Control (Section 31) Notices

9. On 25 March 2020, by Liquor Control (Section 31) Notice, the Director imposed certain conditions on licences in the Kimberly region pursuant to section 31 of the Act due to the Covid-19 pandemic, including the following relevant provisions:

"1. Each relevant licence is subject to a condition that the licence does not authorise the sale of packaged liquor in excess of the following quantities per customer per day-

- (i) 11.25 litres (one carton) of beer, cider or pre-mixed spirits; or*
- (ii) 2.25 litres (3 bottles) of wine; or*
- (iii) 1 litre of spirits; or*
- (iv) 1 litre of fortified wine; or*
- (v) a combination of any two of (i), (ii), (iii) or (iv) above but not a combination of two of the same product."*

("the March Liquor Restrictions").

10. The March Liquor Restrictions were revoked on 20 April 2020.
11. On 15 May 2020, by Liquor Control (Section 31) Notice, the Director imposed certain conditions on licences in the Kimberley region that included the following relevant provisions:

"1. Each relevant licence is subject to a condition that the licence does not authorise the sale of packaged liquor in excess of the following quantities per customer per day-

- (i) 11.25 litres of beer, cider or pre-mixed spirits (eg. one carton or a combination of each kind of liquor up to 11.25 litres); or*
- (ii) 2.25 litres of wine (eg. 3 bottles); or*
- (iii) 1 litre of spirits; or*
- (iv) 1 litre of fortified wine; or*
- (v) a combination of any two of (i), (ii), (iii) or (iv) above but not a combination of two of the same products.*

("the May Liquor Restrictions").

12. In or around mid-2020, the WA Police Liquor Enforcement Unit in the Kimberley became aware that the Spinifex Hotel had been selling packaged liquor in breach of the March Liquor Restrictions and the May Liquor Restrictions.
13. An investigation was undertaken, and Spinifex Holdings was charged with three breaches of the Act. In December 2020, convictions were recorded for all three charges and Spinifex Holdings was fined a total of \$3,000.
14. Upon a further review of the sales records of the Spinifex Hotel and the Boab Inn in January 2021, multiple breaches of the May Liquor Restrictions were identified.
15. The Complaint relies on the facts set out under the headings Part 1, Part 2 and Part 3.

Part 1 - Incidents between 15 October 2019 and 6 December 2020

16. Part 1 concerns a number of incidents that occurred between 15 October 2019 and 6 December 2020 at the Spinifex Hotel. The incident on 6 December 2020 also involves the Derby Boab Inn.
17. These incidents were recorded in Incident Reports generated by the Western Australian Police Force ("**Police**"). A review of those Incident Reports reveals multiple occasions where Spinifex Holdings has breached an express requirement of the Act and/or acted in a manner that is inconsistent with the objects and purposes of the Act.
18. A summary of Part 1 of the Complaint is provided as follows:

15 October 2019 - In support of Grounds 1, 6 and 7

- c) On 15 October 2019, an employee of Spinifex Holdings was working at the Spinifex Hotel when a customer, whom he knew was travelling to Halls Creek, sought to purchase a large quantity of liquor. The employee notified the Spinifex Hotel approved manager at the time, Kenneth Dodge, of the proposed purchase.
- d) The employee reported that he was told by Kenneth Dodge that he was expected to make those large sales no matter who the customer was. The employee recalls making sales of over 30 cartons of beer to one customer who was travelling to Halls Creek, a heavily regulated restricted area. The employee disagreed with this and informed Kenneth Dodge that he did not want to continue making sales of this nature. The employee concluded that the disagreement led to his employment being terminated by Spinifex Holdings.

12 April 2020 - In support of Grounds 1, 6 and 7

- a) On 12 April 2020, Derby Police were conducting a proactive liquor operation/point of sale operation at the Spinifex Hotel bottle shop. At about 7:00 pm two male persons were refused entry for being intoxicated. That refusal escalated into a melee in which both Police Officers were assaulted and required urgent backup to diffuse the situation.
- b) Three males were arrested and convicted with multiple offences including Assault Public Officer - Serious, disorderly, obstruct and hinder police.
- c) The Police Officers were required by the OIC to provide security to the entry of the Spinifex Hotel bottle shop due to the number of incidents and the inadequacy of security and management by Spinifex Holdings.

30 August 2020 - In support of Grounds 1, 2, 6 and 7

- a) On 30 August 2020, Senior Sergeant Barwick, the OIC, was off-duty and inside the bottle shop at the Spinifex Hotel. He personally witnessed a staff member serve a customer two 30 can blocks of Emu Export. The cashier informed the customer each 30 can block would have to be purchased separately. The customer proceeded to conduct two separate transactions, one for each 30 can block. Once the purchases were completed, the cashier told the customer words to the effect "be careful, they'll see you on the cameras" which was believed to be a reference to the closed circuit television cameras mounted outside the Spinifex Hotel by the local Shire.

30 August 2020 - In support of Ground 4

- a) As a result of this incident, the staff member, approved manager and Spinifex Holdings were issued an Infringement Notice. The Infringement Notice was paid.

7 October 2020 - In support of grounds 1, 2, 6 and 7

- a) On 7 October 2020, an off-duty Police Officer was walking past the Spinifex Hotel when he observed three intoxicated males consuming liquor on the veranda.
- b) The Police Officer walked past the group and noticed one male was consuming wine from a bottle. The Police Officer then saw the approved manager on duty walk past the males and say nothing to them. The men were abusive towards the approved manager and the Police Officer.
- c) The Police Officer entered the bar and observed two males drinking beer at the bar. Those two males were clearly intoxicated and described as loud, unsteady on their feet and spilling their drinks.
- d) The Police Officer spoke to the approved manager and advised him that the presence of two groups of intoxicated men was unacceptable and that he had advised Derby Police. As the Police Officer left the Spinifex Hotel, he saw the two males from inside the bar fighting with the three males that had been on the veranda.
- e) Derby Police later attended and arrested one of the males.

19 October 2020 - In support of grounds 1, 2, 6 and 7

- a) At 7:34 pm on 19 October 2020, Police attended the Spinifex Hotel as part of a regular patrol and located six to eight persons consuming alcohol at the front of the premises. Police Officers seized alcohol from the group and disposed of it. The group were argumentative and abusive towards the Police Officers. One member of the group seriously assaulted a Police Officer by multiple punches to her face. The offender was subsequently arrested.

6 December 2020 - In support of grounds 1 and 2

- a) On 6 December 2020, Police Officers from the Kimberley Liquor Enforcement Unit attended at the Spinifex Hotel and identified that the Responsible Service of Alcohol (RSA) registers were not being maintained and staff had been employed longer than 28 days without completing the mandatory training required by the Act.
- b) The approved manager, Trevor Brown, was cautioned for this matter.

6 December 2020 - In support of grounds 1, 2, 6 and 7

- a) On 6 December 2020, a Police Officer from the Kimberley Liquor Enforcement Unit attended the Derby Boab Inn. The licensee of the Boab Inn and the Spinifex Hotel have a common director and shareholder in the Third Respondent.
- b) On 6 December 2020, the approved manager, Melissa Looker, for the Derby Boab Inn was also on duty at the Spinifex Hotel. Section 100(2)(b) of the Act requires a licensed premises to be personally managed and supervised by an approved manager. Therefore, an approved manager is prohibited from managing two licensed premises concurrently.
- c) The Police Officer informed the general manager of the Spinifex Hotel, Trevor Brown, that Ms Looker could not be the approved manager for two licensed premises at the same time to which Mr Brown stated that he thought this was okay. Mr Brown is an experienced approved manager having worked for the Spinifex Holdings since 2011 both at Spinifex Hotel and other premises including the Beadon Bay Hotel in Onslow.

6 December 2020 - In support of ground 4

- a) Boab Inn and the approved managers received liquor infringements for this matter.

Part 2 - Investigations by Police

19. Part 2 details a Police investigation commenced in August 2020 concerning Spinifex Holdings' compliance with the conditions imposed upon its licence. The Police investigation revealed that Spinifex Holdings had breached the conditions of its licence on multiple occasions. Those breaches constituted offences under the Act that led to three charges and three subsequent convictions of Spinifex Holdings. Further Police investigations in 2021 revealed a significant number of further breaches by Spinifex Holdings and Boab Inn of conditions imposed upon their licences.
20. A summary of Part 2 of the Complaint is provided as follows:
 - a) The following is in support of Grounds 1, 2, 3, 6, and 7
 - i. At around 12:55 pm on 15 May 2020, 55 minutes after commencement of trade and after being verbally informed, Police Officers attended at the Spinifex Hotel to monitor sales of liquor. In the space of 15 minutes the Police Officers observed three breaches of the May Liquor Restrictions, as follows:
 - o 12:55 pm - sale of one 30 can block of full strength beer and 10 cans of premixed drinks;
 - o 1:00 pm - sale of two cartons of full strength beer;
 - o 1:08 pm - sale of one 30 can block of full strength beer and one 24 bottle carton of full strength premixed drinks.

- ii. On 23 June 2020, Police Officers seized a report of sales from the Spinifex Hotel covering the following three periods:
 - o 25 March 2020 - 20 April 2020;
 - o 15 May 2020 - 23 May 2020; and
 - o 23 May 2020 - 23 June 2020.

(“the 2020 Detailed Audit Reports”).

- iii. The 2020 Detailed Audit Reports are reports that record each transaction at the Spinifex Hotel bottle shop including the product sold, who sold it, the quantity and the cost of each sale of liquor.
- iv. On examination of the 2020 Detailed Audit Reports, Police identified 1,723 occasions where the quantity of liquor sold exceeded the limits imposed by the March Liquor Restrictions and the May Liquor Restrictions. A total of 468 breaches of the March Liquor Restrictions were identified. A total of 1,255 breaches of the May Liquor Restrictions were identified.
- v. Further, a condition of Spinifex Holdings' licence was that the Spinifex Hotel trading hours were restricted to 12 noon - 8 pm. The 2020 Detailed Audit Reports record that the Spinifex Hotel had breached the trading hours condition of its licence, by trading outside its permitted hours, as follows:
 - o 7 April 2020 - commenced trading before midday - 1 transaction.
 - o 15 May 2020 - commenced trading before midday - 3 transactions.
 - o 18 May 2020 - commenced trading before midday - 4 transactions.
 - o 20 May 2020 - commenced trading before midday- 1 transaction.
- vi. On 4 August 2020, Police Officers interviewed the approved manager of the Spinifex Hotel, Bradley Dunn. During that interview, Mr Dunn stated that he knew that the March Liquor Restrictions and the May Liquor Restrictions had been made and was aware of the details of those restrictions, at the time they had been made. However, Mr Dunn was unable to recall any specific sales in breach of the March Liquor Restrictions or May Liquor Restrictions for which he could supply an explanation.
- vii. On 4 August 2020, Police Officers interviewed the approved manager of the Spinifex Hotel, Kenneth Dodge. During that interview, Mr Dodge stated that he knew that the March Liquor Restrictions and the May Liquor Restrictions had been made and was aware of the details of those restrictions, at the time they had been made. He also placed a notice, supplied to him by the franchisee, Bottlemart, detailing the March Liquor Restrictions, on the front door of the Spinifex Hotel bottle shop. Mr Dodge believed that several of the sales in breach of the March Liquor Restrictions and May Liquor Restrictions were for business clients, though he was unaware of any specific exemptions that would allow those sales.

- viii. On 3 September 2020, Police Officers interviewed the Third Respondent. During the interview, he stated that he was made aware of the notice forming the March Liquor Restrictions at about the time the notice was issued. The Third Respondent stated that he informed Mr Dodge to comply with the March Liquor Restrictions, even after they ceased. He also understood the terms of the May Liquor Restrictions, at the time they took effect.
- ix. As a result of the breaches of the March Liquor Restrictions, the breaches of the May Liquor Restrictions and the findings of trading outside the permissible hours, Spinifex Holdings was charged with three breaches of the Act, as follows:
- breach of section 110(1)(aa) of the Act for failing to comply with the March Liquor Restrictions;
 - breach of section 110(1)(aa) of the Act for failing to comply with the May Liquor Restrictions; and
 - breach of section 111(1) of the Act for a breach (trading outside permitted hours) of a licence condition.
- x. On 9 December 2020, Spinifex Holdings pleaded guilty to all three charges in the Derby Magistrates Court and was fined a total of \$3,000.
- xi. In early 2021, the Police obtained further detailed audit reports from the Spinifex Hotel for the period 1 January 2021 to 31 January 2021 ("**2021 Detailed Audit Reports**"). The 2021 Detailed Audit Reports record similar information as the 2020 Detailed Audit Reports including the product sold, who sold it, the quantity and the cost of each sale of liquor, but in a different format.
- xii. On examination of the 2021 Detailed Audit Reports, Police identified 504 occasions where the quantity of liquor sold exceeded the limits imposed by the May Liquor Restrictions. Those occasions were either one transaction where the quantity of liquor exceeded the May Liquor Restrictions or were comprised of multiple transactions that were processed within milliseconds or seconds of each other that when combined together, exceeded the May Liquor Restrictions. The 504 occasions identified occurred in the following periods:
- 1 - 7 January 2021 - 73 breaches;
 - 8 - 14 January 2021 - 158 breaches;
 - 15 - 22 January 2021 - 164 breaches; and
 - 23 - 30 January 2021 - 109 breaches.
- xiii. In February 2021, the Police obtained detailed audit reports from the Derby Boab Inn for the period 1 January 2021 to 31 January 2021 ("**Boab Detailed Audit Reports**"). On examination of the Boab Detailed Audit Reports, Police identified 262 occasions where the quantity of liquor sold exceeded the limits imposed by the May Liquor Restrictions. Those occasions were either one transaction where the quantity of liquor exceeded the May Liquor Restrictions or were comprised of multiple transactions that were processed within milliseconds or seconds of each other that when combined together, exceeded the May Liquor Restrictions.

Part 3 – Banned Drinkers Register

21. Part 3 provided details of the banned drinkers register (“**BDR**”) trial that commenced in the Kimberley region in July 2021. The purpose of the trial was to place individuals on the BDR for behaviour stemming from harmful levels of alcohol consumption to prevent them from purchasing packaged liquor in a Banned Drinker Area (“**BDA**”).

22. The following is in support of Grounds 4, 5 and 6 of the Complaint:

- a) In January 2021, Spinifex Holdings and Boab were invited by the Racing and Gaming Minister's office and the Derby Liquor Accord, to have a representative attend a meeting with the Minister for Racing and Gaming, the Hon Paul Papalia CSC MLA, regarding the BDR trial to be introduced in the Kimberley region by various Accords. The media release described the purpose of the BDR as follows:

"The McGowan Government continues to work with local governments, police, industry and the community to reduce alcohol-related harm in the Kimberley, and this is a proactive move to address alcohol abuse and antisocial behaviour in the Kimberley community. "

"The BDR concept specifically targets people with alcohol problems, rather than blanket restrictions which impact upon the entire community. "

"The TAMS component provides an effective tool for people to responsibly consume alcohol and to reduce alcohol-related harm."

- b) Spinifex Holdings and Boab were absentees and did not send a representative to attend the meeting with the Minister. The inference drawn by the Complainant from the absence of by both licensees indicated an indifference to the impact of excessive packaged liquor sales on the local community.

23. There was disagreement between the parties as to whether the Third Respondent attended that meeting; the Complainant states that he did not attend, whereas the Third Respondent states that he did attend.

24. Given that the Third Respondent maintains that he was at the meeting, and the Complainant did not propose to call witnesses or cross examine the Third Respondent in order to resolve the factual inconsistency, the Complainant set aside this aspect of the Complaint.

Developments post-hearing

25. On 14 December 2023, the State Government introduced new legislative framework to strengthen the effectiveness of the BDR trial in the Kimberly, Pilbara, Goldfields, Carnarvon and Gascoyne Junction regions.

26. Part 5C of the Act established the BDR and expanded the pathways for being included on the BDR. A person will be a banned drinker if they:

- a) are subject to a barring notice;
- b) are subject to a prohibition order;

- c) are subject to a banned drinker order made by a Police Officer;
 - d) have had a banned drinker order made by the Director on application by a medical practitioner, social worker or other prescribed person; or
 - e) have voluntarily placed themselves on the register.
27. Part 5C provides for when and where a BDA can be designated. Participation by licensees of packaged liquor outlets in a BDA is mandatory, and retail staff must scan identification to check if the purchaser is on the BDR. If the purchaser is registered on the BDR, the sale must not proceed.
28. The Spinifex Hotel and the Boab Inn participate in the BDR, therefore and in any event this part of the Complaint falls away.

REQUESTED SANCTIONS

29. The Complainant has asserted the following penalties and remedies are appropriate:
- a) Cancel the licence, pursuant to section 96(e) of the Act.
 - b) Restrict the sale of packaged liquor only trading hours of the licence to between 12:00 noon and 4:00 pm, unless to bona fide lodgers of the Spinifex Hotel or the Derby Boab Inn, pursuant to section 96(1)(b) of the Act.
 - c) Restrict the quantity and strength of liquor permitted to be sold as packaged liquor for consumption off the premises, pursuant to section 96(1)(b) of the Act.
 - d) Suspend the sale of packaged liquor for a period to be determined by the Liquor Commission, pursuant to section 96(1)(b) of the Act.
 - e) Impose a condition that the licensee install and maintain CCTV cameras in accordance with the Director's Safety and Security at Licensed Premises Policy and to include the regulated areas at the front of the licensed premises, pursuant to section 96(1)(b) of the Act.
 - f) Suspend the operation of the licence until further order or for a specified period, pursuant to section 96(1)(d) of the Act.
 - g) Disqualify, for such period as the Commission thinks fit, the licensee, director and shareholders from holding a licence, pursuant to section 96(l)(f) of the Act.
 - h) Impose the maximum monetary penalty of \$60,000 on the licensee or as the Commission sees fit, pursuant to section 96(1)(m) of the Act.
 - i) Impose a condition on the licence requiring the licensee to comply with the conditions of the Derby Liquor Accord including the BDR, pursuant to section 96(1)(n) of the Act.
 - j) Make such an order as the Commission thinks fit, in relation to the director and approved managers of the licensee companies, pursuant to section 96(l)(n) of the Act.

SUBMISSIONS BY THE COMPLAINANT

30. The Complainant amended the Complaint as follows:

- a) Paragraph 42 of the Complaint refers to 1,723 breaches of the March Liquor Restrictions and May Liquor Restrictions at the Spinifex Hotel in 2020. On review, the Complainant has identified 1,986 breaches in the relevant period in 2020.
- b) Paragraph 50 of the Complaint refers to 504 breaches of the May Liquor Restrictions at the Spinifex Hotel in 2021. On review, the Complainant has identified 505 breaches at the Spinifex Hotel in the relevant period in 2021.
- c) Paragraph 51 of the Complaint refers to 262 breaches of the May Liquor Restrictions at the Derby Boab Inn in 2021. On review, the Complainant has identified 261 breaches at the Derby Boab Inn in the relevant period in 2021.

Evidence

31. The evidence relied on by the Complainant was broadly categorised into two categories:

- a) Transaction Breaches - These are the sales transactions that breached the March Liquor Restrictions and the May Liquor Restrictions.
- b) On-site incidents - The On-site incidents are those matters that were reported or witnessed at around the time they occurred.

Transaction Breaches

32. The Transaction Breaches occurred:

- a) between 23 March 2020 and 23 June 2020 at the Spinifex Hotel;
- b) between 1 January 2021 and 31 January 2021 at the Spinifex Hotel; and
- c) between 1 January 2021 and 31 January 2021 at the Boab Inn.

33. The Transaction Breaches are particularised in the attached "Particulars of Breaches (Attachments 21A, 23 and 24)" ("**Particulars**").

34. The "reason for the breach" provided in the Particulars are set out as follows:

- a) "Over Quantity in one transaction" refers to a single transaction in which the quantity of liquor purchased breached either the March Liquor Restrictions or the May Liquor Restrictions.
- b) "Credit Card Sequential" refers to two or more transactions, usually within quick succession, that have recorded the same number or part number of a credit card, inferring that those transactions record purchases made by one person. The "First Transaction # (Legal)" is identified as a legitimate transaction. The subsequent transactions identified in the same row, but in the column titled "Breach Transactions#" are the transactions that breach the March Liquor Restrictions or May Liquor Restrictions.

- c) "Transactions – Time too close" refers to two or more transactions that have occurred within seconds or milliseconds of each other, inferring that those transactions record purchases made by one person. The "First Transaction # (Legal)" is identified as a legitimate transaction. The subsequent transactions identified in the same row, but in the column titled "Breach Transactions#" are the transactions that are breach of the March Liquor Restrictions or May Liquor Restrictions.
 - d) "s 111 –Trading outside of hours" refers to a transaction that has occurred at a time which is in breach of the trading time conditions on the liquor licence. These matters relate to the Spinifex Hotel which had licence conditions that restricted it from selling liquor before 12 noon.
35. The Particulars are supported by a breach witnessed by a Police Officer and admissions of breaches by Spinifex Holdings:
- a) On 20 August 2020, Senior Sergeant Barwick witnessed a salesperson at the Spinifex Hotel inform a customer that a sale of two blocks of beer which would ordinarily breach the May Liquor Restrictions needed to be separated into two separate transactions. This was clear effort to avoid the restrictions imposed by the May Liquor Restrictions. On 17 September 2021, Police issued an Infringement Notice to the sales person dated 17 September 2020 for breaching section 110(1)(aa) of the Act and that Infringement Notice was paid.
 - b) In December 2020, the First Respondent was convicted of:
 - i. breaching section 110(1)(aa) of the Act for failing to comply with the March Liquor Restrictions;
 - ii. breaching section 110(1)(aa) of the Act for failing to comply with the May Liquor Restrictions; and
 - iii. breaching section 111(1) of the Act for a trading outside of the licenced trading hours.

On Site Incidents

36. The On-site incidents are detailed in paragraphs 21 – 38 of the Complaint and evidence a disregard by the licensee for the conditions of the liquor licence. This includes:
- a) Instructions by the approved manager of the Spinifex Hotel to sell liquor suspected for use in sly grogging to Halls Creek.
 - b) Police Officers required to attend the Spinifex Hotel bottle shop due to the number of incidents occurring there.
 - c) Police Officers witnessing the intentional splitting of sales of liquor to avoid the May Liquor Restrictions.
 - d) Two occasions of intoxicated persons consuming alcohol at the Spinifex Hotel and behaving in a disorderly manner.
 - e) RSA registers not being maintained.
 - f) The approved manager working across two licensed premises, the Spinifex Hotel and the Boab Inn.

37. Between 15 October 2019 and 6 December 2020, the seven On-Site incidents evidence that every couple of months the Police had to become involved with the Spinifex Hotel.
38. The direction to sell liquor that is suspected to be for the purpose of sly grogging to Halls Creek evidences a disregard, if not lack of respect for the conditions seeking to address serious community problems with alcohol consumption in Halls Creek. This incident in isolation could be seen as a poor decision by the approved manager. However, the ongoing disregard that occurred when the March Liquor Restrictions and May Liquor Restrictions were imposed evidence that this incident is an example of a greater problem than just a poor decision by the approved manager. Rather, the licensee is failing to ensure that liquor restrictions are being respected.
39. The On-Site incidents involving public behaviour (paragraph 36(b) and (d) above) may not be entirely preventable but they are matters where the licensee, Spinifex Holdings, should have practices, procedures and policies in place that mitigate the occurrence of those events. The inability of the licensee to address these incidents required the involvement of Police and is reflective of a poorly managed licensed premises.
40. The On-site incidents listed in paragraph 36(c), (e) and (f) above are matters where the licensee has failed to adhere to the conditions of its liquor licence. It is no answer that a licensee may expect the approved managers to ensure compliance with licence conditions. It is the licensee's obligation to ensure compliance. That obligation is provided in section 100(1) of the Act which provides that the conduct of the business under the licence is always the responsibility of the licensee.

Fitness and propriety of the Third Respondent

41. Under section 3(4) of the Act a person occupies a position of authority in a body corporate if, among other things, that person is a director of the body corporate.
42. It is a pre-requisite to the grant of a liquor licence to a body corporate that each person in a position of authority is *"a fit and proper person to occupy that position in a body corporate that is a licensee of the premises to which the application relates"*.
43. Section 33(6) of the Act provides, among other things, that when determining the fitness and propriety of a person the licensing authority may have regard to the character and reputation of that person.
44. Section 33 is concerned with the fitness and propriety of an applicant for a liquor licence. However, the section is also indicative of those considerations which may be relevant to whether a person remains a "fit and proper person" to hold a position of authority in a body corporate for the purposes of sections 95 and 96.
45. The expression "fit and proper person" allows a wide scope for judgment and involves an inquiry about a person's honesty, knowledge and ability in the context of the role they are proposing to undertake.

46. The Commission's primary considerations in deciding whether the Third Respondent is a "fit and proper" person are:
 - a) the relationship between the incidents and his roles and responsibilities under the Act;
 - b) whether the incidents are of such a nature that they reflect adversely on his character and reputation to a serious degree; and
 - c) whether his actions show a course of disregard for the law and/or provide an indication of likely future conduct.
47. The Complaint against the Third Respondent is that he is not a fit and proper person under section 95(4)(h) of the Act.
48. The policy of the Act strongly indicates that a licensee is to be held personally responsible for acts or omissions on the licensed premises which is supported by:
 - a) section 100 of the Act which provides that the conduct of the business under a licence is always the responsibility of the licensee; and
 - b) a licensee is liable for offences even if the licensee did not know and could not reasonably have been aware of or prevented the commission of the offence (section 165).
49. The emphasis on the personal responsibility of a licensee is also evident from the requirement of section 37(1)(a) that the licensee be a fit and proper person.
50. A licensee is obligated to conduct the business in a manner consistent with the public interest and within the public interests of the local community. Where the standards of behaviour of those involved with the sale and supply of liquor falls short, then the credibility of the liquor industry is tarnished and disciplinary action is necessary.
51. Even where contravening employees of the licensee have resigned or had their employment terminated, the fact remains that the licensee remains liable for the actions by an employee of the licensee where such actions are in contravention of the Act.
52. The onerous nature of the obligations and strict liability placed upon a licensee are intended to ensure that licensed premises are operated in manner that is consistent with the public interest and protects the credibility of the industry.
53. Accordingly, a person that holds a position of authority within a corporate licensee must be a fit and proper person to occupy that position. The test of whether a person is fit and proper, therefore, must be specifically considered in regard to the position that they occupy. In respect of the Third Respondent, the following facts are relevant:
 - a) He is the sole director of both Spinifex Holdings and the Boab Inn.
 - b) He holds 100% of the shares of Spinifex Holdings.

- c) He undertakes or displays the following active roles in the management of the Spinifex Hotel and the Boab Inn:
- i. hiring approved managers;
 - ii. personally speaking with Police Officers regarding liquor related matters in Derby;
 - iii. receives weekly sales and attendance numbers for the Spinifex Hotel;
 - iv. receives notifications of any incidents within one day of the incident;
 - v. possesses knowledge about the processes for ordering stock at the Spinifex Hotel;
 - vi. has spoken to the approved managers about the Covid Liquor Restrictions;
 - vii. he attempted to identify measures that could indicate that there were breaches of the Covid Liquor Restrictions;
 - viii. he told his approved manager that breaches would result in termination of employment; and
 - ix. he formed the opinion that Kai Opitz had a lapse of judgement due to training and was involved in directing Mr Opitz to complete the approved manager course.
54. In respect of Spinifex Holdings, the Third Respondent is the person in control. In respect of the Boab Inn, it appears that the Third Respondent is the person in control. He, at a minimum, has control over staffing issues and compliance with Covid Liquor Restrictions for the Boab Inn. It is in the occupation of his position as a sole director in control of the Spinifex Holdings and the Boab Inn which his fitness and propriety should be addressed.
55. There have been multiple breaches of the licence conditions by Spinifex Holdings and the Boab Inn referred to as the "On Site incidents" in the Complainant's Outline of Submissions dated 22 October 2021. The ongoing nature of those breaches over a lengthy period reflect poorly on the Third Respondent's fitness and propriety.
56. However, the Third Respondent's inability to properly manage and ensure compliance with the Covid Liquor Restrictions exemplifies his lack of fitness and propriety. As at January 2021, Spinifex Holdings and Boab Inn continued, on a close to daily basis, to breach the Covid Liquor Restrictions in circumstances where he:
- a) knew or ought to have known that the Kimberley, and Derby in particular, had for many years suffered from problems associated with excessive alcohol consumption;
 - b) knew or ought to have known that there were communities such as Halls Creek that had significant issues arising from the excessive consumption of alcohol which led to specific restrictions on those communities;
 - c) knew or ought to have known as a result of sly grogging, restrictions had been placed on various communities including Halls Creek;
 - d) knew or ought to have known there was a heightened requirement for licensees in the Kimberley region to be vigilant and responsive to Government introduced restrictions on the sale of liquor, of any nature, including the Covid Liquor Restrictions;

- e) knew that the Covid Liquor Restrictions were introduced at a time the pandemic was emerging and a State of Emergency had been declared;
- f) had been informed of the breaches of the Covid Liquor Restrictions by Spinifex Holdings that occurred in early 2020;
- g) knew that his instructions given to staff in or around March 2020 to comply with the Covid Liquor Restrictions were ineffective, yet relied upon similar instructions to ensure future compliance;
- h) knew or believed that his verbal instructions to comply with the Covid Liquor Restrictions were inadequate when he attempted to identify measures that would indicate a breach, and having failed to identify any such measure, put no additional measures in place;
- i) informed staff that if they breached the Covid Liquor Restrictions their employment would be terminated, in circumstances:
 - i. there was no system to identify any breach of the Covid Liquor Restrictions;
 - ii. he did not review any transaction records to attempt to identify a breach of the Covid Liquor Restrictions, or take any other action to identify a breach; and
 - iii. despite the number of breaches evidenced in January 2021, no staff member had their employment terminated.
- j) knew that an Infringement Notice had been issued in respect of the sale of two cartons of beer to one customer in two transactions on 30 August 2020, which he knew or ought to have known was clearly an attempt to conceal a breach of the Covid Liquor Restrictions. However, despite, at that stage, knowing of the breaches of the March Liquor Restrictions, he took no steps to investigate further. Rather, the Third Respondent concluded that the deliberate concealment of the breach was due to a lapse of judgment and lack of training. In those circumstances, the relevant staff member was directed to participate in an approved manager course. The approved manager course had been ineffective in preventing the breaches that had occurred in March 2020 and in January 2021; and
- k) knew the Spinifex Holdings had been convicted of two offences under the Act concerning a failure to comply with the March Liquor Restrictions and a failure to comply with the May Liquor Restrictions. Further, although those convictions amount to two separate single breaches, the Third Respondent was aware that thousands of breaches had been alleged against Spinifex Holdings but took no steps to investigate or identify the extent of those breaches.

57. In these circumstances, the Third Respondent is not a fit and proper person to hold a position of authority in Spinifex Holdings or Boab Inn because:

- a) he has shown a blatant disregard of his duties as a person who holds the controlling position of authority in a licensee despite being put on notice that the licence was being operated improperly and in breach of the conditions;

- b) he has failed to demonstrate a high level of vigilance or care in the conduct of the licensed premises by Spinifex Holdings and Boab Inn;
- c) he has done no more than the bare minimum to ensure that Spinifex Holdings and Boab Inn will comply with their licence conditions, including the Covid Liquor Restrictions; and
- d) the Commission cannot maintain confidence in him to ensure that Spinifex Holdings and Boab Inn will comply with their licence conditions, including the Covid Liquor Restrictions.

Cause for disciplinary action

58. The evidence above supports each ground of the complaint as set out below.
59. Ground 1 - The licensed premises are not properly managed in accordance with the Act (section 95(4)(b)):
- a) all Transaction Breaches detailed in the Particulars; and
 - b) all On-Site incidents.
60. Ground 2 - The licensee has contravened a requirement of the Act or a term or condition of the licence (section 95(4)(e)(i)):
- a) all Transaction Breaches detailed in the Particulars: section 110(aa) of the Act;
 - b) trading outside permitted hours: section 111 of the Act;
 - c) the transaction splitting sale on 30 August 2020: section 110(aa) of the Act;
 - d) allowing drunk, violent, quarrelsome or disorderly behaviour on licensed premises on 7 October 2020 and 19 October 2020: section 115(1) of the Act;
 - e) failure to maintain Responsible Service of Alcohol Registers: section 103A(1)(a) of the Act and regulation 14AD of the *Liquor Control Regulations 1989*, section 103A(1)(b) of the Act and regulation 14AG of the *Liquor Control Regulations 1989*; and
 - f) approved manager working across two licensed premises: section 100(2)(b) of the Act.
61. Ground 3 - The licensee (Spinifex Holdings) has been convicted of an offence under the Act (section 95(4)(f)(i)):
- a) two convictions under section 110(aa) and one conviction under section 111 of the Act recorded on 9 December 2020.
62. Ground 4 - Spinifex Holdings and Boab Inn have been given an infringement notice under section 167 and the modified penalty has been paid in accordance with that section (section 95(4)(fa)):
- a) the transaction splitting sale on 30 August 2020 – Infringement Notice 10130000129679 issued to Spinifex Holdings; and

- b) approved manager working across two licensed premises – Infringement Notice 10130000134984 issued to Boab Inn.
63. Ground 5 - A person (i.e., the Third Respondent) holding a position of authority in a body corporate that holds the licence, or who is interested in the business or profits or proceeds of the business, is or becomes not a fit and proper to hold that position or be so interested (section 95(4)(h)):
- a) all Transaction Breaches detailed in the Particulars; and
 - b) all On-Site incidents.
64. Ground 6 - The licence has not been exercised in the public interest (section 95(4)(j)).
- a) all Transaction Breaches detailed in the Particulars; and
 - b) all On-Site incidents.
65. Ground 7 - The safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee (section 95(4)(k)):
- a) all Transaction Breaches detailed in the Particulars; and
 - b) all On-Site incidents, with the exception of failure to maintain the RSA registers.
66. The breaches by the Respondents set out in the Complaint warrant disciplinary action being taken against the Respondents, including:
- a) Cancel the licence, pursuant to section 96(1)(e) of the Act.
 - b) Disqualify, for such period as the Commission thinks fit, the licensee from holding a licence, pursuant to section 96(1)(f) of the Act.
 - c) Suspend the operation of the licence until further order or for a specified period, pursuant to section 96(1)(d) of the Act.
 - d) Suspend the sale of packaged liquor for a period to be determined by the Commission, pursuant to section 96(1)(b) of the Act.
 - e) Disqualify the Third Respondent from operating a liquor licence under the licensed entities, Spinifex Holdings and Boab Inn, pursuant to section 96(g) of the Act.
67. The breaches are serious breaches and work together to significantly undermine the protective purposes of conditions imposed on the liquor licences held by Spinifex Holdings and Boab Inn, as well as subvert the protective purposes of the liquor restrictions imposed in the Kimberley region.
68. Disciplinary action will serve its important protective purpose by not only forcing the Respondents to respect their obligations as licensees but also deter others from engaging in similar behaviour.

SUBMISSIONS BY THE RESPONDENTS

The Complaint

69. With respect to the First Respondent, the Complainant is relying upon all grounds with the exception of Ground 5, which is relied upon against the Third Respondent.
70. With respect to the Second Respondent, the Complainant is relying upon grounds 1, 2 and 6 against the Second Respondent.
71. Notwithstanding that the Complainant has joined both the First and Second Respondents within the Complaint, the Complaint against both Respondents are separate complaints. Evidence relied upon by the Complainant with respect to the First Respondent cannot be used against the Second Respondent and vice versa.

Halls Creek 64 decision

72. At paragraph 15 of the Complaint, the Complainant states that the Spinifex Hotel was targeted for the purpose of sly grogging. The evidence in support of this allegation consists of an email chain from First Class Constable Jodie Parker (Attachment 7 to the Complaint). The email relates to a complaint made by an ex-employee, Mr Christian Bidewell, in relation to his unease with respect to making large sales of liquor to persons travelling to Halls Creek.
73. It would appear that prior to making the complaint, Mr Bidewell's employment at the Spinifex Hotel had been terminated. It would also appear that Mr Bidewell, based upon the emails provided, could only have worked in the bottle shop on a maximum of eight occasions.
74. The Third Respondent notes that no record can be found that Mr Bidewell was ever employed by the First Respondent.
75. The Respondents notes that:
 - a) No statement has been provided from Christian Bidewell.
 - b) It cannot be determined upon what basis he believed that the alcohol sold by him was being purchased and transported to Halls Creek for the purpose of "sly grogging".
 - c) No evidence was found to support his claim, as it is reasonable to assume that such evidence would have been included in the Complaint.
 - d) It does not appear that management was ever spoken to by the Police with respect to the allegation.
 - e) Neither the First nor the Third Respondent was ever approached by the Police in respect to the complaint.
76. In all the circumstances, it is submitted that there is insufficient evidence to support a finding that the First Respondent sold packaged liquor to "sly groggers".

Liquor Control (Section 31) Notices

77. At paragraph 16 to 19 of the Complaint, the Complainant outlines the successive section 31 Notices imposing restrictions upon the sale of packaged liquor. It is noted that:
- a) At paragraph 20 of the Complaint, Police note that Senior Sergeant Larry Miller informed the approved managers of the Spinifex Hotel, Bradley Dunn and Kenneth Dodge of the contents of the May Liquor Restrictions.
 - b) This evidence is corroborated by Mr Dunn and Mr Dodge in their audio interviews with Police.
 - c) Mr Dunn, during his audio interview states that he was instructed by the Third Respondent *"to only supply alcohol as per the Section 31"*.
 - d) Mr Dodge, during his audio interview, confirmed he had conversations with the Third Respondent with respect to the Covid Liquor restrictions.
78. The evidence of the Third Respondent is that:
- a) He was in email contact with the Police in relation to the imposition of the Covid Liquor Restrictions.
 - b) The Australian Hotels Association distributed information widely in relation to the Covid Liquor Restrictions.
 - c) He had conversations with both Mr Dunn and Mr Dodge with respect to the Covid Liquor Restrictions, during which he instructed them that the restrictions had to be complied with.
 - d) Posters were displayed in the bottle shop advising of the restrictions. This was confirmed by Mr Dunn during his audio interview with Police and in Mr Nanday's statement.
 - e) He was advised by Mr Dodge that staff had been supplied with a "cheat sheet" behind the till detailing the restrictions.
 - f) At a later stage he advised Mr Dodge that he was considering implementing the restrictions as a voluntary measure in the event the Covid Liquor Restrictions were lifted.
79. At no time was the Third Respondent advised that there was any confusion with respect to the interpretation of the Covid Liquor Restrictions, prior to the Police advising the First Respondent that alleged breaches of the Covid Liquor Restrictions were being investigated

August 2020

80. The Police refer to an incident whereby an off-duty Police Officer reported observing two cartons of beer being sold in breach of the Covid Liquor Restrictions. No statement has been provided from the officer in question.

81. A liquor infringement was issued in respect of this incident. Pursuant to section 167(7)(a) of the Act, the payment of the infringement penalty shall not be taken to be an admission of guilt in any proceedings whether civil or criminal.
82. The Third Respondent did not become aware of the allegation until the infringement was issued on 17 September 2020.
83. The only information received by the First and Third Respondent was that two cartons of beer had been sold to the same customer in two consecutive transactions.
84. The evidence of the Third Respondent in relation to this incident is:
 - a) The alleged sale occurred in breach of instructions given to staff with respect to the Covid Liquor Restrictions, namely that they must be complied with.
 - b) The salesperson was Kai Opitz, who rarely worked in the bottle shop.
 - c) At the time of the breach Mr Dodge was still the approved manager of the Spinifex Hotel.
 - d) The Third Respondent understood that Mr Opitz had been investigated by Police in the context of the original audit, however, no infringement was issued to him.
 - e) The Third Respondent believes that that the breach occurred due to a lack of training and experience and directed the staff member in question to complete the approved manager course.

Investigations by Police and Court Outcomes

85. At paragraphs 39 to 48 of the Complaint, the Complainant outlined alleged breaches of the Covid Liquor Restrictions totalling 1,723 alleged breaches as identified upon an audit of the Spinifex Hotel's report of sales in 2020. The Complainant alleges that these breaches were a deliberate act on the part of agents of the First and Second Respondent.
86. Mr Dodge and Mr Dunn were interviewed in relation to these breaches. Admissions made by Mr Dodge and Mr Dunn can be summarised as:
 - a) They were aware of the Covid Liquor Restrictions.
 - b) They were aware that the restrictions limited the amount of liquor each customer was entitled to on a daily basis.
 - c) They were unclear whether it was a requirement that each customer individually pay for their own liquor.
 - d) When making sales they ensured they sighted each customer on behalf of whom liquor was purchased.
 - e) They were aware that the May Liquor Restrictions included exceptions to allow customers such as pastoralists to purchase in bulk but to do so required an entry into a Bulk Register.

- f) Mr Dodge admitted that he properly sold bulk liquor to customers that fell under the exemptions but failed to make an entry into the bulk transaction register because he either forgot or was lazy.
87. The audit also identified nine instances upon which it is alleged that liquor was sold outside of the permitted trading hours.
88. The First Respondent, Mr Dodge and Mr Dunn were charged with three offences:
- a) Being the approved manager of a licensed premises known as the Spinifex Hotel, acted in a way, namely sold liquor in contravention of section 31 conditions of the Act between 25 March 2020 and 20 April 2020.
 - b) Being the approved manager of a licensed premises known as the Spinifex Hotel, acted in a way, namely sold liquor in contravention of section 31 conditions of the Act between 15 May 2020 and 23 June 2020.
 - c) Being the approved manager of a licensed premises known as the Spinifex Hotel, sold liquor from the licensed premises to a person otherwise than during the permitted hours, such person not being an employee or agent of the licensee or a lodger of the premises.
89. The prosecutor alleged that the transactions subject to the convictions respectively were as follows:
- a) 465 transactions sold in excess quantities of the restrictions between 25 March 2020 and 20 April 2020.
 - b) 1,255 transactions between 5 May 2020 and 23 June 2020.
 - c) Transactions outside of permitted hours on 7 April 2020, 15 May 2020, 18 May 2020 and 21 May 2020.
90. There is no allegation that the breaches occurred in accordance with any direction issued by the First or Third Respondent, or with the knowledge of the First or Third Respondent, or that the First or Third Respondent should have been aware of the breach the subject of each charge.
91. On 25 November 2020, both Mr Dunn and Mr Bradley entered pleas of guilty to each charge in the Derby Magistrates Court.
92. During the plea of mitigation conducted on behalf of Mr Dunn and Mr Dodge, it was advanced by their respective counsel that:
- a) The contraventions occurred during a time of panic and uncertainty.
 - b) They were not as vigilant as they should have been.
 - c) There was confusion surrounding the definition of a 'customer'.
 - d) They were doing what they thought they were meant to be doing in line with what training they had.
 - e) They did not benefit from the contraventions.

93. The Magistrate in his findings accepted that:
- a) The breaches were not intentional but resulted from inadvertence.
 - b) The transactions that occurred outside of hours correlated to phone orders placed outside permitted hours where the alcohol was obtained during the opening hours of the establishment.
 - c) Some of the transactions over the quantity related to two separate customers purchasing on one card where there was understandably confusion over the definition of 'customer'.
94. Due to the strict liability provisions contained within section 164 of the Act, on 9 December 2020 a plea of guilty was entered by the First Respondent in the Derby Magistrates Court.
95. The Respondents note that:
- a) Each charge only related to a single breach, notwithstanding that the Police have alleged a number of breaches occurred.
 - b) The plea of guilty does not constitute an admission of each breach alleged by the Police.
 - c) With respect to the alleged number of breaches, during the course of their respective pleas in mitigation, it was advanced by:
 - i. Counsel for Mr Dunn and Mr Dodge that they were not provided all of what was sold and what was not sold and therefore did not address the number of breaches.
 - ii. Counsel for Spinifex that the number of transactions were disputed and sought for the sentence to be based on the one charge.
96. The Third Respondent's evidence in this matter is that:
- a) Mr Dodge and Mr Dunn as approved managers were instructed to comply with the Covid Liquor Restrictions in March when the restrictions were first implemented.
 - b) Signage was placed within the bottle shop advising of the liquor restrictions.
 - c) A schedule was given to staff advising of the daily limits prescribed by the Covid Liquor Restrictions.
 - d) He never had cause to be concerned that the restrictions were not being complied with, until such time as he became aware the breaches were being investigated on 23 July 2020.
 - e) He contacted Police on a regular basis including travelling to Derby to discuss the operation of the Spinifex Hotel. During these meetings and conversations, he would enquire whether there were any issues he should be aware of or Police concerns. On each occasion he was told that there was not.

- f) Neither Mr Dunn nor Mr Dodge were awarded bonuses or had incentive conditions included within their employment contracts whereby they received a bonus for sales of liquor exceeding any target.
- g) Mr Dodge ceased employment with the First Respondent in August 2020.
- h) Mr Dunn ceased employment with the First Respondent on 16 July 2020.
- i) Packaged liquor sales were not a focus, and as such low margins of profit were achieved from such sales. The focus of the business was accommodation.

January 2021 audit of the Spinifex and the Boab

- 97. Paragraph 50 of the Complaint addresses a sales audit conducted by the Police in January 2021. No infringements have been issued nor have any charges been laid with respect to this audit.
- 98. On a review of the sales data, it is submitted that there is insufficient evidence for the Commission to conclude that the transactions were contraventions of the Act.
- 99. The Complainant ask the Commission to draw an inference that the submitted transactions are contraventions on the three following circumstances:
 - a) Transactions Too Close in Time - the time interval between two or more transactions.
 - b) Sequential Card use - the use of the same card across more than one transaction on one day.
 - c) Bulk Transactions - sale of liquor in one transaction about the restricted quantity.
- 100. In relation to the transactions 'Too Close in Time', it is submitted that the correct inference to be drawn is that the transactions occurred during a busy period when a queue of customers had formed. In support of this position, the Respondents rely on the following evidence:
 - a) There are minimal alleged transactions arising from the Boab Inn audit (10 transactions) compared with the Spinifex Holdings audit (360 transactions). This is directly related to the difference in busy periods of the venues.
 - b) Mr Brown's statement that transactions occur in close proximity if there is a queue of customers. That the counter allowed for two customers to place their purchases down so the next transaction can be commenced as efficiently as possible.
 - c) That 74% of transactions occurred with an interval of more than 21 seconds which is sufficient time to finalise a transaction and commence the second transaction.
 - d) There is no evidence before the Commission as to reasonable time between transactions that would contradict the evidence of Mr Brown.
 - e) The Commission can take into account in their assessment, the introduction of 'tap and go' or PayPass which allows transactions, even where a pin code is required, to be completed within seconds.

101. In relation to the 'Sequential Card' transactions, it is submitted that there are a number of conflicting inferences of equal degrees of probability that either:

- a) Multiple customers utilised the same payment method, e.g., family members.
- b) A card was passed between separate customers without the salesperson's knowledge.

102. In support of this position, the Respondents rely on the following evidence:

- a) Mr Brown confirms that the only instance that he or Mr Opitz would permit the same credit card to be used for sequential transactions is with respect to a couple utilising a joint bank account.
- b) Mr Brown further confirms that they do not check card numbers transaction to transaction and therefore they do not have an opportunity to review each card being used for each transaction.
- c) As the salesperson is engaged in other activities, it is reasonable to expect a salesperson may be distracted and not see a card being passed between customers.
- d) 65% of transactions occurred with an interval above 31 seconds. An equally reasonable inference open is that the card was passed between customers.
- e) There was and still is, confusion over whether separate customers can utilise the same payment method.
- f) The Complainant has formed the view that 'customer' should be interpreted by the Commission to include individual persons accessing separate and distinct payment methods. However, this is not an express requirement under the restrictions.
- g) There is no definition of 'customer' in either the Act or the *Liquor Control Regulations 1989*. The Notice in the Gazette defines 'customer' but only to exclude liquor merchants; persons outside Western Australia; station owners and pastoralists; and persons operating or employed at remote worksites.
- h) It can be inferred that the intention of this definition is that anyone who purchases alcohol is a customer unless they fall into one of those excluded categories.
- i) The focus must be on the word used. The word 'customer' is not ambiguous. It is defined in the Oxford dictionary as a person or an organisation that buys goods or services from a shop or business. Therefore, the customer, unless falling into an exemption outlined above, must be the individual or organisation entering into a transaction to purchase liquor from the relevant licensee.
- j) There is no legitimate basis to extend this definition to payment methods. The customer is, in this case, the individual who enters into the transaction. For example, a wife and husband both enter into separate transactions but utilise the same EFTPOS card. To categorise both separate individuals as one collective customer would be to impose restrictions on households or families which is inconsistent with the language used, as well as the purpose of the restrictions.
- k) To interpret the word 'customer' to include a requirement to access separate and distinct payment methods would be reading into the legislation too much a variance with the language in fact used by the Director.

- l) As a matter of common sense, the restrictions should be interpreted as attaching to the individual or the person (i.e., the customer) and not the proposed payment method.
- m) Significantly, if the restrictions had the intention to target payment methods it could have been included in the restrictions.

103. It is submitted the evidence relied upon by the Complainant is insufficient to ground a finding that the January 2021 audit identified breaches of the Covid Liquor Restrictions.

Additional Allegations against the First Respondent

12 April 2020

104. The Police have alleged that on 12 April 2020 they witnessed two male patrons being refused entry on the grounds they were intoxicated.

105. The staff of the First Respondent behaved correctly in this instance, and as such it does not ground a finding that:

- a) the licensed premises are not managed in accordance with the Act;
- b) the licence has not been exercised in the public interest; or
- c) that the safety health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee.

106. The Respondents note that the incident report relied upon by the Complainant (Attachment 8 to the Complaint) reports that:

- a) upon the two men in question being refused entry, Police asked them to move on;
- b) the two men commenced verbally abusing Police; and
- c) the men commenced fighting with the Police upon their arrest.

107. There is no evidence that would support a finding that either man had been patrons of the Spinifex Hotel prior to this incident. Accordingly, there is no ground for alleging that this incident reflects adversely upon the management of the Spinifex Hotel or the First Respondent.

108. At paragraph 24 of the Complaint, the Complainant alleges that the Police Officers were required by the OIC to provide security to the entry of the Spinifex Hotel bottle shop due to the number of incidents and the inadequacy of security and management by Spinifex Holdings. No evidence has been lodged in support of this allegation, which is denied.

7 October 2020

109. The allegation raised is that the approved manager, Kanwarpal Nanday, permitted drunkenness on licensed premises.

110. The allegation relates to two Caucasian men inside the Hotel who the off-duty Police Officer alleged were intoxicated as they were uneasy on their feet, loud and spilling their drinks; and three indigenous males sitting outside the premises on a concrete area.

111. There is insufficient information to fully respond to this allegation.
112. In response to the allegation that Mr Nanday ignored the three indigenous males, reference is made to Mr Nanday's statement that if he had seen those men outside the premises he would have called to alert the Derby Police that members of the public were street drinking.
113. Mr Nanday stated that the Police did not always respond to his calls and if they did, they arrived a significant time after the call had been placed.
114. Mr Nanday was not under any duty or obligation to confront members of the public street drinking, risking his personal safety.
115. In response to the allegations of intoxication of the two Caucasian males, there is nothing to suggest that the conduct referred to, namely, uneasy on their feet and spilling their drinks, occurred over any reasonable timeframe. If this behaviour occurred for less than a few minutes, it would be reasonable to expect that Mr Nanday would be engaged elsewhere and would not have been alerted to the fact that the patrons were intoxicated.
116. When Mr Nanday was made aware of the behaviour, he advised the off-duty Police Officer that 'he would do something' and walked to the Sports Bar area.
117. The next time the off-duty Police Officer sees the two Caucasian males they were 'outside the sports bar' which would suggest they had been exited from the premises.
118. In relation to the allegation that one of the indigenous males was arrested inside the property, reference is made to Mr Nanday's statement where he states that even when you remove someone from the premises they often return and are aggressive.
119. There is no allegation that the indigenous male remained on the property between the alleged fight and his arrest. There is also no information inconsistent with the inference that he returned to the venue and refused to leave requiring the intervention of Police to assist with that purpose.

19 October 2020

120. The allegation raised is that Police observed six to eight persons consuming liquor at the front of the Spinifex Hotel.
121. The allegation is solely supported by an incident report which is Attachment 12 to the Complaint.
122. A review of this incident report reveals that:
 - a) The individuals in question were not on the venue, but rather a grassed area in front of the premises.
 - b) The grassed area is neither on the licensed premises of the Spinifex Hotel, nor on regulated premises. It is a public open space.
 - c) There is no evidence that the liquor being consumed by them had been purchased from the Spinifex Hotel, nor that had they been upon the Spinifex Hotel at any stage.
 - d) Packaged liquor at that time in Derby was also available from the BWS.

123. It is submitted that this incident should be disregarded for the purpose of this Complaint.

6 December 2020

124. The allegation is that on the 6 December 2020 it was detected by Police that the RSA registers were not being maintained.

125. In response, Mr Brown admitted to Police that the RSA register was out of date and accepted that it was an 'oversight'.

6 December 2020

126. The Allegation is that Melissa Looker was acting as the approved manager for both the Derby Boab Inn and the Spinifex Hotel.

127. Trevor Brown was the general manager at the Spinifex Hotel on that day.

128. Mr Brown states the following:

- a) Ms Looker solely worked at the Spinifex Hotel and did not work any shifts at the Derby Boab Inn.
- b) Ms Looker's name was not listed as the approved manager at the Derby Boab Inn. However, Mr Brown's name was displayed on the sign as the approved manager.
- c) Shaheen Goman was working in the Boab bottle shop that day.
- d) He left the premises to obtain something from the Spinifex Hotel. He was absent from the premises for 20 minutes.
- e) On that day he forgot to appoint Ms Goman as approved manager in his absence.

129. It is submitted that this incident arose as an oversight of Mr Brown and did not occur to the extent as alleged by Police in the incident report.

Complaint against the Second Respondent

130. The evidence relied upon by the Police is limited to:

- a) the 6 December 2020 incident which resulted in an infringement being issued for failing to have an approved manager on duty; and
- b) alleged breaches of the Covid Liquor Restrictions following an audit of the sales recorded for the Boab Inn between 1 January 2021 and 31 January 2021.

Breach of Covid Liquor restrictions

131. The audit conducted by Police with respect to the audit conducted of the Boab Inn with respect to January 2021 sales is addressed at paragraph 51 of the Complaint.

132. It should be noted that following the audit, neither the approved manager nor staff of the Boab Inn were interviewed by the Police, and no infringements were issued nor were charges laid against the Second or Third Respondent.

133. The Third Respondent advises that:

- a) The approved manager of the Boab Inn at this time was Trevor Brown.
- b) Mr Dillon instructed Trevor Brown to comply with the Covid Liquor Restrictions.
- c) Signage was posted within the Boab Inn bottle shop advising patrons of the daily quantities they were permitted to purchase under the Covid Liquor Restrictions.

134. The evidence of Trevor Brown is that:

- a) He was made aware by the Third Respondent of the charges that had been laid against the First Respondent and Mr Dodge.
- b) He was instructed by the Third Respondent that the Covid Liquor Restrictions must be complied with.
- c) He instructed staff that the Covid Liquor Restrictions must be complied with.
- d) He always complied with the Covid Liquor Restrictions.
- e) If staff breached the Covid Liquor Restrictions it was without his knowledge and in direct contravention of his directions as approved manager and the directions of the First Respondent.

135. There is no allegation that the breaches, if established, occurred at the direction of or with the knowledge of the Second or Third Respondent.

Complaint against the Third Respondent

136. The complaint against the Third Respondent appears to be limited to:

- a) the alleged breaches of the Covid Liquor Restrictions; and
- b) the three charges to which the First Respondent entered a plea of guilty.

137. The Third Respondent contends that he is not responsible for the day-to-day management of the licensed premises and the breaches that are subject to the Complaint, rather it is the approved managers that bear the responsibility. Furthermore, it is the First and Second Respondents who are ultimately responsible for the conduct of the business conducted under a liquor licence and who are also responsible under the Act for appointing approved managers, not the Third Respondent.

138. The evidence before the Commission is that the Third Respondent spoke to the approved managers at the venues about the Covid Liquor Restrictions. Approved managers Kenneth Dodge and Bradley Dunn confirmed that the Third Respondent directed them to comply with the Covid Liquor Restrictions.

139. The Third Respondent's evidence is that:

- a) He directed management to comply with the Covid Liquor Restrictions.
- b) Signage was placed within the respective venues advising patrons of the Covid Liquor Restrictions.

- c) Staff were provided with a sheet behind the till advising of the maximum daily limits prescribed within the Covid Liquor Restrictions.
- d) He had regular conversations with management of the respective venues during which issues pertaining to the venues were discussed. At no time was he advised by management that there was any confusion with respect to the meaning or implementation of the Covid Liquor Restrictions.
- e) He had regular conversations with the Police for the purpose of discussing whether there were any issues with respect to the operation of the venue. He was advised there was not.
- f) He travelled to Derby in May 2020 for the express purpose of meeting with the Police to determine whether there were any issues with the operation of the venues.
- g) To his knowledge, the managers of the venues - Mr Dodge and Mr Dunn with respect to the Spinifex Hotel and Trevor Brown with respect to the Derby Boab Inn - were experienced managers with unblemished records in the liquor industry.
- h) At no time was there any suggestion or hint that the Covid Liquor Restrictions were being breached.
- i) At no time did it occur to him, nor did he have reason to believe, that management were not complying with the Covid Liquor Restrictions, the central role of approved managers being to ensure compliance with the Act and licence conditions of the respective venues.

140. It is submitted that the Third Respondent:

- a) Did not know about the alleged breaches.
- b) Should not have known about the alleged breaches as:
 - i. He was not acting as the approved manager of the respective venues at the relevant times.
 - ii. There is no evidence that he was "turning a blind eye" to any alleged breaches, nor shutting his eyes to the obvious.
 - iii. There is evidence he had given management directions to comply with the Covid Liquor Restrictions.
 - iv. He had taken the prudent step of regularly liaising with Police to ascertain whether there were any issues with respect to the operation of the premises.

141. Upon becoming aware of the charges, the Third Respondent took the following steps:

- a) Contacting Mr Dodge in August 2020 advising him that he had serious issues with his conduct as approved manager, resulting in Mr Dodge's resignation.
- b) Appointed Mr Nanday as temporary approved manager.

- c) Informed Mr Nanday of the circumstances of Mr Dodge's departure.
 - d) Holding a meeting with staff for the purpose of warning all staff that any breaches of the Covid Liquor Restrictions would also result in termination of their employment.
 - e) Explored measures that could be put in place that could alert him that the Covid Liquor Restrictions were potentially being breached.
142. The Third Respondent submits that he had taken reasonable steps to prevent the occurrence of a breach of the Covid Liquor Restrictions.

RELEVANT LAW

143. The Commission may, where a Complaint has been lodged under section 95 of the Act, take disciplinary action provided it is satisfied, on the balance of probabilities, that the ground(s) upon which the Complaint is based has, or have, been made out.
144. In determining whether there is proper cause for disciplinary action, the Commission needs to be satisfied on the balance of probabilities that one or more of the grounds of Complaint alleged pursuant to section 95(4) of the Act have been made out.
145. The standard of proof applicable to section 95 proceedings is proof on the balance of probabilities.
146. Section 95(11) of the Act states that it is not a defence to a Complaint lodged pursuant to section 95 of the Act to show that the licensee:
- a) did not know, or could not reasonably have been aware or have prevented the act or omission which gave rise to the Complaint; or
 - b) had taken reasonable steps to prevent the act or omission from taking place.
147. The policy of the Act is that a licensee is to be held personally responsible for acts or omissions on their licenced premises. This is illustrated by the following:
- a) the conduct of business under a licence is always the responsibility of the licensee and shall be personally supervised and managed by a natural person in accordance with section 100(1) of the Act;
 - b) it is a criminal offence for the licensee to fail to ensure that the conduct of the business at the licensed premises is supervised and managed in accordance with section 100 of the Act; and
 - c) a licensee is liable for offences committed on the licensed premises by an employee or agent of the licensee, or by a person acting, or purporting to act, on behalf of the licensee - even if the licensee did not know of and could not reasonably have been aware of or have prevented, the commission of the offence, in accordance with section 165 of the Act (see also sections 95(4)(f) and (k) of the Act).
148. In carrying out its functions, including its function under section 96(1) of the Act, the Commission is required to have regard to the primary and secondary objects of the Act.

149. The primary objects of the Act are:

- a) to regulate the sale, supply and consumption of liquor;
- b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and
- c) to cater for the requirements of consumers of liquor and related services, with regard to the proper development of the liquor industry and other hospitality industries in the State.

150. The secondary objects of the Act are:

- a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting the diversity of the requirements of consumers in the State;
- b) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor;
- c) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of the Act; and
- d) to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community.

151. Any inconsistency between the primary and secondary objects is to be resolved in favour of the primary objects.

152. The purpose of the disciplinary action contemplated in section 95 of the Act is to protect the public by maintaining the standards of behaviour for licensees, or a person holding a position of authority in a body corporate that holds a licence, or who is interested in the business or the profits or proceeds of the business. The object of disciplinary proceedings is not to punish those against whom a Complaint has been made out.

153. It is a primary responsibility of the licensing authority to provide adequate controls over the persons directly and indirectly involved in the sale, disposal and consumption of liquor and that the professional standards of the industry and the creditworthiness of the persons in responsible positions must be maintained at the highest level.

154. Section 95(4) of the Act specifies that there shall be proper cause for disciplinary action if:

- a) the licensee has been convicted of an offence in any jurisdiction, that, in the opinion of the Director may imply that the person is unfit to be the holder of a licence (section 95(4)(f)(ii));
- b) the licensee otherwise is, or becomes, an unsuitable person to hold a licence under the Act (section 95(4)(g)); or
- c) a person holding a position of authority in a body corporate that holds a licence, or who is interested in the business or the profits or proceeds of the business, is or becomes not a fit and proper person to hold that position or to be so interested (section 95(4)(h)).

155. Where there is a wide discretion as to the disciplinary sanction to be imposed, as specified in section 96(1) of the Act, the Commission is required to consider all of the circumstances surrounding the conduct which is the subject of the Complaint and to exercise its discretion accordingly.

156. Although section 33(6) of the Act sets out the matters for consideration when determining whether an applicant is a fit and proper person to hold a licence, it also provides some guidance to a determination of a Complaint under section 95:

“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 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 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.”

157. There are many authorities concerning the meaning of ‘fit and proper’ and when deciding whether a person is ‘fit and proper’, many factors may be considered including:

a) character and reputation (*Australian Broadcasting Tribunal v Bond and others* (1990) 94 ALR 11 at 56);

b) honesty (*Simonsen v Rossi, the Registrar, Real Estate and Business Agents Supervisory Board* [2005] (WADC 76)); and

c) previous convictions (*Tavelli v Johnson*, Unreported, WADC Library No 960693, 25 November 1996).

158. The purpose of the words ‘fit and proper’ is to give the decision maker the widest possible scope for judgement (*Hughes and Vale Pty Ltd v New South Wales [No 2]* 1955 HCA 28).

159. In *Tavelli and Johnson* (supra), a case relating to an Inquiry Agent Licence under the *Agents Licensing Act 1954*, Wheeler J noted:

“...some factors relevant to prior convictions could be listed. ‘Convictions will, in my view, generally be regarded as more serious in the statutory context if:

(1) they occur in the course of or relate to the carrying out of the occupation of inquiry agent;

- (2) *they are offences of dishonesty, broadly understood. This is so because, as I apprehend it, the Act is concerned with the integrity of the gathering and presenting of material in Court and that material may be suspect, where the character of the agent suggests dishonesty;*
- (3) *they occur whilst the person is the holder of a licence under the Act;*
- (4) *they are otherwise so serious, either in themselves or as representing a course of disregard for the law, as to reflect particularly adversely on the character of the person committing them.”*

160. The Commission also refers to *Australian Broadcasting Tribunal v Bond* (supra) where Toohey and Gaudron JJ held that:

“The expression ‘fit and proper’, standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of ‘fit and proper’ cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct or reputation (because it provides indication of likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.”

161. Further, a person may be of good repute but, unbeknownst to those who hold that opinion, have serious deficiencies in his or her moral character. Conversely, a person may not be of good repute because of a widespread but mistaken belief that (for example) he or she is dishonest, but in fact is possessed of good moral qualities.
162. Criminal conduct may be the subject of disciplinary proceedings; disciplinary proceedings under the Act have an entirely different purpose as compared with criminal proceedings.
163. Under section 3(4) of the Act a person occupies a position of authority in a body corporate if, among other things, that person is a director of the body corporate.
164. The Commission’s primary considerations in deciding whether the Third Respondent is a “fit and proper” person are therefore:
- a) the relationship between the incidents and the Third Respondent’s roles and responsibilities under the Act;
 - b) whether the incidents are of such a nature that they reflect adversely on the character and reputation of the Third Respondent to a serious degree; and
 - c) whether the actions of the Third Respondent show a course of disregard for the law and/or provide an indication of likely future conduct.

165. The term “public interest” is not defined in the Act.

166. The term “public interest” is defined in the Macquarie Dictionary as “the benefit or advantage to a whole community”, as opposed to the individual. It 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.¹
167. In *Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227* at [48]-[49], Buss JA (as his Honour then was) observed that where a statute provides no positive indication of the considerations by reference to which a decision is to be made, a general reference to “the public interest” will ordinarily only be confined by the scope and purposes of the statute, and in the context of the Act, the decision maker will be bound to take into account factual matters relevant to the objects of the Act set out in section 5(2).
168. The primary objects of the Act include the minimisation of harm or ill-health caused to people, or any group of people, due to the use of liquor. The secondary objects of the Act include the provision of “adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor” (sections 5(1)(b) and 5(2)(d) of the Act).
169. However, as predicated by the conjunctive “and” in Section 5(1) between each of the listed three objects and the mandate in section 5(2) for the licensing authority to “have regard to the primary objects of this Act”, the Commission must have regard firstly, to each of the primary objects of the Act, and then the secondary objects with the primary objects to take precedence in the case of inconsistency with the secondary objects (section 5(3)). Each primary and secondary object informing the subject matter, scope and purpose of the Act.²

DETERMINATION

Alleged Grounds

170. The Complainant contends that there is proper cause for disciplinary action on the following grounds pursuant to section 95(4):
- Ground 1 The licensed premises are not properly managed in accordance with the Act (section 95(4)(b)).
 - Ground 2 The licensee has contravened a requirement of the Act or a term or condition of the licence (section 95(4)(e)(i)).
 - Ground 3 The licensee has been convicted of an offence under the Act (section 95(4)(f)(i)).
 - Ground 4 The licensee has been given an infringement notice under section 167 and the modified penalty has been paid in accordance with that section (section 95(4)(fa)).
 - Ground 5 A person holding a position of authority in a body corporate that holds the licence, or who is interested in the business or profits or proceeds of the business, is or becomes not a fit and proper person to hold that position or be so interested (section 95(4)(h)).

¹ *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 per Tamberlin J [9]

² *Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police* [2020] WASCA 157 [32]

Ground 6 The licence has not been exercised in the public interest (section 95(4)(i)).

Ground 7 The safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee (section 95(4)(k)).

171. At the hearing it was conceded by the parties that Grounds (2) and (3) of the Complaint were substantially made out and that grounds for disciplinary action existed on that basis.

Ground 2, Ground 3 and Ground 4

172. Firstly, the Commission deals with the simple Grounds to make out:

- a) Ground 3 is met against the First Respondent by virtue of the two convictions in the Magistrates Court under section 110(1)(aa) of the Act and one conviction under section 111 of the Act recorded on 9 December 2020.
- b) Ground 4 is made out by the following infringement notices issued and paid:
 - i. Spinifex – Infringement Notice 10130000129679 dated 17 September 2020 under section 110(aa) - Act in any way that Contravenes Act/Term/Condition of Licence/Permit; and
 - ii. Boab Inn – Infringement Notice 10130000134984 - 21 December 2020 under section 100(2) - Licensee failed to ensure premises is personally supervised and managed.
- c) Further, due to the guilty plea in the Magistrates Court and the infringements issued and paid, Ground 2 is met without the need for further discussion and the Commission is satisfied that it is made out that various contraventions of the Act occurred by virtue of those various undisputed matters.

Ground 1

173. By virtue of the convictions recorded and the infringement notices issued, the premises were clearly managed in a manner that breached the provisions of the Act and the March Liquor Restrictions and the May Liquor Restrictions.

174. Due to this, the Commission finds to the required standard that the premises were not properly managed in accordance with the Act and that Ground 1 is also made out.

Ground 5

175. It is argued by the Respondent that the Third Respondent cannot be found to not be a fit and proper person as he himself was not convicted of any offence, only the licensee was.

176. Where the Third Respondent is the sole director and sole shareholder of the Licensees, it is an unconvincing argument that he has no responsibility whatsoever ever for the actions of the First Respondent and Second Respondent or that the Third Respondent can divorce himself from the matter entirely.

177. In considering whether a person is fit and proper the matters set out in paragraph 156 above should be considered. In this case, the Commission is predominately concerned with the conduct of the Third Respondent in respect to the contraventions of the Act and the Third Respondent's conduct in the course of this matter. These matters directly reflect on the character of the Third Respondent.
178. In respect to the incidents themselves the Commission has considered:
- a) the relationship between the incidents and the Third Respondent's roles and responsibilities under the Act;
 - b) whether the incidents are of such a nature that they reflect adversely on the character and reputation of the Third Respondent to a serious degree; and
 - c) whether the actions of the Third Respondent show a course of disregard for the law and/or provide an indication of likely future conduct.
179. The Commission has further considered the Third Respondent's conduct during the matter, and how this reflects on his character, in particular:
- a) the failure of the Third Respondent to comply with orders of the Commission;
 - b) the Third Respondent's lack of credibility in respect to certain pleadings and assertions made as to the failure to provide requested information to the Commission; and
 - c) information provided to the Commission which appears to be deliberately false and/or misleading.
180. It is noted that the Third Respondent is an officer of a body corporate of several licensees. Other than the current matter, the Third Respondent has not been the subject of any other section 95 complaints. The Third Respondent has also satisfactorily operated the First and Second Respondent licences without issue since the incidents.
181. Although the conduct of the Third Respondent leaves a lot to be desired, the Commission finds that the Third Respondent's personal conduct does not reach a level of sufficient seriousness to consider the Third Respondent is not a fit and proper person as contemplated under the Act.
182. Despite this finding, the Commission satisfied that the various contraventions occurred either:
- a) with the consent, or possibly the direction, of the Third Respondent; or
 - b) in the absence of a direct direction, the same were attributable to the Third Respondent's failure to take all reasonable steps to secure compliance by the body corporate with the Act,
- and therefore, even though Ground 5 is not made out, a penalty against the Third Respondent may nevertheless be appropriate.
183. The Commission therefore finds that Ground 5 is not made out in this instance.

Ground 6

184. In this case, the March Liquor Restrictions and the May Liquor Restrictions were specifically put into place to address the particular difficulties which arose in the wake of the Covid-19 pandemic and, in particular, to protect the health and wellbeing of vulnerable persons in the Kimberly region.
185. The Commission considers that where a licensee has acted in breach of government initiatives aimed at addressing adverse consequences of the sale and supply of liquor or the protection of vulnerable communities, the exercise of that licence will consequently not be in the public interest.
186. With respect to the Licensee's failure to participate in the Banned Drinkers Register, at the relevant time the same was expressly voluntary and was being undertaken on a trial basis. The Commission does not consider that the First and Second Respondents' lack of participation in the same indicates that the licences were not exercised in the public interest.
187. The Commission finds that Ground 6 is made out.

Ground 7

188. In the consideration of whether the safety, health or welfare of persons who resort to the licensed premises is endangered by an act or neglect of the licensee, the Commission has considered that:
- a) although there were reported instances of intoxicated persons being outside the First Respondent's premises; and
 - b) while it was clear the March Liquor Restrictions and the May Liquor Restrictions were put in place expressly to limit potential harm in the region and the breach of the same may consequently result in more alcohol being available in the region,
- the Commission is not satisfied to the required standard that any specific endangerment of the safety, health or welfare of persons who resort to the licensed premises, as arising from the breaches alleged by the Complainant, has been established.
189. The Commission therefore finds that Ground 7 is not made out.

Grounds made out

190. Based upon the totality of the evidence that was put before the Commission, the Commission is satisfied, on the balance of probabilities, that there is proper cause for disciplinary action on Ground 1, Ground 2, Ground 3, Ground 4 and Ground 6 as alleged by the Complainant.

Consideration of Penalty

191. The purpose of disciplinary proceedings is not the punishment of the Respondents, but rather for the protection of the public.
192. The Commission firstly wishes to comment on how difficult it has been to deal with the Respondents in this case and the related section 147 matter. The continual refusal to provide requested evidence, spurious pleadings made and excuses for non-compliance provided have unreasonably delayed this matter and required significant expenditure by the Commission.

193. The Respondents' actions do not give confidence that the Respondent has a proper regard for the expected industry standards and for the statutory role of the Commission to consider matters referred to it.

Penalty to the First Respondent

194. The relevant breaches of the Act committed by the First Respondent giving rise to the Complaint were numerous and repeated. They were more than a one-off poor decision by a single manager but rather comprised:

- a) a large and continued amount of transactions which clearly breached the Covid Liquor Restrictions over a period of some months;
- b) related to an area which was well known for sly grogging and harm arising from alcohol consumption; and
- c) required the repeated involvement of the Police.

195. There was no argument that the approved managers and the Third Respondent were not aware of the relevant Covid Liquor Restrictions.

196. The above indicates an ongoing disregard for licence conditions which were put in place to address serious community problems with alcohol consumption in Halls Creek and an indifference for the public interest.

197. The manner of breaches were also more varied for the First Respondent and involved not only the various transactions in breach of the Covid Restrictions, but also failure to manage the premises appropriately and various breaches of the conditions of the First Respondent's licence including RSA and trading hours breaches.

198. In all the circumstances the Commission considers that a fine in the maximum sum of \$60,000 is a suitable sum that reflects the seriousness of the relevant breaches.

199. Given the fact that the First Respondent and Second Respondent are the only two hotels authorised to sell packaged liquor in Derby and the fact that, following the incidents there have been no further breaches of the Act reported, the Commission does not consider it appropriate or necessary in this case to either suspend or cancel the relevant licence.

200. In the Complaint it was also submitted there were further appropriate remedies as follows:

- a) Restrict the quantity and strength of liquor permitted to be sold as packaged liquor for consumption off the premises, pursuant to section 96(1)(b) of the Act.
 - i. The Commission does not consider that it is appropriate that it impose such conditions on an individual licensee in a region which already has specific restrictions and conditions on the sale of packaged alcohol.
 - ii. It is the role of the Director under section 64 of the Act to take into account all appropriate considerations in applying any liquor restrictions as may be appropriate in the relevant region.

- b) Restrict the sale of packaged liquor only trading hours of the licence to between 12:00 noon and 4:00 pm, unless to bona fide lodgers of the Spinifex Hotel or the Derby Boab Inn, pursuant to section 96(1)(b) of the Act.
 - i. The Commission does not consider that this restriction would provide any additional benefit in to assist in the prevention of the type of breaches the subject of the Complaint.
- c) Impose a condition that the licensee install and maintain CCTV cameras in accordance with the Director's Safety and Security at Licensed Premises Policy and to include the regulated areas at the front of the licensed premises, pursuant to section 96(1)(b) of the Act.
 - i. The Commission does not find that this condition would necessarily provide any additional benefit to assist in the prevention of the type of breaches the subject of the Complaint, particularly cameras outside of the premises.
 - ii. However, to the extent it has not already done so, the Licensee is encouraged to install CCTV cameras for the safety of its staff and patrons and to allow for supervision and review by the Third Respondent while he is not present in the region.
- d) Impose a condition on the licence requiring the licensee to comply with the conditions of the Derby Liquor Accord including the BDR, pursuant to section 96(1)(n) of the Act.
 - i. It is not the Commission's role to enforce compliance with a voluntary accord, especially where the terms of the same may be fluid and changeable and, while they consider the needs of the region as a whole, do not necessarily address the breaches of the Act as contained in the Complaint.
 - ii. The Respondents are, however, encouraged to take an active role in considering and complying with any regional accords as the local licensee may consider appropriate.

Penalty for the Second Respondent

- 201. It is noted that Second Respondent, although engaged in similar conduct to the First Respondent, has a substantially fewer number of breaches of the Act, and in particular, though still a substantial number, the transaction in breach of the Covid Liquor restrictions were approximately half of those of the First Respondent.
- 202. The management and staffing of the First Respondent and Second Respondent was also intertwined and clearly similar issues were present in the management of both licensed premises.
- 203. In this case the Commission considers that a fine in the sum of \$30,000 is a suitable sum that reflects the seriousness of the relevant breaches, but considers that the number of breaches were less than that of the First Respondent.
- 204. The Commission refers to its comments in paragraph 199 and 200 above as to the appropriateness of possible other remedies or penalties for the Second Respondent.

Penalty for the Third Respondent

205. In respect to disciplinary action against the Third Respondent, the Complainant asserted that having regard to the application of section 164(1)(a)(ii) of the Act, an appropriate penalty was a disqualification period.
206. The Commission considers that, although the Third Respondent's conduct was not satisfactory, such conduct was limited to the incidents themselves over a relatively short period and the Third Respondent's subsequent dealings with the Commission in respect to this matter and the same does not necessarily amount to a level of conduct that should prevent the Third Respondent from acting in a position of authority with respect to all licenses he is involved with.
207. Section 164(1a) of the Act provides for the liability of officers of a body corporate, where a ground under a section 95 complaint is made out and found:
- a) to have occurred with the consent or connivance of;
 - b) or to be attributable to any failure to take all reasonable steps to secure compliance by the body corporate with this Act,
- on the part of, any officer or other person concerned in the management of the body corporate, then the Commission may impose a penalty under section 96 on that person as well as a penalty on the body corporate.
208. In this case the Commission considers that the Third Respondent as the sole controller of the Licensee corporate body, has not shown an appropriate level of care or management as would be expected of an officer of a licensee body corporate.
209. In all the circumstances the Commission considers that a fine in the sum of \$50,000 is a suitable sum that reflects the seriousness of the relevant breaches and taking into account the direct involvement and responsibility that the Third Respondent had in respect to the incidents.
210. Such a monetary penalty will reassure the public that the conduct in question is not acceptable within the liquor industry and provide a deterrent to further breaches of the Act.
211. The Commission briefly comments that in the event of any further breach of the Act, it may be considered that any such further course of action would likely lead the Commission to consider the Third Respondent to not be a fit and proper person to hold a position of authority in a licensed body corporate.

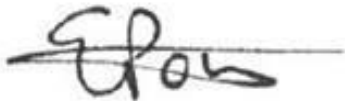
Conclusion

212. In considering all of the evidence before it, the Commission finds that the Complaint has been made out to a satisfactory standard such that proper cause for disciplinary action exists in the terms set out in the orders below.

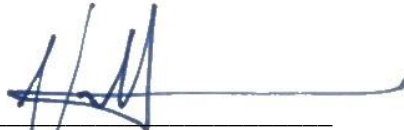
ORDERS

213. On the basis that the Complaint in respect of grounds (1), (2), (3), (4) and (6) are made out, the Liquor Commission makes the following orders:

1. The First Respondent, Spinifex Holdings (WA) Pty Ltd is to pay a monetary penalty of \$60,000 pursuant to section 96(1)(m) of the *Liquor Control Act 1988* within four months of the date of this Decision and lodge with the Liquor Commission evidence of payment of the penalty within 28 days of making the payment.
2. The Second Respondent, Boab Inn Pty Ltd is to pay a monetary penalty of \$30,000 pursuant to section 96(1)(m) of the *Liquor Control Act 1988* within four months of the date of this Decision and lodge with the Liquor Commission evidence of payment of the penalty within 28 days of making the payment.
3. The Third Respondent, Mr Emanuel Richard Brian Dillon:
 - a) is reprimanded by the Liquor Commission for his conduct in relation to his operation as an officer of the First Respondent and the Second Respondent pursuant to section 96(1)(a) of the *Liquor Control Act 1988*; and
 - b) is to pay a monetary penalty of \$50,000 pursuant to section 164(1a) and section 96(1)(m) of the *Liquor Control Act 1988* within four months of the date of this Decision and lodge with the Liquor Commission evidence of payment of the penalty within 28 days of making the payment.



EMMA POWER
CHAIRPERSON



NICHOLAS VAN HATTEM
DEPUTY CHAIRPERSON



ELANOR ROWE
MEMBER