

Our Ref: L 192

Your Ref:

Mr Darryl Freeman
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By email:

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9 February 2010

Dear Mr Freeman

**Complaint under section 139 of the *Liquor Act 2007* ("Act") regarding
Ms Pamilla Billie Forbes, former licensee of the Post Office Hotel,
Grafton - Licence No 112904**

BACKGROUND

1. On 11 December 2009 the Authority received a letter of that date comprising a complaint ("**Complaint**") made in your capacity as a delegate of the Director-General of Communities NSW ("**Complainant**") regarding Ms Pamilla Billie Forbes, the former licensee ("**Licensee**") of the Post Office Hotel in Grafton, New South Wales ("**the Hotel**").
2. The Licensee held the licence of the Hotel from 31 January 2005 to 19 November 2007. There have been two licensees since her departure, and the Hotel has been under new management since 19 November 2007.
3. The Complaint only concerns the period during which the Licensee held the licence for the Hotel. There has been no complaint made against the subsequent licensees or business owners of the Hotel.
4. The Complaint specifies two grounds that are available under section 139 (3) of the Act:
 - Section 139 (3) (b) - that the Licensee failed to comply with conditions to which the licence is subject (the "**Breach of Condition Ground**")
 - Section 139 (3) (i) - that the Licensee is not a fit and proper person to be the holder of a licence (the "**Fit and Proper Ground**").
5. The Complaint requests that the Authority make findings against the Licensee on the two grounds specified and disqualify the Licensee from holding a liquor licence for a period of five (5) years.

The Breach of Condition Ground

6. The Complainant alleges that on 12 July 2007, upon inspection by an Office of Liquor Gaming and Racing ("**OLGR**") Special Inspector, the Licensee failed to make available a register containing a copy of the certificates of satisfactory completion of Responsible Service of Alcohol ("**RSA**") courses by the Licensee and employees who have completed that course.
7. The Complainant has submitted a *Licence History Sheet* that was extracted from the former Liquor Administration Board database ("the **LAB Database**") on 6 July 2007. The LAB database continues to be maintained by OLGR. On 4 January 2010 the Authority obtained an updated version of this document from the LAB Database. It records that the licence condition was first imposed by the former Licensing Court at the request of Police on 26 April 2002. The document shows that the maintenance and production of a compliant register was a licence condition at the time of the OLGR inspection.
8. The evidence submitted by the Complainant in support of the alleged breach of this licence condition comprises a detailed statement by Mr Richard Walton, a special inspector from the OLGR Newcastle office, dated 17 January 2008.
9. The Complainant has also submitted a list of approved RSA course providers who were available at the relevant time. This list was apparently downloaded from the OLGR website on 8 May 2007 and is signed and dated "12 July 2007".

The Fit and Proper Ground – offences against the Act

10. The Complainant alleges that the Licensee was issued with 11 infringement notices ("**Penalty Notices**") dating from 29 October 2005 to 12 July 2007 for various offences against the Act and has since paid all of the penalties demanded in those Penalty Notices.
11. The material submitted in support of this allegation includes a statement by Sergeant Virginia Luskan of Coffs Harbour Police dated 13 July 2009, which describes how on 19 May 2009 she made enquires of the NSW Police's Computerised Operational Policing System ("**COPS**") and prepared the annexed document entitled "Particulars of Liquor Act Offences & Infringement Notices issued against Pamilla Billie Forbes".
12. The Complainant has also submitted an exchange of emails dated 9 and 10 July 2009 between Mr Richard Walton and Ms Lea Davies, Senior Adjudication and Compliance Officer at the State Debt Recovery Office ("**SDRO**"). In those emails, Mr Walton enquired as to the status of 12 Penalty Notices. SDRO provided him with written confirmation that, of the 12 Notices identified by Mr Walton, one had since been withdrawn by Police and one had not been issued against the Licensee. SDRO confirmed that 10 Penalty Notices issued against the Licensee for offences against the Act had been paid in full.
13. Those Penalty Notices are numbered:

4007434283 – (permit intoxication on premises) paid on 12 December 2005
4012844276 – (sale of liquor to minor) paid on 11 July 2007

- 4012844267** – (sale of liquor to minor) paid on 16 June 2008
- 4012844258** – (fail to remove minor from premises) paid on 11 July 2007
- 4012844469** – (permit intoxication on premises) paid on 28 February 2008
- 4012844450** – (permit intoxication on premises) paid on 28 February 2008
- 4012844440** – (permit intoxication on premises) paid on 28 February 2008
- 4012851590** – (permit intoxication on premises) paid on 31 July 2007
- 4012851581** – (supply to intoxicated person on premises) paid on 31 July 2007
- 4014415240** – (permit intoxication on premises) paid on 19 October 2007.

The Fit and Proper Ground – Police complaint regarding Hotel management

14. In further support of the Fit and Proper Ground, the Complainant alleges that on 30 September 2006 the Licensee was issued with a warning from local Police concerning her management of the Hotel, in particular:

- (i) allowing too many patrons into the Hotel shortly before closing
- (ii) not having security out the front of the hotel as patrons were leaving, then only one security officer who did not usher patrons away
- (iii) the level of intoxication of the patrons, with many appearing affected.

15. The material evidencing this warning is COPS report E27930020 dated 30 September 2009, which has been submitted as part of the Complaint.

The Fit and Proper Ground – Licensee allegedly intoxicated on premises

16. The Complainant alleges that the Licensee was intoxicated while working on the premises on four separate occasions – 29 October 2005; 22 March 2006; 30 September 2006 and 9 December 2006.

17. Material submitted by the Complainant in support of these allegations include COPS report E25864763; the Statement of Sergeant Luksan dated 13 July 2009; COPS Report E26652171; the statement of Senior Constable Marisa Bremner dated 20 September 2007; COPS report E27930020 and COPS report E28851311.

The Fit and Proper Ground - Failure to display licence

18. In further support of the Fit and Proper Ground, the Complainant alleges that on 12 July 2007 the Licensee failed to display the licence prominently on a part of the licensed premises that is accessible to the public during trading hours, in breach of a condition that was imposed on the license by the Clause 21 (1) of the former *Liquor Regulation 1996*.

19. The Authority notes that as of 12 July 2007, Clause 21 (1) of the former Regulation stated:

21 Display of licence

(1) Every licence is subject to a condition that the licence must at all times be prominently displayed on a part of the licensed premises accessible to the public during trading hours.

(2) This clause does not apply to a licence during any time when it is in, or in transit to or from, the custody of the Licensing Court.

20. The evidence submitted by the Complainant in support of this allegation comprises a detailed statement by OLGR Inspector Rick Walton dated 17 January 2008.

The Fit and Proper Ground - premises trading without an approved supervisor

21. In further support of the Fit and Proper Ground, the Complainant alleges that on 12 July 2007, between 5.30 pm and 7.45 pm, at a time when the premises were trading and the Licensee was not supervising the premises, the Licensee failed to ensure that the premises were under the supervision of a person who had completed an approved hotelier's course or had been exempted from doing so.

22. The evidence submitted by the Complainant in support of this allegation comprises a detailed statement by Mr Richard Walton dated 17 January 2008.

The Fit and Proper Ground - Licensee's commission of mid range Prescribed Concentration of Alcohol ("PCA") traffic offences

23. Finally, the Complainant alleges that the Licensee has committed two offences of driving with a middle range prescribed concentration of alcohol in her blood, as follows:

- (i) on 18 July 1984 at Nowra Court
- (ii) on 16 August 2004 at Maitland Court.

24. The material submitted by the Complainant in support of these allegations comprise a statement of Sergeant Luskan dated 14 September 2009 which annexes a Road and Traffic Authority ("**RTA**") *Traffic Record Report* obtained by Sergeant Luskan using the Licensee's name and date of birth. This document provides an RTA record of the relevant traffic offences and briefly mentions the outcome (reportedly the matters were dealt with under the former 556A of the *Crimes Act 1900* and section 10 of the *Crimes Sentencing and Procedure Act 1999* respectively).

PROCEDURAL FAIRNESS

25. On 16 December 2009 the Authority sent a letter to the Licensee by registered mail enclosing a complete copy of the Complaint. The Licensee was notified of the potential sanctions that may be imposed by the Authority in the event that the Complaint is established. The Licensee was invited to make written submissions in response to the Complaint by 18 January 2010. The Licensee was also requested to advise whether, in addition to making written submissions, she sought the opportunity to speak to the Authority about this matter by means of a telephone conference.

26. A follow up letter was sent by the Authority to the Licensee by express post on 8 January 2010, inviting her to show cause why a sanction should not be imposed if the Authority is satisfied as to the grounds of the Complaint. The Authority also requested her confirmation of whether the Licensee seeks an oral hearing.

27. On 11 January 2010 the Authority received from the Licensee a handwritten letter of 4 pages simply dated "January 2010" ("**Licensee's Submission**"). Aside from a brief initial telephone conversation with the Authority's General Counsel on 15 December 2009, this comprises her response to the Complaint.

THE LICENSEE'S SUBMISSION AND THE COMPLAINANT'S REPLY

28. The Licensee's Submission did not include a request for an oral hearing.

29. With regard to her personal circumstances, the Licensee submitted that she:

- will be 70 years old "next year"
- has "very bad health" including "moderate emphysema in both lungs caused by passive smoking"
- has osteoarthritis in the T7-T12 vertebrae of her spine
- has a hiatus hernia under her left ribs
- has high blood pressure
- has retired – "my working days are over and yes I am on a pension".

30. The Licensee's Submission briefly recounts the Licensee's history of involvement with other licensed premises, including several hotels and motels throughout her working life, before acquiring the Post Office Hotel business with her son, Neville (who became the publican and licensee of the Hotel at first instance).

31. The Licensee advises that she acquired the licence to the Hotel "due to Neville's health". (In an earlier telephone conversation with the Authority's General Counsel she explained that this was the result of a motorcycle accident.) At that point, the Licensee put the Hotel up for sale.

32. According to the Licensee "many people looked but unfortunately it took a long time to sell". The Licensee describes her long working days thereafter and her admission to Hospital for pneumonia after one and a half years of serving in that role. The Licensee advises that after this hospital admission, for the next fifteen months, she was a "tired working zombie".

33. The Licensee's Submission includes the following comments:

"a successful publican – maybe not – but all the while I wanted out. God had other plans..."

"if I appeared intoxicated, it would only take three drinks.. considering my health and age..."

"on five separate occasions I was assaulted" (the Licensee then provides a short description of each incident and identifies the perpetrators)

"boy oh boy, I am praying that this letter puts an end to the Post Office Hotel – my nightmare..."

"praying again that the authority decides not to take any action against me. I'm just too old and very sick."

34. In an email dated 20 January 2010, the Complainant provided the following response to the Licensee's Submission:

"I have read Mrs Forbes letter and make the following observations:

- 1. She is by her own submission a very experienced person in the hotel industry;*
- 2. If she was incapable of managing the hotel, she should not have transferred the licence to herself;*
- 3. Obligations to properly manage a hotel continue, even while a hotel may be up for sale;*
- 4. If Mrs Forbes has no intention of returning to the industry, something she does not say in this submission, then there would be very little inconvenience, if any, to Mrs Forbes in being disqualified for a period of time;*
- 5. Mrs Forbes submission does nothing to address or justify her conduct at the time Inspector Walton visited the premises.*

Mrs Forbes should be disqualified from holding a licence."

FINDINGS

35. **The Authority finds that on 12 July 2007 the Licensee breached a condition of the licence by failing to make available, upon request by an OLGR Inspector, a register containing a copy of the certificates of the satisfactory completion of an approved RSA course for the Licensee and all employees who have completed that course.**
36. In making this finding, the Authority accepts and relies upon the detailed statement by Mr Richard Walton, OLGR Inspector, dated 17 January 2008. The Authority also relies upon records extracted from the LAB database on 4 January 2010 confirming that a condition requiring the maintenance and production of a compliant register had been imposed upon the Hotel's licence by the former Licensing Court at the request of Police on 26 April 2002 and remained a condition on the licence at the relevant time.
37. The Licensee has not provided any submissions, evidence or other material capable of satisfying the Authority that this alleged breach of licence condition did not actually occur.
38. **The Authority finds that during the period between 29 October 2005 and 12 July 2007, the Licensee committed (10) offences against the Act.**
39. In making this finding, the Authority accepts and relies upon the Statement of Sergeant Virginia Luskan which annexes, *inter alia*, NSW Police Computerised Operational Policing System ("COPS") Event Reports numbered E25864763, E26652171, E28851311, E29160764 and E32483387 detailing Police records of the alleged offences.
40. The Authority also relies upon the email correspondence between Mr Richard Walton of OLGR and Ms Lea Davies of SDRO dated 9 and 10 July 2009 confirming that ten Penalty Notices issued against the Licensee have since been paid by her.
41. While the issue of a Penalty Notice to a person does not, of itself, constitute proof of their commission of the offence, section 150 of the Act deems *payment* of a Penalty Notice to be an admission of the offence for the purposes of disciplinary proceedings under Part 9 of the Act.
42. The Licensee has not provided any submissions, evidence or other material capable of satisfying the Authority that the offences noted in the said Penalty Notices did not actually occur.
43. **The Authority is satisfied that on 30 September 2006 the Licensee was issued with a warning from Police regarding her management of the Hotel.**
44. The Authority is satisfied that Police warned her on that occasion about:
- (i) allowing too many patrons into the Hotel shortly before closing
 - (ii) not having security out the front of the hotel as patrons were leaving, then only one security officer who did not usher patrons away
 - (iii) the level of intoxication of the patrons, with many appearing affected.
45. In making this finding, the Authority accepts and relies upon the information provided in COPS Event Report E27930020 dated 30 September 2009. The Licensee has not provided any submissions, evidence or other material capable of satisfying the Authority that this warning, or the conduct that reportedly have rise to this warning, did not occur.

46. **The Authority is satisfied that on 29 October 2005, 22 March 2006, 30 September 2006 and 9 December 2006 the Licensee was visibly impaired by alcohol while working on the premises.**
47. Police accounts of the Licensee's intoxication levels on the above dates vary in the relevant COPS reports for each incident, from "low to moderately affected" to "well intoxicated". The Authority is mindful that there is no audio visual evidence or blood alcohol evidence confirming whether the Licensee was actually "intoxicated" on any of those occasions, as alleged. The Authority regards an allegation that a licensee was intoxicated while on duty as a serious matter.
48. Police officers gain considerable experience in assessing persons who are affected by alcohol. The Authority notes the detailed contemporaneous descriptions of the Licensee's conduct in the relevant COPS reports, filed by Police officers following their attendances at the Hotel. While it is difficult to conclude with confidence that the Licensee was actually "intoxicated" on all of the reported instances, the Authority is satisfied that the Licensee was at least visibly impaired by the effects of alcohol, while purporting to supervise the premises, on each of the occasions alleged.
49. The Authority notes that COPS Report E28851311 and the statement of Sergeant Luskan describes the issue of three Penalty Notices numbered 4012844469, 4012844450 and 4012844440 against the Licensee with regard to the intoxication on premises of two males and the Licensee herself on 9 December 2006. All of those Penalty Notices were reported by SDRO as paid on 28 February 2008. As previously indicated, section 150 of the Act deems *payment* of a Penalty Notice to be an admission of the offence for the purposes of disciplinary proceedings under Part 9 of the Act. The Authority is satisfied that the Licensee was actually intoxicated on the premises on 9 December 2006.
50. The Authority has considered comments made in the Licensee's Submission to the effect that, if she did appear intoxicated, it would only have taken three drinks, by reason of the state of her health and her long working long hours. In the Authority's view, this is no excuse. It is incumbent upon a fit and proper licensee when supervising licensed premises to restrict his or her own consumption of liquor while on duty to a bare minimum, if any. A licensee who is even moderately affected by alcohol will likely have an impaired ability to monitor the intoxication levels of patrons.
51. The Authority's findings in this regard are based upon its acceptance of the material contained in the Statement of Sergeant Luksan dated 13 July 2009; COPS report E25864763; COPS Report E26652171; the statement of Senior Constable Marisa Bremner dated 20 September 2007; COPS report E27930020 and COPS report E28851311.
52. **The Authority is satisfied that on 12 July 2007 the Licensee failed to display the Hotel licence as required by Clause 21 (1) of the *Liquor Regulation 1996***
53. The Authority accepts and relies upon the detailed statement of Mr Richard Walton dated 17 January 2008 when making this finding. The Licensee has not provided any submissions, evidence or other material capable of satisfying the Authority that this alleged breach of a licence condition did not actually occur.
54. By reason of the above findings and the decision discussed below, the Authority does not consider it necessary to make findings on the alleged failure by the Licensee to

supervise the premises for a short period of time on 12 July 2007, or the alleged commission of two mid range PCA traffic offences in 1984 and 2004 respectively.

DETERMINATION

55. When determining this Complainant, the Authority has considered relevant provisions of the Act, including but not limited to the statutory objectives and relevant considerations that are set out under section 3 of the Act:

3 Objects of Act

- (1) The objects of this Act are as follows:
 - (a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,
 - (b) to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,
 - (c) to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.
- (2) In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following:
 - (a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),
 - (b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,
 - (c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life.

Ground 1: That the Licensee has breached a condition of the licence

56. By reason of the Authority's findings in paragraph 35-37 of this decision **the Authority is satisfied that the Licensee breached a condition of the licence.**

Ground 2: That the Licensee is not fit and proper person to be the holder of a licence

57. On the meaning of "fit and proper person" the Authority has had regard to the decision of the High Court in *Hughes & Vale Pty Ltd v NSW* (No 2 1955) 93 CLR 127, per Dixon CJ, who states (at p156):

"The expression "fit and proper person" is of course familiar enough as traditional words when used with references to officers and perhaps vocation. But the very purpose is to give the widest scope for judgment and indeed for rejection. "Fit" (or 'idoneus') with respect to an office is said to involve three things, honesty, knowledge and ability."

58. Having considered on a cumulative basis the adverse findings that are noted in paragraphs 38-54 of this decision, **the Authority is satisfied that the Licensee is not a fit and proper person to hold a liquor licence.**

DISCIPLINARY ACTION

59. Turning to the question of what, if any, sanction should be imposed upon the Licensee, the Authority notes that a significant period of time has now elapsed between the date that she ceased holding the licence for the Hotel (19 November 2007) and the date of filing this Complaint with the Authority (11 December 2009).
60. The Complaint itself primarily concerns conduct and events that occurred between 2005 and 2007, when the Licensee held the licence for the Hotel.
61. A search of the OLGR Government Licensing Service database and the LAB Database, performed by an Authority delegate on 15 December 2010, disclosed no record of the Licensee holding the licence of, or being a close associate of, any licensed business in New South Wales since she transferred the licence for the Hotel to a third party on 19 November 2007.
62. The Authority accepts the Licensee's claim that she is now 69 years of age (her date of birth is apparent from LAB Database and Police material before the Authority) and that she is in receipt of a pension. The Authority accepts that the Licensee suffers from all of the medical conditions that are identified in the Licensee's Submission. The Authority is satisfied that the Licensee is now retired.
63. Were the Authority satisfied that the Licensee was still active in the industry or was likely to become active in the industry again, the Authority would have disqualified her from holding a licence. However, in the present circumstances, the Authority considers that imposing this sanction would be futile.
64. The Authority has considered whether another sanction available to it under section 141(2) of the Act may be appropriate, but having turned its mind to section 3 of the Act and the facts of this case it does not regard the imposition of an alternative penalty to be in the public interest at this time.
65. In conclusion, the Authority has decided to **exercise its discretion under section 141 (2) of the Act to not take any action against the Licensee**, notwithstanding that both grounds specified in the Complaint have been established.
66. In the unlikely event that a future application is made that identifies the Licensee as the proposed recipient of a liquor licence, or a close associate of a licensee, the Authority has directed Authority delegates to ensure that such application be placed before the Authority Board for determination.

REVIEW RIGHTS

67. Section 144 of the Act provides that an application for review of this decision may be made to the Administrative Decisions Tribunal of New South Wales ("**ADT**"). Such application may be made by the person against whom any disciplinary action is taken by the Authority in relation to the Complaint, or the Complainant.
68. An application for review must be made in the manner and form prescribed by the ADT, within 28 days of the day on which the applicant was notified of this decision. For more information contact the Registry of the ADT at Level 15, 111 Elizabeth Street, Sydney NSW 2000.

Yours sincerely

A handwritten signature in black ink, appearing to read "Chris Sidoti". The signature is fluid and cursive, with a small flourish at the end.

Chris Sidoti
Chairperson