

SUPREME COURT OF QUEENSLAND

CITATION: *Cayneston Pty Ltd t/a The Mad Cow Tavern v Chief Executive of the Dept of Employment, Economic Development & Innovation & Anor* [2010] QSC 394

PARTIES: **CAYNESTON PTY LTD T/A THE MAD COW TAVERN**
(applicant)
CHIEF EXECUTIVE OF THE DEPARTMENT OF EMPLOYMENT, ECONOMIC DEVELOPMENT AND INNOVATION
(first respondent)
EXECUTIVE DIRECTOR OF THE OFFICE OF LIQUOR AND GAMING REGULATION
(second respondent)

FILE NO/S: BS3341/10

DIVISION: Trial Division

PROCEEDING: Application for judicial review

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 19 October 2010

DELIVERED AT: Brisbane

HEARING DATE: 23 July 2010

JUDGE: Margaret Wilson J

ORDER: **1. The decision the subject of the application made on 3 March 2010 to classify the applicant's premises as "high risk" be set aside;**
2. The subject decision be remitted to the first respondent for further consideration according to law; and
3. The respondents pay the applicant's costs of the application on the standard basis to be agreed; if not, as assessed.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – reviewable decisions and conduct – where applicant received notice stating that second respondent as delegate of first respondent considered its licensed premises should be classified as "high risk" because of unacceptable level of violence there – where applicant made representations in response to notice – where second respondent made decision classifying premises as "high risk" – where applicant applied for statutory order of review of decision classifying premises as high risk – whether breach of rules of natural justice in making decision – whether relevant considerations not taken into account – whether irrelevant considerations taken into

account – whether error of law

LIQUOR LAW – statutory interpretation – object of *Liquor Act 1992 (Qld)* to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse – *Liquor Act 1992 (Qld)* s 97 – level of violence that is unacceptable having regard to that object – whether connection between violent incidents and alcohol abuse or misuse necessary

Liquor Act 1992 (Qld) ss 42A, 96, 97, 98, 99A, 99B, 99C, 148A, 165

COUNSEL: AAJ Horneman-Wren SC, and CD Watters, for the applicant
MD Hinson SC for the respondent

SOLICITORS: Creevey Russell Lawyers for the applicant
Crown Solicitor for the respondent

- [1] **MARGARET WILSON J:** The applicant is the licensee of The Mad Cow Tavern in Townsville.
- [2] On 3 March 2010 the second respondent, as the delegate of the first respondent, classified those premises as "high risk" under Part 4 Division 9 of the *Liquor Act 1992 (Qld)* from 29 April 2010, and notified the applicant accordingly. As a result the applicant must not, at any time during trading hours, serve liquid to a patron in a regular glass container or leave or place a regular glass container in an area to which a patron has access.¹
- [3] The applicant applied for a statutory order of review of the decision to classify the premises as high risk seeking –
- (a) an order setting aside the decision;
 - (b) an order referring the decision to the Chief Executive Officer of the Office of Liquor and Gaming Regulation ("OLGR") for further consideration in accordance with law; and
 - (c) an order that the respondents pay its costs.
- [4] It relied on five grounds of review –
- (a) denial of natural justice;
 - (b) failure to take into account relevant considerations;
 - (c) taking into account irrelevant considerations;
 - (d) error of law; and
 - (e) unreasonableness.

Statutory Scheme

- [5] Division 9 of Part 4 of the Act is headed "Banning use of regular glass in certain licensed premises."

¹ *Liquor Act 1992 (Qld)*, s 99C.

[6] Section 97(1) empowers the chief executive (the first respondent) to classify all or part of premises as "high risk" if satisfied –

- "(a) one or more glassings have happened at the premises during the relevant period; or
- (b) there has been a level of violence at the premises during the relevant period that is unacceptable having regard to this Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse."

"Glassing" is defined as an act of violence by a person that involves the use of "regular glass" and causes injury to a person.² "Regular glass" is defined as glass other than tempered glass or toughened glass.³

[7] Section 97(2) provides –

- "(2) However, before classifying the premises or part of the premises as high risk the chief executive must –
 - (a) give the licensee of the premises a written notice under section 98; and
 - (b) have regard to the licensee's response, if any, to the notice.

Note – A guideline may be made by the chief executive under section 42A informing persons about the attitude the chief executive is to adopt on a particular matter or how the chief executive administers this Act."

[8] Section 98 provides –

"98 Notice to licensee of licensed premises considered high risk

- (1) If the chief executive considers that all or part of licensed premises are high risk, the chief executive must give the licensee of the premises a notice under this section.
- (2) The notice must state the following –
 - (a) that the chief executive considers all or a stated part of the premises to be high risk;
 - (b) the reasons the chief executive considers the premises or part to be high risk;
 - (c) an invitation to the licensee to show within a stated period, not less than 14 days after the notice is given to the licensee, why the premises or part should not be classified as high risk.

Examples of parts of licensed premises that the chief executive may decide not to classify as high risk—

accommodation rooms, restaurants, bottle shops."

[9] The licensee may make written representations about the notice within the 14 day period, and may request that the licensed premises or part of them not be classified as high risk. The chief executive is obliged to consider all written representations by the licensee.⁴

[10] If, after considering any representations by the licensee, the chief executive no longer considers the ground exists to classify the licensed premises or part as proposed, he or she must take no further action about the classification and notify the licensee

² *Liquor Act 1992 (Qld)*, s 96.

³ *Ibid.*

⁴ *Liquor Act 1992 (Qld)*, s 99.

accordingly.⁵ But if, after considering any such representation, he or she still considers all or part of the licensed premises should be classified as proposed, then by s 99B(2) –

- "(2) The chief executive must give the licensee a written notice—
- (a) classifying all or a stated part of the premises as high risk; and
 - (b) stating the day from which the classification starts."

Two notices under s 98

- [11] On 16 October 2009 a delegate of the chief executive gave the applicant a notice under s 98 that he considered the premises known as The Mad Cow to be high risk because a glassing had occurred there on 9 April 2009.
- [12] By letter dated 20 November 2009, the chief executive's delegate gave the applicant a second notice under s 98 that he considered the premises to be high risk, this time because of there having been an unacceptable level of violence there within s 97(1)(b).
- [13] The applicant made representations in response to both letters.
- [14] Under cover of a letter dated 3 March 2010 the second respondent, as the delegate of the chief executive, notified the applicant –
- (a) that he had decided to take no further action in relation to the first notice; and
 - (b) that he continued to be satisfied that all of the premises were high risk pursuant to s 97(1)(b); and
 - (c) that he was giving notice pursuant to s 99B that he was classifying all parts of the premises as high risk from 29 April 2010.
- [15] The applicant filed this application for judicial review on 31 March 2010. On 27 April 2010 the impugned decision was stayed until the determination of the application or further earlier order.

Notice under s 98 issued 20 November 2009

- [16] In his letter of 20 November 2009 the delegate said –

"I, as delegate of the chief executive, am issuing this notice pursuant to section 98 of the Liquor Act because I consider all of that part of your licensed premises where liquor is consumed are high risk for the purposes of sections 97 and 98.

I have formed this view after reviewing a range of material from the Queensland Police Service and internal compliance records from the Office of Liquor and Gambling Regulation. Copies of this material are enclosed (see Attachment A). (*Emphasis added*).

This material shows there have been a series of violent incidents at your premises during the past year, which have caused, or had the potential to cause, serious personal injury, pain and suffering to those involved and other patrons of your premises, as outlined in Attachment A.

⁵ *Liquor Act 1992 (Qld)*, s 99A.

I consider that the level of violence at your premises evidenced by these incidents is unacceptable and that your premises are therefore high risk for the purposes of section 97 and 98 of the Liquor Act.

In reaching this view, I have had regard to the frequency and seriousness of the incidents, the number of persons involved, the extent of the injuries caused and the involvement of alcohol abuse and misuse. I have also taken into account a guideline describing how the chief executive will assess matters involving the banning of the use of regular glass (see Attachment B)."

- [17] It is not clear what was intended to be enclosed as Attachment A. What was in fact enclosed was a schedule containing information in nine columns under the following headings –

occnum	OCC TYPE	Charge Sequence	PAC Recorded Charge	Bus Org Name	Suburb	Occ Time	Offender Status	modus operandi
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Twelve incidents at The Mad Cow were described. They were identified by a "QP" reference number and by date.

1	QP 0900027751	11/01/09
2	QP 0900119640	14/02/09
3	QP 0900131571	14/02/09
4	QP 0900165148	27/02/09
5	QP 0900162423	28/02/09
6	QP 0900205290	14/03/09
7	QP 0900316134	26/04/09
8	QP 0900411368	31/05/09
9	QP 0900411246	31/05/09
10	QP 0900473203	21/06/09
11	QP 0900559116	22/07/09
12	QP 0900729609	18/09/09.

The provenance of this document is not clear – whether it was a document received from the QPS, or whether it was a document compiled within the OLGR.

- [18] The applicant has acknowledged receiving the guideline referred to in the letter of 20 November 2009 as Attachment B. (It seems to have been enclosed with the letter of 16 October 2009, but no point has been taken about its omission from the second letter.) I will return to the guideline shortly.
- [19] The applicant made representations in response to the letter of 20 November 2009 on 18 December 2009.
- [20] By letter dated 28 January 2010 the second respondent wrote to the applicant advising that further information had been sought and obtained from the QPS, attaching copies of that further material, and allowing a further 14 days to make any further representations.

[21] The applicant made further representations by letter dated 8 February 2010.

Decision

[22] In the Notice of Decision dated 3 March 2010 the second respondent said –

"By a letter dated 20 November 2009 the Acting Executive Director gave further notice (the 20 November notice) to the licensee pursuant to section 98 of the Act that he also considered the premises to be high risk for the purposes of section 97 and 98 of the Act on the grounds that there had been a level of violence at the premises during the previous 12 months that was unacceptable having regard to the Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse. That notice:

- attached details of 12 violent incidents alleged to have occurred at the premises during the previous 12 months based upon material provided by the Queensland Police Service and internal compliance records from OLGR
- invited the licensee to make representations within 28 days to show why the premises, or any part of them, should not be classified as high risk.

...

Findings

...

With respect to the notice issued on 20 November 2009, I have taken into account all of the representations made by the licensee in relation to both notices, the material provided by the QPS and the internal OLGR compliance records that were provided to the licensee, and Chief Executive's guideline 'Banning use of regular glass.'

I do not accept the submission that the chief executive cannot lawfully issue a section 98 notice under section 97(1)(b) when he has previously issued a section 98 notice under section 97(1)(a).

As delegate of the chief executive, I find on the balance of probabilities that:

- a) Violent incidents did occur at the premises on 11 January 2009, 14 February 2009 (in relation to QPS reference QP0900131571), 27 February 2009, 28 February 2009, 14 March 2009, 26 April 2009, 31 May 2009, 21 June 2009, and on or about 22 July 2009.
- b) In each case injuries or harm were inflicted upon the victims. Injuries sustained included bites and lacerations.
- c) The violent incidents occurred despite the management practices described in the licensee's submissions.
- d) The violent incidents were not confined to any particular part of the premises.
- e) The current licensee was the licensee at the time of each of the incidents.
- f) I am satisfied that the incident referred to in the 20 November notice as occurring on 12 August 2009 in fact occurred on 12 July 2009, and further that it occurred outside the premises. In the circumstances I do not propose to take the incident into account.

- g) I note the licensee's submission that there is insufficient evidence of a violent incident in relation to the allegation of drink spiking on 14 February 2009. Having reviewed the material I cannot be satisfied on the balance of probabilities that a violent incident has occurred and I do not propose to take this incident into account.
- h) I note the licensee's submission that the incident on 27 February 2009 did not occur at the premises and that the police report is incorrect. The licensee's later submissions of 8 February state that the additional police report provided on 28 January 2010 confirms this submission. I do not accept these submissions. I do accept that there were 2 stages to the alleged violent incident – the first stage, according to the police material, occurred at the upstairs dance floor of the premises when the offender punched her at least once in the face. The second stage occurred some 20 minutes later on the footpath outside the premises. Given the altercation began in the premises I consider the incident to be relevant to my assessment as to whether the premises are high risk.
- i) I accept that the most serious aspects of the two violent incidents reported in the police material for 31 May 2009 occurred outside the premises, and that these should be treated as a single incident rather than two separate events. I also accept that the victim was outside the premises attempting to gain entry, and may have contributed to his own injuries by unnecessarily attempting to become involved. However given that the alleged offender was being forcibly removed from the premises at the time of the incident because he had become aggressive and refused to leave, I consider the incident as a whole is relevant to my assessment as to whether the premises are high risk.
- j) I note the licensee's submission that the incident on 18 September 2009 that the police description of the events is completely inaccurate. Given that the allegation of violence appears to have been made against the manager of the premises, and the information provided by the police is completely at odds with the submissions made by the licensee, I cannot be satisfied on the balance of probabilities that the incident occurred as described in the police material. Accordingly I do not propose to take this incident into account.

I do not accept the licensee's submission that incidents where the licensee had complied fully with its legal obligations cannot be taken into account in determining whether the premises are high risk.

On the information available to me I consider that alcohol abuse or misuse was likely to be a factor in most of the violent incidents referred to in the notice, given the location, timing, nature and circumstances of the incidents.

I note the licensee's submission that the offenders in the incidents on 28 February 2009 and 14 March 2009 had each only entered the venue a few minutes prior to each incident, and that they had had their intoxication levels checked prior to being permitted entry. In the circumstances I accept that alcohol abuse or misuse may not have been a factor in these incidents, although I do not consider the abuse or misuse of alcohol to be limited to excessive intoxication, nor that alcohol abuse and misuse will necessarily be obvious to witnesses.

In the circumstances I consider that, given the history and frequency of violence at the premises, there has been a level of violence that is

unacceptable, having regard to the Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse, and that the premises are high risk."

- [23] It is not clear what was meant by "the incident referred to in the 20 November notice as occurring on 12 August 2009" as there was no incident on that date in the schedule provided to the applicant.
- [24] The schedule provided to the applicant did not refer to an incident on 21 July 2009, and there was no finding that an incident occurred on that date. There was a finding of an incident having occurred "on or about 22 July 2009", to which I will return shortly.

Timeline

- [25] Part 4 Division 9 of the *Liquor Act 1992* (Qld) came into force on 15 October 2009.
- [26] Several days before it came into force the first respondent wrote to the Commissioner of Police requesting information about licensed premises that had experienced violence.
- [27] Under s 42A of the Act the first respondent may issue guidelines to inform persons about the attitude he or she is likely to adopt on a particular matter. On the same day the legislative provisions came into force, a guideline outlining criteria to be used in deciding whether to impose a restriction on the use of regular glass in licensed premises was issued. Relevantly, it said –
- "In considering whether unacceptable levels of violence are present, the chief executive will have regard to:
- a) the frequency of violent incidents at a premises;
 - b) the seriousness of the violent incidents including the number of persons involved, and the extent of any injuries or damage caused by the incident/s;
 - c) whether the violent incident/s were caused by alcohol abuse or misuse."
- [28] On 29 October 2009 the QPS provided a list of licensed premises, including The Mad Cow, that had experienced violence.
- [29] On 30 October and 2 November 2009 a committee of experienced compliance and licensing officers met to consider the information supplied by the QPS. Applying four criteria, it produced a list of 12 premises, including The Mad Cow, where it thought the ban should be imposed. Those criteria were –
- (i) that a brawl or melee had occurred at the premises resulting in substantial injuries or arrests;
 - (ii) that there had been at least 2 violent incidents, and in each case a charge of GBH (or worse) had been laid against a defendant and serious injuries suffered by a victim;
 - (iii) that there had been 10 or more violent incidents at a premises resulting in charges of (at least) assault occasioning bodily harm; and
 - (iv) that a violent death had occurred on the premises."

The committee's list took the form of a schedule in columns under nine headings.

Premises	Address	Date / Time	Charge	2 x GBH (or worse)	Melee / Brawl	10 or more Assaults (serious)	Violent death on Premises	Action
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- [30] On 3 November 2009 a Briefing Note was prepared for the first respondent. After referring to the background as described in this timeline, including the guideline, the committee's adoption of four criteria and the committee's list of 12 premises (Attachment 3 to the Briefing Note), it continued –

"It is important to point out that as the decision maker in this process you must consider each of the venue's individual circumstances (listed in attachment 3) along with the data provided by the QPS (attachment 4) on their merits and you must satisfy yourself that, taking into account the approved guideline and the circumstances outlined, there has been a level of violence at the premises during the past 12 months that is unacceptable having regard to the Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse, and accordingly that all or part of the premises are high risk."

- [31] Attachment 4 to the Briefing Note was a schedule of violent incidents at The Mad Cow under nine headings. The footer to the document reveals that it was formatted on 30 October 2009, apparently within the OLGR. Whether it was a reformatting of a document received from the QPS or a document compiled within the OLGR is not clear. The incidents in the schedule were comprised of those in the schedule subsequently supplied to the applicant on 20 November 2009 plus two others about which there was said to be a continuing investigation – one on 20 August 2008 [sic] described as unsolved and the other at 17.05 on 21 July 2009.

- [32] The second respondent signed the Briefing Note as follows –

Approved * / Not Approved / Noted

M. Sarquis

Mike Sarquis

EXECUTIVE DIRECTOR

4/11/09

* as indicated in
attachment 3.

He also endorsed his approval on the page of Attachment 3 to the Briefing Note which related to The Mad Cow.

- [33] The relevant part of Attachment 3 to the Briefing Note was in these terms –

PREMISES IDENTIFIED AS "HIGH RISK"								
UNACCEPTABLE LEVELS (SIC) OF VIOLENCE S 97(1)(b)								
Premises	Address	Date / Time	Charge	2 x GBH (or worse)	Melee / Brawl	10 or more Assaults (serious)	Violent death on Premises	Action
MAD COW TAVERN TOWNSVILLE	129 FLINDERS ST, TOWNSVILLE CITY, QLD Australia 4810	21/07/2009 5:05:00 PM	Assault occasioning bodily harm[0214]	N	N	Y 9 x AOBH 1 x Sexual Assault 2 x Assault		<p>M Sarquis [signed M Sarquis] APPROVED / NOT APPROVED</p> <p>_____ Michael Sarquis Executive Director Office of Liquor and Gaming Regulation 4/11/09 [handwritten]</p>
		22/07/2009 9:10:00 AM	Assault occasioning bodily harm[0214]					
		18/09/2009 8:00:00 PM	Assault, Common [0218]					
		11/01/2009 2:45:00 AM	Assault, occasioning bodily harm[0214]					
		14/02/2009 3:00:00 AM	Assault, occasioning bodily harm[0214]					
		27/02/2009 11:30:00 AM	Assault, occasioning bodily harm[0214]					
		28/02/2009 2:00:00 AM	Assault, occasioning bodily harm[0214]					
		14/03/2009 1:15:00 AM	Assault, occasioning bodily harm[0214]					
		26/04/2009 2:10:00 AM	Assault, occasioning bodily harm[0214]					
		31/05/2009 2:53:00 AM	0215 - Assault, Serious (Other)					
		31/05/2009 3:00:00 AM	Assault occasioning bodily harm[0214]					
		21/06/2009 2:00:00 AM	0316 - Sexual assault (Other)					

- [34] By letter dated 20 November 2009 the applicant was given notice under s 98. It was not given a copy of the relevant part of Attachment 3 to the Briefing Note ("the document in contention").

Denial of natural justice

- [35] This ground of the application for judicial review focuses on the non-disclosure of the document in contention.
- [36] Senior Counsel for the respondents conceded that the document in contention was taken into account when the second respondent issued the s 98 notice. He submitted that this document simply informed the process that led to the issue of the notice under s 98, and that there was no evidence the second respondent took it into account in his ultimate decision to classify the premises as high risk. I do not accept this submission.

- [37] By s 97(2) the first respondent was obliged to give the applicant a notice under s 98, and by s 98(2)(b) that notice had to state the reasons the chief executive considered the premises to be high risk.
- [38] In his letter of 20 November 2009 (the s 98 notice) the second respondent said that he had formed the view the premises were high risk after reviewing "a range of material from the Queensland Police Service and internal compliance records from the Office of Liquor and Gambling Regulation" showing a series of violent incidents there during the previous year. If the document in contention was not within the rubric of material supplied by the QPS and internal compliance records from the OLGR, then the letter of 20 November 2009 was misleading as it did not specify all of the material taken into account.
- [39] It is apparent from the notice of decision to classify the premises as high risk made on 3 March 2010 that the material taken into account at the initial stage was taken into account at the subsequent stage, too – what was taken into account at the subsequent stage being described as "the material provided by the QPS and the internal OGLR compliance records that were provided to the [applicant]", along with the applicant's representations and the guidelines.
- [40] The document in contention contained material adverse to the applicant, upon which it was not given an opportunity to make representations.
- [41] It had the appearance of a convenient summary of relevant information. But it was inaccurate in two significant respects – in the material inserted in the column headed "Charge", and in the material inserted in the column headed "10 or more Assaults (serious)", and it included an incident on 21 July 2009 which was not one of those referred to in the material supplied to the applicant on 20 November 2009.
- [42] What appears under the second heading "Charge" in the document in contention corresponds with what appears under the heading "OCC TYPE" (Occurrence Type) in the document provided to the applicant on 20 November 2009. However, it appears from the material under the heading "Charge Sequence" in the document provided on 20 November 2009 and the further QPS material made available to the applicant that what occurred on 31 May 2009 did not result in a charge of assault occasioning bodily harm, but rather in various other charges, and that what occurred on 21 June 2009 did not result in a charge of sexual assault, but rather in a charge of common assault. It follows that the summary in the seventh column of the document in contention –

"10 or more Assaults (serious)

Y

9 x AOBH

1 x Sexual Assault

2 x Assault"

was inaccurate. The true picture was 8 x AOBH; 3 x assault. The charges laid reflected the seriousness of the violent incidents – a factor which the chief executive identified in the guideline as one to which he would pay regard.

- [43] In the circumstances the applicant has persuaded me that there was a breach of the rules of natural justice in making the decision to classify The Mad Cow as high risk.

Incident on 21 July 2009 at 5:05 pm

- [44] The first incident referred to in the document in contention occurred at 5.05 pm on 21 July 2009. It was included in the schedule which was Attachment 4 to the Briefing Note (i.e., the document formatted on 30 October 2009), but it was not included in the schedule provided to the applicant on 20 November 2009. It was a different incident from that described in the document in contention as having occurred at 9.10 am on (Wednesday) 22 July 2009. The latter was alleged to have occurred in the upstairs bar.
- [45] I am satisfied that the second respondent took the second of these incidents into account in making the impugned decision, and that it was described in the statement of decision as having occurred "on or about 22 July 2009" because the upstairs bar was not open that morning. I am satisfied that the second respondent did not take the incident at 5.05 pm on 21 July 2009 into account in making the impugned decision.

Relevant/irrelevant considerations

- [46] In the notice of decision the second respondent accepted that alcohol abuse or misuse may not have been a factor in the incidents of violence he found occurred on 28 February 2009 and 14 March 2009.
- [47] Section 97(1)(b) permits the first respondent to classify licensed premises as high risk if satisfied that there has been a level of violence that is unacceptable "having regard to the Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse". Senior counsel for the applicant submitted that to take into account incidents in which alcohol abuse or misuse may not have been a factor was to take into account an irrelevant consideration given the subject matter, scope and purpose of s 97(1)(b) – in other words, that, to be relevant, violence must be associated with alcohol abuse or misuse. Alternatively, he submitted that if it was permissible to take those incidents into account, whether they were caused by alcohol abuse or misuse was a relevant consideration, which was not taken into account.
- [48] I accept the submission of senior counsel for the respondents that s 97(1)(b) requires an evaluative judgment to be made; that it requires consideration of –
- (a) the level of violence at the premises during the preceding 12 months; and
 - (b) the Act's object to regulate the liquor industry in a way compatible with minimising the harm caused by alcohol abuse and misuse.

He submitted –

"What is then required is a value judgment whether, having regard to the Act's object, the level of violence is unacceptable.

In terms, s.97(1)(b) does not require a connection between an incident of violence and alcohol abuse or misuse. Section 97(1)(b) requires satisfaction that there is an unacceptable level of violence 'at the premises'. It requires only a geographical or locational connection between violence and the premises.

The requirement to have regard to the Act's object, and the expression of that object as being the regulation of the liquor industry in a way compatible with

minimising harm caused by alcohol abuse and misuse, is not a requirement that violent incidents must be found to have been caused by alcohol abuse or misuse before it can be concluded that the level of violence is unacceptable.

No doubt evidence that violent incidents were caused by alcohol abuse or misuse makes it easier to conclude that the level of violence is unacceptable. But violent incidents may be at a level which justifies their description as unacceptable even though they were not the result of alcohol abuse or misuse.

The classification of premises as high risk depends on the existence of a level of violence judged to be unacceptable having regard to the Act's object of regulating the liquor industry in a way compatible with dismissing [sic] harm caused by alcohol abuse and misuse. One form of regulation is the prohibition on the use of regular glass containers. The prohibition is imposed by s.99C on premises classified as high risk.

The provisions of the Act of present interest are prospective in their terms. They seek to minimise future harm caused by alcohol abuse and misuse. The trigger for engaging the s.99C prohibition, which is directed to minimising future harm, is satisfaction that a level of violence in the past is unacceptable."

- [49] Accordingly, the second respondent did not err in taking the incidents on 28 February 2009 and 14 March 2009 into account. Contrary to the submission made on behalf of the applicant, he did take into account whether they were caused by alcohol abuse or misuse, finding that they may not have been.
- [50] Three of the incidents taken into account – those on 11 January 2009, 26 April 2009 and 31 May 2009 – occurred when security guards were removing patrons. Senior counsel for the applicant submitted that the second respondent erred in failing to consider his client's obligations under ss 148A(4) and 165 of the Act.
- [51] Under s 148A(4) a licensee must provide and maintain a safe environment in and around premises. Under s 165 it may require a person who is unduly intoxicated, disorderly or creating a disturbance to leave the premises; if the person fails to do so, the licensee or his employee or agent ("an authorised person") may use necessary and reasonable force to remove him. Those provisions reflect the Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse or misuse.
- [52] In its representations in response to the notice under s 98 the applicant submitted that the incidents on 11 January 2009, 26 April 2009 and 31 May 2009 ought not be taken into account. However, in the notice of decision the second respondent said he did not accept the submission that incidents where the licensee had complied fully with its legal obligations could not be taken into account.
- [53] The provisions of Part 4 Division 9 of the Act on the one hand and those in ss 148A(4) and 165 on the other are discrete measures taken by the Legislature for the safety of patrons, staff and the community generally. The second respondent was correct in his approach that incidents in which a licensee is complying with its obligations under ss 148A(4) and 165 can be taken into account in deciding that premises should be classified high risk. Whether particular incidents (occurring within the year before giving a notice under s 98) should be taken into account is a

matter for evaluation by the decision maker. The second respondent did not err in taking them into account.

Error of law

[54] For the reasons I have already given, the second respondent did not err in his interpretation of s 97.

Unreasonableness

[55] The applicant did not raise any issue additional to those already covered by the other grounds in support of *Wednesbury*⁶ unreasonableness.

Disposition

[56] The impugned decision is tainted by denial of natural justice, and should be set aside.

[57] I will hear counsel on the form of the orders and on costs.

⁶ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR.