

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2018/153

LICENCE NUMBER: 80300317

LICENSEE: J & L Investments (NT) Pty Ltd

PREMISES: Bar 3/Sinsations
3 Edmunds Street
DARWIN NT 0870

LEGISLATION: Section 31A and Part VII of the *Liquor Act*

HEARD BEFORE: Mr Richard Coates (Chairperson)
Mr Kenton Winsley (Health Member)
Ms Sandra Cannon (Community Member)

DATE OF HEARING: 8 March 2019

DATE OF DECISION: 8 March 2019

DECISION

1. On 8 March 2019, the Northern Territory Liquor Commission ("the Commission") heard and upheld a complaint against J & L Investments (NT) Pty Ltd ("the Licensee"), that the Licensee, on 11 September 2017, did fail to remove persons from the licensed premises that were drunk and imposed a monetary penalty of \$6,200 to be paid within 28 days of the date of notice of this decision. These are the reasons for the Commission's decision.

REASONS

BACKGROUND

2. The Licensee is the proprietor of Bar 3/Sinsations situated at Edmunds Street, Darwin, which is licensed to sell liquor from 11:00am until 4:00am the following day, seven days a week.
3. On Monday 11 September 2017 at about 16:58 hours, a licensing compliance officer Mr Scott Gooch was walking home from work along Edmunds Street past the beer garden of the premises known as Bar 3, where he observed a group of males wearing fancy dress, some of whom were exhibiting signs of intoxication.

4. As a result of Mr Gooch's observations a request for CCTV footage was delivered to the Licensee on 12 September 2017. After some prevarication on the part of the Licensee the CCTV footage was provided to Licensing NT and was examined by Senior Compliance Officer Holehouse who compiled some helpful notes of his observations in relation to the contents of the CCTV footage.
5. On 7 February 2018, a complaint alleging a failure to remove persons from the licensed premises, that were drunk, was lodged with a delegate of the Director-General of Licensing ("Director-General") and served on the Licensee. The complaint alleged that a number of patrons exhibited signs of being drunk and that a "topless" barmaid was inserting her nipple in shot drinks prior to serving them to patrons. The barmaid also straddled a patron who was lying on the floor of the bar before pouring a beer onto her breast and letting it run onto the face of the patron below her. It was further alleged that there were no security staff on duty.
6. On 20 February 2018, the Licensee, through the nominee Julia Castella provided the following response to the allegation:

"I would like to offer an explanation to the complaint instigated by one of your officers at Bar 3 located at 3 Edmund St on Monday 11 of September 2017.

*Firstly I feel it necessary to say that this was a **private function** organised by a local football club for their "Mad Monday" celebration.*

The reason we decided to accommodate this club was that in far too many situations these events are staged in a shed in the back blocks of Winnellie and very often end in violence and bloodshed.

The coach assured us he would maintain security over the team on the day and as a result there were no incidents, the function went from 12:00 midday until 17:00 During the course of the afternoon we provided a free BBQ for the players to be sure they were not drinking on an empty stomach, water was also freely available.

So as you can see we did everything by the book.

At various times during the afternoon when it appeared that some of the patrons had "Had Enough" they were told/asked to leave the premises.

As most of the patrons had arrived as a group the ones put off tap ask if they could wait in the courtyard until the function was over.

This I agreed to as this would save the temptation of having anyone potentially driving home.

At approximately 16:45 the group were told to finish up as I wanted to be at the local Gym by 17:00.

Some of the patrons at this time had left the premises but had not properly shut the gate hence leaving the courtyard open to be viewed from the street the remaining persons were waiting for a lift.

At about this time your officer has walked past and made his observation.

I think this goes to show that when you get one complete idiot then all the best laid plans go out the window.

We feel that we complied as far as we possibly could on the day.

The description of male patrons in the courtyard is such because they had already been ordered out of the bar and were over acting to each other as to their level of intoxication (as boys do).

It would have been far easier for the inspector to come into the premises talk to me (Julia) and survey the situation first hand.

*As for the actions of the Topless barmaid when questioned her reply was that as it was a **private function** this is the sort of behaviour that these groups expected and what they paid for.*

At no time was any sort of "lewd act" committed and as far as she knew none of it was visible to the public or illegal.

The lady in question is fully committed to giving an apology if required but she believes her behaviour was entirely appropriate for the occasion.

I don't feel that any laws or rules have been broken here but due to this complaint we will no longer be helping out any of the local football clubs"

7. The investigations of the delegate of the Director-General appear to have been concluded by March 2018. It is therefore inexplicable why a decision was not made by the Director-General to refer the complaint to the Commission for disciplinary action until 27 November 2018. This matter was originally listed for hearing on 4 February 2019 but following a request by the Licensee for an adjournment was heard on 8 March 2019 which is eighteen months after the incidents occurred, which are the subject of this complaint.

THE HEARING

8. The matter proceeded as a public hearing on 8 March 2019 at Darwin. Mr Mark Wood appeared on behalf of the Director-General and Mr Jarrod Ryan appeared on behalf of the Licensee. The Commission thanked them for their assistance.
9. The Commission reminded the parties that this was not a criminal proceeding and that the Director-General had formed the view that the Licensee has committed a breach of the *Act* and pursuant to section 68(5)(b)(iii) of the *Liquor Act 1979* referred the complaint to the Commission for disciplinary action to be taken against the Licensee. Section 69(4) requires the Commission to "*conduct a hearing for deciding the complaint*" and section 69(5) provides that the Commission may only take disciplinary action against the Licensee if it is satisfied a ground for taking the disciplinary action exists.
10. The Commission proceeded on the basis that the "reasonable satisfaction" standard of proof enunciated in *Briginshaw V Briginshaw* (1938) 60 CLR 336 is applicable to the determination of complaints under section 69 of the *Act*.

11. The Commission sought an explanation from Mr Wood as to what appeared to be an unacceptable delay in referring this relatively straight forward matter to the Commission, however none was forthcoming. He did not dispute our assertion that the excessive delay had effectively limited our discretion in relation to the penalty we could impose because any licence suspension imposed now, 18 months after the incidents, giving rise to the complaint could be regarded unduly harsh given the Licensee had no adverse compliance history in the meantime.
12. The brief containing the documents attached to the Director-General's referral was tendered including the USB stick with the CCTV footage. The Licensee also tendered three statutory declarations, one from Mr Damian Hale, the coach of the Palmerston Raiders Rugby League Club, Mr Terry Fox, the crowd controller usually employed by the Licensee and Ms Julia Castela the nominee of the licensed premises.
13. At the request of Mr Ryan, Mr Gooch the licensing officer who made the initial observations and commenced the complaint process, was called for cross examination. The questioning of Mr Gooch seemed to be aimed at challenging the limited opportunity he had to form a reliable view that one of the patrons in the beer garden was intoxicated. The Commission queried the utility of this approach given we had all watched the CCTV footage prior to the hearing and had seen numerous instances of what appeared to be drunken behaviour on the part of patrons.
14. The cross examination of Mr Gooch was discontinued and Senior Compliance Officer Holehouse was called in his stead. Mr Holehouse was cross examined about the notes he had made of his observations of the CCTV footage and these were compared with the actual vision. Mr Ryan suggested that it was impossible for Mr Holehouse to have concluded a particular patron was drunk when he hadn't been present and had the opportunity to talk to the person. Mr Holehouse did not agree with that proposition and in giving his evidence, satisfied the Commission that there was a sound basis for each of the opinions he provided on the sobriety of particular patrons on the premises that day.
15. The Licensee tendered three statutory declarations in support of its case. Mr Hale declared that he was the coach of the Palmerston Raiders Rugby League Club which had booked the end of season function at Bar 3 on this day. He attended the function and he stated *inter alia*: "that there are no shooters or drink sculling" and "I did not feel that there was excessive drinking". He was generally supportive of Ms Castela, the nominee, stating "I commend Ms Castela on her diligence in upholding her responsibilities as the Manager of Bar 3".
16. The Commission did not find Mr Hale's evidence to be of any real assistance. He was not available for cross examination and his account of no "shooters" or "excessive drinking" was clearly contrary to the events depicted on the CCTV footage.
17. Mr Fox also provided a statutory declaration. He has worked for Ms Castela as a licenced crowd controller and believes that her policy of allowing customers a reasonable amount of time to vacate the premises is a good one. He was also not made available for cross examination and had obviously not viewed the CCTV footage which showed drunken patrons purchasing drinks and engaging in disorderly behaviour on the premises.

18. Ms Castela, the nominee, provided a statutory declaration. In her statutory declaration she states:

"I am 46 years of age and have been the nominee of these venues for approximately 15 years. Furthermore, I have been working in the hospitality industry at various venues for over 20 years.

I have a hands-on role in my management style and closely monitor the service of my staff and behaviour of my patrons.

The football club contacted me to host an end of season function on the Monday following the end of season being the 11 September 2017. The Club had previously held this type of function with us on a number of occasions and without any incident.

We don't normally open the bar on a Monday afternoon and it was an exclusive function and for the invited guests only. No one from the public was invited or entered the function on the day.

At about 4.45pm the function was almost finished and the group was told to finish up by 5pm.

At various times during the afternoon when it appeared that some of the patrons appeared to be showing signs of intoxication the patron was put off tap and not provided with any more alcohol.

As most of the patrons had arrived as a group and had arranged to leave together, some patrons had asked to wait in the alfresco area after being cut off for the rest of the group.

I considered that this was a reasonable request as they would be monitored and not served any more alcohol and were safe and out of harm's way in the alfresco area particularly being a private function.

Although some patrons were cut off and had shown signs of intoxication, I did not consider them to be drunk.

I am an extremely experienced in hospitality work and consider my management style of talking to the patrons as a female to be less confrontational than when security men might be involved in removing a patron particularly in a group.

I consider that I managed the premises appropriately on the day and do not consider that I have breached the Licensing Act in any way.

Her recollection of events is contrary to what is clearly shown by the CCTV footage.

19. Following the evidence of Mr Holehouse, Mr Ryan sought an adjournment to obtain further instructions from the Licensee. When the matter resumed the Commission was advised that the Licensee now conceded that it should have removed the shirtless male with the tattoos and would no longer contest the complaint.

20. Having viewed the CCTV footage and noted Mr Holehouse's and Mr Gooch's observations, the Commission is satisfied that the following incidents recorded by the security cameras warranted the removal of the particular patrons from the licensed premises:

- a. The male person dressed in religious costume who temporarily left the premises and was observed walking erratically on the footpath. We find he was drunk. (recorded by camera 3 at 17:05:59)
- b. The male person wearing a yellow shirt when departing the main gate, was walking in a slow and sluggish manner and had to stop and lean against a concrete pillar in the street. He was clearly drunk (recorded by camera 3 at 17:29:43)
- c. A shirtless man with a tattooed chest is sitting at the bar being served by a naked barmaid. He is seen waving his arms erratically and swaying on his seat drunk. He purchases a shot drink after which the barmaid inserts her nipple in the glass. He appeared to almost pass out after consuming the shot. His actions were uncoordinated and he was clearly very drunk (recorded on camera 8, 16:00:33 to 16:46:00)
- d. Two patrons were hugging each other at the bar and then fell off their stools and ended up on the ground. One of those men had to be helped to his feet. They were both drunk. (recorded on camera 8 at 16:05:26 to 16:06:52)
- e. A man wearing a toga lies on the floor whilst the naked barmaid straddles him and pours beer over her breasts to that it flowed onto the body of the man below. The actions of the barmaid were not in accordance with the adult entertainment guidelines and the behaviour of the patron was disorderly (recorded on camera 8 at 16:27:08)
- f. The shirtless male with the tattooed chest is seen staggering into the beer garden where he removes his pants and stands naked in front of the other patrons. At one stage he appears to be attempting to masturbate another of the males who is sitting at a table. This is another example of this man's drunken and disorderly behaviour. (recorded by camera 5 between 17:16:40 and 17:20:00)
- g. The male in the yellow shirt (referred to in para (b)) walks into a barrel table in the courtyard and is staggering. He lays down on a bench for a period before eventually getting up and staggering off the premises. He appeared to be very drunk (recorded on camera 5 between 17:23:05 and 17:29:20).

21. The Commission warned the Licensee that although the complaint only alleged a breach of section 121 of the *Act*, namely a failure to remove drunken persons from the premises, that it seemed clear to us from the evidence that the Licensee had also breached the conditions of its licence relating to the provision of adult entertainment. Namely that the entertainment should only have been provided at Sinsations Gallery, signs should have warned of an explicit "R" rated show, the audience should have been kept separate from the performer and security personnel were required to be in attendance.

22. The Commission takes the view that it would be inappropriate to impose a separate penalty for these other breaches however it is a matter that is a relevant consideration in determining the ultimate disposition of this matter.
23. After conceding the complaint was made out, Ms Castela was called to give evidence. During questioning by the panel members, Ms Castela surprisingly said that she had only watched the CCTV for the first time a few days ago. She was also asked whether in light of what was depicted on the CCTV, she would do things differently in future. She appeared unable to accept any failure on her part to comply with the terms of her licence and maintained that she had done all that was reasonably required of her on the date of these incidents. Her stance was contrary to the concession that had been made earlier by her counsel and on the conclusions we had reached on viewing the video footage. Perhaps Ms Castela's evidence was affected by nerves, we hope so because if she sincerely believes that she managed these premises appropriately on this day, then we would have serious concerns as to whether she is a fit and proper person to be the Nominee under licence.
24. Some of those members of the football club who attended these premises on this day would also do well to reflect on their poor behaviour. Although much of the day's activities would no doubt now seem a blur, their actions have been captured by the cameras that are now mandated in licensed premises such as these. The Commission's hearings are open to the public which includes the media and we would be surprised if some of the men in attendance on this day would be proud to be sharing footage of their antics with their family and friends let alone members of the general public.

DISCIPLINARY ACTION

25. The Licensee has held this liquor licence for approximately 15 years. This is the first occasion on which it has been the subject of a complaint accepted by the Director-General, resulting in disciplinary action. It is also relevant that the Licensee has had the possibility of license suspension hanging over its head for 18 months and has not been accused of committing any further breaches during that time.
26. The Commission considers that the circumstances of the breach are serious and that the Licensee needs to realise that a similar disregard for the conditions of its licence will not be tolerated in future. The Commission considers that on this occasion a monetary penalty is appropriate. The maximum penalty is \$15,500 (100 penalty units). The Commission imposes a monetary penalty of \$6,200 (40 penalty units to be paid within 28 days of the date of notice of this decision.

NOTICE OF RIGHTS

27. Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. Any application for review of a reviewable decision must be lodged within 28 days of the date of the decision.

28. The Schedule specifies decisions made pursuant to s68 (“Decision to dismiss complaint” and s69(3) (“Decision to take disciplinary action against licensee”) as reviewable decisions. Section 68 confers power on the Director-General to dismiss complaints against licensees, and accordingly has no application to this decision. Section 69, which is headed “Commission’s power to take disciplinary action” confers on the Commission both the power to uphold a complaint and take disciplinary action (s69(4)(b)(ii)), and the power to dismiss a complaint (s69(4)(b)(i)).
29. However, s69(3), the provision in the Schedule, does not in its terms refer to a decision to uphold a complaint and take specified disciplinary action. It provides:
- “The Director-General must give the licensee details about the referral when referring the matter to the Commission”.
30. In this matter, the Commission has decided to uphold the complaint and to take disciplinary action. It is unnecessary for the Commission, which has not had the assistance of argument on this issue, to determine whether or not this decision is a reviewable decision, and the Commission expresses no view on the issue.
31. If this decision is a reviewable decision, in accordance with section 120ZB(1) and (c) of the Act, the affected person would be the Licensee and the person who made the complaint, namely Scott Gooch, Senior Compliance Officer, Licensing NT.



RICHARD COATES
CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

18 March 2019

On behalf of Commissioners, Coates, Winsley and Cannon