

Liquor Commission

Decision Notice

MATTER:	DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT
REFERENCE:	LC2018/049
LICENCE NUMBER:	80315790
LICENSEE:	Tropic Holdings Pty Ltd
PREMISES:	Monsoons 46 Mitchell Street DARWIN NT 0800
LEGISLATION:	Sections 121 and Part VII, Div. 2 of the <i>Liquor Act</i> .
HEARD BEFORE:	Ms Jodi Truman (Deputy Chairperson) Dr Charles Douglas (Health Member) Mr Lindsay Carmichael (Community Member)
DATE OF HEARING:	14 and 18 June 2018
DATE OF DECISION:	21 June 2018

Decision

1. For the reasons set out below, the Commission is not satisfied that the female person depicted in the footage of events occurring on 6 August 2017 was “drunk” as that term is defined under section 7 of the *Liquor Act* (“the Act”).
2. As a result the Commission dismisses the complaint against the licensee.

Reasons

Background

3. Tropics Holdings Pty Ltd is the Licensee for Liquor Licence 80304074 (the licence), trading as Monsoons (“the premises”), situated at 46 Mitchell Street, Darwin, NT 0800. The licence was issued to the Licensee on 1 August 1997. The Nominees are Mr Andrew Binns and Mr Shane Mackey.
4. During the early hours of 6 August 2017 Senior Compliance Officer Scoot Gooch (“SCO Gooch”) was undertaking compliance activity duties in Darwin city. During

the course of his duties he attended the premises and observed a female person of Asian descent (“the patron”) exiting the licensed premises. SCO Gooch formed the opinion that the patron “appeared to be drunk”.

5. As a result of the opinion formed by SCO Gooch, a number of inquiries were made and a complaint was subsequently accepted by the Director-General of Licensing (“the Director-General”) in accordance with section 68(3)(a) of the Act and a notice of the complaint was provided to the licensee and the nominee.
6. Pursuant to section 67(3)(a) of the Act, the ground alleged in the complaint dated 19 October 2017 was that the licensee had contravened a provision of the Act. During the hearing before the Commission, it was made clear that the relevant provision of the Act alleged to have been contravened was section 121, namely that the licensee failed to remove a person who was drunk from the licensed premises. The Licensee responded to the complaint on 30 October 2017 and again on 29 January 2018.
7. On 1 March 2018 the Director-General formed the view that the licensee had committed a breach of the Act, i.e. a breach of section 121 of the Act, and determined that disciplinary action should be taken against the licensee.
8. On 28 February 2018 however amendments to the Act came into effect, together with the *Liquor Commission Act*. Those amendments required, inter alia, that the Director-General refer a complaint to the Commission for disciplinary action to be taken against the licensee in relation to that ground should the Director-General consider that appropriate.
9. As a result on 10 May 2018 this complaint was referred to the Commission pursuant to section 68(5)(b)(iii) of the Act for disciplinary action to be taken against the licensee.
10. Pursuant to section 69(4) of the Act, upon receipt of such a referral, the Commission must conduct a hearing for deciding the complaint and upon completion of the hearing either dismiss the complaint or uphold the complaint and take specified disciplinary action against the licensee. This must be done by written notice to the Director-General and the licensee.

Public Hearing

11. In understanding these reasons, it is important that it be kept in mind that this is not a prosecution of a breach of section 121 of the Act. That is quite a different matter and a matter that would not be determined by this Commission. These are proceedings brought by the Director-General under Part VII of the Act with respect to enforcement provisions for licences and special licences.
12. As earlier noted, section 69 of the Act provides the Commission must conduct a hearing for deciding the complaint. The matter was therefore listed for hearing on 14 June 2018. Notice of the hearing was given to the licensee on 22 May 2018 and the matter proceeded as a hearing on 14 June 2018. Unfortunately the matter was unable to be completed on that date and continued on 18 June 2018.

13. On each day of the hearing, the Director-General appeared via her representative, namely Mr Mark Wood. The licensee was represented by counsel, namely Mr Tom Anderson. Oral evidence was given before the Commission and a number of documents were tendered and submissions made.

Preliminary Issue

14. At the commencement of the hearing a preliminary issue was argued on behalf of the licensee. In substance it was argued that there were insufficient particulars provided to the licensee such that it was submitted that the licensee did not know or understand when or how it was alleged the licensee had breached section 121 of the Act and as a result the licensee was prejudiced in its preparation for the hearing and the complaint should therefore be dismissed.

15. During the course of argument and submissions on this issue, it was made clear that the basis upon which it was being alleged by the Director-General that there had been a breach of section 121 of the Act was that the patron was “drunk” and that failure to comply with the requirement under section 121 of the Act to remove the patron occurred between 0136 hours and 0157 hours on Sunday 6 August 2017. It was this alleged breach of section 121 that was being relied upon as the contravention of a provision of the Act constituting the ground for complaint or disciplinary action against the licensee.

16. Having obtained those details the Commission determined that there were sufficient particulars provided to the licensee such that the “charge”, legislation, grounds and particulars of the relevant time of the contravention had been provided and were adequate to allow the licensee to prepare and mount its defence. As a result the Commission rejected the submission on behalf of the licensee that there was a lack of sufficient particulars and refused to dismiss the complaint. The hearing proceeded thereafter.

Senior Compliance Officer Scott Gooch

17. Mr Wood on behalf of the Director-General led evidence from SCO Gooch. In addition to his oral evidence, the hearing brief was tendered before the Commission as exhibit 1. That hearing brief contained the statements and other materials sought to be relied upon by the Director-General in support of the complaint, including a statement from SCO Gooch.

18. SCO Gooch has been an inspector since March 2015, however prior to that employment he was involved for 28 years in investigations as a NSW police officer, also investigations for 9 years with the NSW Fire Service and various corporate and other government investigations and also relevantly was a licensee of football clubs in NSW. It was apparent to the Commission that SCO Gooch is a very experienced investigator.

19. SCO Gooch gave evidence as to his observations during the early hours of 6 August 2017. He stated that he was on duty on the evening of 5 August and early morning of 6 August 2017 with SCO David Neall (“SCO Neall”). He stated they attended at the premises at about 0130 hours on 6 August 2017 in relation to

another matter. SCO Gooch gave details about that matter; however they are not significant with respect to the details of these events.

20. SCO Gooch gave evidence generally consistent with his statutory declaration that:

- a. At about 0158hrs he was standing on the footpath at the front of Monsoons, conducting observations upon patrons and staff within the front alfresco section of the premises, whilst also talking about another (unrelated) matter with the Duty Manager, Mr Shane Mackey.
- b. He stated that at this time, his partner SCO Neall was in another area of the premises, conducting an investigation not related to this matter.
- c. At this time he observed a female of Asian appearance, wearing a white coloured shirt and a black coloured skirt. For ease of reference we shall refer to this person as “the patron”.
- d. The patron appeared to be assisted as she walked from the premises to the footpath by two persons either side of her: a male of Asian appearance, who was wearing a blue coloured shirt, as well as another female of Asian appearance, who was wearing a dark coloured top with jeans.
- e. The patron whilst being assisted appeared to be having difficulty and the persons either side of her were assisting her to remain upright and to walk. He also noted at this time the patron’s eyes appeared to be almost closed.
- f. He continued to observe this group, who walked past him, before stopping within about five metres. At this time he observed the patron lean forward and vomit onto the roadway (Mitchell Street). In addition to observing this act, he could audibly hear the patron vomiting given her close proximity to him.
- g. SCO Gooch stated that he immediately turned to Mr Mackey, who also appeared to be watching this, and said, “That’s not too good is it”. Mr Mackey shook his head for a short time and then walked back into Monsoons.
- h. SCO Gooch stated that he then observed the patron as she was assisted by the other two persons, as they crossed Nuttall Place. The other two persons continued to assist the patron, before they stopped by a wall to a small store (directly next to Nuttall Place). The patron was then seated on the footpath leaning against the wall, with the other two persons leaning over and appearing to provide her with some assistance.
- i. SCO Gooch approached the group and produced his Inspector badge and introduced himself. He stated the patron seated on the footpath did not look at him and her head was slumped downwards. He noted the remnants of vomit at the side of her mouth and that she appeared drowsy.

- j. SCO Gooch spoke to the group and told them they were not in trouble. The two persons assisting appeared both concerned and reluctant to speak with him. He asked some further questions during which time the Asian male confirmed they had been in the venue and then said, "She normally doesn't drink and went downhill quickly".
 - k. SCO Gooch asked what the patron had been drinking at which time the other female said that her friend usually did not drink a lot and they had called her husband to come and pick her up.
 - l. SCO Gooch stated that it was at this time that he concluded (based upon his observations) that the patron appeared to be drunk.
 - m. At this point however SCO Gooch also stated that he concluded that the patron was unable to speak directly with him and that the two persons assisting her did not wish to further speak with him. As a result he moved away from the group and crossed Nuttall Place and continued to make observations.
 - n. A short time later he observed a male approach the group who assisted the patron from the footpath and placed her in a motor vehicle before driving away.
21. In his oral evidence SCO Gooch stated that he had been unable to judge the patron's coordination because she was being assisted at all times by a male and female on either side. He also stated that she "did not look well" and that she did "not appear able to engage". He repeated however that both the male and female with the patron made reference to the patron having been drinking and that she "doesn't normally drink a lot". The Commission notes that neither of those two (2) persons, nor any person who was with the patron at the relevant time were called to give evidence before the Commission.
22. SCO Gooch also gave evidence that he had attempted to identify various persons who appeared to be employees of the licensee during his investigation, however he had been unable to speak to them directly to establish their identities in the footage. SCO Gooch stated that he "believed" certain persons depicted in the footage were employees of the licensee, namely Ms Jessica Allard and Mr Max Borde, but that he had been unable to communicate directly with those persons.
23. SCO Gooch stated that a decision was subsequently made to proceed without statements from either of those persons. SCO Gooch stated that he had also not investigated what training, if any, those persons had received from the licensee as to their duties and/or obligations as employees of the licensee.
24. SCO Gooch gave evidence that he did speak to one witness, namely Mr Alireza Lajevardi ("Mr Lajevardi") in December 2017. Mr Lajevardi had been working as a crowd controller at the premises on 6 August 2017. As a result of speaking to Mr Lajevardi, SCO had drafted a statutory declaration from him. That statutory declaration was tendered as part of exhibit 1.

25. SCO Gooch gave evidence that in January 2018 he received an email from Mr Lajevardi advising of “some physical and mental health issues he was experiencing as a result of an incident (not related to this matter)” and requesting to be excused from any further involvement. As a result SCO Gooch gave evidence that he did not require Mr Lajevardi to sign his statement. Mr Lajevardi was also not called as a witness in the hearing. This was a decision made by the representative of the Director-General.
26. SCO Gooch stated that he considered the significant time of the breach of section 121 of the Act commenced “from about 1.43 am” as that was when the patron started putting her head down and, in his opinion, “giving the appearance that she was drunk”. SCO Gooch stated that in addition to what he saw on the footage, the observations he made that went to form his opinion that the patron was drunk were:
- a. His initial observations of her being assisted from the venue;
 - b. Her eyes being “pretty much closed”
 - c. Her lack of coordination;
 - d. The fact that she vomited;
 - e. That she had to be assisted;
 - f. That she “slumped” against the wall outside;
 - g. Her head was then “slumped forward” as she was outside;
 - h. That vomit remnants remained near her mouth; and
 - i. She appeared unable to speak.
27. SCO Gooch stated that as a result of such observations it warranted a request to further investigate.
28. SCO Gooch further stated that having subsequently viewed the footage he considered there were numerous occasions where employees of the licensee should have made “some further inquiries or observations” as to the patron and did not do so within a reasonable period of time.
29. Under cross examination SCO Gooch agreed that there had been an earlier incident at the premises which he was aware had occupied the attention of a number of staff members including one of the nominees, namely Mr Shane Mackey (“Mr Mackey”). SCO Gooch stated that he understood that this other incident had involved another female patron collapsing at the venue and an ambulance having been called. He did not know any further details but had received “second hand” information that it may have related to “some sort of mental or physical health issue”.
30. It was suggested to SCO Gooch that in fact the other female patron’s collapse had been drug induced and SCO Gooch stated that was not what he had been told

and was not the information he had received. There was no evidence provided to this Commission as to what had caused the other female patron to collapse.

31. SCO Gooch agreed in cross examination that the patron had appeared to deteriorate quickly according to the footage he saw between 1.43 am and 1.56 am. He also agreed that he could not rule out the possibility that she had taken an illicit substance.
32. SCO Gooch disagreed however that her rapid deterioration was “more likely” to be due to drugs rather than alcohol. Significantly SCO Gooch stated that every person was different and that some “handle” their alcohol better than others. He noted in particular that he “would not be surprised” that a female of small stature, Asian descent and inexperienced at drinking would “go downhill quickly” from alcohol.

The CCTV footage

33. Via SCO Gooch, Mr Wood played the CCTV footage obtained from the licensee by SCO Neall. Importantly, SCO Gooch gave evidence that he and SCO Neall viewed footage of the events at the premises shortly after these events took place and that the footage that was ultimately downloaded and provided by the licensee to the investigators was the footage that SCO Neall had determined was relevant, i.e. to say that the determination as to what time period and footage was relied upon for the purpose of this complaint was made by Licensing NT officers and **not** the licensee.
34. SCO Neall was not called to give evidence before the Commission. The Commission therefore does not know why it is that SCO Neall chose to request only the footage that was played and subsequently tendered before this Commission. The Commission did however hear evidence that the footage taken at the venue is set to be “automatically” overridden on the hard drive 14 days after it has been recorded. Any additional footage taken of the events of 5 and 6 August 2017 has therefore been well and truly overridden.
35. The CCTV footage relied upon was played. At various points the footage was paused and further evidence given by SCO Gooch as to what he considered he was viewing at those relevant times. Whilst SCO Gooch’s opinion was considered by the Commission, the Commission wishes to make clear that it is the observations of the Commission members and the opinions formed by those members of what was seen that is determinative of the question as to whether there has been a contravention of a provision of the Act.
36. The Commission members carefully considered that footage. As had been stated by counsel for the licensee almost at the outset of the hearing; “the complaint rises or falls on that footage”. We will return to that aspect later in these reasons.
37. During the course of the footage the patron’s head slumps forward and on to the table at which she is sitting a number of times. At one stage prior to her removal from the premises, the patron does not appear to move at all for a significant period of time with her head remaining on the table during that time. Her friends make physical contact with her on a number of occasions and at one stage in fact tie her

hair back. The Presiding Member even questioned if it was possible that the patron had vomited within the premises, however SCO Gooch stated that he was not aware of that having occurred. It is unclear on the footage.

38. The footage depicts the patron being assisted up and out of her chair and then out of the premises by a male and a female who appear to be part of her friendship group. This appears to occur at about 1.59 am with the agreed evidence being that the patron left the premises at about 2.00 am. The Commission finds that it is clear from the CCTV footage that the patron would **not** have been able to remove herself from the premises without assistance.

Monsoons Door Summary Sheet

39. In addition to the evidence of SCO Gooch and the footage, the Monsoons Door Summary Sheet was tendered as an exhibit (exhibit 3). The Commission heard that this recorded (inter alia) the exit of patrons from the premises for various reasons.
40. Significantly this document recorded at 0200 hours "1 x F ATL ABA". The Commission received evidence that this was shorthand understood to mean "1 female asked to leave affected by alcohol". We will return to this document later in these reasons.

Mr Shane Mackey

41. Following completion of the case on behalf of the Director-General, evidence was led on behalf of the licensee. Mr Shane Mackey ("Mr Mackey") was called and gave evidence that he is the manager employed at the premises and dual nominee on the liquor licence. Mr Mackey gave evidence as to his work experience and it is clear that Mr Mackey has worked in licensed premises for a considerable period of time.
42. Mr Mackey had also provided a statutory declaration to SCO Gooch during the course of his investigation. That was tendered as part of exhibit 1 and Mr Mackey gave evidence consistent with that statutory declaration. It is clear that Mr Mackey was significantly involved with an earlier incident and not directly involved with this particular patron until she was already outside of the premises. Mr Mackey stated that he had not even seen the patron leave the premises prior to seeing her outside.
43. In addition to his statutory declaration, Mr Mackey gave evidence that he was part of the training provided to staff and that although "glassies" were not required to have Responsible Service of Alcohol ("RSA") training, he ensured that during their training glassies were given clear instructions on what to be on the lookout for in terms of patron behaviour and that it was reinforced that they were a "second set of eyes" for him and "security" if they saw anything that might mean a patron should be asked to leave. The Commission pauses to note that it is the obligation of all employees of the licensee to ensure compliance with section 121 of the Act. RSA certification is not the test.

44. Mr Mackey agreed during the course of cross examination that the behaviour of the patron having her head on the table was the sort of behaviour that “may” need further investigation. There was then an attempt to suggest that such behaviour could be related to a patron being on the phone, however Mr Mackey ultimately agreed that having their head on the table for whatever reason was a matter that would require further observation and/or investigation. This was an appropriate concession to make.
45. With respect to exhibit 3, namely the Door Summary Sheet, Mr Mackey also stated during cross examination that if a patron had been asked to leave because they were affected by alcohol, that he would expect that would be written down in the sheet and that if there were any other reason for that patron having been asked to leave; he would likewise expect that to have been appropriately recorded.

Determination of the Complaint

46. As earlier noted this is a complaint alleging the licensee has contravened a provision of the Act, namely section 121, by failing to remove a person who was drunk from the premises. This is the nature of the case that was alleged on behalf of the Director-General from the outset of the hearing. It was made clear on behalf of the Director-General that the complaint relied upon an allegation that the person was “drunk”, not “violent, quarrelsome, disorderly or incapable of controlling his or her behaviour”, but “drunk”.
47. In considering the matter, it is therefore necessary to consider the meaning of “drunk”. In this regard the Commission notes that “drunk” is defined under section 7 of the Act as follows:

“7 *Meaning of drunk*

*A person is **drunk** if:*

- (a) the person's speech, balance, coordination or behaviour appears to be noticeably impaired; and*
- (b) it is reasonable in the circumstances to believe the impairment results from the person's consumption of liquor.*

48. With respect to the evidence going to these matters, the Commission notes the evidence of SCO Gooch that at no time did the patron speak to him. We therefore have no evidence of her speech.

49. With respect to other matters referred to in the definition; the Commission notes that the Door Summary Sheet stands as a contemporaneous record of what was recorded on this particular occasion as to why the patron was being asked to leave. That document records that a female was asked to leave at 0200 hours as she was “affected by alcohol”. It was conceded during the course of Mr Mackey’s evidence that this appeared to be a reference to the patron subsequently observed by SCO Gooch.
50. The Commission considers this document to be a significant piece of evidence as it goes to support the suggestion that at the relevant time, Mr Lajevardi also considered the patron to be “affected by alcohol”, i.e. that her behaviour which led to him asking her to leave the premises relates to her consumption of liquor.
51. Be that as it may however that is not all of the evidence and there is the objective evidence contained in the CCTV footage still to be considered. When the Commission considers this footage to assess whether the patron was “drunk”, there is (as a result of the short period of time chosen as relevant by the inspectors) in fact very little time available to observe the patron do anything except be seated. It is a matter of mere seconds that the patron can be seen to walk towards the table on the footage that was tendered. In that short period of seconds, the patron does not appear to be overly impaired in her balance and/or coordination such that it cannot be said that she appeared “drunk” as that term is defined.
52. The Commission is then left to consider her behaviour in laying her head on the table, then slumping even further forward onto the table and then her apparent inability to stand or leave from the premises without assistance.
53. Whilst this Commission does in fact consider this to be behaviour which appears to be “noticeably impaired” as referred to in section 7 and the meaning of “drunk”, the section does not end there. Section 7 goes on to provide that the person is drunk if “it is reasonable in the circumstances to believe the impairment results from the person’s consumption of liquor”.
54. In this regard, the unfortunate aspect of the evidence is that the Commission has not been provided with any evidence as to when the patron arrived at the premises. The Commission has not been provided with any evidence of the patron drinking any liquor at the premises. The Commission has not been provided with sufficient evidence as to her balance or coordination within the premises (apart from the few seconds that she walks to the table) to assist the Commission in assessing those aspects. As earlier noted the footage of her walking towards the table is extremely short and depicts only a few steps. Her coordination in that time is not so impaired as to be obvious to the Commission. Although it is to be noted that this does stand in stark contrast to her coordination when she has been asked to leave. However by that time the licensee is in fact complying with the Act.

55. As earlier noted, the Commission has no evidence as to when the patron arrived at the premises and therefore no evidence as to how long the patron was at the premises or whether she consumed liquor at the premises. The Commission accepts that there is reference by her friends to her “not normally” drinking and going “downhill quickly”, but that is just one piece of the evidence.
56. Whilst the Commission is, as SCO Gooch apparently was, **highly suspicious** that the patron was drunk, that is not enough. We have no evidence of speech. There is nothing particularly impaired with her balance as she approaches the table and whilst her “behaviour” is noticeable in the sense that she has her head down on the table and is slumped forward for the majority of the time that she is depicted in the CCTV footage; the Commission is simply unable to be satisfied that this was as a result of the consumption of liquor.
57. This is particularly so in circumstances where no evidence has been called from relevant employees who were on duty that night and clearly saw (and had involvement) with the patron. There is also no evidence from any of the persons with the patron at that time, or even the patron herself. These are all decisions made on behalf of the Director-General as to the manner in which this complaint was to be conducted before this Commission. Whilst some of the reasons for not calling such persons may be considered to be reasonable; it is not the responsibility of the Commission to go searching for evidence, nor can the Commission infer the evidence that *may* have been available from those persons had they been called.
58. As to the question of whether it is “reasonable in the circumstances to believe the impairment results from the person's consumption of liquor”; the Commission notes the unsatisfactory nature of the evidence before it as to the patron's **actual** consumption of liquor. This should also be considered in light of the lack of evidence as to how long the patron was on the premises and the evidence of SCO Gooch that he could not rule out the possibility of drugs being involved.
59. It is for these reasons that whilst we have our suspicions of the patron's behaviour and accept the bonafides of the evidence of SCO Gooch as to why he formed the opinion that he did, the Commission cannot be satisfied to the requisite standard of the balance of probabilities that this patron was “drunk” and as such cannot be satisfied that there has been a breach of section 121 of the Act.
60. In light of the Commission's inability to be satisfied of a breach of section 121, the Commission is likewise unable to find the licensee has contravened a provision of the Act and is therefore unable to find the basis for the ground of complaint has been made out and is likewise unable to find there exists a ground for taking disciplinary action against the licensee.
61. In such circumstances the Commission dismisses the complaint as outlined at the start of this Decision Notice.
62. Before finalising these reasons this Commission does wish to note to this licensee and in fact all licensees that despite being unable to be satisfied as to the

circumstances of this complaint, it is the opinion of this Commission that something *more* should have been done on this particular occasion by the licensee (and/or its employees). There were clearly a number of occasions where staff members should have seen this patron and made relevant observations of her. Had that been done, inquiries should then have been made as to her wellbeing. It may have been the case that the patron was unwell and in those circumstances the licensee should have done something to assist the patron. The Commission hopes that a greater degree of care is taken by this licensee of its patrons in the future.

Notice of Rights:

63. Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. A decision to take disciplinary action against the licensee pursuant to section 69(3) of the Act is specified in the Schedule and is a reviewable decision.
64. Section 120ZC of the Act provides that a person affected by this decision may seek a review before the Northern Territory Civil and Administrative Tribunal. Any application for review of this decision must be lodged within 28 days of the date of this decision.
65. For the purpose of this decision, and in accordance with section 120ZB(1)(a) of the Act, the affected person is the licensee



JODI TRUMAN
Presiding Member
Deputy Chairperson