

NORTHERN TERRITORY LIQUOR COMMISSION
REASONS FOR DECISION

CITATION: *COMPLAINT AGAINST TENNANT CREEK MEMORIAL CLUB INCORPORATED* [2023] NTLiqComm 4

REFERENCE: LG2022/058

LICENSEE: Tennant Creek Memorial Club Incorporated

PREMISES: Tennant Creek Memorial Club
48 Schmidt Street
TENNANT CREEK NT 0860

LICENCE NUMBER: 81402774

LEGISLATION: Part 7 Division 4 of the *Liquor Act 2019*

HEARD BEFORE: Mr Russell Goldflam (Acting Deputy Chairperson)
Mr Bernard Dwyer (Health Member)
Ms Katrina Fong Lim (Community Member)

DATE OF HEARING: 18 January 2023, 7 February 2023

DATE OF DECISION: 8 February 2023

DECISION

1. On 21 September 2022, a delegate of the Director of Liquor Licensing (**the Director**) accepted a complaint against the Tennant Creek Memorial Club (**the licensee**) alleging that the licensee or an employee of the licensee had contravened a provision of the *Liquor Act 2019* (**the Act**).
2. On 15 December 2022, the Director referred the complaint to the Northern Territory Liquor Commission (**the Commission**).
3. On 18 January 2023 and 7 February 2023, the Commission conducted a hearing of the complaint.
4. On 8 February 2023, the Commission dismissed the complaint and issued a decision notice accordingly. The Commission stated that it would publish its reasons. These are the reasons.

REASONS

Background

5. The Tennant Creek Memorial Club Incorporated is the licensee of the Tennant Creek Memorial Club (**the premises**) in the town of Tennant Creek. The licence was initially granted on 7 September 1990. In 2021, the Director issued a formal warning to the licensee for contravening s 141 of the Act, the relevant terms of which are set out below.
6. On 12 August 2022, a patron of the licensee who the Commission identifies pseudonymously as Ms Smith, was at the premises for about four hours, during which she drank a substantial amount of liquor, becoming intoxicated. When the premises closed shortly before midnight, Ms Smith was driven in a courtesy bus to the caravan park where she was staying. At some point after alighting from the bus, Ms Smith tripped face first onto the ground where she died, apparently of positional asphyxiation.
7. Following a preliminary investigation of the circumstances of Ms Smith's death, on 19 August 2022 NT Police requested the office of the Director to conduct an investigation to determine whether the licensee had contravened the Act or its licence conditions.

The Complaint

8. On 21 September 2022, a Senior Compliance Officer from the office of the Director made a complaint against the licensee that it had contravened s 285(1) of the Act, which provides:

A person commits an offence if:

- (a) the person is a licensee or a licensee's employee; and
- (b) the person intentionally sells or otherwise supplies liquor to another person; and
- (c) the other person is on or in the licensed premises and is intoxicated, and the person is reckless in relation to those circumstances.

9. At the commencement of the hearing of the complaint, the Commission, pursuant to s 166(5) of the Act, which provides that the Commission "may hear a matter not referred to it but which arises from a matter that was referred to it", placed the parties on notice that it proposed to also consider whether the licensee had breached s 141 of the Act. Section 141 establishes an offence, the elements of which are stated in s 141(1), as follows:

A licensee and the licensee's employees must exclude and remove from the licensed premises any person who is violent, violent, quarrelsome, disorderly or incapable of controlling their behaviour, other than a person residing in or lodging at residential accommodation on or in the licensed premises.

10. Accordingly, at the hearing the parties adduced evidence and made submissions in relation to the possible contravention of both s 285 and s 141, enabling the Commission to consider and determine both of these potential grounds for disciplinary action. In final submissions, the representative for the Director urged the Commission to find that both grounds were made out.

The hearing

11. The hearing commenced on 18 January 2023. Mr Kulda appeared for the Director. Mr Stirk of counsel appeared for the licensee. The licensee's current nominee, Mr Jenkins (who, it is noted, was only engaged as the licensee's manager after the events the subject of these proceedings), and the licensee's Vice-President, Mr Gill, attended throughout the hearing, as did two members of the Director's staff, Ms Sowerby and Mr Verity. The Commission thanks them all for their attendance, and in particular, Mr Gill in his capacity as an office-bearer of the licensee club. In matters where a not-for-profit community-based club such as this licensee is the subject of a complaint, the Commission strongly encourages an appropriately senior member of the club's management committee to attend the hearing.

12. The Commission received into evidence a number of documentary exhibits, including:

- a. Complaint made by Senior Compliance Officer Butler and accepted by the Director's Delegate Holly Sowerby on 21 September 2022.
- b. Statutory declarations by:
 - Senior Compliance Officer Grant Butler, who investigated the complaint
 - Karl Ganley, who drove the courtesy bus that took Ms Smith home from the premises;
 - Kainona Turagaviu, a crowd controller on duty at the premises at the relevant time; and
 - Robert Tait, the barman who sold Ms Smith liquor at 23:21 hours on 12 August 2022.
- c. Closed circuit television (CCTV) footage of the premises on 12 August 2022 from 19:18 hours, when Ms Smith entered the premises, until midnight, when she exited the premises.

- d. A "Sales Audit" ledger recording liquor sales conducted by the licensee during the period Ms Smith was on the premises on 12 August 2022.
 - e. The licensee's staffing roster for the week commencing 8 August 2022.
 - f. Correspondence between NT Police, Licensing NT and the licensee.
13. The Commission viewed the CCTV footage and, in undertaking the task of assessing the footage, was greatly assisted by an aide memoire in the form of a detailed Timeline of Events prepared by Licensing NT staff.
14. The hearing continued on 7 February 2023, when it heard oral evidence from Robert Tait, Grant Butler and Jordan Jenkins, followed by final submissions on behalf of the Director and the licensee. The Commission reserved its decision.
15. On 8 February 2023, the Commission determined to dismiss both grounds of the complaint, and issued a decision notice to that effect.

The facts

16. The Commission finds the following facts.
- a. At 19:18 hours on 12 August 2022, Ms Smith, who had been brought to the premises from her accommodation by the licensee's courtesy bus, walks into the premises. Her gait appears to be unimpaired. She immediately purchase a beer (her first drink).
 - b. At 19:43, Ms Smith is given and drinks a shot of Sambuca (her second drink).
 - c. At 19:51, Ms Smith is given a schooner of beer (her third drink).
 - d. At 20:26, Ms Smith is given a schooner of beer (her fourth drink).
 - e. At 20:40, Ms Smith's gait appears to be deliberate and stilted.
 - f. At 21:11, Ms Smith is given a shot of liquor and drinks it (her fifth drink).
 - g. At 21:21, Ms Smith is holding a full schooner of beer (her sixth drink). She appears to be tipsy, leaning on the shoulder of an off-duty employee of the licensee.
 - h. At 22:02, Ms Smith is given a schooner of beer (her seventh drink).
 - i. At 22:15, Ms Smith converses with Robert Tait for two minutes.

- j. At 22:25, Ms Smith is given a beer (her eighth drink).
- k. At 22:33, Ms Smith is given a schooner of beer (her ninth drink).
- l. At 23:23, Ms Smith purchases a drink of Johnny Walker whisky (her tenth drink) from the bar. She is served by Robert Tait. She walks away from the bar, stumbles, loses and trips over one of her thongs, and replaces it with difficulty. Robert Tait sees this and says to her, from behind the bar, “that is your last drink”.
- m. At 23:26, Ms Smith walks through the gaming area of the premises. From her gait, she is obviously intoxicated.
- n. At 23:56, Ms Smith stumbles, bumping into a table and a chair.
- o. At 00:00, Ms Smith exits the premises, apparently unable to walk or stand without assistance.

17. The Commission finds that between 23:23 and 00:00, the licensee and the licensee’s employees failed to exclude and remove from the licensed premises Ms Smith, who was then incapable of controlling her behaviour.

18. The licensee admits, and the Commission finds, that at 23:23, an employee of the licensee intentionally sold Ms Smith liquor while she was on the premises and intoxicated.

The licensee did not contravene s 141 of the Act

19. In contrast to provisions of the repealed *Liquor Act 1978*, s 141 does not require a licensee and its employees to exclude and remove from the premises persons merely because they are intoxicated. Removal is required of persons who are violent, quarrelsome, disorderly or incapable of controlling their behaviour.

20. There is no evidence that Ms Smith was at any time violent, quarrelsome or disorderly. The Commission is however satisfied that from 23:23, Ms Smith was incapable of controlling her behaviour. Having considered all of the evidence before it, the Commission does not make a positive finding that Ms Smith had become incapable of controlling her behaviour before that time.

21. Section 141 provides that it is a defence to a prosecution for an offence against s 141 “if the defendant has a reasonable excuse”.

22. In considering whether to find that the licensee had a reasonable excuse for not excluding and removing Ms Smith from the premises between 23:23 and 00:00, the Commission had regard to the following facts:

- a. After being served her tenth drink at 23:23, the deceased was not sold any further drinks, and there is no evidence that she was given or drank any further liquor.
- b. At 23:23, when he noticed that Ms Smith was incapable of controlling her behaviour, Mr Tait, an employee of the licensee, told Ms Smith she would not be served liquor again that night.
- c. Closing time for the premises that night was midnight, with last drinks due to be called at 23:30. The licensee maintained a courtesy bus service to drive patrons home. Ms Smith was a regular patron of the licensee, had been brought to the premises by the courtesy bus, and it would have been reasonable to expect that she would be taken home by the courtesy bus, as indeed occurred.
- d. The premises were equipped with comfortable seating adjacent to the exit door, where patrons waiting for the courtesy bus could wait inside the premises.
- e. If Ms Smith had been removed from the premises after 23:23, she would have been required to wait in an unsupervised area outside on a Tennant Creek winter's night for an extended period while in a highly vulnerable state.
- f. There were sufficient staff on duty inside the premises to supervise patrons.

23. The Commission finds that the licensee had a reasonable excuse for not removing Ms Smith from the premises after 23:23. In the circumstances, it would have been unfair and irresponsible to remove her. Accordingly, the Commission is not satisfied that this ground for disciplinary action exists.

The licensee did not contravene s 285 of the Act

24. The sole issue in contention regarding the allegation that the licensee contravened s 285 was whether or not Mr Tait, the person who sold Ms Smith liquor at 23:23 while she was intoxicated, was reckless in relation to the circumstance of Ms Smith's intoxication. Section 8 of the Act provides that Part IIAA of the Criminal Code applies to an offence against the Act. Part IIAA of the Criminal Code includes s 43AK(2), which provides that a person is reckless in relation to a circumstance when:

- (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
- (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

25. In considering whether to find that Mr Tait was aware of a substantial risk that Ms Smith was intoxicated, the Commission has had regard to:

- a. Mr Tait's extensive experience as a barman.
- b. Mr Tait's awareness of Responsible Service of Alcohol principles.
- c. Mr Tait's awareness that the deceased had been on the premises for at least an hour.
- d. Mr Tait's awareness that the deceased was a regular patron who would drink at the premises.
- e. Mr Tait's awareness that on previous occasions the deceased had become intoxicated on the premises.
- f. The fact that the sale was half an hour or so before closing time.

26. The Commission finds that Mr Tait was aware of a substantial risk that Ms Smith was intoxicated.

27. In considering whether to find that having regard to the circumstances known to the person, it was unjustifiable to take the risk, the Commission has had regard to the following facts, which it finds:

- a. Mr Tait demonstrated in his general evidence a sound understanding of the principles of Responsible Service of Alcohol.
- b. Mr Tait knew from experience to assess Ms Smith's level of sobriety by whether her speech was slurred.
- c. Mr Tait had had a conversation with Ms Smith about 80 minutes previously in which her speech was not slurred.
- d. When Ms Smith approached the bar at 23:19 there were no visible signs of intoxication on the CCTV, and Mr Tait didn't notice any.
- e. Mr Tait did not engage in conversation with Ms Smith at 23:19 because he was busy with other patrons.
- f. There is no clear CCTV (or other) evidence of behaviour or conduct by the deceased prior to 23:19 that should have alerted staff to Ms Smith's intoxication.
- g. Although the CCTV evidence establishes that Ms Smith was served at least ten alcoholic drinks over a period of 4 hours, only the first and last of these

were sold to her by bar staff, so they only had a limited opportunity to assess her state of intoxication.

- h. Although the deceased was drinking on the premises for 4 hours, a lot of that time was in relatively unsupervised areas, namely the gaming and smoking areas.
- i. All the CCTV footage showing clear signs of Ms Smith's intoxication is after she bought the drink at 23:23.
- j. When Ms Smith stumbled badly shortly after purchasing the drink, Mr Tait noticed this and told her she was cut off, which is evidence that he was following Responsible Service of Alcohol practice.
- k. The premises were adequately staffed on the night, with about ten staff on duty.

28. The Commission is not satisfied on the balance of probabilities that having regard to the circumstances known to Mr Tait, it was unjustifiable for him to take the risk that Ms Smith was intoxicated when he sold her liquor at 23:23.

29. The Commission does not give significant weight to the statement by Mr Ganley, the driver of the courtesy bus, that Mr Kenna, another employee of the licensee had told him that Ms Smith had been "cut off" earlier in the night. There is comprehensive CCTV coverage of the premises, and if Ms Smith had been cut off earlier in the night, it is likely that this would have been captured on CCTV. Usually, patrons get cut off when they try to purchase liquor at the bar. There is no CCTV of Ms Smith trying to purchase any liquor after 19:18 until the drink she purchases four hours later at 23:23. This evidence is "double hearsay", and the licensee was not given an opportunity to test this evidence by cross-examining either Mr Ganley or Mr Kenna.

30. Mr Kulda submitted on behalf of the Director that Ms Smith did not sign in when she entered the premises and that the licensee had failed to establish proper RFA compliance systems. There is evidence to support both these submissions, but they do not assist the complainant. There was no evidence that Mr Tait knew Ms Smith had failed to sign in. Mr Tait's evidence was that he knew about poor staff training and supervision, but the Commission considers that this did not affect the way he exercised his judgement when he decided to sell Ms Smith liquor at 23:23.

31. The Commission has also considered whether it could find that "the person" who breached s 285 was the licensee rather than Mr Tait. Some licensees are individuals, but this licensee is a body corporate, namely an incorporated association. The Criminal Code provides that a body corporate can commit an offence with a fault element of recklessness. Section 43BM relevantly provides:

- (1) If... recklessness is a fault element..., that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.
- (2) The ways in which authorisation or permission may be established include:
 - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; and
 - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; and
 - (b) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; and
 - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

...

- (6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture, for a body corporate, means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant conduct happens.

high managerial agent, of a body corporate, means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

32. There was no evidence before the Commission capable of establishing that the Club's management committee or its "high managerial agent" (in this case, the then manager of the club) authorised or permitted the club's employees to illegally serve intoxicated patrons.

33. For these reasons, the Commission determined to dismiss the matter of the hearing.



Russell Goldflam

ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

7 March 2023

On behalf of Commissioners Goldflam, Dwyer and Fong Lim