

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2018/055

LICENCE NUMBER: 80102200

LICENSEE: M and J Pascoe and Daughters Pty Ltd, Pepity Pty Ltd, Wrigm Pty Ltd, GRJP Pty Ltd, Stewie Pty Ltd, Maniel Dark Pty Ltd and MT Radloff Pty Ltd (trading as Todd Tavern)

PREMISES: **Todd Tavern**
Cnr Wills Tce and Todd Mall
ALICE SPRINGS NT 0870

LEGISLATION: Section 121 and Part VII of the *Liquor Act*

HEARD BEFORE: Mr Russell Goldflam (Acting Deputy Chairman)
Ms Pauline Reynolds (Health Member)
Mr Blair McFarland (Community Member)

DATE OF HEARING: 10 October 2018, 20 November 2018

DATE OF DECISION: 4 December 2018

DECISION

1. On 20 November 2018, the Northern Territory Liquor Commission ("the Commission") reserved its decision after hearing a complaint against M and J Pascoe and Daughters Pty Ltd, Pepity Pty Ltd, Wrigm Pty Ltd, GRJP Pty Ltd, Stewie Pty Ltd, Maniel Dark Pty Ltd and MT Radloff Pty Ltd (trading as Todd Tavern) ("the Licensee"). In this Decision, the Commission upholds the complaint, for the reasons that follow.

REASONS

BACKGROUND

2. The Licensee is the holder of Public Hotel Liquor Licence 80102200 ("the licence") over premises in the Central Business District of Alice Springs ("the Todd Tavern"). The licence identifies five designated areas in which consumption on the premises is authorised. One of these areas is the Riverside Bar, which is authorised to trade between 10:00 hours and 19:00 hours each day. In fact, however, the Riverside Bar

opens at about 10:30 hours and trades until about 13:45 hours.¹ The licence authorises the sale of takeaway liquor from a bottleshop adjacent to the Riverside Bar, from 14:00 hours on weekdays. It is also a condition of the licence that no liquor other than light beer may be sold or supplied prior to 11:30 hours on weekdays.

3. The Riverside Bar is patronised almost exclusively by Indigenous patrons, who purchase and drink beer at the bar until shortly before the bottleshop next door opens, when they leave, it is reasonable to infer, in order to purchase or obtain takeaway liquor. On Wednesday 13 December 2017, there were about 80 to 90 patrons in the Riverside Bar, which is permitted to accommodate up to 150 patrons.²
4. On that date a lightly built, short Indigenous female ("CW") entered the Riverside Bar at 11:19 hours, and remained there until 13:15 hours, when she was directed to leave the premises by Mr Richard Dopheide, the sole security officer on duty that day at the Riverside Bar, who escorted her off the premises. CW was distinctively dressed, and her activities during this period are clearly visible on CCTV footage that Licensing NT subsequently seized from the Licensee. While at the Riverside Bar, CW consumed six cans of Victoria Bitter that she purchased from the bar at 11:48 hours, 12:02 hours, 12:15 hours, 12:28 hours, 12:41 hours and 12:56 hours. In addition, she obtained cans of Victoria Bitter from fellow patrons at 11:48 hours and 13:07 hours, and drank from those two cans.
5. At about 13:11 hours, in the course of conducting a joint operation to detect offences against the *Liquor Act* ("the Act") on licensed premises in Alice Springs, a Senior Licencing Compliance Officer (Ms Cheryl McKenzie) and four NT Police officers entered the Riverside Bar.
6. At about 13:15 hours CW came to the attention of Constable Munro when he inadvertently stepped in front of her as she was returning to her table after going to the toilet, and she bumped into him from behind. Then, as he turned towards her, she pushed him again with her elbow, seemingly either in irritation or from clumsiness. Constable Munro observed that CW had a vague look on her face and an unsteady gait. He formed the belief that CW was drunk, and approached Mr Dopheide. In his evidence, Constable Munro said, "Basically, in no uncertain terms tell [sic: I told] him [the security guard], 'she's drunk. She needs to go.'"
7. Mr Dopheide then approached CW, spoke to her and escorted her off the premises. She walked unaided out of the Riverside Bar, and began to walk away from the premises along the footpath when she was called back by Ms McKenzie, who was standing outside the door to the Riverside Bar.
8. Prior to working as a Senior Compliance Officer with Licensing NT, Ms McKenzie had served as a police officer for 8 years, and the Commission finds that she is qualified to give an opinion as to a person's drunkenness.
9. Ms McKenzie had a conversation with CW for about two minutes, from about 13:19 hours to 13:21 hours. During this conversation Ms McKenzie formed the belief that CW was "quite drunk. She was slurring her words, was just unsteady on her feet, red eyes...". Ms McKenzie made notes during the conversation which include a record of signs of

¹ Evidence of Mr Dan Hodby, a Director of one of the companies that jointly hold the licence.

² Evidence of Mr Hodby and CCTV footage of Riverside Bar operations, 13 December 2017.

drunkenness. Body-worn video footage of this conversation recorded by one of the attending police, Constable Hunt, was tendered into evidence, and viewed and listened to by the Commission.

10. On 5 February 2018, in accordance with s68(2) of the Act, Ms Holly Sowerby, a Licensing NT Compliance Officer, lodged a signed complaint ("the Complaint") in the approved form with the Director-General of Licencing ("the Director-General").
11. The Complaint specified the ground that the licensee "contravened a provision of the Act (whether or not the provision creates an offence)".
12. The Complaint particularised the alleged contravention as being a breach of s121(1) of the Act,³ which provides that a licensee "must" remove a person on the premises who is drunk.
13. On 6 February 2018, and in accordance with s68(4) of the Act, a Delegate of the Director-General accepted the Complaint, informed the licensee of the substance of the Complaint, and determined to conduct an investigation of the Complaint.
14. On 21 May 2018, the Director-General, having given the licensee an opportunity to comment on the Complaint, and having completed her investigation, referred the complaint to the Commission for disciplinary action pursuant to s68(5)(b)(iii) of the Act.

THE HEARING

15. The matter commenced as a public hearing on 10 October 2018 at Alice Springs, and continued on 20 November 2018. Mr Timney appeared on behalf of the Director-General. Mr Bonig appeared for the Licensee. The Commission thanks both Mr Timney and Mr Grove for their attendance and assistance.
16. Uncontested evidence was given at the hearing of the following further facts, which the Commission now finds:
 - Apart from Mr Dopheide, who was generally stationed outside the front door, while CW was on the premises on 13 December 2017 the Riverside Bar was staffed by only one person at a time.
 - The Riverside Bar was attended by the Licensee nominee, Mr Matt Radloff, until about 12:30 hours, when he was called away to another area of the Todd Tavern and handed over to Mr Hodby, who ran the bar alone until after CW had left.
 - Staff duties at the Riverside Bar during this period comprised bar service, picking up empties, walking around the bar area, and talking to patrons to gauge their level of drunkenness.
 - CW was a regular patron of the Todd Tavern, who had previously been asked to leave on occasion because of her intoxication.
 - While CW was on the premises on 13 December 2017, between them, Mr Radloff and Mr Hodby sold her a can of beer on six occasions, and walked past her four times while doing a "walk around", with words being exchanged on occasion. For example, at 12:07 hours, Mr Radloff conversed with CW for about 16 seconds.

³ In addition, the Complaint alleged a breach of s102 of the Act (sale or supply of liquor to person who is drunk), but the Director-General subsequently dismissed that part of the Complaint.

- The last such interaction was at 13:03 hours, when Mr Hodby went to remove a can from the table at which CW was sitting, and CW indicated that she was still drinking from it by placing her hand over the can. Mr Hodby gave her a "thumbs up" and moved on. No words were exchanged.
- At 13:13 hours, CW walked immediately in front of three police officers on her way to the toilet.
- Prior to the "bumping and pushing" incident at 13:15 hours set out at paragraph 6 above, no person in authority had noticed that CW was drunk.

17. The CCTV footage shows that from about 13:00 hours, there are indications that CW was drunk. Her gait was unsteady. Before finishing the last can of Victoria Bitter she had purchased, she got a can of Victoria Bitter from another female patron and drank from both cans, while holding them at the same time. At one point she appeared to get into a brief argument with two other patrons.

18. When asked how many times he had previously asked CW to leave, Mr Hodby stated:

It could only be once or twice, but between myself and Matt [Radloff] and other bar staff, it could be more. But the same could also be said for up to 40% of the entire patrons of the Todd Tavern.

19. Mr Hodby also gave the following evidence:

If there were two of us in there then it's adequately staffed... we were busy enough to warrant having two people in there... we were short-staffed in another area or there was a matter we needed to attend to at that particular time... the number of patrons that were in bar, possibly 80... maybe 90. If we'd had two staff available we would have two staff in there... I don't believe on that day we did have two staff available.

20. When asked why, if available, he would have rostered on two staff, he stated:

Well, to preserve our liquor licence and to make sure we're adhering to the Act, which involves getting out there and having one serving and one talking to people. We evict between ten and up to thirty people in a day, depending on how many people in the hotel that day.

21. This evidence is somewhat at odds with the account given on behalf of the Licensee by their solicitors in a letter dated 18 February 2018 to the Director-General in response to the Complaint and tendered in these proceedings, stating:

- Minimum 1 security guard at all times, with up to 3 guards;
- Only senior staff members (management) operate within the bar, with generally one from start to finish

THE PARTIES' SUBMISSIONS

22. The Director-General submitted that the failure by the Licensee or its employees to notice that CW was drunk was a consequence of under-staffing of the Riverside Bar. The Director-General submitted that because of the nature of its patronage and pattern of trading, the Riverside Bar is a problematic bar that needs more supervision and more monitoring. The Director-General submitted that the extraordinary rate of ejections of

patrons from the Todd Tavern is "alarming". The Director-General urged the Commission to send a message to the Licensee that its trading practices are inappropriate.

23. The Licensee made the following principal submissions:

- a. CW was removed by Mr Dopheide, an agent of the Licensee, and accordingly the licensee had not failed to remove her.
- b. Observations made of CW's state of drunkenness after her removal from the premises are irrelevant, as to uphold the Complaint, the Director-General is required to prove that CW was drunk before being removed.
- c. Neither the Licensee nor police noticed any signs of drunkenness until 13:15, when CW stumbled into Constable Munro. Mr Hodby had observed CW on several occasions, including at 13:03, and she had exhibited no signs of drunkenness. Having more staff on duty would not have changed this.
- d. In the circumstances, the Licensee had a reasonable excuse for failing to detect that CW was drunk.

THE LAW

24. Section 7 of the Act provides:

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.

25. Section 121 relevantly provides:

121 Power to exclude or remove persons

- (1) A licensee or employee of the licensee must, or an inspector or police officer may, exclude or remove a person, not being a bona fide resident of the licensee's licensed premises, from the licensed premises if the person is drunk, violent, quarrelsome, disorderly or incapable of controlling his or her behaviour.
- (1AA) A licensee or an employee of a licensee must not contravene subsection (1) in relation to the licensee's licensed premises.
Maximum penalty: 100 penalty units.
- (1AB) An offence against subsection (1AA) is an offence of strict liability.
- (1AC) It is a defence to a prosecution for an offence against subsection (1AA) if the defendant establishes a reasonable excuse.

26. In *Northern Territory Liquor Commission and Others v Rhonwood Pty Ltd* (1997) 6 NTLR 209; 117 NTR 1 ("*Rhonwood*"), the Full Court of the Supreme Court of the Northern Territory (per Martin (BF) CJ, Bailey J and Morling AJ) considered the construction of s121 of the Act. As then in force, s121(1) was substantially similar to s121(1) as currently in force.⁴ *Rhonwood* is authority for the following statements of law:

- Section 121(1) imposes a duty on a licensee which they must discharge personally or by their employees or agents, to remove a drunk person from their licensed premises.
- The proper conduct of licensed premises is of such public importance that licensees who are granted the privilege of selling liquor can reasonably be expected to assume responsibility for the acts of their employees when selling liquor on their behalf.
- A licensee can not avoid responsibility for having drunk persons removed from their premises merely by absenting themselves therefrom.
- Section 121(1) imposes a strict obligation on licensees to be liable for the failure of their employees to remove drunk persons from their licensed premises.

DISCUSSION

27. The removal of CW from the premises was a consequence of an unequivocal direction by police to an agent of the Licensee. But for that action, CW would not have been removed. As the Licensee has maintained, the Licensee, its employees and agents were unaware that CW was drunk prior to her removal. In these circumstances, the Licensee's submission at paragraph 23(a) above that the Licensee is entitled to claim responsibility for removing CW is unsustainable, and is rejected.

28. The Commission is comfortably satisfied that when spoken to by Ms McKenzie immediately after having been removed from the Riverside Bar, CW's speech, coordination and behaviour appeared to be noticeably impaired, and that it was reasonable in the circumstances to believe that the impairment resulted from the six to eight cans of Victoria Bitter beer she had consumed in the Riverside Bar over the previous two hours. Accordingly, pursuant to s7 of the Act, CW was drunk. Furthermore, the Commission finds that CW was drunk for at least half an hour before being removed from the Riverside Bar. The Licensee's submission at paragraph 23(b) above is rejected.

29. The Licensee's submissions at paragraph 23(c) and (d) above raise two questions that the Commission considers are of central importance in this case:

- a. Does s121(1) impose on a licensee a duty to provide sufficient staff to enable continuous active surveillance of patrons to check for signs of drunkenness?
- b. If so, was this duty breached in the circumstances of the Complaint?

30. The Commission has concluded that the answer to both of these questions is "yes".

31. As explained in *Rhonwood*, a licensee can not avoid their duty by personally absenting themselves from the premises. It follows that, similarly, a licensee can not avoid their duty by conducting their business in a manner that results in insufficient staff being

⁴ The *Alcohol Reform (Liquor Legislation Amendment) Act 2011* (Act No. 17, 2011), which commenced on 1 July 2011, inserted sub-sections 121(1AA), (1AB) and (1AC) into s121. Previously, contravention of s121 did not constitute a criminal offence.

present on the premises to ensure compliance with the duty. As Mr Rodby, a principal of the Licensee said, adherence to the Act "involves getting out there and having one serving and one talking to people",⁵ talking to them, that is, for the purpose of gauging their level of drunkenness.⁶

32. In other words, the "strict obligation" referred to in *Rhonwood*, which was subsequently fortified by the enactment of s121(1AB)'s fault element of strict liability, operates so as to preclude licensees from managing their business by turning a blind eye to their responsibilities. Accordingly, the Commission finds that s121(1) imposes a duty on licensees to provide sufficient staff to enable continuous active surveillance of patrons to check for signs of drunkenness.
33. The Licensee submits that had there been more staff on duty, CW's drunkenness would not have been detected. As soon as police and Compliance Officers actually engaged with CW, it became patently obvious to them that she was in fact drunk. Whether her drunkenness would inevitably have been detected had there been more staff on duty is beside the point. The salient issue is whether or not the Licensee had sufficient staff on duty to meet its obligations.
34. The Commission accepts the Director-General's contention that one staff member was insufficient to responsibly manage a bar operating as the Riverside Bar did on 13 December 2017, as indeed was quite properly conceded by Mr Hodby in his evidence⁷.
35. One aspect of the management of the Todd Tavern of particular concern to the Commission was the candid disclosure by Mr Hodby that he estimated that between 10 and 30 patrons are evicted from the Todd Tavern each day. The Licensee submitted that this demonstrates that the Licensee takes its responsibilities seriously. A second disturbing fact that emerged was that, according to the Licensee, CW's pattern of drinking and behaviour on the premises is typical of the venue's patrons.⁸ The Commission considers that these facts demonstrate that liquor is routinely consumed on the premises at dangerous levels. In the Commission's view, this does not demonstrate that the Licensee takes its responsibilities seriously. On the contrary.
36. The final issue that arises is whether the Licensee has established a reasonable excuse for failing to notice CW's drunkenness. The Licensee relies on two excuses. The first is that CW's drunkenness was not readily apparent, and no signs of it were apparent at all until about seven minutes before police entered the licensed premises. The second is that the bar was under-staffed because the Nominee, Mr Radloff, had been unexpectedly called away to attend another area of the licensed premises.
37. In relation to the first excuse, the Commission refers to the discussion at paragraphs 31 to 34 above, and in particular the fact that as soon as a person in authority engaged with CW, it was obvious to that person that she was drunk. The Commission accepts that CW did not exhibit much in the way of flagrant signs of drunkenness before doing this, but the bar staff knew or should have known that she had purchased from them and drunk six cans of full strength beer over a period of about 90 minutes, and this knowledge

⁵ See paragraph 21 above.

⁶ See paragraph 17 above.

⁷ See paragraph 19 above.

⁸ See paragraph 18 above.

alone would have alerted responsible and astute bar staff that it was highly probable that CW had become drunk. This excuse is not made out.

38. The Licensee has failed to satisfy the Commission on the balance of probabilities that but for Mr Radloff being called away, there would have been more than one staff member on duty at the Riverside Bar for the session on 13 December 2017. Mr Hodby's evidence was that before Mr Radloff was called away, Mr Radloff had been the only staff member on duty at the bar, and the tenor of Mr Hodby's evidence was that he only came in to work at the Riverside Bar that day because Mr Radloff had been unexpectedly called away. As set out at paragraph 21 above, there was some evidence before the Commission that the Riverside Bar was generally staffed by only one employee, and no evidence was adduced by the Licensee directly to the contrary. This excuse is not made out.

39. The Complaint is upheld.

NOTICE OF RIGHTS

40. 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.

41. The Schedule specifies that a decision made pursuant to s69(3) ("Decision to take disciplinary action against licensee") is a reviewable decision. Section 69, which is headed "Commission's power to take disciplinary action" confers on the Commission the power to uphold a complaint and take disciplinary action (s69(4)(b)(ii)).

42. However, s69(3), the specific provision in the Schedule, does not in its terms refer to a decision to either dismiss a complaint or take specified disciplinary action. It provides:

The Director-General must give the licensee details about the referral when referring the matter to the Commission.

43. In this matter, the Commission has decided to uphold the complaint and proposes 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.

44. If this decision is a reviewable decision, in accordance with section 120ZB(1)(a) and (c) of the Act, the affected persons would be the applicant and the person who made the complaint, namely Holly Sowerby, Compliance Officer, Licensing NT.

DISCIPLINARY ACTION

45. The Commission will hear further from the parties in relation to what disciplinary action should be taken against the Licensee.
46. Leave is granted pursuant to s53(1)(b)(iv) for the parties and counsel to appear by telephone or online facilities.

A handwritten signature in blue ink, appearing to read 'R. Goldflam', with a long horizontal flourish extending to the right.

RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

4 December 2018

On behalf of Commissioners, Goldflam, Reynolds and McFarland