

NORTHERN TERRITORY LIQUOR COMMISSION

Decision Notice

MATTER:	DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT
REFERENCE:	LC2018/053
LICENCE NUMBER:	80304474
LICENSEE:	KTLP Enterprises Pty Ltd
PREMISES:	Plaza Karama Tavern Karama Shopping Centre Kalymnos Drive KARAMA NT 0812
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) Ms Christine Hart (Community Member)
DATES OF HEARING:	5 July and 27 September 2018
DATE OF DECISION:	2 October 2018

Decision

1. For the reasons set out below, the Commission is satisfied that on 24 February 2017 an employee of the licensee contravened a provision of the *Liquor Act* ("the Act"); namely section 121 of the Act by failing to remove a person, not being a bona fide resident of the licensee's licensed premises, from the licensed premises, who was "drunk" as that term is defined under section 7 of the *Liquor Act* ("the Act").
2. As a result the Commission upholds the complaint against the licensee.
3. The Commission is satisfied that disciplinary action should be taken against the licensee and imposes a monetary penalty upon the licensee of 30 penalty units.
4. The monetary penalty is due and payable by the licensee within 28 days of 2 October 2018 (i.e. the date upon which notice of the penalty was given to the licensee by the Commission).

Reasons

Background

5. KTLP Enterprises Pty Ltd is the Licensee for Liquor Licence 80304474 (the licence), trading as the Plaza Karama Tavern (“the premises”), situated at the Karama Shopping Centre, Kalymnos Drive, Karama, NT 0812. The licence for the premises was first issued in the 1990’s with the current licensee having held this licence for a number of years, but also having held the licence previously under another corporate identity. The Nominee is Mr Peter LaPira.
6. At about 2210 hours on 24 February 2017 Senior Compliance Officers Scott Gooch (“SCO Gooch”) and Steven Holehouse (“SCO Holehouse”) attended the premises as part of a covert compliance check. Both Senior Compliance Officers provided a statement as to their observations on this particular evening and gave evidence before the Commission that confirmed the matters set out in their statements as follows:
 - a. The Senior Compliance Officers conducted a walk-through of the Sports Bar and Gaming Areas, noting that patron numbers were low with only 6-8 patrons at the gaming machines and several patrons scattered through the bar. The Officers then returned to the Sports Bar and entered the TAB Area.
 - b. At this point observations were made outside into the Beer Garden Area. SCO Gooch observed a group of four (4) males seated at a table, three (3) of whom he observed to be drinking pints of beer and cocktails. A fourth male seated with the group was observed by SCO Gooch to have his head down, resting on his arm against the table. SCO Gooch stated that this male appeared to be asleep. SCO Holehouse also made observations of this male. For the purpose of these reasons we shall refer to this male as “the subject male”.
 - c. SCO Gooch made observations of the subject male from two (2) different positions with a direct line of sight on both occasions for a period of ten minutes. During this period the male did not move.
 - d. At about 2220hrs two (2) Wilson Security Staff were observed to enter the Sports Bar. SCO Gooch observed that one of the security staff walked directly out to the Beer Garden and approached the group of four males at the table. SCO Gooch observed the Security Officer stand behind the subject male who appeared to be asleep, and pat him on the back on a number of occasions. At the same time the Security Officer was also speaking with one of the other males seated at the table.

- e. SCO Gooch stated that a short time later the subject male awoke, at which point he was assisted to his feet by one of the other males at the table. The man was then physically assisted in leaving the premises. At this time the Senior Compliance Officers observed that the subject male was Asian in appearance, had difficulty in walking, was unbalanced, his eyes appeared to be bloodshot, and he appeared unable to engage in conversation.
 - f. SCO Holehouse's statement substantially supported the observations made by SCO Gooch.
 - g. Both Officers gave evidence that this man appeared to be drunk, with SCO Gooch stating "heavily" so.
7. After the subject male was removed from the premises and in an endeavour to ascertain how long the man had been at the premises; the Senior Compliance Officers spoke with the Security Officer who identified himself as Mr George Kimarua ("Mr Kimarua") and the Duty Manager, Mr Johnson Nyalungwe ("Mr Nyalungwe"). Unfortunately at that time there were difficulties experienced by the Officers in attempting to engage with Mr Kimarua and Mr Nyalungwe, due to language and interpretation difficulties. However the Officers did note Mr Nyalungwe comment that he was "... only new" to the position.
8. SCO Gooch gave evidence that at this time they advised Mr Nyalungwe that there appeared to be a breach of the *Liquor Act*, and that further inquiries would be conducted through the Nominee with a view to securing CCTV footage and copies of any relevant journal entries etc. The Officers then left the premises a short time later.
9. Thereafter investigations were conducted by the Officers as follows:
- a. On Monday 27 February 2017:
 - i. Senior Compliance Officers spoke with the Nominee Mr Peter La Pira ("Mr La Pira") by telephone. At this time Mr La Pira stated he had spoken with a female staff member, who advised him she had been aware of the subject male but had failed to act upon this.
 - ii. A short time later Mr La Pira forwarded via email an electronic copy of an "Occurrence Report", which provided a version of the event by the Security Officer Mr Kimarua. The Commission notes that within that contemporaneous record Mr Kimarua referred to the male as being asked to leave "for he was intoxicated" and that he stated to the group that "he's not allowed here (because) he look really intoxicated".

- b. On Monday 28 February 2017, Mr La Pira attended the offices of Licensing NT and handed over to the investigating officers a USB containing CCTV footage of the incident. That CCTV footage was tendered into evidence and played before the Commission.
 - c. On Wednesday 8 March 2017 Ms Cerisse Gomez who had been identified as the female staff member on duty on 24 February 2017 attended the offices of Licensing NT. Ms Gomez participated in an audio-recorded interview during which she was given a caution. A transcript of that interview was tendered into evidence. Ms Gomez made admission that she had earlier noted the condition of the subject male and that she had formed the opinion that he was “intoxicated”. Ms Gomez confirmed she was aware at the relevant time of her obligations with regards to remove any persons that she though were “drunk” and that she had not done so.
 - d. On Thursday 6 April 2017 Mr Kimarua, attended the offices of Licensing NT. Mr Kimarua also participated in an audio-recorded interview during which he was given a caution. A transcript of that interview was tendered into evidence. Mr Kimarua stated he observed the subject male as appearing to be asleep but that shortly after approaching and speaking with the group he formed the opinion that the man was in fact “drunk” and he then assisted in removing the man from the premises as had been observed by the Officers on the relevant evening.
10. During the course of the hearing, SCO Gooch confirmed that he had formed the opinion that the subject male he observed on 24 February 2017 and as seen in the CCTV footage was “drunk” and that he would describe him (as he had in his statement) as “heavily drunk”. SCO Gooch gave evidence that the particulars he relied upon in forming that opinion were as follows:
- a. The male appearing to be asleep;
 - b. Attempts to wake the man by repeatedly patting him on the back before he was able to we woken;
 - c. The male being assisted to his feet;
 - d. The male being physically assisted in leaving the premises by a friend as well as Mr Kimarua;
 - e. The male having difficulty in walking;
 - f. The male being unbalanced;
 - g. His eyes appearing closed;
 - h. When his eyes were open “they appeared bloodshot”;

- i. The male appearing unable to engage in conversation;
 - j. The male appearing unable to walk without assistance;
 - k. The male's head being "slumped forward".
11. SCO Holehouse gave evidence that the matters set out in his statement were true and correct and confirmed that he had formed the opinion that the subject male he observed on 24 February 2017 and as seen in the CCTV footage was "drunk". The particulars SCO Holehouse relied upon in forming that opinion were as follows:
- a. The male appearing asleep in the beer garden;
 - b. The male being slumped over at the table;
 - c. Security spending "several seconds attempting to rouse the male by physically patting his back";
 - d. The male being lifted to his feet;
 - e. The male then standing for several seconds appearing to attempt to control his own balance after being lifted to his feet;
 - f. The male being "escorted" out by security and a friend in "very measured slow, short steps";
 - g. The male appearing to have "little to no ability to coordinate his own movements or walk unassisted to any degree"
 - h. The male's gait being "uneven and sluggish" and even whilst being held up by security and a friend "his shoulders were rounded over in posture and he was unable to hold his head up";
 - i. The male's balance being "still noticeably affected" with security and a friend still having "to support his weight and provide balance and direction";
 - j. The male appearing "unable to coordinate his steps and his stride appeared to be further impaired and resembled at some point to be a dragging motion caused by forward momentum rather than a stride";
 - k. The male being unable to hold his head upright;
 - l. The male's eyes appearing closed;
 - m. The male's balance, coordination and behaviour appearing "noticeably impaired".

12. As is clear from the above, both Officers formed the opinion that the subject male was drunk. Further investigations were conducted by the Officers and a complaint was subsequently accepted by the Director-General of Licensing (“the Director-General”) on 18 May 2017 in accordance with section 68(3)(a) of the Act.
13. On 12 September 2017 correspondence was sent to the licensee and nominee advising that a complaint had been lodged and that the ground alleged in the complaint was that the licensee or employee of the licensee had contravened a provision of the Act, namely section 121. It is the Commission’s view that although the particulars could have been more clearly stated; it was readily able to be inferred by that correspondence that the particular being relied upon was that there had been a failure to remove a person from the licensed premises who was “drunk”. It is also apparent from the response provided on 25 September 2017 by the nominee on behalf of the licensee that it was clearly understood that “drunk” was the particular being relied upon.
14. The Licensee responded to the complaint on 25 September, 16 November and 13 December 2017. All responses were tendered into evidence and were considered carefully by the Commission.
15. On 13 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, and as a result pursuant to section 68(5)(b)(iii) referred the complaint to the Commission for disciplinary action to be taken against the licensee.
16. 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

17. 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.
18. Certain submissions were made on behalf of the licensee at the conclusion of the hearing. As a result of these submissions, the Commission wishes to make clear the powers that it has when a complaint is referred to the Commission by the Director-General.

19. Part VII, Division 2 of the Act sets out the powers of both the Commission and the Director-General in relation to complaints. Complaints cannot be made directly to the Commission. They must firstly be made to the Director-General (in accordance with section 68(2)) who **must** as soon as practicable upon receiving the complaint either “accept the complaint” or “refuse to deal with the complaint” (see section 69(3)).
20. If the Director-General accepts the complaint certain things must be undertaken by the Director-General (see section 68(4)) including inter alia conducting an investigation. On completing the investigation the Director-General **must** decide to either dismiss the complaint (see section 68(5)(a)) or take a number of other actions (see section 68(5)(b)); one of which is to refer the complaint to the Commission for disciplinary action to be taken in relation to the ground of complaint.
21. The Act makes clear however that it is only upon the Director-General referring the complaint to the Commission that the Commission becomes involved in the complaint process (see section 69). Section 69 also establishes that when such a referral is made by the Director-General, it is then “for the Commission to decide whether to take disciplinary action against the licensee”. That is the role tasked to the Commission. It is not a role which assigns to the Commission any power whatsoever to assess the determination made by the Director-General or to conduct further investigation, but “to decide whether to take disciplinary action against the licensee” and that **must** be determined by the Commission conducting a “hearing for deciding the complaint” (see section 69(4)).
22. Criticisms were made by counsel representing the licensee, which the Commission can only assume were upon instructions, about the Director-General’s decision making process in determining to refer the complaint to the Commission rather than issuing an infringement notice as per the Director-General’s powers under section 68(5)(b)(i). As stated to counsel during the hearing, this is an irrelevant matter for the Commission and has no bearing upon the task assigned to the Commission upon referral of a complaint. It is not a matter for the Commission to consider.
23. The Act makes clear that the Commission has powers in relation to complaints when, and only when, the matter is referred to the Commission by the Director-General to decide whether to take disciplinary action or not. It is not for the Commission to question or analyse the manner in which the Director-General has chosen to exercise her powers up until that point in time and the Commission refuses to do so.
24. Once the referral has been made the Act makes clear what the Commission **must** do and that is set out under section 69, particularly subsections (4) and (5). It is on that basis and that basis alone that the Commission proceeds and has proceeded in this matter.

25. In accordance with the Act, notice was given to the licensee of the referral of the complaint to the Commission and the matter was listed for hearing on 5 July 2018. The hearing proceeded on that date, however it was unable to be completed and therefore continued until completion on 27 September 2018.
26. At the hearing, the Director-General appeared via her representative, namely Ms Sally Ozolins on the first day and Mr Phil Timney on the second day. The licensee was represented by counsel, namely Mr Josh Ingrams. Oral evidence was given before the Commission and a number of documents were tendered and submissions made.

The witnesses

27. Evidence was led on behalf of the Director-General from both SCO Gooch and SCO Holehouse. In addition to their 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 the statements of each Officer and importantly the CCTV footage taken of the relevant events.
28. In relation to the experience of each Officer; the Commission notes that 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. SCO Holehouse has been in the compliance section of Licensing NT for the last 10 years and prior to that was employed as a NT Corrections officer for 14 years during which period he also conducted investigations into misconduct and prior to that period was in the Military Police for 5 years.
29. It was apparent to the Commission that both Officers were very experienced investigators and well trained in their observations of persons during the usual day to day course of their duties as compliance officers. As earlier noted, both officers gave evidence as to their observations during the evening of 24 February 2017 commensurate with their earlier statements.

The CCTV footage

30. As noted earlier, the CCTV footage of the events was obtained, was played during the course of SCO Gooch's evidence and tendered as an exhibit. The Commission considered this footage very carefully. It was a very significant part of the evidence relied upon. As was stated by counsel for the licensee at the outset of the hearing; this evidence was "perhaps the most significant" of the evidence relied upon. At various points during the course of the footage being played it was paused and further evidence given by SCO Gooch as to what he considered he was viewing at those relevant times.

31. It is the opinion of the Commission that the CCTV footage corroborates the evidence as given by the Officers. The Commission's own observations of the CCTV footage has noted the following matters which the Commission considers significant (times are approximate only):

- a. 9.44pm – subject male and 3 other males enter premises as a group. The Commission notes that the subject male already appears upon entry to be unsteady on his feet. When the subject male attempts to sit down, he reaches out to the chair stool in a manner in which he appears to be attempting to use the stool to keep his balance. The subject male takes some time to get himself into a position where he can seat himself on the stool. He appears to be having difficulties keeping his head up and appears to “prop” himself on the table for a period of time. The male appears to “wobble” as he steadies (or readies) himself to attempt to take a position on the chair;
- b. Once seated, the male is slumped forward resting on his arms on the chair. He continues to appear to have difficulty holding his head up. He appears at one stage very shortly after taking his seat to need to rest himself up against the wall immediately to his left side.
- c. The male then appears to attempt to remove himself from leaning to his left side but appears to over correct himself so much that he almost falls off the stool as he moves to his right side. His head “lolls” to the side as he appears to take some time to again steady himself. The male appears extremely unbalanced.
- d. During this time, two (2) of the three (3) males who had accompanied the subject male are in the immediate vicinity. The third male who had entered with the group appears to approach the bar very shortly after entering.
- e. Once steadied again on his stool, the subject male appears to be hunched over at the table and having difficulties in keeping his head up. Occasionally he appears to move his head as if to nod in agreement with whatever conversation may be occurring (which cannot be heard on the CCTV footage as there is no audio) however he does not appear to be otherwise extensively engaged in any conversation.
- f. 9.46pm - the male who had approached the bar arrives with drinks. The Commission is satisfied that these appear to be beers. When that male arrives, the subject male lifts his head up quickly from the table and leans back, again appearing to have difficulty with his balance and coordination going initially to his right and then swinging back and into the wall to his left. It is not apparent as to what drink is provided to the subject male.

- g. 9.47pm - one of the other males places his hand on the shoulder of the subject male whilst the subject male remains hunched over the table on his arms and his head hanging down. Some seconds later the subject male leans to his right side and almost appears to fall out of his chair, but is propped up by the male in the white shirt that he entered the premises with. This appears to enable the subject male to gain his balance again and remain in his chair.
- h. 9.48pm - the group appear to begin to move outside to the beer garden area. The subject male appears to have significant difficulty in getting out of his chair and when he does so he appears to almost stumble forward at which time the chair comes with him but then the chair rights itself again. The subject male appears to take a drink from the table and cautiously walk, again appearing to have difficulties with his balance and coordination. The Commission does not accept the submission made on behalf of the licensee that at this time the subject male “move(d) from one area of the premises to another, carrying a glass of water, without incident and conversing with his associates”.
- i. Upon entering the beer garden the subject male appears to walk in a manner where he is going from side to side as his balance shifts from one foot to the other. His balance and coordination appear noticeably impaired.
- j. The subject male appears to fall slightly forward and use the table to keep his balance as the accompanying males move chairs around to assist him to take a seat. The subject male is not involved in this process and does not appear to be capable of being involved in this process as he uses both arms to hold himself steady whilst leaning on the table.
- k. 9.49pm - the subject male takes a seat and pulls himself forward to the table. Upon being seated he appears to lean to his right side and his head appears to “loll” up and back several times. Within seconds of being seated the male is leaning forward significantly and appears unable to hold his head up. Whilst seated the male sways from side to side and appears to have significant difficulty in keeping his balance even in the seated position. The male slumps forward a number of times in a manner consistent with someone who is “nodding off”.
- l. 9.50pm – the male appears to lean forward and rest his head on his right arm on the table. Occasionally he appears to attempt to raise his head from his slumped over position but not to any great degree and simply sways from side to side in his seated position.

- m. At one stage when the subject male leans significantly to his left, the accompanying male in what appears to be a red shirt leans over and places his hand on the subject males right shoulder and appears to hold him for a few seconds and rub his shoulder. During this time the subject male appears to centre himself on his chair again all the while remaining in his seated position.
- n. For some time the subject male appears to sway from side to side and back and forth in his seated position and occasionally appears to attempt to raise his head but appears to have significant difficulties in doing so. His coordination and balance (even whilst seated) appear significantly impaired.
- o. 9.52pm – the subject male lifts his head and appears to engage in some way with the other males. During this time he leans significantly to his left side and appears to have significant difficulties with his balance. He then slumps forward to the table again and continues to sway about in his chair in the seated position.
- p. 9.54pm – the subject male begins to lean heavily to his right side still slumped forward in his chair with his head rested on his arm and appearing to have difficulties in lifting his head as he continues to sway from side to side.
- q. A short time later the male again sways heavily to his left side and then slumps forward again on to the table continuing to sway in the seated position from side to side and occasionally lifting his head for mere seconds before slumping forward again. His balance and coordination appear significantly impaired.
- r. 9.56 – the male seated to the left side of the subject male places his hand on the subject male’s left shoulder as he sways in his chair from side to side lifting his head up with apparent difficulty from time to time.
- s. 9.57pm - the male seated to the left side of the subject male again places his hand on the subject male and appears to lean in and speak to the subject male who is slumped forward on the table. The subject male then leans significantly to his left side to speak to the other male and leans towards him. The balance of the subject male appears impaired and he sways back and forth heavily in his chair. The subject male appears to have his arm around the other male in a hugging fashion for a period of time but remains slumped forward in his chair with his head slumped forward and shoulders hunched over.

- t. 9.59pm – the subject male appears to push his chair back slightly and remains slumped forward. The male to his left now has his arm on the subject male's back as the subject male continues to sway.
- u. 10.00pm – the subject male again moves himself so that he is slumped forward but this time again with his head resting on his right arm on the table. He continues to appear to have great difficulty lifting his head and continues to sway in the seated position. The subject male's movements in his chair begin to slow.
- v. 10.02pm – the male seated to the left of the subject male leaves the table and is seen to go back inside the bar area. The subject male appears to attempt to raise his head a number of times but is unsuccessful.
- w. 10.04pm – the male who entered with the group in the white shirt is also seen to leave the table and is seen to go back inside the bar area. At about the same time the male who had been seated to the left of the subject male returns to the table.
- x. During this time the male wearing a red shirt and seated on the right hand side of the subject male appears to reach over and touch the subject male on the back and the back of head area. The subject male does not appear to respond in any way to this contact. Shortly thereafter the male to his left hand side also reaches out and makes contact with the subject male to his back. The subject male does not appear to respond in any way to this contact.
- y. 10.07pm – the male who entered with the group in the white shirt is seen to return to the table and appears to have 3 beers with him. There has been very little movement from the subject male in the interim.
- z. 10.09pm – the male in the white shirt returns to his seat at the table. Again very little movement is seen from the subject male.
- aa. 10.10pm – it appears as if the subject male attempts to lift his head again with little success. Shortly thereafter the male seated to the left of the subject male leaves the table and is seen to go inside. The subject male begins to lean over to his right side almost off the table. It appears as if the male in the white shirt is attempting to engage with the subject male, however the subject male's head does not lift up from the table.
- bb. 10.11pm – the male in the white shirt and the male in the red shirt appear to “cheers” one another with their drinks over the top of the subject male.

- cc. 10.13pm – a female bar attendant arrives with a tray of drinks and places them at the table immediately behind the subject male who is still slumped over on to the table with his head on his arm. The evidence establishes that this female bar attendant is Ms Cerise Erica Gomez (“Ms Gomez”). Ms Gomez is seen to bring 2 drinks to the table via the left side of the subject male who remains slumped over. The evidence establishes that these drinks are cocktails. As Ms Gomez returns to her tray to get the third cocktail, the subject male lifts his head from the table and moves to his right side, but then returns to slump over with his head on his arm on the table. Ms Gomez is seen to place the third cocktail on the table. The subject male appears to sway from side to side in his chair. Ms Gomez takes some glasses from the table and departs.
- dd. It was alleged during the hearing that Ms Gomez stated she spoke with the subject male during her time at the table serving the drinks. The Commission does not accept this evidence. There appears to be very, very little interaction if any between Ms Gomez and the subject male and certainly not to a sufficient extent that would be expected of an employee of a licensee who found someone within the premises in the manner that the subject male was at the time Ms Gomez was at the table. It is also noted that Ms Gomez is at the table from 10.13.03 to 10.13.38, some 35 seconds.
- ee. 10.15pm – the subject male is again seen to lean heavily to his right side and almost off the table. The male previously seated to the left of the subject male returns to the table. The subject male does not appear to react to this in any way.
- ff. 10.16pm – the male in the white shirt leaves the table and is seen to go inside.
- gg. 10.17pm – the male in the white shirt returns to the table.
- hh. 10.18pm – the male in the red shirt seated to the right of the subject male is seen to leave the table and appears later to have gone inside.
- ii. 10.19pm – the male seated to the right of the subject male leaves the table very briefly and then returns. The subject male does not appear to react in any way to the comings or goings of the other 3 men to the table.
- jj. 10.21pm – a security guard approaches the table and comes around to the right side of the subject male. The evidence establishes that this is Mr George Kimarua (“Mr Kimarua”). Mr Kimarua appears to place his left hand on the back of the subject male. There appears to be little to no movement from the subject male for several seconds before he lifts his upper body up from the table and is seated upright. The subject male appears to find it difficult to keep his head raised and although he remains seated upright, he keeps his head slumped forward and appears unable to lift his head. There is little to no interaction between

Mr Kimarua and the subject male. Mr Kimarua appears to interact with the other males at the table.

kk. 10.22pm – the subject male is assisted by Mr Kimarua and the male in the white shirt to leave the table. The subject male appears very unsteady and unable to raise his head. He appears unable to walk on his own without assistance. At various times he appears to almost be dragged as he does not appear able to coordinate his feet. His balance and coordination appears **extremely** impaired. The subject male is removed from the premises.

32. The Commission finds that it is clear from the CCTV footage that the patron would **not** have been able to remove himself from the premises without assistance.

Determination of the Complaint

33. 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”.

34. At one stage there was a submission that it could also be found that the person was “incapable of controlling his or her behaviour” and that this could also be relied upon by the Commission. However as was made clear by the Commission during the hearing, it is apparent that this complaint has always been one where it was alleged that the subject male was “drunk”. That is the manner in which the hearing commenced and it is on that basis that the Commission has considered this complaint.

35. 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.*

36. With respect to the evidence going to these matters, the Commission notes the following:

- a. As to speech:
- i. SCO Gooch stated that he observed that the subject male appeared unable to engage in conversation;
 - ii. Ms Gomez stated that she spoke to the subject male and that she asked him if he was okay and he said he was okay. She told the Officers that she told him he had to leave and that the subject male told her “after I drink this water he will leave”.

As earlier noted, based on our observations of the CCTV footage and the interaction Ms Gomez appears to have with the table, the Commission does not accept this evidence from Ms Gomez and we place no weight whatsoever on that statement. The Commission may have accepted that a one word response such as “okay” may have occurred but not a sentence as there appears little to no engagement between Ms Gomez and the male.

The Commission notes that Ms Gomez also told the Officers that when the male “spoke to me like he was really sleep and really yep ... intoxicated”.

The Commission notes that the nominee Mr La Pira also provided a statement in which he alleged that Ms Gomez told him that the subject male spoke to her and his voice did not sound slurred. For the same reasons outlined, the Commission does not accept that evidence from Ms Gomez and places no weight whatsoever on that statement allegedly made by Ms Gomez.

- b. As to balance; the Commission has already noted the various observations made by SCO Gooch and Holehouse. These accord with the Commission’s own observations of the subject male’s balance within the premises.
- c. As to coordination; the Commission has already noted the various observations made by SCO Gooch and Holehouse. These accord with the Commission’s own observations of the subject male’s coordination within the premises.
- d. As to behaviour; the Commission has already noted the various observations made by SCO Gooch and Holehouse. These accord with the Commission’s own observations of the subject male’s behaviour within the premises. The Commission also notes:

- i. Ms Gomez referred to finding the subject male “sleeping” and that he had to be woken up. She described him as appearing “intoxicated” and that she formed that opinion from the look in “the eyes”; and
- ii. Mr Kimarua referred also to finding the subject male “sleeping on the table while his mates were just drinking” and that he saw that the man “was drunk”. He also stated that when he “started to talk to him he couldn’t open his eyes and it **became obvious this man was not sick but he was drunk**” (emphasis added).

37. With respect to other matters referred to in the definition; the Commission again notes that the “Occurrence Report” 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 male was asked to leave because “he was intoxicated” and that “he look really intoxicated”. The Commission accepts that this was a reference to the subject male in this complaint.

38. 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 Kimarua also considered the patron to be “intoxicated”.

39. As earlier noted the Commission has also very carefully considered the objective evidence contained in the CCTV footage and has noted above our own observations of what can be seen in that footage. When the Commission considers this footage to assess whether the patron was “drunk”, there is over 40 minutes of footage giving the Commission sufficient time to observe the patron within the premises. In that time it is the assessment of the Commission that the male’s balance, coordination and/or behaviour is **significantly** or to use the words of the Act **noticeably** impaired.

40. The Commission notes however that the definition of “drunk” under section 7 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”.

41. In this regard, the Commission notes that the CCTV footage depicts the subject male and his group from the time that they enter the premises until the time that they depart. This is over a period in excess of 40 minutes. The Commission notes that it does not appear at any time that the subject male consumes any liquor whilst on the premises; however consumption on premises is not required in order to find whether it is “reasonable in the circumstances to believe the impairment results from the person’s consumption of liquor”. The Commission has been provided with sufficient evidence as to the male’s balance, coordination and behaviour within the premises to assist the Commission is assessing those aspects.

42. The Commission also considers the behaviour of the subject male's friends to be relevant when determining whether it is "reasonable in the circumstances to believe the impairment results from the person's consumption of liquor". In this regard the men in the group behave in a manner consistent with what is unfortunately not unexpected of persons who have another person in their group who has drunk far too much, but the remainder of the group does not yet want to have to take their friend home. In this regard the other members of the group are seen to:

- a. Prop the subject male up from time to time;
- b. Prevent him from falling over or tipping over when first at the premises or sliding off the table when seated outside;
- c. "Cheers" over the top of him as they continue to drink whilst he appears unable to lift his head from the table;
- d. Make contact with him from time to time in a manner that appears consistent with attempting to ensure the subject male is still conscious.

43. The Commission finds that the behaviour of the other men who are at the premises with the subject male is not behaviour consistent with the other possible alternative explanations for the subject male's behaviour that counsel for the licensee suggested. The other males are not behaving in a way that would suggest that their friend was simply suffering from "a late night the night before or a particularly busy week, a long day in the sun without much water, a mental illness or a physical illness, or even a deep grief or loss". The Commission does not accept that any of these alternative scenarios are more likely than not to the scenario that the subject male was drunk.

44. The Commission also has the evidence of Ms Gomez and Mr Kimarua who dealt directly with the subject male and who each described him as being drunk, along with the evidence of both SCO Gooch and Holehouse.

45. When this evidence is combined with the Commission's own observations of the CCTV footage and the noticeable impairments as earlier outlined, the Commission is satisfied that it is reasonable in the circumstances to believe those impairments were as a result of the subject male's consumption of liquor. The Commission considers the evidence goes far beyond that of being highly suspicious and is satisfied (for the reasons outlined above) that it is reasonable to believe the male's impairment results from the consumption of liquor and the Commission is satisfied based on all of the evidence that it is more likely than not that the male was "drunk" as that term is defined.

46. Whilst the Commission is satisfied that the patron was drunk, in order to uphold this complaint, the Commission must be satisfied that the "licensee or employee of the licensee" did not "remove" a person "from the licensed premises" who was "drunk" in order to find a contravention against section 121.

47. In this regard the Commission finds, based on its own observations of the balance, coordination and behaviour of the subject male upon entering the premises that it was patently obvious that he was drunk. As earlier noted his balance and coordination is noticeably impaired within seconds of him entering due to his inability to take a seat and then the manner in which he does eventually sit down before then going outside to the beer garden area.
48. This noticeable impairment only continues and becomes all the more obvious during the time that he is in the beer garden. Such impairment is obvious, and should have been obvious, to Ms Gomez (and any other staff member for that matter) when she went out with the tray of drinks to the table where the subject male was slumped over on the table. The Commission finds that Ms Gomez considered the male to be drunk and that she did not comply with the requirement under the section 121 of the Act to remove the male from the premises. The Commission finds Ms Gomez's tearful statements during her recorded conversation to the Officers where she states she is "already upset for what happened because I know in myself that I did something wrong and I acknowledge what happened for what my fault is..." are clear acknowledgements that she was aware that she had not and did not comply with her obligations as an "employee of the licensee" to have the subject male removed.
49. The Commission notes the evidence of Mr La Pira as to the "steps" required to be taken for the "removal of patrons". There is no evidence that Ms Gomez complied with any of these steps and whilst the Commission encourages the safe removal of any and all patrons from premises, the Commission finds that there is no evidence that the licensee or employee of the licensee complied with the obligations under section 121 of the Act until Mr Kimarua came in and removed the subject male based on his own observations.
50. As a result of this finding, the Commission is satisfied to the requisite standard of the balance of probabilities that this patron was "drunk" and was not removed. As such the Commission is satisfied that there has been a breach of section 121 of the Act and as a result, the Commission likewise finds the licensee has contravened a provision of the Act. The Commission therefore finds the ground of complaint has been made out and due to the serious nature of this conduct finds that there exists a ground for taking disciplinary action against the licensee.
51. In such circumstances the Commission upholds the complaint as outlined at the start of this Decision Notice.

Disciplinary action to be taken

52. In relation to the question of whether disciplinary action should be taken upon this complaint, counsel for the Director-General informed the Commission that there is no adverse compliance history or complaints against the licensee. This is particularly important given the decades that the licensee has held this licence. The Commission also notes the statement made by counsel for the Director-General that the nominee (i.e. Mr La Pira) is ordinarily and historically a "responsible nominee who is cooperative with licensing staff in terms of the

management and operation of the premises”. Mr Timney further submitted that the Commission could also take into account (in favour of the licensee) that the staff spoken to by licensing officers “cooperated completely” and this was indicative of the responsible attitude of the nominee.

53. Mr Timney did however submit that this was a serious matter and it was clear that the subject male was “extremely drunk” and that the “situation called for him to be removed” and he “should have been removed as soon as he was observed” in such a state. The Commission agrees with this submission. It is due to the seriousness of the matter that the Commission finds that it *is* appropriate that disciplinary action be taken.
54. Section 69 of the Act requires that when the Director-General refers a complaint to the Commission, the Director-General must also specify details about “the disciplinary action that is recommended”. In this regard it was submitted on behalf of the Director-General that the disciplinary action to be taken was a monetary penalty. The Commission notes that section 70 provides that the amount of monetary penalty “must not exceed the lesser” of “the maximum amount of the fine specified for the offence” or “100 penalty units”. The Commission notes that the “maximum amount of the fine specified” for an offence against section 121 is 100 penalty units. Therefore the maximum monetary penalty that can be imposed by the Commission in this matter is 100 penalty units.
55. The Commission notes that counsel for the licensee submitted that none of the disciplinary actions available to the Commission under section 67(2) of the Act are appropriate. The Commission disagrees with this submission and considers a monetary penalty is an entirely appropriate disciplinary action to be taken with respect to this complaint.
56. The Commission does consider the failure of the licensee via its employee to have removed the subject male from the premises to be serious in all of the circumstances of this matter. Whilst the subject male was eventually removed via the actions of Mr Kimarua, the Commission finds that there were numerous opportunities in the over 40 minutes that the male was on the premises to have observed just how drunk he appeared. The premises were not excessively busy and the impairment of the male was extremely obvious.
57. Even if the Commission were to only consider the period of time from when Ms Gomez brought the cocktails to the table and the male was removed by Mr Kimarua, the Commission considers the impairment of the male to have been so serious that immediate and direct action for his removal should have been taken. This does not mean he had to be “shirtfronted” out of the premises, but steps should have been taken, even if they were in accordance with those that Mr La Pira outlined are in place at the premises, for his removal. This did not occur.
58. Such is the seriousness of this failure that the Commission would have imposed a monetary penalty of 35 penalty units. However, taking into account the prior exemplary history of the licensee and the matters relating to the nominee’s usual conduct on behalf of the licensee with respect to involvement with Licensing NT, the Commission has determined to reduce that monetary to 30 penalty units, i.e. a sum of \$4,620.

59. In accordance with section 70 of the Act this monetary penalty is a debt due to the Territory and is due and payable by the licensee within 28 days after provision of this Decision Notice to the licensee as outlined at the start of this Decision Notice.

Notice of Rights:

60. 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.

61. 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.

62. For the purpose of this decision, and in accordance with section 120ZB(1)(a) of the Act, the affected person is the licensee

A handwritten signature in black ink, appearing to read 'Jodi Truman', with a long horizontal flourish extending to the right.

JODI TRUMAN
Presiding Member
Deputy Chairperson