

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2020/038

LICENCE NUMBER: 80316554

LICENSEE: Epsomm Pty Ltd

PREMISES: Humpty Doo Tavern
2207-2648 Freds Pass Road
HUMPTY DOO NT 0836

LEGISLATION: Section 130 of the *Liquor Act 2019*

HEARD BEFORE: Mr Richard Coates (Chairman)
Mr Robert Parker (Health Member)
Mrs Sandra Cannon (Community Member)

DATE OF HEARING: 22 September 2020

DATE OF DECISION: 20 October 2020

DECISION

1. For the reasons set out below, the Northern Territory Liquor Commission ("the Commission") heard and upheld a complaint against Epsomm Pty Ltd ("the licensee"), and is satisfied that between 27 January 2020 and 29 January 2020 inclusive the licensee sold liquor to individuals without completing a scan of an approved identification on the Banned Drinker Register ("BDR") identification system on 54 separate occasions contrary to the provisions of section 130 of the *Liquor Act 2019* ("the Act").
2. The Commission is satisfied that disciplinary action should be taken against the licensee and pursuant to section 165(2)(b) of the Act, suspends the condition of the licence permitting takeaway trade for a period of 24 hours commencing 10:00 am on 10 November 2020.
3. Pursuant to section 165(2)(a) of the Act, the Commission also imposes the following additional condition on the licence:

"The licensee is to install, maintain and operate a camera surveillance system on the licensed premises in compliance with the requirements and guidelines prescribed from time to time by the Director of Liquor Licensing (the Director)

including CCTV camera surveillance at the point of sale designed and operated so as to record information regarding the items purchased, the use of the BDR scanner, interactions between the purchaser and the salesperson, the appearance of the purchaser and the appearance of the salesperson. The licensee must retain all data captured by the camera surveillance system for not less than 14 days. The licensee must maintain a register of the CCTV including a daily log of the date and time check, as well as any use of the system by the licensee, an employee of the licensee, inspector or police officer. The system is to be protected from unauthorised use and the register must be produced to the Director upon request”.

BACKGROUND

4. Epsomm Pty Ltd is the Licensee for Liquor Licence 80316554, trading as Humpty Doo Tavern (the premises) situated at 2207-2648 Freds Pass Road, Humpty Doo NT 0836.
5. The current nominee for the premises is Mr Guy Dunne (Dunne).
6. On 4 February 2020, Licensing NT requested till tapes and CCTV footage from the premises for the time period 27 January to 2 February 2020 (inclusive) and on 13 February 2020, in the absence of Dunne, Mr Andrew Case (Manager) supplied Till Tapes and Video Footage data for 27 to 29 January 2020. Due to technical errors the footage for 30 January to 2 February 2020 could not be supplied.
7. On 15 April 2020, a complaint was formally accepted by a Delegate of the Director of Liquor Licensing in accordance with section 161(2)(a) of the Liquor Act 2019 (the Act), and the notice of the complaint was provided to the Licensee on the same day.
8. The complaint alleged that on fifty four (54) occasions the licensee contravened section 130 of the Act, by selling liquor to an individual without completing a scan of an approved identification.
9. These fifty four (54) incidents identified have been broken down into the following categories:
 1. Day 1 - (27 January 2020) - Till Tapes vs Video Footage vs APMS Data - Fail to scan on 19 (nineteen) separate occasions. (Includes one RED Screen)
 2. Day 2 - (28 January 2020) - Till Tapes vs APMS Data - Fail to scan on 20 (twenty) separate occasions.
 3. Day 3 - (29 January 2020) - Till Tapes vs APMS Data - Fail to scan on 15 (fifteen) separate occasions.
10. On 1 September 2017 the Northern Territory government established the current Banned Drinker Register (BDR), a scheme the purpose of which is to prevent persons identified as harmful drinkers from purchasing liquor. The scheme was supported by section 31A of the *Liquor Act 1978* (now section 130 of the Act), which inserted into Northern Territory takeaway liquor licences a condition providing that licensees and their employees must not sell takeaway liquor without scanning a customer's photographic identification.

11. The scanning device is linked to the BDR, and, if the customer is on the BDR, the seller is alerted and must refuse the sale. As the Commission has previously stated:

“The Commission notes the importance of the BDR provisions under the Act. As has been publically noted many times, there is a significant body of evidence that supports supply reduction measures such as the Banned Drinker Register. Studies have shown there are benefits in banning persons from being able to purchase alcohol including increased venue safety, general risk management, and deterrence of antisocial behaviour. There is also a considerable body of research that shows a strong correlation between alcohol availability and crime, anti-social behaviour and family violence. Reducing access to liquor has demonstrated corresponding reductions in these areas. These provisions form part of the Government’s policies towards making communities safer”.

12. On 30 April 2020 the licensee forwarded a letter to the Manager Compliance – Liquor Commission, Tobacco and Community Gaming in which it admitted the breaches and outlined details of the disciplinary measures it had taken with regard to the staff who had been involved in the actions constituting the breaches.

13. The Licensee stated:

We recognise the importance of further, ongoing and more detailed training and accept that more can be done in this space. Since our discussions with Senior Compliance Officer Franchi, we have further increased our staff engagement on this matter, with the following being implemented:

- Our BDR training has been revised, adding more detail and more one on one training with supervisory staff,
- All staff have been asked to undertake training on BDR operations and have resigned acknowledgement forms indicating that they understand the requirements of their role.
- Prior to receiving the complaint, we had already sought: training from Licencing NT, in conjunction with Inspector Franchi. This session was initially postponed due to the COVID-19 crisis however has now been completed on Wednesday 29 April 2020.
- Staff will receive refresher BDR training every six months of their employment, as part of our commitment to correct use of the BDR.

PUBLIC HEARING

14. The matter proceeded as a public hearing on 22 September 2020. The Director was represented by Mr Bernard Kulda, Manager Compliance – Liquor, Tobacco and Community Gaming and Ms Sally Ozolins of counsel appeared for the licensee whose directors were also present, namely Guy Dunne and Andrew Case. The Commission records its appreciation of the assistance provided by all those involved in the hearing.
15. A summary of the facts alleged were tendered as exhibit one (1) and the referral brief was also tendered into evidence as exhibit two (2).

16. The complaint proceeded before the Commission on the basis of the agreed facts and the licensee admitted the 54 offences of failing to properly scan the approved identification of patrons purchasing takeaway liquor contrary to section 130 of the Act.
17. Both in the letter of 30 April 2020 and during the hearing the licensee asked that Licensing NT provide them with the monthly (APMD) data so that they could conduct their own audits to ensure their staff were complying with the BDR requirements. Mr Kulda responded to the effect that it would not be feasible to do this across the board.
18. The Commission accepts that the licensee has a good compliance record, is genuinely remorseful and is committed to ensuring staff receive the necessary further training to ensure future compliance with the BDR requirements. It is also relevant that the licensee has co-operated with compliance officers and admitted the breaches at an early stage. The Commission also accepts that the hospitality industry is currently facing financial hardship as a result of the COVID-19 pandemic.
19. Between the 27 and 29 January the Licensee sold take away liquor on 333 occasions of which 54 of those transactions did not comply with the BDR. That is, in 16% of sales staff did not properly attend to their responsibilities under the legislation. This was not a one off or momentary lapse of concentration. Four staff were involved and 16% of all transactions were not compliant.
20. As was noted by the Commission in the Darwin River Tavern decision¹:

“The BDR provisions represent an important part of the provisions under the 1978 Act. There is a significant body of evidence that supports supply reduction measures such as the Banned Drinker Register. Studies have shown there are benefits in banning persons from being able to purchase alcohol including increased venue safety, general risk management, and deterrence of antisocial behaviour. There is also a considerable body of research that shows a strong correlation between alcohol availability and crime, anti-social behaviour and family violence. Reducing access to liquor has demonstrated corresponding reductions in these areas. These provisions form a significant part of the Government’s policies towards making communities safer.

With this important public policy background, it is clear that the BDR provisions are in place to attempt to reduce the risk to the community of problem drinking. The Commission therefore anticipates that the community expects that as this is a public policy about making the community safer, that when there is a breach, the consequences to follow from such a breach should be strict”.

21. In that decision the Commission also helpfully detailed the circumstances of a number of earlier decisions of the Commission whereby some lenience was afforded to licensees in the period shortly after the re-introduction of the BDR however, it was made patently clear in July 2018 in the decision of Halikos Hospitality Pty Ltd that licensees were warned that the period of leniency was over and that further breaches would not be tolerated².

¹ Northern Territory Liquor Commission, *Oceanview Developments Pty Ltd (Darwin River Tavern) Decision Notice Disciplinary action pursuant to the Liquor Act 1978*: (28 January 2020)

² Northern Territory Liquor Commission, *Halikos Hospitality Pty Ltd Decision Notice Disciplinary action pursuant to the Liquor Act 1978*: (2 July 2018) at [46]

22. The evidence against the licensee in this matter largely derives from CCTV footage which the licensee had installed for security purposes. During the course of the hearing, the Commission asked the licensee whether it would have any objection to the Commission imposing a condition requiring it to maintain CCTV coverage at the point of sale for takeaway liquor such that compliance with BDR requirements could be monitored in future. The licensee indicated its agreement to such a proposed condition. The Commission has accordingly determined to impose the additional condition of licence as outlined in paragraph 3 of the decision notice.
23. It was submitted by Ms Ozolins, counsel for the Licensee that although the evidence supported a finding that there was a ground for complaint the Commission could not be satisfied that it was appropriate to take disciplinary action in this case. The Commission accepts that human error is bound to result in some small degree of non-compliance even with the best training regime. However a 16% failure rate is way in excess of what might be regarded as an unavoidable level of error. The past training received by these staff on the appropriate procedures that were required for a BDR check had not brought home to them the importance of getting it right. We have little doubt that the licensee would not tolerate its employees undercharging customers in 16% of transactions so it is unrealistic to expect the Commission to accept that although proven, the level of non-compliance with this beneficial legislation is not deserving of penalty.
24. While the Commission accepts that the licensee has policies in place to remind its employees of the BDR procedures and has required all of them to attend training it is ultimately responsible for their failures. The message needs to be brought home to them that there will be consequences for their sloppy work practices.
25. Ms Ozolins also submitted that even if the Commission was satisfied that a ground for disciplinary action existed, and one of the sanctions detailed in section 165(2) of the Act was appropriate, then the Commission ought to consider suspending enforcement of that penalty.
26. The Commission raised concern as to whether or not any power existed for the Commission to suspend the enforcement of a disciplinary action. The same concerns were raised in the complaint concerning The NT Rock Bar Pty Ltd³.
27. It was accepted that no comprehensive submission with authorities had been provided to the Commission in the NT Rock Bar matter so this Commission gratefully accepted Ms Ozolins' offer to provide written submissions on the issue.
28. On this issue Ms Ozolins submitted:

It is respectfully submitted that with reference to the primary and secondary purposes of the Act, specifically the public interest in sale, supply, service, promotion and consumption of liquor, in addition to the regulation of liquor in a way that contributes to the responsible development of the liquor industry in the Northern Territory, the powers of the Commission to administer and enforce compliance should be read broadly (section 3 Liquor Act 2019 refers).

³ Northern Territory Liquor Commission, *The NT Rock Bar Pty Ltd (The Rock Bar) Decision Notice Disciplinary action pursuant to the Liquor Act 2019 (7 July 2020)*, [26]

Section 6 of the Liquor Commission Act 2018 specifically confers power to do all things necessary or convenient to be done for, or incidental to, the performance of its functions. It is presumed that the Commission will properly consider all relevant matters in determining disciplinary action pursuant to section 165 of the Act with reference to the purposes as set out in the Act.

In the present case, if the Commission is of the view that objectively, the type and nature of the contravention is such that disciplinary action is the only appropriate action, but accepts the significant extenuating factors relevant to the licensee mitigate the need for immediate sanction, it is submitted that section 6(3) of the Liquor Commission Act 2018 provides authority for the Commission to suspend the disciplinary action as it is necessary or convenient or incidental to the proper performance of its functions under section 165 of the Act.

29. Division 5, subdivision 1 of the Sentencing Act NT empowers a court to suspend a term of imprisonment of not more than 5 years. It also provides the structural arrangements for dealing with a breach. It is relevant to note that suspended sentences were abolished in Victoria in 2012 and a number of other states and the ACT are considering the possibility of abolishing that form of disposition⁴.
30. Suspended sentences are not readily understood by the general community particularly when there is a breach and the court that subsequently deals with the re offender does not restore the whole of the sentence that was suspended. Although we accept that earlier versions of the Commission have imposed suspended penalties we are not aware of what if any compelling reasons existed for those tribunals to invoke such a power. The concept of the “sword of Damocles” hanging over a licensee’s head to ensure future compliance with the Act is not as relevant as it might be in the criminal law when it is more likely than not that any future breaches will once again be committed by members of staff for whose actions it is vicariously liable.
31. In the absence of a specific legislative regime detailing the basis upon which a licensee could have the suspended penalty imposed let alone the procedural mechanism for getting the matter back before us, the Commission is cautious about going to section 6 of the Liquor Commission Act 2018 to find power to do something which it is not convinced is necessary.
32. Section 163 of the Act empowers the Director to take no further action on a complaint which has been substantiated section 163(1)(a)(ii), or give the licensee a formal warning in relation to the complaint – section 163(1)(b) as well as referring the matter to the Commission for disciplinary action.
33. Section 165 provides as follows;

165 Disciplinary action

(1) The Commission may take disciplinary action against the licensee only if the Commission is satisfied:

(a) A ground for the disciplinary action exists; and

⁴ Lorana Bartels and Simon Rice, “Reviewing reforms to the law of suspended sentences in ACT” (2012) 14 FLJ

- (b) The disciplinary action is appropriate in relation to that ground.
- (2) The Commission may take any of the following disciplinary actions against a licensee:
 - (a) Vary the conditions of a licensee's licence or impose additional conditions on the licence;
 - (b) Suspend a licence;
 - (c) Cancel a licence;
 - (d) Impose a monetary penalty on a licensee in accordance with section 167;
 - (e) Direct a licensee to take, or refrain from taking, a specific action;
 - (f) Disqualify a person from holding a licence for a specified period.
- (3) Subject to section 168, the Commission may take disciplinary action against a licensee for a contravention of this Act even if:
 - (a) The licensee is issued an infringement notice in relation to that contravention; or
 - (b) The licensee is being prosecuted for an offence in relation to that contravention.
- 34. If the Director had referred a matter to the Commission which involved a complaint that a licensee had failed to comply with the BDR requirements on half a dozen occasions over a period of several months, then the Commission might well take the view that although a ground for the disciplinary action existed none of the actions specified in section 165(2) were appropriate.
- 35. In a case such as that it might have been more appropriate for the Direction to warn the licensee to improve its performance in this regard. If the Licensee was later referred to the Commission for further, more significant BDR breaches then it would be entitled to take into account the earlier warning when fixing a penalty for those matters then before it. We consider that Division 4 of Part 7 of the Act contains sufficient options for disciplinary action and that there is no merit nor need for the Commission to construe a power within the Act to suspend a penalty.
- 36. Ms Ozolins also submitted that the Commission could not be satisfied on the evidence in this case that it was appropriate to take disciplinary action. The Commission finds to the contrary, that grounds for disciplinary action exist and that the only appropriate action in relation to that ground is suspension of the licence in so far as it permits take away sales.
- 37. The Commission has had regard to the relatively high proportion of breaches over the short period that was audited and the fact that four staff members were involved. As previously indicated we have also taken into account the licensee's co-operation and demonstrated intention to improve compliance with the BDR requirements in the future. Having considered all the other matters raised in mitigation by the licensee, the

Commission has determined that the take away licence should be suspended for 24 hours on 10 November 2020.

NOTICE OF RIGHTS

38. Section 31(1) read with section 166(7) of the Act provides that the decision set out in this decision notice is reviewable by the Northern Territory Civil and Administrative Tribunal (NTCAT). Section 94(3) of the *NTCAT Act* provides that an application for review of a reviewable decision must be lodged within 28 days of the date of the decision.
39. In accordance with section 31(2) of the Act, the persons who may apply to NTCAT for a review of the decision are the Director and the licensee.



RICHARD COATES
PRESIDING MEMBER
CHAIRPERSON

22 October 2020

On behalf of Commissioners Coates, Parker and Cannon