

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE : 2018/055

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: 18 February 2019

DATE OF DECISION: 21 February 2019

DECISION

1. On 4 December 2018, the Northern Territory Liquor Commission ("the Commission") upheld 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"). On 18 February 2019 the Commission heard the parties in relation to disciplinary action, and the Commission imposed a monetary penalty of \$3,850 to be paid within 28 days.
2. The facts, circumstances and findings in relation to the complaint are set out in the Commission's Decision Notice dated 4 December 2018 in these proceedings.

APPLICATION FOR RECUSAL

3. When the hearing of this matter resumed on 18 February 2019, Mr Bonig, counsel for the Licensee, made application that the Commission panel seized of this matter recuse itself on the ground of actual bias or, in the alternative, apprehended bias. Counsel for the Director-General, Mr Timney, as is usual in relation to such applications, made a submitting appearance.
4. After hearing submissions, the Commission refused the application. The reasons for that decision are as follows.
5. The Licensee submitted that the Commission's Decision Notice dated 4 December 2018 was so infected by irrelevant findings, findings unsupported by evidence and unbalanced findings as to disclose bias. In particular, the Licensee contended that:
 - a. The failure by the Commission to refer to the "atrocious" evidence of a police officer, Senior Constable First Class Jenny Hamilton, demonstrates that the Commission failed to properly balance the evidence adduced at the hearing.
 - b. The finding that "[a]t one point [CW] appeared to get into a brief argument with two other patrons" is inappropriate and unbalanced. There were other interpretations available: CW may have been engaging in jovial and playful banter.
 - c. The finding that "CW was drunk at least half an hour before being removed" is beyond the scope of the complaint referred to the Commission by the Director-General.
 - d. The finding that "CW was drunk at least half an hour before being removed" is inconsistent with the finding that "CW did not exhibit much in the way of flagrant signs of drunkenness" before being removed, which shows that the Commission had an unbalanced attitude.
 - e. The failure by the Commission to refer to the evidence of the recording made by Police Officer Jason Hunt that CW walked past him before she was noticed by police is indicative of a lack of balance by the Commission.
 - f. The following italicised passage has no foundation in the evidence, is unnecessary, indicates that the Commission has taken a particular view of the Licensee's practices which will prevent it from being impartial in imposing penalty, and exhibits clear bias:

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. *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.* [footnote omitted]

g. The finding that all of the patrons evicted were drunk is unsupported by evidence and very serious.

6. The Licensee submitted that in order to establish actual bias,

the applicant must show that the decision-maker 'had a closed mind to the issues raised and was not open to persuasion by the applicant's case', and that actual bias exists where 'the decision-maker has prejudged the case against the applicant, or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the applicant and was not open to persuasion in favour of the applicant.'¹

7. The Licensee expressly eschewed a submission that the Commission had a closed mind, and relied on the purported second limb of the test enunciated above. The Commission readily accepts that the passage cited above is an authoritative statement of the law, but does not accept that it includes an alternative to the closed mind category of actual bias. Rather, in the view of the Commission, this statement of the law expresses alternative ways of discerning whether the decision-maker has a closed mind: either because the decision-maker prejudges the case, or because the decision-maker exhibits strong partisanship or hostility in conducting the case.

8. If the Commission's understanding of the nature of actual bias in Australian law is correct, it follows that having regard to the disavowal by the Licensee of an allegation that the Commission had a closed mind, the contention of actual bias must fail. The Commission considers, however, that, as its view of the law may be erroneous, it should consider and respond individually to each of the Licensee's specific contentions.

9. In relation to apprehended bias, the Licensee referred to, and the Commission accepts, the well-established principles conveniently summarised in *Halsbury's Laws of Australia* as follows:

A reasonable apprehension of bias exists where a fair-minded observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question he or she is required to decide. The apprehension must be that of a fair-minded lay observer with sufficient understanding of the circumstances of the case to make a reasonable judgment, taking into account that the judge is a professional whose training, tradition and oath require him or her to discard the irrelevant, immaterial and prejudicial. There are two steps required to establish apprehended bias. There must be an identification of the particular relationship or circumstance said to give rise to the apprehended bias and then a logical connection must be made between that circumstance or relationship and the feared deviation from impartial decision making.²

¹ *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17, (2001) 205 CLR 507 at [36] per Gleeson CJ and Gummow J (citations omitted)

² Cited in *Manolakis v Henderson* [2018] SADC 147 at [44] (citations omitted)

CONSIDERATION

10. The Commission deals with each of the Licensee's seven contentions set out at paragraph 5 above in turn.

- a. At the hearing, the Licensee strongly submitted that the Commission should give no weight to the evidence of Officer Hamilton. The Commission accepted that submission. None of the Commission's findings was based on any of Hamilton's evidence. Accordingly, it was unnecessary to refer to her evidence, and the Commission did not do so. There is no substance in this contention.
- b. The Commission's observation about CW's conduct is couched in tentative terms. Whether the observation was open on the evidence is a matter that could conceivably be agitated in a review of the Commission's decision, but, as an observation of relatively minor significance based entirely on the Commission's assessment of CCTV evidence, the Commission is unable to accept that it discloses either actual or apprehended bias.
- c. The evidence established to the satisfaction of the Commission that CW was drunk at least half an hour before being removed. Assuming that on review it were determined that this finding was impermissibly beyond the scope of the complaint, such a determination would support a submission that the Commission had misapprehended the nature of its hearing powers under s69 of the Act, but it would not establish bias on the part of the Commission.
- d. Whether there is any substance in the submission that the finding of drunkenness is inconsistent with the Commission's finding that "CW did not exhibit much in the way of flagrant signs of drunkenness" before being removed might be a matter appropriate to have determined on review. Noting that the second of these two purportedly inconsistent findings is one in favour of the Licensee, the Commission rejects the contention that actual bias is disclosed, or that a well-informed observer would reasonably apprehend any such bias.
- e. As the Commission understands it, the point of the contention that the Commission did not refer to the evidence of a recording made by Police Officer Jason Hunt is that the Commission gave no weight to the fact that he failed to notice that CW was drunk until she bumped into him. That contention is misconceived. The Commission referred to this evidence at paragraph 16 (dot point 7) and paragraph 23(c) of its Decision Notice.
- f. The Licensee's most vigorously expressed contention was in relation to the Commission's criticism of the Licensee's trading practices at paragraph 35 of its Decision Notice. Contrary to the Licensee's submission, and as set out above at paragraph 5(f), the passage complained of was founded on evidence adduced by the Licensee, in response to a submission made on behalf of the Licensee. The Commission accepts that the passage embodies a particular view of the Licensee's practices. The Commission considers that as a matter of procedural fairness to the Licensee, prior to the imposition of penalty it was appropriate to alert the Licensee to the adverse view the Commission had formed. This provided the Licensee with an opportunity to either make submissions in the penalty phase of the hearing that the Commission's view was unjustified, or to address the issues of concern identified by the Commission, or both. The Commission rejects the contention that making an assessment of the Licensee's practices precludes it from properly discharging its adjudicative functions. Indeed, the Commission considers that in order to properly discharge its adjudicative functions, the

Commission is required, after hearing the evidence in a complaint matter, to assess the subject licensee's practices. Having made such an assessment, it is not inappropriate or improper for the Commission to articulate it.

- g. The Commission made no finding that all of the patrons evicted were drunk. This contention is misconceived.
11. The Commission has carefully reflected on the Licensee's submission that it has conducted these proceedings by way of prejudgment, or by way of partisanship or hostility against the Licensee.
12. All of the contentions made by the Licensee stem from findings or observations of the Commission in the Decision Notice of 4 December 2018, after the hearing had been completed. The Licensee did not allege any matters that were specific instances of prejudgment. Rather, as the Commission understands the Licensee's submissions, the Licensee submits that an inference of prejudgment may be drawn from the alleged overall lack of balance in the Commission's findings.
13. During the course of the hearing, the Commission made evidentiary and procedural rulings in favour of the Licensee. On the application of the Licensee, the Commission excluded evidence of significant probative value that was adverse to the Licensee on the basis that it had been improperly obtained. This undermines the force of any submission that the hearing was conducted with serious partisanship or hostility against the Licensee. Indeed, no such express submission was made by the Licensee. It appears that the Licensee, to the extent that it relies on a contention of partisanship or hostility, submits that this may be inferred from the Commission's findings adverse to the Licensee.
14. These are difficult submissions to sustain, because an obvious, alternative inference to be drawn from the findings is that they are based neither on prejudgment on the one hand, or partisanship or hostility on the other, but on the evidence heard, as the Commission evaluated it. The Commission rejects these submissions.
15. Whether the findings were either so unbalanced or adverse to the Licensee, or both, as to bespeak error is not for the Commission to determine.
16. As explained above, the Licensee has not identified any specific alleged errors in the process of the hearing. It has only identified specific alleged errors in the result of the hearing. The Commission considers that this is an important relevant consideration in determining whether apprehended bias is made out. Having conducted a hearing the conduct of which has not in itself given rise to complaint, the Commission is unable to be satisfied that a fair-minded observer might reasonably apprehend that the Commission may have been biased only because the Commission has made findings adverse to the Licensee.

DISCIPLINARY ACTION

THE PARTIES' SUBMISSIONS

17. The Director-General's submissions on disciplinary action can be summarised as follows:

- a. The Director-General has recommended the imposition of a monetary penalty
- b. The Todd Tavern licensee has previously been subject to disciplinary action on three occasions, twice in 2008 and once in 2010. None of these matters involved a breach of s121. The penalties imposed were:
 - i. Two days suspension of trading, one day of which was suspended, for permitting a minor to enter and remain at the Riverside Bar on 31 January 2008.
 - ii. Two days suspension of takeaway trading, for breaching the requirement to scan identification on five occasions, and selling more than one cask of wine to a patron on one day, on two occasions, in July-August 2008.
 - iii. Five days suspension of trading in the Riverside Bar for permitting 236 patrons to enter and remain on premises authorised to hold 100 patrons, on 16 September 2009.
- c. Two component companies of the current consortium that constitutes the Licensee, Maniel Dark Pty Ltd and MT Radloff Pty Ltd, were not part of the consortium when the previous breaches were committed.
- d. The applicable maximum monetary penalty is \$15,400.
- e. The Commission as currently constituted has to date only imposed disciplinary action for a breach of s121 on one occasion ("the Karama Tavern complaint"), when it imposed a monetary penalty of \$4,620.

18. The Licensee's submissions on disciplinary action can be summarised as follows:

- a. The current managers/licensees have no history of non-compliance with the Act.
- b. On being directed to remove CW, the licensee immediately complied.
- c. To prevent a further breach, CW has now been banned from the Riverside Bar altogether, because staff are not confident they can reliably assess her level of drunkenness.
- d. The Riverside Bar has a licence from 10 am to 7 pm. It closes at 1:45 to 2:00 pm on weekdays, and does not operate on Saturdays, Sundays or Public Holidays.
- e. There is no wine available at the bar, or spirits except for pre-mixed spirits in cans.
- f. The Licensee does not offer happy hours or discounts for liquor sold in the Riverside Bar.
- g. The Riverside Bar offers patrons an incentive to purchase light beer (at \$5.00 a can) or mid-strength beer (at \$5.50 a can). Full strength beer is \$8.00 a can.
- h. Food is available for free on Thursdays and Fridays (sausage sizzle) and food is available from a menu on Monday to Friday.
- i. After the incident the Licensee adopted the practice of ceasing to sell full strength beer after 1 pm if there are signs of potential trouble amongst patrons.
- j. Only senior staff members operate the bar. As a general practice, two people are rostered on, but sometimes they are called away if needed in another bar, or if someone does not turn up for work. On Thursdays and Fridays, which are usually busier than the other trading days, two security guards are rostered to work at the Riverside Bar, one on the door and one patrolling inside the premises.

- k. If there is an escalation of anti-social behaviour, early closure and lockout is implemented, which demonstrates the responsible approach of the licensee. For example:
 - i. Recently (within the last six weeks) three children were seen in a car across the road by police, who suspected that the parents were in the hotel. The parents were removed and the bar was closed.
 - ii. On another occasion, Licensing NT asked the Licensee to consider restricting sales to mid-strength beer because of concerns about violence arising from a motor vehicle accident, and the Licensee did so.
- l. Since the incident the subject of the complaint the Licensee has consciously endeavoured to be more vigilant to ensure that drunk patrons are removed.
- m. Since this incident, no complaints have been proven and no disciplinary action has been taken against the Licensee.
- n. The Karama Tavern complaint is to be distinguished: in that matter there was a 40 minute period when that patron was obviously drunk on the premises.

19. The Commission has taken into account all the submissions made by counsel, and the facts and circumstances of the breach. The Commission considers that the following matters are of particular significance in relation to disciplinary action in this matter:

- a. The Licensee's previous breaches of the *Liquor Act* were all committed more than ten years ago.
- b. The current managers/nominees of the premises (Mr Hodby and Mr Radloff) have no prior history of non-compliance with the *Liquor Act*.
- c. The patron concerned was permitted to remain on the premises for at least half an hour after becoming drunk.
- d. The patron did not attract attention to herself by being violent, quarrelsome or disorderly. She was quiet and for the most part sat alone while on the premises. She did not exhibit much in the way of flagrant signs of being drunk.
- e. The breach was a result of the Licensee failing on that day to arrange for sufficient staff to be available to monitor the condition of patrons in a heavily patronised bar with a large number of drinkers.
- f. The Licensee has implemented measures to minimise harm and encourage responsible consumption of liquor at the premises, and to reduce the risk of further breaches of the Act.
- g. If (as she was permitted to do pursuant to s68(5)(b)(i) of the Act and r7 and Schedule 2 Part 2 of the *Liquor Regulations*) the Director-General had elected to issue an infringement notice against the licensee for the breach, a penalty of five penalty units (\$770) would have been imposed.

20. The Commission considers that pursuant to s67(2) it can impose more than one type of disciplinary action, but does not consider that to do so would be appropriate on this occasion.

21. In all the circumstances of this matter, the Commission has determined to impose a monetary penalty of 25 penalty units, which, at the 2018 rate of \$154 per unit, is \$3,850.

22. In accordance with s70(2)(c) of the Act, the monetary penalty imposed is due and payable by the Licensee within 28 days from the date this decision is notified to the Licensee.

23. The Licensee is on notice that in the event of any further similar breaches of the Act, the Commission will give serious consideration to taking more substantial disciplinary action, including imposing additional conditions for the Licensee's licence.

NOTICE OF RIGHTS

24. 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.

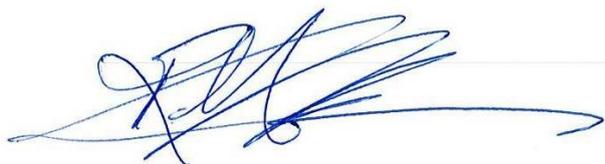
25. The Schedule specifies that a decision made pursuant to s69(3) ("Decision to take disciplinary action against licensee") is a reviewable decision. Section 69, which is headed "Commission's power to take disciplinary action" confers on the Commission the power to uphold a complaint and take disciplinary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

26. 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.

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

28. 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.



RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

21 February 2018

On behalf of Commissioners, Goldflam, Reynolds and McFarland