

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2019/134

LICENCE NUMBER: 80102044

LICENSEE: J AN R Jenkins Pty Ltd

PREMISES: **Tennant Creek Hotel**
146 Paterson Street
TENNANT CREEK NT 0860

LEGISLATION: Section 121 and Part VII of the *Liquor Act 1978*

HEARD BEFORE: Mr Russell Goldflam (Acting Deputy Chairman)
Mr Bernard Dwyer (Health Member)
Mr Blair McFarland (Community Member)

DATE OF HEARING: 3 February 2020

DATE OF DECISION: 7 February 2020

DECISION

1. On 3 February 2020, the Northern Territory Liquor Commission ("the Commission") heard a complaint against J AN R Jenkins Pty Ltd ("the licensee"). The Commission dismisses the complaint, for the following reasons.

REASONS

BACKGROUND

2. The licensee is the proprietor of the Tennant Creek Hotel ("the premises"), a public hotel on the main street of Tennant Creek licensed to sell liquor on weekdays from noon until midnight, with extended hours on weekends. The nominated manager of the licence is Mr Jordan Jenkins ("Mr Jenkins").
3. At about 3 pm on 3 September 2019, Ms Holly Sowerby, a Licensing NT Senior Compliance Officer, attended the premises and saw a man ("JF") outside the entrance to the premises who appeared to be drunk, and who had apparently just exited the premises. Ms Sowerby's subsequent observations of JF confirmed that he was indeed drunk. Ms Sowerby obtained CCTV footage of the premises which showed that JF entered the premises two minutes after they had opened at noon, and consumed beer

there over the course of the next three hours. On 25 September 2019, Ms Sowerby made a complaint against the licensee in accordance with s 68 of the *Liquor Act 1978* (“the Act”). The complaint was accepted the same day by a Delegate of the Director-General of Licensing.

4. On 19 December 2019, the Director of Liquor Licensing (“the Director”)¹ referred the complaint to the Commission. In accordance with s 69 of the Act, the Director specified details of the disciplinary action recommended (suspension of liquor licence) and the ground for the disciplinary action (breach of s 121 of the Act occasioned by the licensee’s failure to remove from the premises a person who was drunk).

THE HEARING

5. The matter proceeded as a public hearing on 3 February 2020 at Alice Springs. Mr Wood appeared on behalf of the Director. Mr Jenkins appeared for the licensee. The Commission thanks them both for their attendance and assistance. As Mr Jenkins was unrepresented, the hearing was conducted with a minimum of formality.
6. In accordance with Regulation 133 of the *Liquor Regulations 2019*, the complaint, which had been made under s 68(1) of the Act but not determined before the commencement of the *Liquor Act 2019*, proceeded and was determined under the *Liquor Act 1978*.
7. The Commission received into evidence, without objection, the brief that had been supplied to it by the Director with his referral of the complaint to the Commission, as well as the CCTV footage collected, compiled, logged and annotated by Ms Sowerby. The Commission heard oral evidence from Ms Sowerby, Elliott Jenkins and Jordan Jenkins.

THE FACTS

8. Although the licensee did not admit the complaint, there was little dispute regarding the facts on which both the Director and the licensee relied. The Commission makes the following factual findings:
 - a. On Tuesday 3 September 2019, five employees of the licensee were working at the premises, including Elliott Jenkins, a licensed and experienced crowd controller whose assigned duties were to patrol the public areas of the premises.
 - b. JF entered the premises for the first time that day at 1202 hours by walking into the Faye Lewis bar.
 - c. Over the next three hours JF drank beer, both from jugs he purchased himself and from schooners and jugs he shared with other patrons.²
 - d. During the afternoon session, there were about fifty patrons on the premises.
 - e. The licensee’s usual practice is to engage four licensed security staff on days when there are over 100 patrons. The licensee usually engages crowd controllers

¹ The powers and functions of the Director-General under the Act were transferred to the Director of Liquor Licensing on 1 October 2019, when the *Liquor Act 2019* commenced.

² Although the evidence of how much JF drank is unclear, the Commission is of the tentative view that JF consumed in the order of 15 standard drinks while on the premises.

as follows: one or two on Mondays and Tuesdays; two or three on Wednesdays; four or five on Thursdays and Fridays; one or two on Saturdays.³

- f. When the licensee has only one crowd controller on duty, that person patrols inside the premises, and is not stationed outside the front door of the premises.
 - g. The only other Tennant Creek public hotel, the Goldfields, does not usually have a crowd controller stationed outside the front door of its premises on a weekday afternoon.
 - h. Two public hotels in Alice Springs, the Todd Tavern and Bojangles, both usually have a crowd controller stationed outside the front door of their premises on a weekday afternoon, but they generally have patron numbers in excess of 100 during those sessions.
 - i. By 1442 hours, JF's balance, coordination and behaviour appeared to be noticeably impaired by alcohol: he was drunk.⁴
 - j. At 1443 hours, having been refused service by bar attendant Michael Billios, JF was removed from the premises by Elliott Jenkins for the first time that day.
 - k. At 1445 hours, JF entered the premises a second time.
 - l. At 1446 hours, Elliott Jenkins and Michael Billios removed JF a second time.
 - m. At 1449 hours, JF entered the premises a third time.
 - n. At 1449 hours, Elliott Jenkins and Michael Billios commenced to remove JF a third time. However, while doing so, Elliott Jenkins was pushed by another patron, ("the aggressive patron") who Elliott Jenkins removed from the premises. Outside the premises, the aggressive patron punched Elliott Jenkins, who was assisted by Michael Billios and a third employee of the licensee to restrain the aggressive patron until police arrived and arrested him. During this incident, the licensee's staff were diverted from the task of removing JF from the premises.
 - o. At 1451 hours, JF left the premises for the third time on his own initiative.
 - p. At 1454 hours, JF entered the premises a fourth time. Over the next ten minutes, JF walked to various areas of the premises, including the Faye Lewis Bar, the gaming area, the male bathroom, and the beer garden.
 - q. At 1504 hours, JF left the premises for the fourth (and final) time on his own initiative, and was first observed by Ms Sowerby.
9. A disputed factual issue of some significance is whether or not the licensee's employees were aware of JF's presence on the premises after his fourth entry at 1454 hours until his final exit at 1504 hours. If they were, and if they had failed to take reasonable steps to remove JF, this would be cogent evidence in support of the complaint. The Commission carefully viewed CCTV footage recorded at 1456 hours by a camera facing the entrance to the male bathroom. The footage shows Mr Billios walking past the bathroom door towards the rear of the premises, at about the same time as JF exits the bathroom and walks towards the front of the premises. According to the log prepared by Ms Sowerby, "Mikey [Michael Billios] walks past JF just after he has exited the bathroom". The Commission accepts that it is reasonably possible that Mr Billios saw JF as they passed each other, but also finds that it is reasonably possible that Mr Billios did not see JF. The Commission considers that a finding of fact adverse to the respondent licensee should only be made where the Commission is "reasonably satisfied" that the fact is

³ Mr Jenkins informed the Commission that the licensee does not open on Sundays.

⁴ See s 7 of the Act.

proven.⁵ The Commission is not reasonably satisfied, and does not find, that Mr Billios saw JF at 1456 hours.

10. Mr Wood on behalf of the Director conceded that there were no other occasions during this ten minute period when it could be positively established that an employee of the licensee noticed that JF had re-entered the premises. Having viewed the CCTV footage for the relevant period recorded on four cameras at various locations on the premises, the Commission considers that this concession was properly made. The Commission also has regard to the evidence of Elliott Jenkins, who deposed that after being assaulted by the aggressive patron, he was engaged in restraining that patron, dealing with the police, de-escalating and sanitising himself, which prevented him from resuming his usual duty of patrolling the premises until about 1501 hours.
11. The Commission is not reasonably satisfied, and does not find, that any of the licensee's employees were aware that JF was on the premises for the ten minute period commencing at 1544 hours.

THE LICENSEE DID NOT BREACH THE ACT BY FAILING TO REMOVE A DRUNK PERSON FROM THE PREMISES

12. Mr Wood conceded – and once again, the Commission considers that the concession was properly made – that the first and second removal of JF were carried out promptly, and do not constitute a breach of the requirement to remove drunk patrons. Similarly, it was properly conceded on behalf of the Director that although the licensee had failed to successfully complete the attempted third removal of JF, in the circumstances set out at paragraph 8.n) above, it had established a reasonable excuse⁶ for not carrying out the third removal of JF.
13. The finding that none of the licensee's staff may have been aware that JF was on the premises during the ten minute period commencing at 1544 hours does not in itself relieve the licensee of its responsibility to detect the presence of a drunk patron on its premises. As the Commission has recently observed, "s 121(1) imposes a duty on licensees to provide sufficient staff to enable continuous active surveillance of patrons to check for signs of drunkenness. In short, the Act does not permit licensees to turn a blind eye to their responsibilities."⁷
14. The licensee had engaged five staff, including a licensed crowd controller, to cater for some fifty patrons. In addition, from viewing the CCTV footage, the Commission is satisfied that staff on duty, and in particular Elliott Jenkins and Mr Billios, actively patrolled the premises, engaged with patrons, maintained surveillance and promptly acted to remove patrons as required. The Commission is satisfied that the licensee provided sufficient staff for the purpose of complying with its s 121 obligations to remove persons from the premises.

⁵ *Briginshaw v Briginshaw* (1930) 60 CLR 336 per Dixon J.

⁶ See s 121(1AC) of the Act.

⁷ *Antony Zaki Habib – Disciplinary Action* (LC2019/129, 19 January 2020) ("Habib") at [19].

15. Accordingly, although the licensee failed to carry out a fourth removal of JF, the Commission is satisfied that the licensee has established a reasonable excuse for not doing so.

16. The Commission finds that the licensee and its employees did not breach the Act by failing to remove JF from the premises, and accordingly, the Commission finds that the sole ground for disciplinary action specified by the Director is not made out.

THE LICENSEE DID NOT BREACH THE ACT BY FAILING TO EXCLUDE A DRUNK PERSON FROM THE PREMISES

17. That, however, is not the end of the matter.

18. At the outset of the hearing, in response to a request by Mr Jenkins for further particulars of the complaint, Mr Wood stated that the complaint was being pressed not only on the basis that the licensee had failed to remove JF from the premises, but also, and indeed primarily, on the basis that the licensee had failed – three times – to exclude JF from the premises.

19. Understandably, Mr Jenkins objected to what amounted to a very late and not previously notified change in the Director's case. However, as no actual prejudice to the licensee in the conduct of its defence resulting from this turn of events could be identified, the Commission permitted the complaint to proceed on this amended basis.

20. Moreover, s 69(5)(a) of the Act confers power on the Commission to take disciplinary action against a licensee if it is satisfied that "a ground for taking disciplinary action exists" (as distinct from "a ground specified by the Director"). Accordingly, the Commission is of the tentative view that in considering a complaint the Commission is not fettered by a requirement that a ground of which it is satisfied be the same ground or one of the same grounds specified by the Director.⁸ It follows that even if the Director had not sought to rely on the ground that the Act had been breached by failing to exclude JF from the premises, if the Commission, after conducting the hearing, had reached the conclusion that the Act had been breached by failing to exclude JF from the premises, the Commission would have been entitled to uphold the complaint on that ground.

21. The Director contended that the licensee's employees failed to exclude JF from entering the premises for the second, third and fourth time, when he was drunk, and that this constituted a breach of s 121(1) of the Act.

22. It is common ground that JF was drunk at the relevant time, and that he was not excluded from re-entering the premises at 1445 hours, 1449 hours and 1454 hours. However, it does not necessarily follow that this constitutes a breach of s 121(1).

23. Section 121(1) of the Act relevantly provides:

⁸ See *Habib* at [14].

A licensee or employee of the licensee must... exclude or remove a person... from the licensed premises if the person is drunk.⁹

24. The Commission considers that s 121(1) is susceptible to two alternative constructions. Firstly, it may mean that there is both an obligation to exclude every drunk person who is outside the licensed premises, and an obligation to remove every drunk person who is inside the licensed premises.
25. Alternatively, the obligation may be to exclude or (if they get in) remove every drunk person on or near the premises.
26. If the first construction is correct, any entry by any drunk person to any licensed premises would amount to the prima facie commission of an offence against s 121, a strict liability offence. The only practicable way to ensure compliance with such a provision would be for all licensees to have a crowd controller stationed outside the entrance of a wide range of establishments, including licensed restaurants, sporting clubs, wineries and even some hair salons. The Commission doubts that the legislature intended this. For this reason, the Commission considers that the second suggested construction of the provision is the correct construction.
27. However, as with the Commission's observations regarding the scope of the obligation to remove drunk persons set out at paragraph 13 above, the Commission considers that the obligation to exclude drunk persons does not permit licensees to turn a blind eye to their responsibilities by simply claiming that having ejected a drunk patron, they have no continuing duty to take any steps to prevent that patron from re-entering the premises.
28. The Commission considers that they do have such a duty, and that the scope of this duty is to take the steps that are reasonable in all the circumstances. This formulation correlates to the "reasonable excuse" defence to a breach of s 121(1) provided in s 121(1AC).
29. The Commission could proceed to determine this complaint by considering whether the steps the licensee took to comply with its duty to exclude or remove drunk persons were reasonable. Alternatively, the Commission could proceed by considering whether the licensee had a reasonable excuse for failing to exclude or remove JF. In either case, the question for the Commission to determine in the particular circumstances of this complaint is the same: whether it was reasonable for the licensee not to have a crowd controller stationed outside the front entrance of its premises on a Tuesday afternoon.
30. However, the answer to that question might turn on which pathway is taken. If the Commission considers whether the steps the licensee took to comply with its duty to exclude or remove drunk persons were reasonable, the complaint will only be upheld if the Commission is satisfied that the steps taken were unreasonable: the burden of proof of this disputed fact will be on the complainant.
31. On the other hand, if the Commission considers whether the licensee had a reasonable excuse for failing to exclude or remove JF, the complaint will be upheld unless the

⁹ This obligation also extends to the removal or exclusion of persons who are violent, quarrelsome, disorderly or incapable of controlling their behaviour. The Commission notes that while on the premises, despite being drunk, JF was apparently peaceable, compliant, orderly and in control of his behaviour.

Commission is satisfied that “the defendant establishes a reasonable excuse”: the burden of proof of this disputed fact will be on the licensee.

32. The Director contended that it was unreasonable for the licensee not to have a crowd controller stationed at the front entrance. The licensee contended that it was reasonable.

33. In assessing this issue, the Commission invited the parties to identify the applicable industry standards. The phrase “as per industry standards” in this particular context is familiar to the Commission, because it has long appeared in the standard conditions contained in special licences issued under Part VI of the Act, which include:

Crowd Controllers are to be employed as per industry standards as follows: two licensed crowd controllers for the first 100 hundred patrons and one additional crowd controller for each 100 hundred patrons thereafter.

34. The meaning of this standard is contentious, and its origin is obscure.

35. Neither the Act, the *Liquor Regulations* as in force during the currency of the Act, the *Private Security Act 1995* or the *Private Security (Crowd Controllers) Regulations 1996* refers to the industry standards. The statutory scheme for crowd controllers includes a Code of Practice for Crowd Controllers. The Code does not refer to the industry standards or prescribe a ratio of crowd controllers to patrons.

36. Similarly, neither the *Liquor Act 2019* nor the *Liquor Regulations 2019* refers to the industry standards. Section 47(1)(r) of the *Liquor Act 2019* replaces Part VI special licences with a “special event authority” for events expected to have less than 1,500 attendees. Regulation 90 of the *Liquor Regulations 2019* prescribes as a condition of a special event authority that licensed crowd controllers must be engaged if the Director considers they are needed to mitigate a safety risk at the event. In other words, the pre-existing numerical formula for special licences has now been dispensed with.

37. The licensee will in due course be issued with a public bar authority under the *Liquor Act 2019*. Division 14 of the *Liquor Regulations 2019* prescribes conditions for a public bar authority. The prescribed conditions do not refer to crowd controllers.

38. Mr Wood and Mr Jenkins both submitted that the formula set out at paragraph 33 above means that no crowd controllers need be employed if there are less than 100 patrons, that two crowd controllers are required if there are between 101 and 199 patrons, and that an additional crowd controller is required for each additional 100 patrons.

39. If Mr Wood and Mr Jenkins are correct, it is clear that the licensee was compliant with and indeed exceeded the relevant industry standard. The Commission finds that it was not unreasonable for the licensee to operate in accordance with what it honestly believed to be the industry standard as construed by the office of the Director of Liquor Licensing.

40. That is a sufficient basis on which to dismiss this complaint, but the Commission takes the opportunity afforded by consideration of this matter to comment further on the issue.

41. With respect, the Commission doubts that Mr Wood and Mr Jenkins correctly understand the meaning of the familiar “two licensed crowd controllers for the first 100 hundred patrons” formula. Based on the ordinary meaning of the expression, Commission’s

tentative view is that the formula means that two crowd controllers are required if there are no more than 100 patrons.

42. Notwithstanding the reference to “industry standards”, the familiar formula does not appear to be based on a particular authoritative or recognised document. As the authors of a recent Australian study on this topic observe:

The common rule of thumb found in many Australian states is that of a ratio of two crowd controllers for the first 100 patrons and one for each additional 100 patrons or part thereof.¹⁰

43. The authors, however, eschew a simplistic numerical formula in favour of a risk-based approach to determining the ratio of crowd controllers to patrons appropriate for a particular venue or event. (This approach, the Commission notes, broadly resembles the risk-based licensing scheme established by the *Liquor Act 2019*.)

44. Nevertheless, at least one Australian jurisdiction has prescribed a numerical formula as a default standard (if the conditions of a liquor licence do not otherwise provide). In Queensland, after 2300 hours a licensed venue with not more than 100 patrons must have at least one crowd controller on duty, with an additional crowd controller required for each additional 100 patrons up to 500 patrons.¹¹

45. The Commission acknowledges that the licensee has taken a risk-based approach by increasing the number of crowd controllers on duty during sessions when patron numbers are higher. As the Commission has previously observed, the level of liquor consumption and associated harm in the Barkly is extraordinarily high.¹² As has been observed, JF himself apparently consumed a large quantity of liquor in the afternoon of Tuesday 3 September 2019. In these circumstances, the Commission considers that the Tennant Creek Hotel operates in a high-risk environment. Nevertheless, the number of patrons was modest, and there was a staff to patron ration of 1:10, which Ms Sowerby conceded in her evidence was adequate.

46. Having regard to the foregoing, and in all the circumstances of this matter, the Commission is not satisfied that it was unreasonable for the licensee to operate its public hotel licence with a single crowd controller when there were 50 patrons on the premises.

47. If the Commission’s view of the construction of s 121(1) of the Act expressed at paragraph 26 above is incorrect, the Commission is also satisfied that the licensee has established that it had a reasonable excuse for failing to exclude JF from the premises.

48. Consequently, the Commission dismisses the complaint.

¹⁰ Robert Harris and Deborah Edwards, *An empirical basis for the ratio of crowd controllers to patrons* (National Drug Law Enforcement Research Fund, 2015), p. 1.

¹¹ See s 142AG *Liquor Act 1992* (Qd) and Regulation 37C *Liquor Regulation 2002* (Qd).

¹² *Reasons for Proposed Variation of Licences* (Northern Territory Liquor Commission, 8 May 2018) at [1] – [2].

NOTICE OF RIGHTS

49. 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.

50. The Schedule specifies decisions made pursuant to s 68 (“Decision to dismiss complaint” and s 69(3) (“Decision to take disciplinary action against licensee”) as reviewable decisions. Section 68 confers power on the Director-General to dismiss complaints against licensees, and accordingly has no application to this decision. Section 69, which is headed “Commission’s power to take disciplinary action” confers on the Commission both the power to uphold a complaint and take disciplinary action (s 69(4)(b)(ii)), and the power to dismiss a complaint (s 69(4)(b)(i)).

51. However, s 69(3), the provision in the Schedule, does not in its terms refer to a decision to dismiss a complaint. It provides:

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

52. In this matter, the Commission has decided to dismiss the complaint. 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.

53. 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 person who made the complaint, namely Holly Sowerby, Compliance Officer, Licensing NT, and the licensee.



RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
7 February 2020

On behalf of Commissioners, Goldflam, Dwyer and McFarland