

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER:	DISCIPLINARY ACTION PURSUANT TO THE <i>LIQUOR ACT 2019</i>
REFERENCE:	LC2022/009
LICENCE NUMBER:	81017321
LICENSEE:	PLS (NT) Pty Ltd
PREMISES:	Pit Lane Liquor 2/8 Middleton Street YARRAWONGA NT 0830
LEGISLATION:	Section 130 and Section 162(1) of the <i>Liquor Act 2019</i>
HEARD BEFORE:	Mr Richard Coates (Chairperson) Mr Bernard Dwyer (Health Member) Ms Amy Corcoran (Community Member)
DATE OF HEARING:	17 March 2022
DATE OF DECISION:	30 March 2021

Decision

1. For the reasons set out below, the Northern Territory Liquor Commission (the Commission) upholds the complaint and is satisfied that:
 - a. Between 23 and 25 June 2021 (inclusive) the licensee, PLS (NT) Pty Ltd trading as Pit Lane Liquor, contravened section 130 of the Liquor Act 2019 (the Act) on 128 occasions by selling liquor to individuals without completing a scan on the Banned Drinker Register (BDR) identification system or failing to scan the individuals form of identification.
2. The Commission is satisfied disciplinary action should be taken against the licensee as follows:
 - a. Suspend the condition of the liquor licence from 10:00 hours to 22:00 hours on Friday, 22 April 2022.
 - b. Pursuant to section 165(2)(e) of the Act, the Commission also directs the licensee to place signage in an area visible to the public that would utilise the takeaway facilities during the period of the suspension

informing the public that the takeaway conditions have been suspended for failure to comply with the Banned Drinker Register (“BDR”) identification system.

Reasons

Background

3. The licensee PLS (NT) Pty Ltd is the holder of Liquor Licence 81017321, trading as Pit Lane Liquor (the premises) situated at 2/8 Middleton Street, Yarrowonga. The nominee is Ms Elisabeth Idsenga.
4. On 1 September 2017, the Northern Territory government established the current Banned Drinkers Register (BDR), a scheme the purpose of which is to prevent persons identified as harmful drinkers from purchasing liquor. At the time of its establishment, the scheme was supported by s31A of the *Liquor Act 1978* (the 1978 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.
5. The scanning device provided under the identification system is linked to the BDR. If a 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”.
6. On 1 October 2019, the *Liquor Act 2019* (the Act) commenced operation. The Act continues the BDR scheme and is supported by Division 1 of Part 6 of the Act and in particular section 128.

Allegations:

7. Facts admitted at the Hearing by the licensee were that on 23 September 2021 a complaint was formally lodged with the delegate of the Director of Liquor Licensing, Mr Bernard Kulda (the Delegate) pursuant to section 160 of the Act in relation to alleged breaches of section 130 of the Act. It was initially alleged that the licensee had sold alcohol to patrons without completing a BDR scan of an approved ID on 129 occasions over the three-day period between 23 and 25 June.
8. The licensee responded to the complaint on 7 October 2021. It argued that having reviewed the CCTV footage it showed staff having completed a BDR

scan in respect of 12 of the alleged breaches. It also suggested that there were intermittent connectivity issues, which had resulted in some of the transactions not being recorded properly on the BDR system.

9. Upon receiving the licensee's response licensing compliance officers embarked upon an exhaustive re-examination of CCTV footage, sales data and APMS data derived from the BDR system as well as checking the network event log for the relevant computer router.
10. As a result of those further investigations, it was revealed that the 12 disputed transactions were failures to scan an ID. On 10 of those occasions the staff member had pressed the restart button on the bottom left hand side of the screen instead of "check BDR" on the right hand side of the screen. It was also revealed that the only router connectivity issue that occurred during the relevant period was outside trading hours and could not have impacted on staff's ability to utilise the BDR system. It was however discovered that one of the alleged breaches was in fact for the sale of a non-liquor product so the total number of breaches alleged was reduced to 128.
11. It was not until the hearing that the licensee admitted those breaches, a breakdown of which are as follows:
 - a) Wednesday 23/06/2021 – 31 non-BDR scans in a total of 372 sales.
 - b) Thursday 24/06/2021 – 30 non-BDR scans in a total of 428 sales.
 - c) Friday 26/06/2021 – 67 non-BDR scans in a total of 628 sales.
12. Having accepted the complaint and the investigation commencing, upon completion of the investigation the Delegate was empowered under section 163(1) of the Act to do any of the following:
 - a. take no further action (if satisfied of certain matters);
 - b. give the licensee a formal warning;
 - c. mediate the complaint;
 - d. issue an infringement notice;
 - e. enter into an enforceable undertaking; or
 - f. refer the complaint to the Commission.
13. On 25 February 2022, the Delegate referred the complaint to the Commission for disciplinary action to be taken against the licensee. Pursuant to section 166 of the Act, upon receipt of such a referral, the Commission must conduct a hearing and decide whether to take disciplinary action against the licensee. Upon completion of the hearing, the Commission must dismiss the complaint or take disciplinary action against the licensee. Pursuant to section 165, the Commission may take disciplinary action against the licensee only if the Commission is satisfied:
 - a. a ground for disciplinary action exists; and

- b. the disciplinary action is appropriate in relation to that ground.
14. Section 158(2) of the Act provides “An investigation into a complaint accepted under section 161 must be conducted within 90 days after the complaint is accepted or any longer period allowed by the Commission”.
15. On 17 December 2021 and again on 28 January 2022 extensions were sought by the Delegate of the time within which to complete the investigation pursuant to section 318 of the Act. Although extensions were granted until 28 February 2022 and the Commission accepts that there were some complexities associated with aspects of this investigation it is not acceptable that the matter has taken 9 months to get to hearing.

The Hearing

16. This complaint was set down for public hearing on 17 March 2022. On that date Mr Sallis and Ms Idsenga, Directors of the licensee company appeared on behalf of the licensee and Mr Kulda appeared on behalf of the Director. The Commission is grateful for the assistance provided by all those present at the 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 the Act. These are proceedings brought under Part 7 of the Act with respect to regulatory compliance for licences.
18. At the commencement of the hearing, the Chairperson advised the licensee that each of the Commissioners had read the Director’s referral brief, which became exhibit 1 at the hearing. The Commission inquired if there was anything in that brief which was objected to by the licensee and no objections were made.
19. There had been no indication provided to the Commission prior to the hearing that the licensee would be admitting the breaches so the Chairperson inquired whether the licensee was willing to proceed or wanted the matter adjourned so that the CCTV evidence could be examined in detail. At that point, Mr Sallis indicated that the licensee would be “reluctantly” admitting the breaches as alleged.
20. The licensee raised a number of matters in mitigation: it relied upon the lack of any adverse compliance issues in relation to its operation of this licence. It co-operated with Compliance officers. Management had been given a false sense of confidence when viewing CCTV footage because it appeared that staff were taking the ID from customers, placing it on the BDR scanner and pressing the scan button. Mr Sallis noted that the staff at the centre of these failed scans are long serving, loyal and diligent staff whom were very much trusted by management to uphold their compliance obligations. It suggested that without being provided with the BDR data to compare against the sales data there was no realistic way of self-auditing its compliance with the requirements of the legislation. It also claimed that as this was solely a take away outlet, it would be harder hit by any suspension of licence than a tavern for example, because, it would have no revenue at all from the business.

21. During the course of the hearing, it became clear that the cause of the overwhelming majority of these breaches was the failure of the licensee's staff to press the scan button after placing the ID on the scanner and instead pressed the restart button which is located on the opposite side of the screen. Mr Sallis submitted that management only became aware that staff were feigning scans in late December 2021 at their staff training which was organised by licensing officers. This is a very busy drive through bottle shop with staff operating across four BDR scanners and under pressure to complete the sale as quickly as possible. It is now understood by management that to their dismay the staff on many occasions pressed the reset button instead of the scan button to avoid any delays caused by failed ID scans in which they would then have to enter the ID details manually.
22. The licensee's staff have now received further training from licensing Officers on the use of the BDR and according to Mr Sallis now realise that they have let him down. Their attempts to cover up the failure to comply with the BDR scan procedures proved futile and staff now realise that in a certain percentage of sales they will be obliged to manually enter the customer's details into the system due to scan failures.
23. Mr Sallis suggested that Licensing should provide licenses with copies of the APMS data spreadsheets from the BDR, which would allow them to self-audit their staff's compliance with their obligations under the act. When asked by the Commission if this could be done, Mr Kulda, on behalf of the Director agreed that the data could be provided.
24. The Commission does not want to impose additional obligations on Licensing NT to provide this information to licensees across the board on an ongoing basis. However, it believes there would be merit in the Director making it known across the industry that self-audits are encouraged and that the APMS spreadsheets can be provided to licensees for a specified period to facilitate those audits.
25. While the Commission has taken into account all these matters raised in mitigation, and is prepared to accept that the licensee had no actual knowledge of the occurrence of these breaches it cannot accept it is blameless. It could have upgraded the quality of its CCTV coverage at an earlier stage and also looked at staffing levels to reduce the pressure on staff to complete sales within unrealistic time frames. Updated training by Licensing staff could also have been arranged which would have disabused staff of any notion that they could somehow cheat the BDR.
26. Over the three days when these breaches occurred the unlawful sales ranged from 7% to 10% of the days' transactions. The most breaches occurred on the Friday where more than 10% of sales were not subject to a BDR check.

The Disciplinary Action

27. Having upheld the complaint, the Commission has determined it is appropriate that disciplinary action be taken. The Commission also notes that there were no submissions made that this should not be the case.

28. Given the nature of the complaints which have been admitted, and subsequently found as occurring, the Commission does not consider that it is appropriate that the matter should be dismissed and therefore now turns to the question of the nature of the disciplinary action to be taken in relation to the contraventions of the Act.

As was noted by the Commission in the Darwin River Tavern decision:

“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”.

29. With these types of breaches, it is important to remember that the purpose of the BDR provisions is to identify those persons who may be prohibited from purchasing liquor. There is a risk posed to the community if licensees fail to comply with the BDR provisions, particularly in light of the public policy behind the provisions. In submission on penalty, Mr Kulda submitted that in accordance with other decisions of the Commission that a suspension of licence for two days was appropriate and that those should include the main trading day, being Friday. Mr Sallis stressed his prior compliance record (which was not disputed by Mr Kulda) and submitted that a one day suspension for a Wednesday would be a more appropriate disposition.
30. The Commission has carefully considered a number of the previous decisions concerning failure to comply with the identification system and has determined that in all the circumstances it is appropriate to suspend the operation of the licence for one day and that should be a Friday. It has also determined that in line with most other decisions in relation to these types of breaches that on the day of the suspension the licensee place signage at the premises informing the public that the licence has been suspended for failure to comply with the BDR system.

Notice of Rights:

31. Section 31 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 2014*

provides that an application for review of a reviewable decision must be lodged within 28 days of the date of the decision.

32. In accordance with section 31(2) of the Act, the persons who may apply to NTCAT for review of this decision are the Director and the licensee.

A handwritten signature in black ink, appearing to read 'Richard Coates', with a large, stylized initial 'R'.

RICHARD COATES
PRESIDING MEMBER
CHAIRPERSON

On behalf of Commissioners Coates, Dwyer and Corcoran
01 April 2022