

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Delicious Blue
Date of Decision:	29 September 2000
Date of Hearing:	10 July 2000
Complaint:	Pursuant to Section 48(2)
Nominee:	Ms Jenny Um
Heard Before:	Mr John Withnall (Chairman)
Appearances:	Orsolya Bartalis Lonny Ruddick (Complaints in Person) Mr P Cantrill (for Licensee)

This hearing resulted from the pursuance of complaints by Ms Orsolya Bartalis and Mr Lonny Ruddick in relation to various aspects of the operation of Delicious Blue. A third simultaneous complaint along similar lines was also received from Mr Dennis Miles, who did not appear at the hearing. All three complainants had been employees of the licensee at the relevant times. References hereinafter to the complainants are references to Ms Bartalis and Mr Ruddick, and do not include Mr Miles.

The original letter of complaint from Ms Bartalis was amplified by a subsequent statutory declaration by her, with a statutory declaration in broadly similar terms being received from Mr Ruddick (see pages 1 to 5 of the Hearing Brief).

Certain aspects of the complaint of Ms Bartalis no longer concerned the Commission by the time of the hearing, viz. liquor invoiced to the restaurant but which actually went to East Timor, and various health or hygiene matters which became issues between the licensee and the Health Department. This is not to say that health aspects cannot or should not be within the purview of the Licensing Commission, but in this particular case the health issues were such that we feel that they have been satisfactorily actioned and addressed.

The absence of a notice posted in the licensed premises in terms of condition 2 of the licence conditions is admitted by the licensee, and was remedied well before the hearing, straight after the initial attendance by a liquor inspector following receipt of the complaint.

Contested issues essentially distilled into serving intoxicated patrons, serving in the absence of availability of snacks and serving later than one and a half hours after closure of the kitchen. Allegations of *possible* service of liquor to underage patrons was just too amorphous to be sustained even had there not been an outright denial on the part of the licensee.

Both Ms Bartalis and Mr Ruddick had experienced problems with the licensee in terms of workplace relations; both believed they were owed money. Mr Ruddick had also had arguments with one of the proprietors, Mr Nyunt (or Mac), over an overseas phone bill of thousands of dollars, and damage to a vehicle of the licensee of which Mr Ruddick had use. They had been friends, they had resided together in Darwin, but that friendship had been soured by events.

The two complainants formed a personal friendship while working at Delicious Blue, and Mr Ruddick conceded that the relationship had affected his work at some times. The employer had shifted him, apparently unwillingly, to Uncle Sams (a business owned by the same proprietors as Delicious Blue).

Mr Ruddick says he had decided by December 99 to make a complaint to the Commission about various matters but did not do so until after his girlfriend was dismissed or resigned from Delicious Blue in March 2000 and she too had made a complaint.

Both feel hardly done by in terms of their respective partings from the licensee's employ; both are seeking further financial recompense.

In my view the motivation for the complaints is obvious, but it does not necessarily or automatically discount their credibility. Their evidence must still be weighed. The standard of proof applied by the Commission is the civil standard of balance of probability but with the requirement in matters of complaint that the balance be *clearly* weighted in favour of a finding of probability. In a recent decision (Liquorland Fairway Waters) the Commission had this to say as to the evidentiary burden:

The standard of proof applied by the Commission is that of the balance of probabilities, but on the basis of the nature of an issue affecting the process by which we are reasonably satisfied (*Briggenshaw -v- Briggenshaw*, 60 CLR 336). On a contested or contentious issue we require to be positively persuaded rather than indulging in any artificial or mathematical weighing exercise.

I need to be positively persuaded that a given complaint should be upheld.

As to the serving of intoxicated persons, I am not positively persuaded. Except for only a few specifics which I'll come to, the evidence of the complainants was too generalised to give the licensee any real option in defence other than to make general denial.

One of the exceptions to such generalisation of the evidence was in relation to a specific customer, Mr Wayne Kennon, whom the licensee called in rebuttal of the evidence of the complainants. It was said by Mr Ruddick that sometimes Mr Kennon's voice would be slurred, and his actions at a slower pace, yet he would be served. I could not help but note that Mr Kennon gave his evidence in a slow or measured way. He admitted readily that on one occasion in Delicious Blue he had over-indulged in wine, but denied ever being intoxicated in Delicious Blue. He has known the proprietor Ms Jenny Um for eight years, and believes she would not tolerate intoxication in her premises.

In relation to Mr Kennon, the evidence of his intoxication is simply not sufficiently detailed for me to be able to make any effective assessment at this remove in time.

There was also evidence of a female patron being ill in the ladies toilet, but on the evidence the cause remains unknown, and cannot be found to have been due to over-intoxication, whatever the suspicion.

There is the "table 31" incident when Ms Bartalis was physically prevented from passing the table by a patron she now says was intoxicated. She admitted in evidence that she had been deliberately ignoring him and that this was undoubtedly the reason he tried to prevent her passing on the occasion that he did. The only objective evidence available to me of his intoxication is that Ms Bartalis smelled alcohol on his breath, not all that unusual with a patron who is consuming alcohol, but not necessarily indicative of an excess of alcohol or intoxication.

Ms Bartalis complains that her judgment was over-ruled on that occasion. This was also the evidence of complainants in relation to two other episodes (one each) where their respective judgments were over-ruled and patrons were served another drink on the basis that they would then leave (which in due course they did, in each case).

It is impossible for me to prefer the complainants' judgment against that of either of the proprietors in relation to those incidents. I have no doubt that the complainants honestly believed that those patrons should not have been served, but the complainants' opinions cannot become mine without more to go on, something more to weigh on the scales of persuasion.

I realise the difficulty of the complainants in presenting a sufficiently detailed picture in each case, but to some extent it is a difficulty of their own making, a result of the long delay between event and eventual complaint.

Moving on to the situation in relation to the kitchen, I believe the evidence over-all in this regard to be such that I shall be amending the relevant conditions of the licence pursuant to Section 49(4)(a) of the *Liquor Act*. I believe that it does remain arguable on behalf of the licensee that the kitchen was available for the production of some form of "meal" after the kitchen had closed in terms of it servicing the published menu. However, while it cannot be said that the licensee was not within the "letter of the law" in terms of the relevant condition, it seems on the evidence that on occasions inadequate staffing arrangements may have led to the contravention of the spirit and intent of the relevant condition, and I will be tightening the condition accordingly.

It has not assisted the complainants that on many occasions that Mr Ruddick complains of drinking being permitted on the premises after the expiry of more than one and a half hours from the so-called closure of the kitchen, Mr Ruddick himself was left in control of the premises, and there was according to Mr Ruddick always enough material for some meals that would have been able to be prepared but that since he wasn't being paid for it he wasn't going to do it (even though he was an assistant chef).

As I say, on the evidence I cannot find the licensee in breach of the relevant condition of the licence, but the "liquor without a meal" condition is intended as a privilege of good management, and a matter of good faith, and should the Commission lose that faith at any time in relation to any particular premises, the continuance of the "liquor without a meal" concession for those premises will be in jeopardy.

The formal decision is that the complaint is upheld only insofar as the failure to display the notice required by Condition no. 2 in the licence. Given that this situation was remedied immediately following a visit by a liquor inspector following the Commission's receipt of the complaint, and well before the hearing, I formally record the breach but impose no penalty. This does not mean that there has been no consequence for the licensee; the licensee's record is no longer a clean one and in the event of any further complaint at any time in the future the licensee will not be able to point to an unblemished record. The licensee can no longer be a "first offender" should such a consideration become relevant at some future time.

Further, as indicated earlier, there will be a variation of licence conditions. The special condition in licence 80516130 headed "Kitchen Operation" is deleted and the following wording substituted in its stead:

"The premises shall close no later than one and one-half hours after the kitchen shall have closed by way of having ceased to fully service the main menu for the day."

The special condition headed 'Snack Foods' is deleted, and the following wording substituted in its stead:

"A reasonable range of snack foods will be available at all times, to the satisfaction at any time of the Director of Licensing."

The foregoing amendments to the conditions of the licence are made in pursuance of section 49(4)(a) of the *Liquor Act*.

John Withnall
Chairman

29 Sept 2000