

Northern Territory Licensing Commission

Reasons for Decision

| | |
|--------------------------|---|
| Premises: | Hot Potato Tavern |
| Licensee: | Crocosaurus Cove Pty Ltd |
| Licence Number: | 80317973 |
| Nominee: | Michael William Scott |
| Proceeding: | Alleged Breach of Section 110 of the <i>Liquor Act</i> -Breach of Licence Condition-Exceed Patron Numbers |
| Heard Before: | Mr Richard O'Sullivan (Chairman) Mr Philip Timney (Legal Member) Mrs Jane Large |
| Date of Hearing: | 13 July 2010 |
| Date of Decision: | 12 August 2010 |
| Appearances: | Mr Joshua Ingrames, Counsel for the Director of Licensing Mr Ray Murphy, Counsel for the Licensee |

Background

- 1) On 8 April 2010 the Director Licensing lodged a complaint with the Licensing Commission pursuant to section 48(2) of the *Liquor Act* ("the Act") alleging that the Licensee of the Hot Potato had committed a breach of Section 110 of the Act.
- 2) The complaint concerned the number of patrons present at the Hot Potato at approximately 12.55 am on 14 March 2010. The liquor licence for the Hot Potato contains a condition of licence limiting the maximum numbers of patrons permitted to be on the licensed premises at any given time to 350 persons. The condition alleged to have been breached reads as follows:

"Whichever is the least, the Licensee shall obtain and observe maximum patron limits as recommended by the Northern Territory Fire Service, OR, the total maximum patron numbers permitted shall not exceed 350, as advised to the Northern Territory Licensing Commission by the licence applicant"
- 3) The maximum patron numbers, as assessed by the Northern Territory Fire and Rescue Service ("NTF&RS"), is 346 persons. The Hot Potato is subject to a "lock out" condition prohibiting entry to the premises after 3.00 am on any morning the venue is trading. Licensing Inspectors viewed the CCTV footage obtained from the premises for the hours of 3.00 am to 4.30 am on 14 March 2010 and observed that 466 patrons exited the premises during that 1 ½ hours.
- 4) The Licensee and Nominee were advised of the complaint in a letter from the Director dated 23 March 2010. A response was received from the Nominee, Mr Michael Scott, in a letter dated 6 April 2010. Mr Scott acknowledged that there was an excess number of patrons on the premises at the relevant time. He stated further that the breach came about as a result of some abnormal circumstances occurring on the night, including a failure of the systems and procedures in place to monitor patron numbers. Mr Scott also identified additional procedures that had been put in place to ensure there was no recurrence of the breach.

- 5) The Complaint was referred to the meeting of the Licensing Commission held on 4 May 2010. The Commission noted the admission of the breach by the Nominee and determined to conduct a hearing in respect of the appropriate penalty.

The Hearing

- 7) Mr Ingrames, counsel for the Director of Licensing, submitted to the Commission a summary of agreed facts, admitted as Exhibit 1, as follows:
- a. *At approximately 00:55 hours on 14 March 2010, Licensing Inspectors McCorkell, Pech and Burdett, as part of a formal inspection, attended Hot Potato on Mitchell Street in Darwin*
 - b. *The immediate impression on entry was that the venue was crowded. The impression was gained upon being confronted by a "wall" of patrons, caused by the flow of the dance floor across the room, between the DJ booth on one side and the dance floor on the other.*
 - c. *Hot Potato has only 1 public entry & exit*
 - d. *Inspector Pech spoke with an employed crowd controller, Mr Adrian Franklin, who was unsure as to how many patrons were in the venue.*
 - e. *Inspector Pech suggested to Mr Franklin that they consider slowing down the entry of patrons.*
 - f. *Hot Potato is subject to a 03:00 hour lockout when it trades to 04:00 hours. Patrons cannot enter after this time, but may leave the premises.*
 - g. *CCTV footage of the entry way of Hot Potato was requested. A viewing of the footage discovered approximately 466 patrons exiting the premises between 03:00 – 04:30 hours.*
 - h. *At all relevant times the Defendant was the holder of Liquor Licence Number 80317973 ("the Liquor Licence"). Mr Michael William Scott is the Nominee of the Liquor Licence.*
 - i. *Special condition (5) of the Liquor Licence states:*
 - j. *Whichever is the least, the Licensee shall obtain and observe maximum patron limits as recommended by the Northern Territory Fire Service, OR, the total maximum patron numbers permitted shall not exceed 350, as advised to the Northern Territory Licensing Commission by the licence applicant.*
 - k. *Notice number 015868 from the Northern Territory Fire Service provides that the maximum patron limit for Hot Potato is 346 patrons.*
 - l. *On the morning of 14 March 2010 the maximum patron limit for Hot Potato was exceeded by approximately 120 patrons.*
- 8) Mr Murphy acknowledged that the Licensee agreed with the facts as presented and formally admitted the breach of licence condition by the Licensee in that the patron numbers on the night in question had exceeded the maximum number allowable by approximately 120 patrons.

Evidence Presented on Behalf of the Licensee

- 9) Mr Murphy, Counsel for the Licensee, called Mr Adrian Franklin, the owner operator of Proactive Security, to give evidence on behalf of the Licensee. Mr Franklin informed the Commission that he was a licensed crowd controller and was on duty at the Hot Potato on 14 March 2010. He stated that Proactive Security had been engaged to provide security services at Hot Potato since the venue opened in around December 2008.

- 10) Mr Franklin stated that he would normally roster on 2 crowd controllers at the opening time of 10.00 pm with a further 1 or 2 commencing around an hour later, with the number depending on patronage on the night. Mr Franklin confirmed that on the night in question he had received a call around 11.00 to 11.30 pm requesting that he attend for duty at the Hot Potato. He stated that he arrived around midnight and was predominantly patrolling inside the venue. He advised that in the weeks leading up to the breach the Hot Potato had experienced quiet trading with a maximum of 150 to 200 patrons per night attending the premises.
- 11) A document titled "Tap on Mitchell and Hot Potato Crowd Control Policy" was shown to Mr Franklin and tendered into evidence as Exhibit 5. Mr Franklin agreed that the document comprised the agreement he negotiated with the Hot Potato for the provision of crowd control services to the premises. In terms of monitoring patron numbers, Mr Franklin noted that the agreement included provisions requiring a method for systematically counting patron numbers entering or leaving the premises and that patron numbers were to be logged on an hourly basis in the security register and in daily reports to prevent numbers exceeding the maximum licensed level.
- 12) Mr Franklin gave evidence that when the premises first opened and patron numbers were high, crowd controllers used hand held counters to monitor patron numbers. In addition, routine checks comprising "head counts" were conducted within the premises on a periodic basis. Mr Franklin conceded candidly that in the period leading up to the breach, when patronage was low, the hand counters were not used and monitoring of patron numbers was conducted via head counts only.
- 13) Mr Franklin stated that on the 14 March 2010 he had been on duty for approximately one hour when the Licensing Inspectors arrived. He recalled a conversation with Inspector Pech and, in response to a question about patron numbers present at the time, he advised her that he did not think the patron numbers were excessive. He conceded that he had not done a head count as that was normally done by duty Manager Marty Giles, who was absent on the night. He also acknowledged that he did not speak with the crowd controllers who had commenced duty at opening time in regards to patron numbers.
- 14) After speaking with inspector Pech, Mr Franklin stated that he returned downstairs and noted that the dance floor looked busy but the mezzanine floor and sunken bar were not. Mr Murphy then showed Mr Franklin a set of photographs showing the dance floor, the mezzanine floor and the sunken bar. Mr Franklin stated that the crowd numbers on the night in question were similar to those in the photographs. The photographs and the CCTV footage obtained by the Inspectors were tendered as Exhibit 6 and showed a sparsely populated mezzanine floor.
- 15) Mr Franklin stated that whilst he did not conduct a head count, after viewing the downstairs area he did instruct the crowd controllers on the door to start a "line up", meaning a one patron out / one patron in system. There is no pass out system operating at Hot Potato so if a patron left the premises, for whatever reason, they would need to join the line before re-entering.
- 16) Mr Franklin confirmed that he did not think the premises were overcrowded. After speaking with Inspector Pech however he reacted to her comments and observations and instructed that the line-up commence.
- 17) Sometime following the incident Mr Franklin spoke with the Nominee in regard to new procedures to be implemented to prevent further occurrences of exceeding patron numbers. The matters discussed were confirmed in writing in an email from the Nominee to Mr Franklin. Mr Franklin was instructed to take the following measures to prevent a recurrence of overcrowding:
 - Constant and accurate door count to be maintained at the entry point, including using hand held counters;

- The issue of monitoring patron numbers to be stressed to all Proactive staff;
 - Head counts to be conducted within the venue, particularly at times of peak capacity; and
 - Closer liaison between the duty manager and crowd controllers.
- 18) Mr Franklin advised that as a result of that directive from Mr Scott a head count was now conducted at the door from the commencement of each night's trade by the crowd controllers using hand held counters. Hourly head counts are also conducted by the duty manager and the crowd controllers and the numbers are recorded in a register maintained at the door.
- 19) In response to a question from the Chairman, Mr Franklin advised that they did not use the counters on the night in question as the venue did not look overcrowded to him, he added that it was easy to move from one side of the room to the other and the patrons seemed comfortable with no apparent congestion. Mr Franklin agreed that the maximum crowd numbers permitted was not essentially a matter of congestion and comfort but more concerned with patrons' ability to exit the premises quickly in an emergency.
- 20) Mr Franklin concluded his evidence by advising that the crowd was well behaved on the night in question and that he did not recall any significant incidents that attracted the attention of the crowd controllers.

Viewing of the Premises

- 21) Following hearing the evidence of Mr Franklin the Commission then adjourned the hearing for the purpose of conducting a viewing of the premises. During the viewing Mr Scott asked the Commission to note the layout of the premises, and in particular the location of the dance floor right next to the entrance door. He advised that this was a part of the "marketing" of the premises in that patrons on entering the premises immediately saw people on the dance floor and were therefore more likely to enter and remain at the premises. Mr Scott suggested that the location of the dance floor gave the appearance that the venue was crowded when in fact other areas of the licensed premises, including the mezzanine floor and sunken bar, were sparsely patronised.
- 22) Mr Scott informed the Commission that the Licensee was currently sourcing an electronic queuing system that would potentially reduce the pressure on door staff in respect of the monitoring of numbers of patrons entering the premises. He envisaged that the system would be in place within the next few weeks.
- 23) The hearing resumed with the Chairman requesting submissions and evidence in respect of penalty from both parties.

Submissions on Penalty on Behalf of the Director

- 24) Mr Ingrames, Counsel for the Director tendered written submissions in respect of penalty. He submitted that the purpose of the patron number condition of licence was to protect the safety of individual patrons of the premise. In determining penalty consideration should be given to the nature of the premises, being a confined "bunker" type venue with only 2 exit points, both of which involve the use of stairs.
- 25) Whilst acknowledging the role of the licensed crowd controllers engaged by the Licensee, Mr Ingrames submitted that the Licensee remains liable for the breach. The Licensee is no less culpable than the crowd controllers who were engaged to control the flow of patrons into the premises. The Licensee has not exercised its responsibility adequately in this instance, leading to a potentially dangerous situation. Mr Ingrames stated that the breach was significant, being almost 120 patrons above the permitted number of 350.

- 26) Mr Ingrames submitted that the Licensee was entitled to receive credit for the early admission of the breach and that it has no history of breaching its conditions of licence, including the maximum patron numbers conditions.
- 27) Mr Ingrames referred the Commission to the only similar breach that had come before the Commission, being the complaint against the Todd Tavern, heard in March 2010. He submitted that, despite the paucity of similar offences, general deterrence is a significant factor to be taken into account by the Commission so as to encourage compliance by licensees.
- 28) Mr Ingrames noted that there were few differences between the Todd Tavern breach and that committed at the Hot Potato. However, he submitted that the Commission could conclude following the viewing of the premises that the layout of the dance floor adjacent to the entrance had the potential to create significant problems if an emergency situation arose. He also noted that the premises were located in an "underground bunker" which posed additional risks in terms of an emergency evacuation.
- 29) Mr Ingrames conceded, rightly in the Commission's view, that there were no grounds in this instance to justifying a penalty greater than that imposed on the Todd Tavern.
- 30) In summary, Mr Ingrames submitted that the appropriate penalty would be a suspension of licence for a period in the range of 2 days and that, for the purpose of general deterrence, the penalty imposed should be applied to high trading periods, such as Friday and Saturday evening. In response to a question from the Chairman, Mr Ingrames confirmed that the penalty range proposed was at the higher level and should be discounted taking account of the acknowledged mitigating factors on the part of the Licensee.

Submissions on Penalty on Behalf of the Licensee

- 31) Mr Murphy asked that the Commission, in determining the appropriate penalty, to take into account the new arrangements put in place for compliance with patron numbers following the subject incident. He noted that in the 4 to 6 weeks preceding the breach the venue never reached capacity. The failure of the systems on the night was in part due to the absence of the duty manager, Mr Giles, and the fact that this information was not relayed to Mr Scott. Mr Murphy submitted that this problem had been addressed by Mr Scott issuing a directive that he was to be advised of the absence of any key personnel in future.
- 32) Mr Murphy submitted that the Licensee acknowledged that it was responsible for the breach of the licence condition, regardless of the fact it had employed a licensed security firm to ensure the patron numbers were not exceeded. He noted however that the Licensee had not totally abrogated its responsibility to its agent. Proactive Security had been issued with clear written instructions as to what measures were to be implemented to ensure compliance with the maximum patron condition of licence. He stated that in this instance those instructions were not followed and the Licensee had been let down by its agent.
- 33) The breach had been followed up with further written instructions and the implementation of additional measures for monitoring patron numbers. Mr Murphy emphasised that the breach was not a result of deliberate or reckless behaviour on the part of the Licensee and distinguished this instance from that of the Todd Tavern where the Licensee had simply abrogated its responsibility to the security staff. In this instance the Licensee had exercised appropriate control over the security personnel and had been let down on the night in question.
- 34) Mr Murphy acknowledged that the absence of the duty manager on the night was a mistake and repeated that in future the absence of any key personnel was to be reported to the Nominee.
- 35) In respect of the installation of a queuing system, Mr Murphy asked that the Commission note that the system would be installed at a cost to the Licensee of approximately \$5,000

and would result in a number of advantages including not having patrons form a line extending to Mitchell Street and the potential frustration of patrons. Once the system was installed security personnel would be able to spend more time on other crowd control duties.

- 36) The seriousness of the breach was acknowledged by Mr Murphy in respect of the Licensee's obligations to ensure the safety of patrons and he conceded that the seriousness of the offending increased with the number of patrons over capacity.
- 37) Mr Murphy made a number of submissions in respect of the permissible maximum patron numbers and various formulae for arriving at that figure. He also tendered a letter from a Director of Crocosaurus Cove Pty Ltd to NTFR&ES (Exhibit 9) which stated that the allowable number should be 411. Mr Murphy submitted that, in assessing the seriousness of the offending, the Commission should take account of the higher figures as they more accurately reflect the rationale behind limiting patron numbers, namely patron safety.
- 38) In submissions in mitigation, Mr Murphy asked the Commission to take account of the unblemished record of the Licensee, including a similar record in respect of the management of Crocosaurus, The Tap and Melaleuca on Mitchell. He noted that the Licensee had admitted the breach within one week of notification of the complaint and that the Licensee had co-operated with the Inspectors in reaching an agreed set of facts. He also reinforced the remedial measures taken by the Licensee since the breach, including the proposal to introduce the queuing system at significant cost.
- 39) Mr Murphy concluded by submitting that this breach was distinguishable from that of the Todd Tavern in that the Licensee of the Hot Potato had not abrogated responsibility to the crowd controllers but instead had reinforced its duty of care by issuing clear instructions as to how patron numbers were to be monitored in the future. Following the breach those measures had been reiterated to Mr Franklin and tighter measures put in place. The breach in this instance was in the order of approximately 34% over capacity, compared to 120% for Todd Tavern.
- 40) In closing Mr Murphy submitted that the appropriate penalty in the circumstances would be to issue a notice to the Licensee, in accordance with section 49(4)(b) of the Act, directing the Licensee to implement the procedures and systems that were now in place or about to be installed in respect of monitoring patron numbers. He submitted that there was no requirement for the Commission to impose a penalty in the interests of general deterrence as there was no evidence that breaches of patron number conditions were prevalent or showing trends of increasing. Mr Murphy submitted that should the Commission be minded to impose a penalty of suspension of licence then, taking account of the mitigating factors and remedial actions taken by the Licensee, that suspension should be suspended for a fixed period.

Consideration of the Issues

- 41) The Commission considers a breach of licence conditions relating to maximum patron numbers to be at the serious end of the scale of offending given the serious and life threatening consequences that may arise in an emergency situation. The concerns of the Commission were expressed in the Todd tavern decision in the following manner:

At the lower end of the scale, overcrowding has the potential to result in the Licensee being unable to monitor patron behaviour, including the level of intoxication of patrons, to the necessary standard. A more serious risk is the potential for arguments and physical confrontation between patrons vying for space in the premises. At its highest level, in terms of risk posed to patrons, if the need to quickly depart from premises due to an emergency arose, such as in the case of a fire, loss of life or serious injury is a real possibility.

- 42) The Commission sees no reason to resile from that stated view in respect of this breach and remains of the view that a breach of this type is of such a serious nature as to warrant an actual term of suspension of licence, even for first time offenders.
- 43) The maximum number of patrons permitted to be on the premises is 346. That approximate figure was stipulated by the Commission (at the time that figure was 350) at the conclusion of the licence application hearing and independent of the number that may have been assessed by NTFR&ES. The number was in fact accepted by the licence application during the conduct of that hearing. NTFR&ES in fact ultimately stipulated patron numbers of a lower figure than determined by the Commission at the licence application hearing, that being 346. The Commission is unimpressed by any attempt to persuade or influence the NTFR&ES to regulate for a higher number than that stipulated and does not accept that it should adopt the figure of 411 when assessing by how far the maximum patron number was exceeded on the night of the breach.
- 44) The Commission notes with some concern the evidence provided by Mr Franklin. On being advised of Inspector Pech's view that the premises were overcrowded he checked the premises and formed a view that the patron numbers were within the maximum number of 346. He stated that he implemented the "line up" in response to Inspector Pech's observations and not as a result of his own opinion that the permissible patron numbers had been exceeded. The evidence adduced during the hearing indicated clearly that Mr Franklin's observations on the night were wrong and unreliable and that the premises had numbers significantly above permissible patron numbers. That factor provides a clear indication that Licensee's must have reliable mechanisms in place to monitor patron numbers and that simple walk by head counts are not a suitable means of assessing patronage.
- 45) The Commission does not accept the submission that it need not impose a penalty taking account of the need for general deterrence on the basis that breaches of this nature are not prevalent nor the subject of an increasing trend.
- 46) The Commission takes little comfort from submissions that whilst the dance floor was crowded on the night, the other areas of the premises, namely the mezzanine floor and sunken bar, were under patronised. The dance floor of the Hot Potato is located immediately next to the main exit from the premises. On the night in question the majority of patrons were on the dance floor, blocking the exit for patrons in the other areas. In an emergency situation patrons on the mezzanine floor and in the sunken bar would need to exit the premises through the crowded dance floor. The potential for disaster in such a situation is abundantly obvious.
- 47) The Commission does to accept the submission that the appropriate penalty is a written notice to the Licensee directing that it implement the measures it now has in place. The Commission expects the Licensee will implement and continually enforce those measures as a means of ensuring compliance with the licence condition. More importantly, the Commission expects that the measures would be implemented at all times in the interests of the safety of the patrons of the Hot Potato rather than as a result of a directive from the Commission to do so.
- 48) The Commission notes that the excess number of patrons on the premises in this instance was significant, being 120 persons above the maximum number allowable. The risk to patrons in an emergency situation is such that the Commission is minded to impose a period of actual suspension of licence.
- 49) In considering penalty the Commission agrees with the submission of Mr Ingrames that a penalty for a breach of this nature would be in the range of a suspension of licence for a period of 2 days, less any discount for mitigating circumstances.
- 50) In arriving at the appropriate penalty the Commission notes and takes into account the mitigating factors presented in Mr Murphy's submissions on behalf of the Licensee. Those factors include:

- the Licensee's unblemished record to date;
- the early admission of the breach in the written response to the Director's complaint;
- the co-operation by the Licensee in the investigation of the complaint and during the conduct of the hearing;
- the fact that the Licensee has accepted responsibility for the breach and not abrogated its responsibility in that regard to its contracted crowd controllers;
- the fact that the Licensee had provided its agents, Proactive Security, with clear written instructions as to the measures to be enforced to ensure compliance with the patron number conditions;
- the remedial actions taken by the Licensee in reinforcing, in writing, the crowd controllers responsibilities; and
- the proposal by the Licensee, of its own volition and at significant expense, to introduce a queuing system to further minimise the risk of overcrowding.

51) Taking account of those matters the Commission has determined to discount the penalty it would have applied for a breach that it regards as significantly serious in terms of patrons safety and wellbeing.

Decision

52) The Commission reaffirms the views expressed in the Todd Tavern decision that the issue of overcrowding of licensed premises is particularly serious and one that requires a strong message to be sheeted home to all Licensees that breaches of this nature will not be tolerated. The potential for serious harm in the event of an emergency situation requires the imposition of a penalty at the higher end of the scale and one that includes an actual suspension of licence.

53) The Commission has determined to impose a suspension of the licence for the Hot Potato for the period during which the premises were found to have been overcrowded, namely from 1.00 am to 4.00 am on a Sunday morning. The suspension period is to commence at 1.00 am on Sunday 29 August 2010 and conclude at 4.00 am on the same date.

54) In reaching that conclusion on the appropriate penalty the Commission takes particular note of the remedial actions implemented by the Licensee since the occurrence of the breach and trusts that the Licensee will ensure that those measures remain in place, not only during busy periods but at all times the licensed premises are open for trade. The Commission also expects the Licensee to ensure that its agent crowd controllers also continually enforce the measures identified during the conduct of the hearing.

Richard O'Sullivan
Chairman

12 August 2010