

# Northern Territory Licensing Commission

## Penalty Decision

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<b>Respondent:</b>	<b>Mr Joseph Brown</b>
<b>Licence Number:</b>	Security Provider Number 5947
<b>Proceedings:</b>	Complaints Pursuant to Section 53A <i>Private Security Act</i>
<b>Heard Before:</b>	Mr Philip Timney (Presiding Member) Mrs Jane Large Mr John Brears
<b>Dates of Hearing:</b>	17 January, 8 February and 1 March 2012
<b>Appearances:</b>	Licensing Inspector Mark Wood for the Director of Licensing Mr Ian Rowbottam, Counsel for Mr Brown

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### Background

- 1) By published decision dated 24 April 2012, the Commission found that Mr Brown, in his capacity as a licensed Crowd Controller, used excessive force in his dealings with Mr Tonkin at Monsoons on 6 May 2011. The Commission was satisfied on the evidence presented at Hearing that Mr Brown used excessive force when he applied the wrist lock on Mr Tonkin and when he carried out an ill-conceived and defectively executed ground stabilisation technique. Consequently the Commission found that Mr Brown breached sub-Section 19(2)(c) of the Act, with reference to Clause 3.13 of the Code of Practice for Crowd Controllers, in that he used undue force in the course of his duties as a Crowd Controller on that date.
- 2) Following publication of that decision the Commission directed the parties to provide submissions on penalty in respect of the identified breaches of the Act on the part of Mr Brown. Those submissions were to be lodged with the Executive Officer of the Commission no later than twenty-one days following the delivery of the decision to the parties, that is by 16 May 2012.
- 3) Written submissions, on behalf of the Director of Licensing, were received from Inspector Wood via email dated 15 May 2012. Following a request for an extension of time, submissions on behalf of Mr Brown were received from Mr Rowbottam via email dated 17 May 2012. The submissions of both parties are set out in full below.

### Submissions of Penalty on behalf of the Director of Licensing (Inspector Mark Wood)

- 4) I refer to the recent decision of the Commission in relation to an allegation of conduct contrary to Section 19(2) of the *Private Security Act* by the Licensee, Mr Joseph Brown. The matter was found proved and as requested in paragraph 94 of the written decision I now provide submissions on penalty on behalf of the Director of Licensing.

### Background

- 5) This matter arose when on 10 May 2011 Mr Bradley Tonkin attended the offices of Licensing, Regulation and Alcohol Strategy Darwin and met with Inspectors Paull and Cookson. Mr Tonkin informed the Inspectors that he had been removed from Monsoons

Bar on Friday, 6 May 2011 during which he alleged he had been subjected to the use of undue force by two crowd controllers, namely Mr Joseph Brown and Mr Gene Hocking.

- 6) Mr Tonkin stated he had been in Monsoons with friends earlier in the evening and then left to get food. Upon his return he attempted to re-enter the premises but was refused entry by Mr Hocking at the Nuttall Place entrance. Mr Tonkin admitted then obtaining entry by climbing over the low railing of the premises at the Mitchell Street entrance.
- 7) Once inside Mr Tonkin proceeded to the ATM, inserting his card into the machine as well as his PIN. It was at this time Mr Brown spotted Mr Tonkin as having previously been refused entry. Mr Brown in the company of Mr Hocking approached Mr Tonkin at the ATM, placed him into restraining wrist locks and removed him from the premises. Once outside the premises in Nuttall Place Mr Tonkin stated he had been driven into the concrete footpath at which point he sustained injuries to his face and some muscular injuries.
- 8) Medical reports confirmed Mr Tonkin required three sutures in his lip and several abrasions to the face.

## Issues

### Criminality of the Act

- 9) Although the consideration before the Commission is one based in a civil tribunal and not a criminal court of jurisdiction reference to the *Criminal Code* (the Code)<sup>1</sup> is appropriate in the circumstances given the nature and severity of Mr Tonkin's injuries. Mr Brown used force in the removal of Mr Tonkin both whilst inside the premises and outside on the footpath and:

*'The Commission is satisfied that Mr Brown had no lawful reason to apply any force whatsoever to Mr Tonkin when he was at the ATM.'*<sup>2</sup>

- 10) Further, the Commission found:

*'it was the Crowd Controllers who escalated the situation that resulted in Mr Tonkin's injuries by applying force that was not necessary or reasonable.'*<sup>3</sup>

- 11) The Code defines assault as:

#### **187 Definition**

*In this Code assault means:*

*the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of harm or by means of false and fraudulent representations as to the nature of the act or by personation;*

- 12) It is not submitted that there was an assault by Mr Brown on Mr Tonkin, that consideration is a matter for other agencies and jurisdictions. What is submitted is the level of force and harm could be considered an assault in another jurisdiction and any consideration as to penalty should rightfully examine the seriousness of the force and harm in the context of the event and legislated definitions.
- 13) The Commission has determined that Mr Brown did use excessive force in his dealings with Mr Tonkin on 6 May 2011. To determine the criminality and therefore penalty for this offence it must be viewed in the following context:

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<sup>1</sup> *Criminal Code (NT)*

<sup>2</sup> P Timney, 'Reasons for Decision', Mr Joseph Brown, 24 April 2012 at [79].

<sup>3</sup> P Timney, above n2 at [80].

- Mr Brown stated that Mr Tonkin was aggressive and struggling once he had been removed from the premises.
- CCTV footage and evidence from Mr Tonkin established that he was not struggling at the ATM or outside the premises until he became concerned for his physical safety, contradicting Mr Brown's evidence.
- Mr Brown was in the company of another crowd controller during the event and there were in total six licensed crowd controllers on duty that evening.<sup>4</sup>

### The failure of the Mr Brown

14) In consideration of the issues the Commission has determined that:

*'...no interpersonal techniques were engaged by Mr Brown...when they approached Mr Tonkin at the ATM and placed him in restraining holds. Nor was it apparent that Mr Brown...engaged in any conversation with Mr Tonkin prior to applying the restraining holds.'*<sup>5</sup>

- 15) Mr Brown also failed to release Mr Tonkin once he had been removed into the street and off the premises. It was determined that there existed no circumstances that would prevent the release of Mr Tonkin by Mr Brown and that '...he should have been released immediately once he was on Nuttall Street'.<sup>6</sup>
- 16) It is submitted that Mr Brown's failures directly resulted in the incident and escalated the situation when there was no requirement to do so.

### Consequences and Harm

17) As submitted earlier although the consideration before the Commission is one based in a civil tribunal and not a criminal court of jurisdiction reference to the Code<sup>7</sup> is appropriate in the circumstances given the nature and severity of Mr Tonkin's injuries. The Code defines 'harm' as:

#### 1A Harm

- (1) *Harm is physical harm or harm to a person's mental health, whether temporary or permanent.*
- (2) *Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.*
- (3) *Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.*
- (4) *Harm does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.*

18) It is clear from the medical evidence tendered that Mr Tonkin suffered harm as a result of the actions of Mr Brown. Mr Tonkin was transported to the Royal Darwin Hospital by Police where he was treated and released. The report of Dr Stone indicates Mr Tonkin had;

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<sup>4</sup> Hearing Brief, [88].

<sup>5</sup> P Timney, above n2 at [77].

<sup>6</sup> P Timney, above n2 at [84].

<sup>7</sup> *Criminal Code (NT)*, s1A.

*'Several superficial abrasions on nose, chin and right cheek. 2 cm deep laceration on right upper lip.'*<sup>8</sup>

- 19) Treatment of the injuries included suturing of his top lip and subsequent treatment by his family physician Dr Elizabeth Moore describes a possible amplification of a pre-existing back injury as a result of the incident. Dr Moore also details a need for ongoing dental treatment from the trauma to his teeth.

### **Contested Proceedings**

- 20) Mr Brown chose to contest the proceedings and upon the finding of the offence proven is now disentitled to any mitigation on penalty an early admission would otherwise have provided.

### **Evidence**

#### *Mr Tonkin*

- 21) Cogent and persuasive evidence was given to the Commission by Mr Tonkin that he had done the wrong thing by re-entering the premises when refused but had not struggled or been otherwise aggressive or violent with the crowd controllers who removed him.<sup>9</sup>
- 22) The most persuasive and telling evidence was the provision of the extensive CCTV footage of Mr Tonkin's behaviour prior to his refusal of entry, his entry to the premises and his subsequent removal. The Commission witnessed the interaction of parties when Mr Tonkin was approached at the ATM and it was clear that Mr Brown made no attempt at applying appropriate interpersonal techniques or conversation.
- 23) Mr Tonkin stated he was walking passively with the crowd controllers during his removal and stopped once outside due to his concerns as to the direction in which he was being taken. It was at this time that he was forced to the concrete face first with no means of breaking his fall.
- 24) Once on the ground it was his evidence that Mr Brown continued to hold him down forcefully by twisting his arms and pushing down on his back and shoulders. Mr Tonkin further detailed his injuries as a result of the incident which included ongoing medical, dental and physiotherapy treatment.

#### *Mr Brown*

- 25) It was the evidence of Mr Brown that he observed Mr Tonkin using the ATM and trying to withdraw money. He then stated that once he and another crowd controller had placed Mr Tonkin in restraint locks to remove him from the premises that he continued to struggle.<sup>10</sup> The Commission was able to watch clear CCTV footage of the event described by Mr Brown in his evidence and his claim of Mr Tonkin struggling was contrary to what was seen in the footage.
- 26) Mr Brown further claimed that Mr Tonkin was aggressive outside and this was the reason for taking him to the ground. Again the footage does not support Mr Brown's claims other than Mr Tonkin appearing to want to break away from the holds. There was no footage demonstrating that Mr Tonkin was aggressive, argumentative or attempting to fight Mr Brown. Mr Brown's own evidence was that he asked Mr Tonkin, "Are you going to walk away?", yet he gave him no chance to do so.

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<sup>8</sup> Hearing Brief - Folio 84.

<sup>9</sup> P Timney, n 2 at [74].

<sup>10</sup> P Timney, above n2 at [28].

- 27) To his credit Mr Brown stated that Mr Tonkin had made no threats towards him during the incident and that he was aware of the card being in the ATM at the time of the incident.<sup>11</sup> Also, he admitted in cross-examination that he 'had no real conversation with Mr Tonkin prior to removing him'.<sup>12</sup>
- 28) Of significant concern is Mr Brown's apparent reluctance to accept any culpability. It was the evidence of Mr Brown that Mr Tonkin 'should not have been there'.<sup>13</sup> Mr Brown did concede however when questioned by the Commission that he "would not do that stuff anymore".<sup>14</sup>

*Mr Graham*

- 29) Valuable evidence was given by Mr Paul Graham as an experienced trainer of security personnel and crowd controllers. Mr Graham was able to demonstrate to the Commission various holds and practices that he taught and recommended. Mr Graham stated the ground stabilisation technique used by Mr Brown was not a recognised technique.<sup>15</sup>
- 30) Mr Graham was of the opinion that the crowd controllers were not co-ordinated in the way they dealt with Mr Tonkin and was of the opinion that Mr Brown was not trying to ground stabilise Mr Tonkin. Mr Graham was not aware that Mr Brown had previously given evidence that he was in fact trying to ground stabilise Mr Tonkin.
- 31) Mr Graham was only able to comment on the footage supplied as there was no audio available of the interactions between the crowd controllers and Mr Tonkin. Mr Graham did agree that Mr Tonkin did not seem drunk in the footage and was not demonstrating obvious signs of aggression.<sup>16</sup> Mr Graham did concede that it *may* have been more appropriate for Mr Tonkin to have been allowed to remove his card from ATM.<sup>17</sup>

*Monsoons' Staff*

- 32) Statutory declarations were supplied by two female staff of Monsoons Ms Colton and Ms Foster. Neither was called by Mr Rowbottam to support their statements which were at best self-serving and did not match the CCTV footage provided of the incident. The Commission rightfully placed little weight on their statements.

*CCTV Footage*

- 33) As noted by the Commission the most persuasive evidence arguably came from the CCTV footage of the event. It clearly showed Mr Tonkin and his dealings with the other crowd controller who refused his entry to the premises, his subsequent sneaking into the premises and his eviction.
- 34) The footage was irrefutable evidence that Mr Brown did not engage with Mr Tonkin inside the premises as required and that his subsequent eviction was unnecessarily forceful and violent. What was clear in the footage was the significant damage to Mr Tonkin as a result of his being driven into the concrete something that arguably could have been avoided had Mr Brown acted in a professional and correct manner.
- 35) It is respectfully submitted that any consideration as to penalty should be done in the context of the behaviours demonstrated by each of the participants, Mr Tonkin, Mr Brown and the other crowd controller. The only aggressors in the footage are Mr Brown and the other crowd controller.

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<sup>11</sup> P Timney, above n2 at [32].

<sup>12</sup> P Timney, above n2 at [34].

<sup>13</sup> P Timney, above n2 at [80].

<sup>14</sup> P Timney, above n2 at [31].

<sup>15</sup> P Timney, above n2 at [39].

<sup>16</sup> P Timney, above n2 at [43].

<sup>17</sup> P Timney, above n2 at [44].

## History of the Licensee

- 36) Mr Brown has not appeared before the Commission previously and has held a Northern Territory licence since June 2007. Accordingly Mr Brown should be afforded the benefit of coming before the Commission for this matter with an unblemished record.

## Previous Decisions

- 37) Recently the Commission has dealt with a number of events from the one licensed premises being Monsoons. Of note a determination of the Commission in relation to licensed crowd controller Mr Andrew Staib on 1 July 2011 imposed a one (1) month suspension of licence for his use of undue force.
- 38) In that matter Mr Staib was involved in two incidents where each time the patrons were aggressive and violent and had been asked to leave the premises. This current matter distinguishes the Staib matter as Mr Tonkin was not violent or aggressive at any time, had not been asked to leave and suffered significant harm which did not happen in the Staib matter.<sup>18</sup>
- 39) An earlier matter involving Mr Mark Creagh determined 7 December 2010 also distinguishes this matter in that the patron was aggressive, intoxicated and refused to leave the premises once directed. There was no harm suffered by the patron who was later placed into protective custody by police as a result of his behaviour. Mr Creagh was suspended for a period of seven (7) days.
- 40) In 23 July 2008 Presiding Member Short found the Licensee Mr Vanny Mann was not an appropriate person to hold a licence under the *Private Security Act*. As a result of Mr Mann's non-appearance and expiration of his licence Ms Short determined that Mr Mann not be eligible to hold a licence for a period of 10 years. This matter also involved an allegation of actions which were taken as an assault on patrons at licensed premises in the company of others.
- 41) Given the significant harm to Mr Tonkin in this current matter the Commission may be satisfied that Mr Brown's actions must be held at the higher end of the scale warranting *at minimum* a substantial period of suspension of licence.

## Conclusion

- 42) The Supreme Court of the Northern Territory in the matter of *O'Neill Hotel Management Services P/L v NT Liquor Commission*<sup>19</sup> described the Commission's role as "in exercising its powers with respect to breaches under the Act is essentially one of protection of the public"<sup>20</sup> any penalty imposed should therefore be designed to give effect to that purpose.
- 43) Pursuant to Section 53D(1)(f) the Commission has the power suspend a licence or cancel a licence under Section 53D(1)(g) where the Licensee has contravened the Act<sup>21</sup> and the Commission is satisfied that the contravention is of sufficient gravity to justify the relevant determination.
- 44) The general principles of sentencing consider deterrence in respect to both specific and general. General deterrence is imposed to dissuade potential offenders for engaging in the unlawful conduct by the threat of anticipated punishment.<sup>22</sup> Specific deterrence is designed to be punitive upon the offender and provide deterrence for future actions.<sup>23</sup>

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<sup>18</sup> It is not in dispute that he was refused re-entry by Mr Hocking.

<sup>19</sup> *O'Neill Hotel Management Services P/L v NT Liquor Commission* [1999]NTSC 124

<sup>20</sup> *O'Neill Hotel Management Services P/L v NT Liquor Commission* [1999]NTSC 124, at [60].

<sup>21</sup> *Private Security Act (NT)*, s53D(1).

<sup>22</sup> R Edney and M Bagaric, *Australian Sentencing Principles*, (2007) at [3.3.1].

<sup>23</sup> *Ibid.*

- 45) It is respectfully submitted that the intentional attempt to shift blame onto Mr Tonkin for the events by stating 'he shouldn't have been there' demonstrates a lack of comprehension on the part of Mr Brown of his duty and responsibilities as a crowd controller. From this it may be argued the need for specific deterrence in this matter is greater than the general deterrence. Any penalty imposed should rightly reflect the issues and seriousness nature of the offending as outlined above.
- 46) When sentencing along with the deterrence considerations there is the principle of proportionality, which is making the punishment fit the crime.<sup>24</sup> The High Court held in *Hoare*:
- A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.*<sup>25</sup>
- 47) In consideration of the objective circumstances in this matter, namely the actual significant physical harm suffered by Mr Tonkin it may be taken this is at the highest level in terms of offending. Mr Brown's own evidence that Mr Tonkin 'shouldn't have been there' is in my respectful submission of great significance. In effect this may be argued to be apportioning the blame for the Licensee's actions upon the victim Mr Tonkin. There are arguably sufficient grounds to justify a cancellation of licence in this matter.
- 48) Had Mr Brown been charged for assault in a criminal jurisdiction the fact Mr Tonkin suffered harm would upon conviction prevent Mr Brown from being a Licensee. Regulation 3 of the *Private Security (Crowd Controllers) Regulations* prescribes that criminal offence<sup>26</sup> as being a disqualifying offence effectively cancelling his licence and preventing him from being a Licensee for a period of ten years.
- 49) Mr Brown has not previously appeared before the Commission for like matters and has not come to the attention of Inspectors since the event. Given Mr Brown's unblemished history and that this is a single event with no subsequent offending there is arguably an entitlement to some mitigation in penalty.
- 50) From this and the powers as outlined it is submitted that the Commission may be satisfied that sufficient gravity exists for an actual suspension of licence to be imposed as the appropriate disposition. Further, the aggravating factors would support a period of several months' suspension.
- 51) It is on this basis that it is respectfully submitted the Commission be minded to impose a period of suspension of not less than six (6) months to be actually served. I thank you for your consideration of these submissions.

## **Submissions made on behalf of Mr Brown**

- 52) With respect to penalty in this matter I will briefly reply to the submissions of Mr Wood on behalf of the Director and then provide submissions relating directly to Mr Brown –

## **Submissions on Penalty of the Director**

- 53) The many references by the Director to criminality and criminal actions are unhelpful, irrelevant and liable to lead the Commission into error.
- 54) This is not a criminal proceeding and references to "assault" and other criminal law terms are as unhelpful as the attempt by the Director to inappropriately persuade the Commission

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<sup>24</sup> R Edney and M Bagaric, n 21 at [15.5].

<sup>25</sup> *Hoare v The Queen* (1989) 167 CLR 348 at [354].

<sup>26</sup> *Criminal Code* (NT), s188(2).

what facts the Commission found in the matter. That is solely the province of the Commission, having heard the evidence.

55) In the limited role of the Commission in these matters (i.e. protection of the public) it is not for the Commission to determine the “criminality”. Venturing down that path will lead the Commission into appealable error. Such a request by the Director is blatantly irregular. The Director’s recitation of the procedure and history of the complaint is equally is entirely irrelevant.

56) The only comment of relevance by the Director is that the Commission has determined that:

*‘no interpersonal techniques were engaged by Mr Brown...when they approached Mr Tonkin at the ATM and placed him in restraining holds. Nor was it apparent that Mr Brown...engaged in any conversation with Mr Tonkin prior to applying the restraining holds.’<sup>27</sup>*

57) Mr Brown also failed to release Mr Tonkin once he had been removed into the street and off the premises. It was determined that there existed no circumstances that would prevent the release of Mr Tonkin by Mr Brown and that *‘he should have been released immediately once he was on Nuttall Street’*.<sup>28</sup> That, and only that finding is what the Commission is entitled to penalise Mr Brown for, combined with the ultimate “sweeping motion” that resulted in Mr Tonkin hitting the pavement as shown in the video.

58) As to the Director’s submission on harm, the un-contradicted evidence from the report of Dr Stone indicates Mr Tonkin had;

*‘Several superficial abrasions on nose, chin and right cheek. 2 cm deep laceration on right upper lip.’<sup>29</sup>*

59) The Director seems to equate this with harm at the higher end of the scale. Clearly it is not. Far from it. For the Commission to be invited to find anything else is, again, to invite the Commission into error.

60) The evidence does not support the report of the complainant’s family friend Dr Elizabeth Moore (in any event it is described as a “**possible** amplification of a pre-existing back injury as a result of the incident” and therefore cannot satisfy the requisite standard of proof). Given the equivocal responses from Mr Tonkin on this point the Director failed to call Dr Moore and consequently did not satisfy the requisite standard of proof.

61) That Mr Brown chose to contest the proceedings is not surprising in the circumstances. The Director however appears to confuse basic concepts of a “failure to plead guilty” with the imposition of an otherwise harsher penalty. The fact that a person may not admit a charge does not entitle the tribunal to increase a penalty. It merely disentitles a person from receiving mitigation on account of a plea – which is often between 20-25%. It does not entitle the Commission to “add” a further penalty.

62) Any suggestion by the Director to the contrary is in error and contrary to an abundance of basic trite law.

63) As to the Director’s unhelpful recitation of the evidence of each of the witnesses, what cannot be in dispute is that Mr Brown (and for that matter Mr Hocking) fell with Mr Tonkin. However ill-advised the ultimate “sweeping” manoeuvre was, it is clear that the consequences were accidental and not intended. Indeed that was not even contested by the Director in cross-examination. All three men fell to the ground. Mr Brown sustained injuries to his knee area. Mr Hocking can be seen clutching at the car for support.

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<sup>27</sup> P Timney, above n2 at [77].

<sup>28</sup> P Timney, above n2 at [84].

<sup>29</sup> Hearing Brief - Folio 84.

- 64) It is clear (and indeed uncontested in the evidence) that an ill-conceived attempt at ground stabilisation went horribly wrong. The evidence of Mr Brown on this point was never challenged. Mr Brown falls to be penalised by what he subjectively intended.
- 65) The suggestion by the Director that Mr Brown requires, in any fixing of penalty, a measure of specific deterrence is again, liable to lead the Commission into appealable error. Specific deterrence is designed to specifically punish those who are, for instance, likely to re-offend or who have a history of offending. In the circumstances here, such a submission is ill-conceived.
- 66) The Director suggests “*Mr Brown has not appeared before the Commission previously and has held a Northern Territory licence since June 2007. Accordingly Mr Brown should be afforded the benefit of coming before the Commission for this matter with an unblemished record.*” However, the Director neglects to acknowledge that Mr Brown had, for many years before, an equally unblemished record in Queensland. A total of almost 10 years in a difficult and taxing industry. That can only show that specific deterrence ought play no part in the penalty as Mr Brown is likely not to return before the Commission. Even when questioned by the Commission Mr Brown acknowledged, with the benefit of hindsight that he would not continue with the same sort of actions.

## Previous Decisions

- 67) The Director refers to only three decisions - Staib, Creagh and Mann as “comparative sentences”. All three decisions can be distinguished by the *conduct* on the part of each of those crowd controllers. The decision of the Commission in relation to Mr Andrew Staib on 1 July 2011 imposed a one (1) month suspension of licence for his use of undue force. That matter involved two separate where Staib deliberately punched and head-butted patrons and grabbed them by the throat. In the second incident he took part in a melee. All the time whilst acting in his capacity as a crowd controller.
- 68) The matter involving Mr Mark Creagh determined by the Commission on 7 December 2010 also involved a punch, of such a magnitude that the victim who was standing of him near the entrance to Lost Arc, was propelled so as to land off the sidewalk and “onto his back on Mitchell Street whilst vehicles were passing”. In any description, a king hit of the type that has become so notorious for exacting severe damage and even killing. Mr Creagh was suspended for a period of seven (7) days.
- 69) The finding in 23 July 2008 that Mr Vanny Mann was not an appropriate person to hold a licence under the *Private Security Act* was as a result of Mr Mann’s non-appearance and expiration of his licence. The Commission has always dealt with the non-appearance of Licensee’s differently so as to protect the public in circumstances where the Commission has no evidence to the contrary. Those cases cannot be compared to this matter.
- 70) The Director, conclusion to his submissions comparing cases erroneously points to the harm as being the determinative factor, rather than the subjective intent as detailed above.
- 71) The matters of Saner Chaiyapoe, involving a deliberate kick to the head (and resulting in three days suspension), Gene Hocking, again a sweeping motion with his legs to drop a patron (a caution), Darren Baillie who slapped or punched an indigenous woman (and was fined) all involved deliberate use of excessive force.
- 72) None of these penalties came near the Director’s suggested “6 months” suspension. Such a penalty is unheard of and has not been justified by the Director on any basis. The imposition of such a penalty would be in error for a crowd controller who has an otherwise unblemished record of almost ten years.

## Mr Brown’s Personal Circumstances

- 73) The income from this employment is Mr Brown’s only income. He is the sole bread-winner for his family having a partner and three young children. He instructs that he is struggling to

make ends meet given the high cost of accommodation in Darwin. Any period of suspension will have a grave effect on him. Of note too is the fact that he has never had a complaint of any sort made against him in an industry where he is one of the longest licence holders.

## Conclusion

- 74) Mr Brown's only intent at all times was to escort, off the premises, a patron who had come onto premises when specifically excluded. It is clear from the video that the injuries to Mr Tonkin were not intended. For all the reasons set out above, any penalty therefore ought be less than many of the cases mentioned above.

## Consideration of the Issues

- 75) By decision dated 24 April 2012, the Commission found that Mr Brown in his capacity as a licensed Crowd Controller used excessive force in his dealings with Mr Tonkin at Monsoons on 6 May 2011. The Commission was satisfied that Mr Brown used excessive force when he, in company with Crowd Controller Gene Hocking, applied the wrist lock on Mr Tonkin, when he failed to release Mr Tonkin once he was outside the premises and when he carried out an ill-conceived and defectively executed ground stabilisation technique. Consequently the Commission found that Mr Brown breached sub-Section 19(2)(c) of the Act, with reference to Clause 3.13 of the Code of Practice for Crowd Controllers, in that he used undue force in the course of his duties as a Crowd Controller on that date.
- 76) Having reached that determination the Commission is now tasked with determining the appropriate penalty to be applied for the breach, taking account of the seriousness and foreseeable consequences of the offending. As a starting point the Commission is of the view that, regardless of the consequences of Mr Brown's actions, this offence is at the serious end of the scale for the simple reason there was no need for Mr Brown or Mr Hocking to use any force whatsoever in their dealings with Mr Tonkin on the night in question.
- 77) Mr Tonkin conceded consistently and frankly that he should not have been inside Monsoons when he was approached by the security officers, having been refused entry earlier in the evening. However, at the time he was placed in the restraining locks by Mr Brown and Mr Hocking the CCTV footage shows clearly that he was not displaying any signs of aggressive behaviour such as to warrant any form of physical restraint whatsoever.
- 78) Similarly, once Mr Tonkin was removed from the premises there was no need for the Crowd Controllers to continue to restrain him and he should have been released immediately once he was on the footpath in Nuttall Street. Mr Rowbottam went to some lengths to convince the Commission that Mr Tonkin was acting in an aggressive manner at various times throughout the evening, including when he was being restrained outside Monsoons, and that the actions of the Crowd Controllers were justified and as a result Mr Tonkin needed to be ground stabilised.
- 79) The evidence presented by the CCTV footage does not support that contention and the Commission prefers the evidence of Mr Tonkin that he simply resisted being directed by the Crowd Controllers towards the dark end of Nuttall Street because he feared for his personal safety. The Commission considers that reaction to be understandable given the manner in which Mr Tonkin was physically restrained without first being afforded the opportunity to leave the premises of his own accord.
- 80) During the first day of the hearing Mr Rowbottam sought an adjournment to allow for Ms Laura Foster, the Duty manager at Monsoons on the night, to be called to give evidence as to the aggressive manner in which Mr Tonkin was behaving on that night. Ms Foster's evidence was described as being "crucial" to Mr Brown's defence of the allegations. Despite the Commission granting 2 adjournments to allow Ms Foster to be called this did not occur. It was made clear by Inspector Wood during the course of the Hearing that

should Mr Brown intend to rely on the Statutory Declaration of Ms Foster then he required her to be called for cross examination.

- 81) Allowing for the fact the Ms Foster was not called to give evidence the Commission accepts Inspector Wood's submission that her statement should be disregarded in its entirety.
- 82) There was no other evidence presented to the Commission indicating that Mr Tonkin was acting in an aggressive manner towards Mr Brown or Mr Hocking. Mr Brown was unable to give evidence to that effect and the CCTV footage viewed by the Commission gave no indication that Mr Tonkin was acting in a threatening manner. In fact, in the earlier incident when Mr Tonkin was speaking with Mr Hocking after he had been refused entry he appeared to be calm and stood with his hands in his pockets for the majority of the time. In those circumstances the Commission is at a loss to understand how the Crowd Controllers came to the conclusion Mr Tonkin was an aggressive patron such that it was necessary to use physical force to restrain him and forcibly remove him from the premises.
- 83) Mr Tonkin's evidence was that he re-entered Monsoons to retrieve some personal property. Mr Hocking was not prepared to assist in that regard when asked to so by Mr Tonkin. Similarly, when Mr Tonkin was restrained he was standing next to the ATM and had activated his card by entering the PIN. He stated in evidence that he asked to be allowed to remove his card before being ejected and the Crowd Controllers refused. Mr Tonkin stated that had he been permitted to retrieve his card when would have left the premises of his own free will and without the need for any physical intervention. Unfortunately he was not afforded that opportunity and, as a result of the force used by the Crowd Controllers, his night on the town ended with his being conveyed to hospital with significant injuries to his face.
- 84) One of the main functions of Crowd Controllers is to defuse the potential for the safety of patrons to be put at risk. In this case Mr Brown, by not communicating with Mr Tonkin at all, escalated what was a non-aggressive situation into one where a patron received significant injuries.
- 85) Mr Brown, on his own evidence, did not engage in any conversation with Mr Tonkin prior to applying the wrist restraints. He was asked on several occasions by Commissioners why he felt the need to use physical force to restrain Mr Tonkin. His response was consistent, namely that "He (Mr Tonkin) should not have been there". Put simply, that is far from sufficient reason for a Crowd Controller to use physical force. The Commission also notes that Mr Brown demonstrated no sympathy for Mr Tonkin nor did he demonstrate any sign of remorse during the Hearing, nor in Mr Rowbottam's submissions, for the injuries suffered by Mr Tonkin as a result of his and Mr Hocking's actions. This gives the Commission little comfort in terms of the potential for Mr Brown to offend again should similar circumstances arise in the future.
- 86) The fact that Mr Tonkin was not more seriously injured is, in the Commission's view, a result of good fortune and not as a consequence of any care shown towards his safety by the Crowd Controllers. The technique applied by Mr Brown and Mr Hocking was fraught with danger and, on the evidence of Mr Graham, was not a recognised ground stabilisation technique, despite Mr Brown's assertions to the contrary. The Commission notes the submission that it was not intended by Mr Brown that Mr Tonkin would be driven head first into the footpath and that the incident was merely an unfortunate accident. However, it is difficult to assess what else would have occurred in circumstances where Mr Tonkin's arms were completely restrained and he was deliberately tripped by Mr Brown and Mr Hocking.
- 87) Mr Rowbottam submitted that Mr Tonkin's fall to the pavement was an unfortunate accident and noted that Mr Brown also fell to the ground and Mr Hocking was required to reach out for a parked car to steady himself. Fortunately for Mr Hocking he was able to do so as he had a free arm. Similarly Mr Brown was able to take some action to break his fall. Mr Tonkin, on the other hand, was not as fortunate as both his arms were being restrained and he had no means of preventing his face being driven into the footpath. The Commission takes some comfort from the evidence of Mr Graham that the technique used by Mr Brown

and Mr Hocking was not a recognised ground stabilisation technique and one that was fraught with danger both for the Crowd Controllers and the patron. The Commission takes no comfort from Mr Brown's evidence that he was employing a recognised technique and one that was necessary in the circumstances.

- 88) The Commission has routinely stated that it will impose periods of actual suspension of licence where a Crowd Controller uses force that is more than what is required to control a particular situation. In this instance the Commission is satisfied that the use of force against Mr Tonkin was totally unjustified. In the Commission's view the situation could have been resolved by communication and without any physical intervention at all. That was Mr Tonkin's evidence and Mr Brown was unable to refute that evidence as he clearly made no attempt to diffuse the situation via communication or non-physical means. In those circumstances the Commission views Mr Brown's actions as being at the more serious end of the scale of offending such that an actual suspension of licence is the appropriate penalty.
- 89) The Commission considers Mr Brown's failure to engage in any conversation with Mr Tonkin as being completely inappropriate behaviour and contrary to the requirements under the Code of Practice for Crowd Controllers to at least attempt to engage in mediation and non-violent resolutions, as required by Clauses 3.15 and 3.16.
- 90) Inspector Wood submitted that, given the seriousness of the offence, the appropriate penalty would be for Mr Brown's licence to be suspended for a period of 6 months. He also submitted that the penalty applied should involve an element of specific deterrence on the grounds that Mr Brown had displayed little remorse for his actions and appeared unwilling to accept any culpability for his actions and the injuries suffered by Mr Tonkin. The Commission accepts that submission and agrees that the penalty must take account of Mr Brown's failure to acknowledge that his actions were not only unwarranted but also amounted to a clear breach of the Code of Conduct for Crowd Controllers.
- 91) The Commission was referred to a number of its previous decisions concerning the use of unreasonable force by Crowd Controllers, by Inspector Wood and Mr Rowbottam. As would be expected, previous penalties applied by the Commission vary considerably depending on the individual circumstances of the incident under consideration and the degree of offending. Several of these decisions are readily distinguishable on the basis of Crowd Controllers reacting to aggression demonstrated by patrons. That factor is not applicable in this instance as Mr Tonkin was displaying no signs of aggression as evidenced by his own testimony at the Hearing, by the CCTV footage and by Mr Brown's failure to point to any aggressive behaviour on Mr Tonkin's part.
- 92) The Commission is of the view that the offending on the part of Mr Brown and the use of physical force in circumstances where none was required militates towards the imposition of a significant period of suspension of licence. The Commission is of the view the starting point in this case is a suspension of licence of Mr Brown's Crowd Controller licence for a period of 6 months.
- 93) The Commission notes Inspector Wood's submission that Mr Brown contested the complaint and, as a result, is not entitled to the benefit of a discount on penalty that would normally apply in the case of an admission to the offending at the first available opportunity. The level of harm suffered by Mr Tonkin is also a factor that the Commission takes into account in determining the appropriate penalty. The Commission does not accept the inference that Mr Tonkin's injuries were insignificant or superficial. The fact that he did not suffer more serious injuries was in no part attributable to any care shown for his wellbeing by Mr Brown.
- 94) The Commission does however accept the submission on the part of both parties that Mr Brown is entitled to a discount of penalty on the basis of his unblemished record in the security industry over a significant period of time totalling almost 10 years in the Northern Territory and Queensland. The Commission also notes Mr Rowbottam's submission that security work is Mr Brown's only source of employment and that his is the sole bread-

winner for his family and agrees that the penalty should not be one that is crushing or such as to cause undue financial hardship in that regard.

- 95) Having said that the Commission is also mindful of the reasons for the requirement for Crowd Controllers to be licensed and to operate in a regulated environment. They operate in an environment where the safety of patrons, and Crowd Controllers themselves, is often put at risk by unruly and aggressive patrons. Crowd Controllers are authorised to use physical force when the circumstances of a given situation dictate that force is necessary to prevent injury to other patrons or the Crowd Controller themselves. Those factors were not present in the situation involving Mr Tonkin and Mr Brown with the result that the penalty imposed on Mr Brown must be such as to reflect the seriousness of the offending as well as the serious repercussions that can arise from the unwarranted use of force.
- 96) The Commission expresses its significant concern at Mr Brown's insistence that the leg sweeping technique used to ground stabilise Mr Tonkin was appropriate and necessary. The Commission does not agree with that assertion on either count. Mr Graham, whom the Commission was asked to treat as an expert on Crowd Controller training, was clear in his evidence that the technique used by Mr Brown and Mr Hocking was not a recognised technique and one that was fraught with danger, both for the patron and the Crowd Controllers. Mr Brown's insistence that the technique was legitimate, despite the expert evidence, is of significant concern and gives the Commission little comfort in terms of the potential for Mr Brown to engage in similar practices in the future. His comment that he "would not do that stuff anymore" provides little comfort in that regard and, in fact, reinforces the Commission's view that Mr Brown has learnt little from this incident in terms of what is appropriate behaviour for a Crowd Controller.
- 97) The Commission also notes the evidence presented by Mr Graham and his concerns that, under the current licensing regime for Crowd Controllers, there is no requirement for Crowd Controllers to undergo refresher training or to update their skills following the initial entry requirement training. Mr Brown conceded during the Hearing that he has had no formal training in crowd controlling techniques since being granted a licence in Queensland some ten years ago.

## Decision

- 98) The Commission has found that Mr Joseph Brown has breached sub-section 19(2)(c) of the Act, with reference to Clause 3.13 of the Code of Practice for Crowd Controllers, in that he used undue force in the course of his duties as a Crowd Controller in attempting to remove Mr Tonkin from the Monsoons premises on 6 May 2011. The undue force identified by the Commission includes the application of wrist locks when Mr Tonkin was stranding by the ATM, the failure to release Mr Tonkin once he was off the premises and the ill-advised and poorly executed ground stabilisation technique.
- 99) Mr Brown currently holds a dual licence enabling licensed employment as a Crowd Controller and as a Security Officer. The penalty imposed as a result of the breaches is applicable only to the Crowd Controller component of the licence, being the activity that Mr Brown was engaged in when the incident occurred. The Commission is advised that security work is Mr Brown's only source of income and, whilst it is open to the Commission to suspend both arms of the licence, it does not intend to do so in this instance so as to allow Mr Brown to continue to earn a living.
- 100) Accordingly, the Commission determines, pursuant to Section 53D(1)(c) of the Act, that the appropriate penalty is a suspension of Mr Brown's Crowd Controller licence for a period of 6 months from the date of publication of this decision. During that period Mr Brown must not work as a Crowd Controller however he may engage in duties during that period as a Security Officer.
- 101) The Commission also determines to suspend the final three months of that penalty on the condition that Mr Brown demonstrates, to the satisfaction of the Director of Licensing, that

he has undergone formal refresher training in the area of “Controlling Persons Using Open Hand Techniques” or a similar course covering the same competencies. Should Mr Brown decline the opportunity to undergo such training his Crowd Controller licence will remain suspended for the full six month period.

Philip Timney  
Presiding Member

28 June 2012