

# NORTHERN TERRITORY LIQUOR COMMISSION

## DECISION NOTICE

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**MATTER:** DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

**REFERENCE:** LC2018/162

**LICENCE NUMBER:** 80102044

**LICENSEE:** J AN R Jenkins Pty Ltd

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

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

**HEARD BEFORE:** Mr Russell Goldflam (Acting Deputy Chairman)  
Ms Pauline Reynolds (Health Member)  
Mr Blair McFarland (Community Member)

**DATE OF HEARING:** 11 February 2019

**DATE OF DECISION:** 15 February 2019

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### **DECISION**

1. On 11 February 2019, the Northern Territory Liquor Commission ("the Commission") dismissed a complaint against J AN R Jenkins Pty Ltd ("the Licensee"). These are the reasons for that decision.

### **REASONS**

#### **BACKGROUND FACTS AND FINDINGS**

2. On the basis of unchallenged evidence adduced at the hearing, the Commission is comfortably satisfied of the following facts, which are not in contention.
  - a. The Licensee is the holder of Public Hotel Liquor Licence 80102044 ("the licence") over premises in the main street of Tennant Creek ("the Tennant Creek Hotel"). The licence authorises trading in various areas, including the Faye Lewis Lounge Bar and Bineveski Beer Garden on weekdays between noon and one minute to midnight.

- b. At about 7:23 pm on Thursday 1 March 2018, a casually dressed adult Indigenous female of medium height and slight build ("JB") entered the Tennant Creek Hotel. At the entrance, JB interacted momentarily with a staff member, Elliott Jenkins, who was on security. He did not bar her entry.
- c. JB walked directly into the Faye Lewis Lounge Bar, stopped briefly to greet two male patrons, went into the female toilet in the gaming machine area of the hotel at 7:24 pm, and about a minute later left the toilet and walked into the Bineveski Beer Garden.
- d. At 7:29 pm, while still in the Bineveski Beer Garden, JB was directed to leave the premises by a senior compliance officer from Licensing NT, who was accompanied by two police constables ("the inspection party"), whereupon JB walked directly out of the hotel, followed by the inspection party.
- e. Before JB was directed to leave, neither the Licensee nor any of its employees noticed signs that she was or might have been drunk.
- f. The three inspection party members then interviewed JB on the footpath outside the entrance to the hotel for about 30 minutes. During the conversation, two other licensing inspectors approached and joined the group. Approximately nine minutes of the conversation were recorded by a police officer using Body Worn Video ("BWV").
- g. JB was distinctively dressed, and her activities in the Faye Lewis Bar, the gaming machine area and on the footpath are clearly visible from both the BWV, and from CCTV footage that Licensing NT subsequently seized from the Licensee.<sup>1</sup> JB's voice when she conversed with members of the inspection party in the street was clearly audible from the BWV.
- h. On 9 March 2018, in accordance with s68(2) of the Act, Licensing NT Senior Compliance Officer Holly Sowerby lodged a signed complaint ("the Complaint") in the approved form with a Delegate of the Director-General of Licensing ("the Director-General"). The Complaint identified the alleged contravention as being a breach of s121(1) of the Act, which provides that a licensee or employee of a licensee must remove a person on the premises who is drunk.
- i. On the same day, 9 March 2018, a Delegate of the Director-General accepted the complaint and wrote to the Licensee, informing it of the grounds of the complaint and providing the Licensee with an opportunity to respond to the complaint.
- j. On 21 March 2018 the Licensee's nominee responded in writing. In his response, the nominee took issue with the allegation that JB had been drunk, and provided a statutory allegation by JB dated 12 March 2018 and witnessed by the nominee.
- k. On 20 July 2018, Ms Sowerby, having obtained further statutory declarations from members of the inspection party, completed her investigation and submitted a report to the Director-General.

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<sup>1</sup> CCTV footage of JB in the beer garden was also produced to the Commission, but was of limited evidentiary value because of its poor quality.

- I. On 19 December 2018, the Director-General referred the complaint to the Commission for disciplinary action pursuant to s68(5)(b)(iii) of the Act.
3. No explanation has been provided to the Commission for the delay from 20 July 2018 to 19 December 2018. As the Commission has determined to dismiss the complaint on substantive grounds, it is unnecessary for the Commission to consider the significance of this delay.

## **THE HEARING**

4. The matter proceeded as a public hearing on 11 February 2019 at Alice Springs. Ms Morley appeared on behalf of the Director-General. The Licensee's nominee Mr Jordan Jenkins appeared for the Licensee, accompanied by Mr John Jenkins, a principal of the Licensee, and Mr Elliott Jenkins, a staff member of the Licensee. The Commission was informed that Jordan, John and Elliott Jenkins were all available to give evidence. The Commission thanks both Ms Morley and Messrs Jenkins for their attendance and assistance.
5. The Director-General tendered the brief of evidence that had accompanied the referral to the Commission made on 19 December 2018, and the brief was admitted as evidence without objection by the Licensee. The brief included statements by police officers, Licensing NT officers and JB, the CCTV footage and the BWV footage. No other evidence was called by the Director-General.
6. At the close of the Director-General's case, the Commission indicated that it was minded to dismiss the complaint, and thereupon the Licensee elected not to call any of the three witnesses in attendance and available to give evidence on behalf of the Licensee.
7. At the hearing, the only contentious issue of substance that emerged was whether JB was drunk.

## **THE LAW**

8. Section 121(1) of the Act provides:

A licensee or employee of the licensee must, or an inspector or police officer may, exclude or remove a person, not being a bona fide resident of the licensee's licensed premises, from the licensed premises if the person is drunk, violent, quarrelsome, disorderly or incapable of controlling his or her behaviour.

9. Section 7 of the Act provides:

### **Meaning of *drunk***

A person is ***drunk*** if:

- (a) the person's speech, balance, coordination or behaviour appears to be noticeably impaired; and
- (b) it is reasonable in the circumstances to believe the impairment results from the person's consumption of liquor.

10. In *Northern Territory Liquor Commission and Others v Rhonwood Pty Ltd* (1997) 6 NTLR 209; 117 NTR 1 ("*Rhonwood*"), the Full Court of the Supreme Court of the Northern Territory (per Martin (BF) CJ, Bailey J and Morling AJ) considered the construction of s121 of the Act. As then in force, s121(1) was substantially similar to s121(1) as currently in force. *Rhonwood* is authority for the following statements of law:

- Section 121(1) imposes a duty on a licensee which they must discharge personally or by their employees or agents, to remove a drunk person from their licensed premises.
- The proper conduct of licensed premises is of such public importance that licensees who are granted the privilege of selling liquor can reasonably be expected to assume responsibility for the acts of their employees when selling liquor on their behalf.
- A licensee can not avoid responsibility for having drunk persons removed from their premises merely by absenting themselves therefrom.
- Section 121(1) imposes a strict obligation on licensees to be liable for the failure of their employees to remove drunk persons from their licensed premises.

11. The Commission proceeds on the basis that the standard of proof enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is applicable to the determination of complaints under s69 of the Act.

## THE EVIDENCE

12. The Commission summarises the evidence adduced in relation to the sole contentious issue as follows:

- Constable Bruce Atkinson, a member of the inspection party, deposed a statutory declaration on 15 June 2018, to which he appended what appear to be contemporaneous notes, which record that he observed JB to be "heavily intoxicated... had 12 full strength VB stubbies... stumbling, unsteady on her feet, slurred speech." In his statutory declaration, however, Atkinson records that JB said she had consumed about half a bottle of rum and a 24 pack.
- Licensing NT Principal Compliance Officer Anthony O'Donohoe, a member of the inspection party, deposed a statutory declaration on 18 June 2018 in which he states that he observed JB "swaying slightly and she had glazed eyes... her speech was slurred.... She claimed she had drunk three beer cans then she changed her answer to six."
- Licensing Inspector Christopher Wade deposed a statutory declaration on 13 March 2018 stating that he observed JB on the footpath being interviewed by members of the inspection party "swaying slightly, her eyes were slightly glazed and her pupils dilated. She spoke reasonably well but did slur on occasion. When asked how much she had drunk [sic] she gave answers which then changed...".
- Licensing Inspector Brian Wingrove deposed a statutory declaration on 1 May 2018 stating that he observed JB on the footpath being interviewed by members of the inspection party "unsteady on her feet and swaying around... responses were often delayed and answers varied."
- Various members of the inspection party deposed that JB was breath-tested on the footpath by a police officer, with a reading of 0.247%.

- JB deposed a statutory declaration on 12 March 2018 stating that earlier that day she had shared "a 24 carton of VB and 2 chardonnay with a group of about 7 or 8 other people." She denied being drunk, and stated that she was frightened by being asked "lots of questions for a long time" by "about 8 men standing around me asking me questions, some where [sic] in Police uniform, some weren't." She stated "I have red eyes a lot and have seen doctors for this". She denied staggering.
- The CCTV footage provides a continuous visual record of JB's conduct during the period of approximately seven minutes when she was on the premises (except when she was in the toilet). The Commission viewed this footage and was unable to discern from it any noticeable impairment of JB's balance, coordination or behaviour. In particular, when JB left the premises, she marched out in a manner which appeared to be purposeful, deliberate and efficient.
- The BWV footage provides a clear audio record of JB's speech when being interviewed by the inspection party on the footpath. The Commission viewed this footage, and was unable to discern from it any noticeable impairment of JB's speech. She spoke articulately in an accent characteristic of Indigenous people from the Barkly region who also speak one or more languages other than English. As the interview progressed, some of her answers were inconsistent.

## **CONSIDERATION**

13. There was no allegation in relation to this complaint that the Licensee had insufficient staff on duty to effectively carry out its duties under s121 of the Act. In addition to Elliott Jenkins at the front entrance to the premises, Jordan Jenkins informed the Commission, and the Commission accepts, that three bar staff were on duty in the Faye Lewis Lounge Bar. Jordan and John Jenkins were both present in the Bineveski Beer Garden during the relevant period. There were only a handful of patrons visible in the CCTV footage of JB's movements on the premises. The Commission is comfortably satisfied that any failure of the Licensee and its employees to notice that JB was drunk was not due to inadequate staffing of the premises at the relevant time.
14. None of the witnesses who provided statements was made available for cross-examination, and accordingly the Commission treats their evidence in respect to the sole issue in contention with caution.
15. The Commission considers that the most salient items of evidence made available to it were the CCTV and BWV footage, which provide an objective and direct albeit necessarily incomplete record of JB's speech, balance, coordination and behaviour at the relevant time. The patent discrepancies between that record and the accounts of some members of the inspection party cause the Commission to experience some doubts about the accuracy of those members' accounts. By contrast, the CCTV/BWV record is generally consistent with the account provided by Licensing Inspector Wade regarding JB's level of drunkenness. Where their accounts differ, the Commission prefers the account of Licensing Inspector Wade to those of the other witnesses.

16. The Commission ascribes very limited weight to the breath test, for the following reasons. Firstly, none of the witnesses deposed that they themselves performed the breath test. Secondly, the officer who performed the breath test was not reliably identified.<sup>2</sup> Thirdly, no authoritative evidence of the result of the breath test (such as a photograph of the device used, showing the reading produced at the time) was adduced. Fourthly, whereas s124B of the Act provides that the results of breath analysis by a breath analysis instrument prescribed for the purposes of the *Traffic Act* are admissible as prima facie evidence in proceedings for an offence against the Act, there is no such provision in relation to the results of a hand-held breath test instrument. Fifthly, there is no evidence that the instrument used was properly calibrated, was operating effectively, was correctly used or was accurate. Sixthly, no evidence was adduced as to the significance of the alleged reading of "0.247%".
17. The Commission finds that JB gave inconsistent accounts of her previous drinking that day, but ascribes limited weight to this as evidence that she was drunk. Although such behaviour might be attributable to drunkenness, it might also be attributable to other causes, including intimidation (as JB herself asserts), confusion, mistake, loss of memory, annoyance, evasiveness, dishonesty or a combination of factors.
18. The statutory definition of "drunk" includes the phrase "appears to be noticeably impaired". The Macquarie Dictionary defines "noticeable" as "able to be noticed; such as to attract notice". The Commission considers that the phrase "appears to be noticeably impaired" connotes a level of apparent impairment greater than slight.
19. The Commission is unable to be satisfied to the requisite standard that JB's speech, balance, coordination and behaviour appeared to be more than slightly impaired. Accordingly, the Commission is not satisfied that JB was drunk, and is not satisfied that the licensee or an employee of the licensee breached their duty to remove a drunk person. It follows that the Commission is not satisfied that the complaint should be upheld.
20. The Commission further considers that pursuant to s121(1AC) of the Act, had the licensee been prosecuted for an offence against s121, the Licensee would have been entitled to defend the charge on the basis that it had a reasonable excuse pursuant to s121(1AC), namely that neither the Licensee nor its employees had a reasonable opportunity to observe JB at close quarters. The Commission considers that this excuse would have been made out, having regard to the facts that the premises were adequately staffed, that JB was on the premises for only seven minutes, that JB did not interact with the licensee or an employee of the licensee longer than momentarily, and that JB did not exhibit any signs of being drunk that would have been apparent to the Licensee's employees. In the context of this complaint, even if the Commission had found that JB was drunk, the presence of this reasonable excuse would, in the view of the Commission, have made it inappropriate to take disciplinary action and, as required by s69(5)(b), the Commission would have dismissed the complaint for that reason.

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<sup>2</sup> Senior Compliance Officer Holly Sowerby, who investigated and laid the complaint but was not an eye witness to the incident the subject of the complaint, deposed a statutory declaration on 4 September 2018 in which she asserts that Constables Atkinson and Benson performed the breath test. Atkinson's statement does not state that he performed the breath test. The brief of evidence does not include a statement by Benson. None of the eye witnesses identify the person who performed the breath test.

## ORDERS

21. The Commission makes the following Orders:

1. The complaint is dismissed.
2. The further hearing of this matter listed for 22 March 2019 is vacated.

## NOTICE OF RIGHTS

22. Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. Any application for review of a reviewable decision must be lodged within 28 days of the date of the decision.

23. The Schedule specifies decisions made pursuant to s68 (“Decision to dismiss complaint” and s69(3) (“Decision to take disciplinary action against licensee”) as reviewable decisions. Section 68 confers power on the Director-General to dismiss complaints against licensees, and accordingly has no application to this decision. Section 69, which is headed “Commission’s power to take disciplinary action” confers on the Commission both the power to uphold a complaint and take disciplinary action (s69(4)(b)(ii)), and the power to dismiss a complaint (s69(4)(b)(i)).

24. However, s69(3), the provision in the Schedule, does not in its terms refer to a decision to either dismiss a complaint or take specified disciplinary action. It provides:

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

25. In this matter, the Commission has decided not to uphold the complaint or to take disciplinary action. It is unnecessary for the Commission, which has not had the assistance of argument on this issue, to determine whether or not this decision is a reviewable decision, and the Commission expresses no view on the issue.

26. If this decision is a reviewable decision, in accordance with section 120ZB(1)(a) and (c) of the Act, the affected persons would be the applicant and the person who made the complaint, namely Holly Sowerby, Compliance Officer, Licensing NT.



RUSSELL GOLDFLAM  
ACTING DEPUTY CHAIRPERSON  
NORTHERN TERRITORY LIQUOR COMMISSION

15 February 2019

On behalf of Commissioners, Goldflam, Reynolds and McFarland