

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER:	DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT
REFERENCE:	2019/1430
LICENCE NUMBER:	80304941
LICENSEE:	Oceanview Developments Pty Ltd
PREMISES:	Darwin River Tavern Lot 2333 Darwin River Road DARWIN RIVER NT 0822
LEGISLATION:	Sections 31A(5)(a) and Part VII of the <i>Liquor Act 1978</i> .
HEARD BEFORE:	Ms Jodi Truman (Deputy Chairperson) Ms Elizabeth Stephenson (Health Member) Ms Sandra Cannon (Community Member)
DATE OF HEARING:	22 January 2020
DATE OF DECISION:	28 January 2020

Decision

1. For the reasons set out below, the Commission upholds the complaint and is satisfied that between 9 and 15 June 2019 the licensee sold liquor to individuals on one hundred and thirty eight (138) occasions without scanning an approved identification of the individual with the scanner contrary to section 31A(5)(a) of the *Liquor Act 1978* ("the 1978 Act").
2. The Commission is satisfied disciplinary action should be taken against the licensee and suspends the condition of the liquor licence relating to Takeaway Hours for a period of 48 hours commencing at 0900 hours on Friday, 28 February 2020.

Reasons

Background

3. Oceanview Developments Pty Ltd ("the licensee") holds the liquor licence for the premises known as Darwin River Tavern ("the premises"), situated at Lot 2333 Darwin River Road, Darwin River NT 0822. The licence was issued on 24 March 2016 and the current Nominee is Ms Fiona Agnes McGregor.

4. On 1 September 2017 the Northern Territory government established the current Banned Drinkers Register (“BDR”), a scheme the purpose of which is to prevent persons identified as harmful drinkers from purchasing liquor. The scheme was supported by s31A of the 1978 Act, which inserted into Northern Territory takeaway liquor licences a condition providing that licensees and their employees must not sell takeaway liquor without scanning a customer’s photographic identification.
5. The scanning device is linked to the BDR, and, if the customer is on the BDR, the seller is alerted and must refuse the sale. As the Commission has previously stated:

“The Commission notes the importance of the BDR provisions under the Act. As has been publically noted many times, there is a significant body of evidence that supports supply reduction measures such as the Banned Drinker Register. Studies have shown there are benefits in banning persons from being able to purchase alcohol including increased venue safety, general risk management, and deterrence of antisocial behaviour. There is also a considerable body of research that shows a strong correlation between alcohol availability and crime, anti-social behaviour and family violence. Reducing access to liquor has demonstrated corresponding reductions in these areas. These provisions form part of the Government’s policies towards making communities safer”¹.

6. On 14 June 2019, Ms Jo Angeles contacted Licensing NT via email and informed Senior Compliance Officer Marco Franchi (“SCO Franchi”) that on Sunday 9 June 2019 she attended with a family member, namely Ms Kez Hall (“Ms Hall”) at the premises to purchase alcohol. Ms Angeles advised that neither she nor Ms Hall were asked to provide an identification document at the time of purchase, however Ms Hall offered and handed over her driver licence to the staff. They then purchased two (2) bottles of wine and a six pack of Jim Beam Cans.
7. The staff member was seen to place Ms Hall’s Driver Licence into the BDR scanner but did not remove the licence from the BDR Scanner following the transaction. Ms Angeles and Ms Hall remained in the store for about one (1) minute before leaving. Ms Angeles stated that in this time period she saw several other people purchase liquor. After exiting the premises and getting into their motor vehicle to leave, Ms Hall realised she did not receive her driver’s licence back following the BDR. As a result, Ms Hall returned inside the premises to retrieve her ID. While waiting in line, Ms Hail saw 3 to 4 other persons purchase alcohol at the register.

¹ Northern Territory Liquor Commission *Disciplinary action pursuant to the Liquor Act: Halikos Hospitality Pty Ltd* (LC2018/054, 2 July 2018) at [37]

8. Upon reaching the register Ms Hall asked for her driver's licence to be returned and saw the staff member retrieve it from the BDR scanner at the register which had just been used for the purchases of a number of other persons. Ms Angeles stated that both she and Ms Hall were concerned that the licence had been used to process liquor transactions for the other customers.
9. As a result of this information, on 14 June 2019, a request for Camera Surveillance Footage and Till Tapes was sent to the licensee for the period Sunday 9 June 2019 between the hours of 1:00 pm and 4:00 pm inclusive.
10. On 3 July 2019 Licensing NT received from the licensee Camera Footage for 9 June 2019 as requested. The Till Tapes commenced at 1.19pm and concluded at 2.54pm. The period from 2.54pm to 4.00pm was not provided.
11. As a result, on 12 July 2019 SCO Franchi sent an email to the licensee requesting the missing till tapes for the time period commencing at 2.54pm and concluding at 4.00pm. Later that same day, the relevant Till Tapes were provided.
12. In the meantime, on 4 July 2019, a request for Camera Surveillance Footage and Till Tapes was sent to the licensee for the period Saturday 15 June 2019 until Friday 21 June 2019 inclusive.
13. Then on 5 July 2019, a request for Camera Surveillance Footage and Till Tapes was sent to the licensee for the period Saturday 22 June 2019 until Friday 5 July 2019 inclusive.
14. On 22 July 2019 SCO Franchi received the Camera Surveillance Footage and Till Tapes for the period 15 June until 5 July 2019.
15. Through preliminary inquiries undertaken by Licensing NT of that footage and the till tapes, SCO Franchi believed he had identified 138 breaches of section 31(5)(a) of the 1978 Act.
16. On 10 September 2019, SCO Franchi lodged a complaint with the Director-General of Licensing ("the Director-General") against the licensee. The particulars of the complaint were 138 breaches of section 31A(5)(a) of the Liquor Act. The complaint was accepted by a delegate of the Director-General that same day.
17. On 10 September 2019 SCO Franchi issued a letter to the licensee advising that a complaint had been lodged with the Director-General alleging the licensee had breached section 31A(5)(a) of the 1978 Act on 138 occasions and inviting the licensee to respond in writing.
18. On 26 September 2019 SCO Franchi received a response from the Director of the licensee, namely Ms Alison Woolley acknowledging and apologising for the 138 identified breaches.

19. It was admitted by the licensee before the Commission “the 138 offenses of failing to scan thoroughly/not scanning the approved identification of patrons purchasing take away liquor from the bottle shop” contrary to section 31A(5)(a) of the 1978 Act.
20. Having accepted the complaint and the investigation commencing, upon completion of the investigation the Director-General was empowered under section 68(5) of the 1978 Act to either dismiss the complaint or “otherwise – any of the following in relation to a ground for the complaint”: issue a formal warning; issue an infringement notice; require the licensee to enter into an undertaking; or refer the complaint to the Commission.
21. On 29 November 2019, pursuant to s68(5)(b)(iii) of the 1978 Act, the complaint was referred to the Commission for disciplinary action to be taken against the licensee.
22. Pursuant to section 69(4) of the 1978 Act, upon receipt of such a referral, the Commission must conduct a hearing for deciding the complaint and upon completion of the hearing either dismiss the complaint or uphold the complaint and take specified disciplinary action against the licensee. This must be done by written notice to the Director-General and the licensee.

Public Hearing

23. In understanding these reasons, it is important that it be kept in mind that this is not a prosecution of a breach of section 31A(5)(a) of the Act. These are proceedings brought under Part VII of the Act with respect to enforcement provisions for licences.
24. Section 69 of the Act provides the Commission must conduct a hearing for deciding the complaint. The matter was therefore listed for hearing on 22 January 2020. Notice of the hearing was given to the licensee and the matter proceeded as a hearing on the scheduled date and time.
25. At the hearing, the Director of Liquor Licensing (as it is now known) appeared via his representative, namely Mr Mark Wood. The licensee appeared via a Director, namely Ms Allison Woolley. The licensee admitted the breaches and as a result a summary of the admitted facts was tendered as evidence, together with the referral to the Commission and the response document provided by Ms Woolley referred to above and dated 26 September 2019. Thereafter submissions were made.
26. As noted earlier, on the admitted facts, the Commission upholds the complaint and finds the breaches as set out at the commencement of these reasons.

The Disciplinary Action

27. The licensee has admitted all 138 separate transactions as being the occasions when the licensee failed to comply with section 31A(5)(a) of the Act. The hearing before the Commission was truncated by virtue of these admissions resulting in it no longer being a question whether the complaint should be upheld. The licensee's admissions meant the complaint **should** be upheld and the question for the Commission to determine thereafter was what disciplinary action should be taken in relation to the contravention of the Act.
28. With these types of breaches, it is important to remember that the purpose of the BDR provisions within the 1978 Act are to identify those persons who may be prohibited from purchasing liquor. There is a risk posed to the community if licensees fail to comply with the BDR provisions, particularly in light of the public policy behind the provisions.
29. The referral to the Commission included within it (as required under section 69(2)(a) of the 1978 Act) details about the disciplinary action that it was "recommended" that the Commission take. The recommendation in this referral was that the disciplinary action take "the form of a suspension of liquor licence for a period determined by the Commission pursuant to section 69(4)(b)(ii) of the Act". During the course of proceedings Mr Wood was asked whether there was any recommendation about the length of any suspension and stated "two to three days".
30. It should be noted at this point, as it was during the course of the proceedings, that the Commission is not bound by any recommendation made to it concerning the disciplinary action to be taken. In fact all options of disciplinary action as that term is defined under section 67 of the 1978 Act remain available to the Commission, including cancellation and disqualification.
31. In relation to the licensee's compliance history, the Commission was not provided with any evidence of any prior breaches relating to this licensee. The Commission also considers it relevant with this licensee, that Oceanview Developments Pty Ltd became the licensee of Darwin River Tavern on 24 March 2016. The licence was transferred to Oceanview Developments Pty Ltd from the previous licensee Litchfield Trading Co Pty Ltd, who were granted the licence on 4 August 1993. Ms Fiona McGregor was the nominee under the previous licensee, appointed in February 2010, continued in that role during the transfer and remains in that position today.
32. In relation to breaches of the BDR provisions, the Commission was informed that there had been four (4) previous complaints under the 1978 Act. These related to the following premises and were as follows:
 - a. Liquorland Alice Springs – breach of section 31A(5)(d) of the 1978 Act – dismissed.

- b. Lizards Bar and Restaurant - breach of section 31A(5)(a) of the 1978 Act being 10 separate occasions – monetary penalty of 20 penalty units was imposed.
 - c. Pigglys Pty Ltd - breach of section 31A(5)(a) of the 1978 Act being one occasion – monetary penalty of 1 penalty unit imposed (although the Commission notes the unusual features of that referral).
 - d. Northside IGA - breach of section 31A(5)(a) of the 1978 Act being 3 separate occasions – formal warning letter sent.
33. The Commission was further informed however that there were other relevant decisions relating to breaches of section 31A(5) of the 1978 concerning failure to comply with then “approved identification” provisions. This included the decision of the Northern Territory Liquor Commission in *Complaint pursuant to section 48(2) of the Liquor Act – Failure to Scan an Approved Identification Prior to the Sale of Liquor: Deemat Pty Ltd* (2 November 2011) (“the Deemat 2011 decision”).
34. In the *Deemat 2011* decision at paragraph 11 it was noted as follows:

“... previous decisions of the Commission in relation to breaches of section 31A(5)(a) of the Act were tabled. These were noted as follows:

 - “A Decision of 5 November 2008 (Todd Tavern) in relation to several ID breaches on separate occasions with the Licensee incurring a two day suspension at the bottle shop;
 - A Decision of 1 December 2009 (Macs Liquor Alice Springs) following a finding that seven sales were made without obtaining or scanning authorised forms of ID, the penalty imposed by the Commission was a one day’s suspension.
 - Commission Decision of 17 June 2010 (Stuart Hotel) in relation to a breach of the Act where a person presented false ID in order to purchase takeaway. Commission issued a reprimand to the Licensee.”
35. The Commission has considered these decisions carefully.
36. The Commission notes however that on the very same day that it heard this complaint, it also heard a complaint which it upheld in relation to 10,551 separate occasions of failing to comply with section 31A of the 1978 Act over a period of 17 months. In that matter the Commission took disciplinary action of suspending the licence for 28 days.
37. Ms Woolley confirmed before the Commission that the licensee relied upon the matters set out in its letter of 26 September 2019 in terms of mitigation. Such matters could be summarised as follows:
 - a. The licensee “apologised greatly”.

- b. The licensee "... would like to take the time to apologies (sic) for the miscommunication between staff and management as well as the incorrect use of the Banned Drinker Register. We believe the staff and management have now had the correct training and will not be committing any offenses during the purchase of take away liquor."
- c. "Prior to the banned drinker register being introduced again in September 2017 the staff members who were employed during the re-instalments had the training, due to the rapid change of staff we were unable train the current staff, who didn't receive any training until the 31st of August 2019".
- d. "Since receiving the complaint from Licensing, Darwin River Tavern has;

Management and staff have since taken the appropriate action within correcting the misuse of the BDR register. The training day for the BDR was on the 31st of August 2019, we have undergone the correct training for the use of the BDR scanner. Since receiving the correct training, we are now able and more than willing to scan every patrons approved identification as they purchase any take away liquor."
- e. "The main staff members who were seen on the CCTV footage not scanning/pressing the restart button were unaware of the seriousness of the offenses they were committing while being employed within the Northern Territory. They were both from overseas and since then they have left, moving to another state. They may have thought the "green screen" when pressing the restart button may have indicated the identification went through and was approved within the system. During the time of being employed they didn't receive the correct BDR training while being employed at Darwin River Tavern. I can assure you the new/current employees will be trained on use of the BDR and correct identification used for the system to approve and have no issues scanning".
- f. "Within the system not picking up the full information on the Identification, this occurs when the ID being used is old or scratched as well as the scanning machine being scratched and unable to read the identification information thoroughly, the staff members were unaware of needing to rescan some of the ID s being used, a few instances where the staff members are serving elder gentleman/elder ladies and knowing he/she is older the minimum age but not knowing they had to rescan or manually type the age into the BDR for the system to approve and register it".

38. Whilst the Commission was encouraged by the frankness of the licensee in admitting the breaches alleged. This has to be seen in the context of what appears on the evidence to be an overwhelming case. The Commission notes that of the 138 incidents identified, they can be broken down into the following categories:

- i 51 instances where staff did not ask for identification and did not scan ("Not Scanned").
- ii 57 instances where staff scanned the identification, however pressed the "Restart" button instead of the "Check BDR" button. Therefore not sending details through to the BDR database to check if the individual was listed on the BDR ("Pressed the Restart Button").
- iii 28 instances where staff scanned the identification, however did not press the "Check BDR" button. Therefore not sending details through to the BDR database to check if individual was listed on the BDR ("Scanned but BDR not checked").
- iv 2 instances where a red screen has shown, with staff taking no action to amend the screen, and selling the alcohol, despite the red screen ("Scanned with Red Screen").

39. In addition, this is another occasion where on numerous occasions the licensee has sought to attribute blame to its employees, rather than acknowledging and accepting its obligation to ensure its employees were complying with their duties and obligations under the licence. As noted at the hearing, the licensee has the ability to ensure their staff collects payment for all sales. The licensee should therefore have the same ability to ensure their staff complies with the provisions of the BDR. This is particularly so in light of the fact that the BDR provisions are required to be complied with **before** payment is received and processed.

40. It should be clear to this licensee, and all other licensees for that matter, that it is long past time that licensees seek to blame staff for failing to comply with the BDR, particularly staff traveling through and no longer residing in the Northern Territory. The licensee is obliged to ensure its staff are advised of, trained in and comply with, the BDR provisions and all licence provisions. It is as simple as that.

41. Further, the BDR was first introduced in 2013 and again in 2017. Both installations were accompanied by extensive system training from Licensing NT which included on-site, hands-on training as well as manuals, brochures and posters. This is not new.

42. It should also not be forgotten that the licensee has admitted formally the breaches which clearly state that it is the licensee who has contravened a provision of the 1978 and therefore the responsibility rests with the licensee. When raising these matters with the licensee the Commission notes that Ms Woolley eventually stated as follows:

"They just didn't take it seriously".

43. Although clearly a comment Ms Woolley perhaps later regretted having made, the evidence clearly supported that this is **precisely** what occurred.

44. The Commission is concerned with the number of transactions alleged in this complaint. It identifies 138 separate transactions over a period of 26 days where the BDR provisions were not complied with. Given the number of separate transactions involved the Commission simply cannot accept that this was an anomaly and finds that, as stated by the licensee itself, the licensee was not being proactive in ensuring the provisions were taken seriously.
45. An obvious inference from the number of transactions admitted to have been involved in these breaches is that this was not “inadvertent” or “careless” but that this was in fact the manner in which this licensee usually trades. It is however noted that these breaches were discovered as a result of careful investigation from licensing officers and these were the breaches found.
46. It is also to be noted that since the breaches came to light and were brought to the attention of the licensee, the licensee has been proactive in ensuring its staff are properly trained and has worked hard with Licensing NT and its officers. It was also apparent from the presentation of Ms Woolley before the Commission that this matter has been taken very seriously and continues to be taken seriously.
47. As earlier noted, the BDR provisions represent an important part of the provisions under the 1978 Act. There is a significant body of evidence that supports supply reduction measures such as the Banned Drinker Register. Studies have shown there are benefits in banning persons from being able to purchase alcohol including increased venue safety, general risk management, and deterrence of antisocial behaviour. There is also a considerable body of research that shows a strong correlation between alcohol availability and crime, anti-social behaviour and family violence. Reducing access to liquor has demonstrated corresponding reductions in these areas. These provisions form a significant part of the Government’s policies towards making communities safer.
48. With this important public policy background, it is clear that the BDR provisions are in place to attempt to reduce the risk to the community of problem drinking. The Commission therefore anticipates that the community expects that as this is a public policy about making the community safer, that when there is a breach, the consequences to follow from such a breach should be strict.
49. A further aspect for this Commission to consider is, these kinds of breaches are not easy to detect and therefore must be taken seriously when they are found to have occurred.
50. The Commission notes that with respect to the disciplinary action to be taken against the licensee; the Director-General has recommended that the disciplinary action that should be taken against the licensee is suspension of its liquor licence.

51. The Commission inquired of Ms Woolley what financial impact would occur to the licensee if the Commission were disposed to suspend the licensee's liquor licence. Submissions were made as to that financial impact. Due to commercial privacy, the Commission will not detail those in these reasons, but they were taken into account.
52. Whilst credit is given to the licensee for its admissions with respect to these breaches, the facts are that these 138 breaches are admitted to have occurred over a period of 26 days. The Commission does however note that the licensee quickly undertook training to ensure its staff were appropriately trained following discovery of these breaches and has worked hard with Licensing officers. An aspect however that makes these breaches serious is that this licence is a high risk licence and the ability to cause significant harm in the community by virtue of non-compliance with the BDR provisions is extremely high.
53. It should also be kept in mind that the seriousness of the BDR provisions and the seriousness of breaching such provisions were made patently clear by the Commission back on 2 July 2018 when the Commission issued its decision in relation to the premises known as Lizards Bar and Restaurant². Before finalising those reasons the Commission stated as follows:
- “ ... as was stated to the licensee at the conclusion of the hearing, this Commission wishes to make clear to this particular licensee and all licensees (and their employees) that the provisions of the Banned Drinkers Register (“BDR”) **must** be taken seriously. This decision should serve as a warning to licensees that breaches will not be tolerated and now that the provisions have been in place since 1 September 2017, i.e. a period of almost 12 months, there will no longer be any leniency extended for failures to comply. The provisions are well known. Their compliance is simple. Their enforcement will be taken seriously due to their significance in keeping communities safer”.
54. The Commission could not have been clearer in its statement about the significance of these provisions and the seriousness of any breaches. It likewise could not have been clearer in its warning to all licensees.
55. In the decision issued by the Commission in Piggly's Pty Ltd on 20 February 2019 the Commission repeated that:
- “Licensees should expect that a failure to comply with s31A will attract substantial penalties”.

² Northern Territory Liquor Commission *Disciplinary action pursuant to the Liquor Act: Halikos Hospitality Pty Ltd* (LC2018/054, 2 July 2018) at [46]

56. Given the number of breaches involved, the importance of these provisions under the Act and within the broader framework of alcohol policy in the Northern Territory and the high risk nature of the licence, the Commission has determined that this matter is serious and as a result it is appropriate that the licence be suspended. Taking into account however all of the matters raised in mitigation on behalf of the licensee, the Commission has determined that on this occasion the licence should be suspended for the period recommended by the Director namely two (2) days.

57. The Commission therefore suspends the condition of the liquor licence relating to Takeaway Hours for a period of 48 hours commencing at 0900 hours on Friday 28 February 2020.

Notice of Rights:

58. Section 120ZA of the 1978 Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. A decision to take disciplinary action against the licensee pursuant to section 69(3) of the 1978 Act is specified in the Schedule and is a reviewable decision. It is however section 69(4)(b)(ii) that provides the Commission power to uphold the complaint and take disciplinary action against the licensee.

59. In this matter, the Commission has decided to uphold the complaint and 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

60. If this decision is a reviewable decision, in accordance with Section 120ZB(1)(a) and (c) of the 1978 Act, the affected persons would be the licensee and the person who made the complaint.



JODI TRUMAN
PRESIDING MEMBER
DEPUTY CHAIRPERSON