

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2020/017

LICENCE NUMBER: 80818127

LICENSEE: The NT Rock Bar Pty Ltd

PREMISES: The NT Rock Bar (The Rock Bar)
Shop 2, 78 Todd Street
ALICE SPRINGS NT 0870

LEGISLATION: Section 165 of the *Liquor Act 2019*

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

DATE OF HEARING: 25 June 2020

DATE OF DECISION: 7 July 2020

DECISION

1. On 25 June 2020, the Northern Territory Liquor Commission (the Commission) heard and upheld a complaint against The NT Rock Bar Pty Ltd (the licensee), and decided to take disciplinary action against the licensee.
2. The Commission has determined to take disciplinary action by imposing a monetary penalty in the sum of \$1,600, to be paid by 31 July 2020.

STATEMENT OF REASONS

BACKGROUND

3. The licensee operates a liquor licence at a popular restaurant bar in the entertainment precinct of the Alice Springs central business district. The Rock Bar has been trading for over ten years, and is particularly patronised by backpackers, many of whom are also clients of the licensee's associated enterprise, The Rock Tour, which provides guided camping tours to Uluru, Kata Tjuta and Kings Canyon.
4. The licensee suspended trading in both of its businesses due to COVID-19 restrictions on 22 March 2020. The licensee plans to re-open the Rock Bar on 9 July 2020.

THE HEARING

5. The matter proceeded as a public hearing on 25 June 2020. Mr Wood appeared on behalf of the Director of Liquor Licensing (the Director). Mr Cowan, the licence nominee and a director of the licensee, appeared on behalf of the licensee. The Commission thanks them both for their attendance and assistance. As the licensee was unrepresented, the hearing was conducted with a minimum of formality.

THE FACTS

6. The licensee indicated that it did not intend to contest the complaint. Accordingly, the hearing proceeded by way of a recital of the facts relied on by the Director in support of the complaint, alleging breaches of sections 141 and 285 of the Act. The licensee admitted the truth and accuracy of the recited facts, and the Commission, which had viewed the CCTV footage supplied by the Director with the referral of the complaint to the Commission, finds the recited facts to be proved. The facts may be summarised as follows.
7. On 7 December 2019 a patron of the Rock Bar (the patron) entered the premises at around 18:00 hours. Over the next three hours, the patron purchased or was supplied with beers on between at least four and as many as eight or more occasions.
8. Throughout this period the patron visited the bathroom several times and talked with other patrons in the vicinity of the entry to the bar and in the beer garden. The patron also interacted with staff, helping them to put up decorations.
9. CCTV footage recorded by the licensee, provided on request to Licensing NT and included in the referral of the complaint by the Director to the Commission, confirms a steady change in the patron throughout the period, resulting in a noticeable impairment of the patron at approximately 21:08 hours and significant impairment of the patron at approximately 21:42 hours as he made his way to the bathroom.
10. At that time the patron walked with difficulty and not in a straight line and bumped into a handrail before entering the bathroom. Soon after, the patron left the bathroom and his balance and coordination were markedly impaired. He had soiled himself.
11. The patron exited the premises and fell over while attempting to enter a taxi at the front of the premises, before entering the taxi and leaving. This was seen by a member of the public, who complained to Licensing NT.

THE LAW

12. Section 141(1) of the Act relevantly provides:

A licensee and the licensee's employees must exclude and remove from the licensed premises any person who is violent, quarrelsome, disorderly or incapable of controlling the person's behaviour...

13. Section 285(1) of the Act relevantly provides:

A person commits an offence if:

- (a) The person is a licensee or a licensee's employee; and

- (b) The person intentionally sells or otherwise supplies liquor to another person; and
- (c) The other person is on or in the licensee premises and is intoxicated, and the person is reckless¹ in relation to those circumstances.

14. Section 160(1) of the Act provides that a person may make a complaint against a licensee on various grounds, including:

- (b) The licensee or the licensee's employee contravened another provision of this Act or the regulations....

FINDINGS

15. The Commission finds that the licensee's employees breached section 141(1) of the Act by failing to remove a person who was incapable of controlling his behaviour.

16. The Commission finds that the licensee's employees breached section 285 of the Act by intentionally supplying liquor to an intoxicated person on the premises, where the licensee's employees were reckless in relation to the person's intoxication. In other words, the Commission finds that the licensee's employees were aware that there was a substantial risk that the person they were supplying liquor to was intoxicated, and that having regard to the circumstances known to the licensee's employees, it was unjustifiable to take that risk.

17. The Commission upholds the complaint on the ground specified in the complaint, namely that the licensee or the licensee's employee contravened the Act.

18. In accordance with section 165(1) of the Act the Commission is satisfied that a ground for the disciplinary action exists and the disciplinary action is appropriate in relation to that ground.

19. Although the licensee admitted the breach of section 141(1) of the Act, it submitted in mitigation that the patron left the premises after being told to do so by an employee of the licensee. The admission of the breach clearly implies that the licensee accepts that the patron should have been removed at an earlier time. Accordingly, the weight to be given to this submission, if accepted, would be rather limited. However, the Commission does not accept this submission by the licensee, for the following reasons:

- a) Mr Cowan gave evidence that he became aware of the complaint when he returned from leave in January 2020, and investigated it for himself in February 2020. In the course of his investigations an employee informed Mr Cowan that he had removed the patron, a "regular" known to staff, on the occasion the subject of the incident. The Commission accords limited weight to this hearsay evidence obtained in these circumstances.
- b) The licensee did not adduce any evidence from the (now former) employee himself, or provide a cogent explanation for electing not to do so.

¹ See s 43AK ("Recklessness"), *Criminal Code 1983* (NT)

- c) The licensee made no reference to this aspect of the incident in his initial response to the complaint on 5 February 2020, and did not provide any further explanation of the circumstances of the incident until the hearing itself.
- d) Licensing NT Senior Compliance Officer Ms Sowerby's evidence was that she had examined and analysed the CCTV record for the period when the patron was on the premises, and in particular the brief period between when he emerged from the bathroom in a soiled state and left the premises. During this latter period there was no record of him interacting with any of the licensee's employees. The record was compiled from footage of cameras positioned at various locations on the premises, so that the movements of the patron after he exited the bathroom could be tracked almost continuously.

DISCIPLINARY ACTION

- 20. The Commission accepts the submission of the Director that in imposing disciplinary action, the Commission should apply the principles of proportionality, parity and deterrence.
- 21. In considering what disciplinary action to impose, the Commission has had regard to the following circumstances that are adverse to the licensee:
 - a) On 21 November 2019 the licensee had been issued with an infringement notice in the sum of \$1,590 arising from substantially similar breaches committed on 28 February 2019.
 - b) When initially informed of the complaint, the licensee, without fully investigating the circumstances of the matter, did not admit the breaches.
- 22. In considering what disciplinary action to impose, the Commission has had regard to the following circumstances that are favourable to the licensee:
 - a) In over ten years of trading, the licensee has had only one previous instance of non-compliance with the Act.
 - b) On the evening of the breaches, the licensee had six staff on duty, all of whom were appropriately trained in relation to compliance with the Act.
 - c) The number of staff on duty was sufficient, having regard to the number of patrons on the premises.
 - d) There was no evidence that bar staff sold liquor to the patron while he was intoxicated. While intoxicated, he was supplied liquor by helping himself to a beer from trays of drinks that were delivered to a group of patrons by bar staff.
 - e) The period during which the patron was intoxicated and noticeably impaired while on the premises was relatively brief.
 - f) The licensee admitted the breaches and has taken appropriate action to mitigate the risk of any further such breaches, including the issue of a lifetime ban to the patron, and the appointment of a director of the licensee to manage the bar when it re-opens.

- g) The licensee has suffered substantial financial hardship as a result of the forced suspension of its two business due to COVID-19 for more than three months.
23. The Director recommended to the Commission that it suspend the licence. Section 69(2)(a) of the *Liquor Act 1978*, which is no longer in force and is inapplicable to this matter, required the Director to specify the disciplinary action that is recommended. The Act as now in force contains no such requirement. Nevertheless, the Commission considers that, as a party to the proceedings, it is appropriate for the Director to make submissions in relation to disciplinary action, and that the Commission should consider any such submissions.
24. It was submitted on behalf of the Director that a licence suspension should be imposed. The Commission agrees that licence suspension would not be an inappropriate penalty having regard to the principles of proportionality (potentially seriously adverse events can ensue from breaches of this nature), parity (other licensees have had suspensions imposed for similar repeated breaches) and deterrence (specifically, as this is a second breach, more stringent action should be taken against this licensee; generally, a suspension would send a message to the community and other licensees that breaches will be met with stern action). On the other hand, Mr Wood submitted that having regard to the matters favourable to the licensee set out at paragraph 22 above, the penalty should be substantially mitigated, and that this could be achieved either by suspending the suspension, or imposing only a nominal period of suspension.
25. The Commission considers that although there is force in these submissions, a preferable course in the particular circumstances of this complaint is to impose a monetary penalty that is higher, albeit to a nominal extent, than the monetary penalty previously imposed for the licensee's similar breaches.
26. The Commission's reasons for not accepting the Director's recommendation are:
- a) As stated above, the Director's recommendation is no longer supported by the imprimatur of statute.
 - b) It is doubtful that the Commission has power to suspend the operation of a licence suspension. The Commission has no inherent powers. All of its powers are conferred, whether expressly or by implication, by statute. Section 165(2)(b) of the Act empowers the Commission to suspend a licence, but the Act does not expressly empower the Commission to suspend the operation of disciplinary action on condition that the licensee not commit any further breaches for a specified period. Section 165(2)(e) of the Act empowers the Commission to direct a licensee to take or refrain from taking a specific action, but does not empower the Commission to fix in advance any particular consequence in the event that such a direction is breached. By contrast the *Sentencing Act 1995* confers power on criminal courts to impose good behaviour bonds and suspended sentences of imprisonment, with conditions. If the legislature had intended to confer analogous powers on the Commission, it could have (and presumably would have) done so in a similar manner.
 - c) The Commission does not consider that the power conferred on the Commission by section 6(3) of the *Liquor Commission Act 2018* "to do all things that are necessary or convenient for, or incidental to, the performance of its functions" operates so as to enlarge the scope of the powers delineated in section 165(2) of the Act.

- d) The Act does not stipulate a minimum period of suspension that can be imposed, and accordingly the Commission considers that it has the power to impose a nominal period of licence suspension. Such a course would be somewhat akin to the “rising of the court” sentences imposed on occasion by judges in the Northern Territory’s criminal courts. However, this particular sentencing practice is, in the view of the Commission, in reality an extraordinary device used by judges who are required to both deliver a just sentence and comply with the Northern Territory’s mandatory sentencing laws. To use such a measure in other circumstances would, in the view of the Commission, risk bringing the administration of the Commission’s functions into disrepute. A Clayton’s penalty is no real penalty at all.
- e) The usual period of suspension of licence for breaches of this nature is one or two days of trading. The Commission accepts the licensee’s evidence that suspension for one day would cost the licensee far more than the monetary penalty imposed by way of infringement notice in November 2019. Given the significant mitigating circumstances, and in particular the crippling economic effect on the licensee of COVID-19, the Commission considers that it would be unduly harsh to impose such a severe penalty.

27. Accordingly, the Commission has determined to impose an unusually modest monetary penalty in the unusual circumstances of these unusual times. In doing so, the Commission emphasises that it is not setting a precedent for any future breaches of this nature by this or other licensees.

NOTICE OF RIGHTS

28. Section 31(1) read with section 166(7) of the Act provides that the decision set out in this decision notice is reviewable by the Northern Territory Civil and Administrative Tribunal (NTCAT). Section 94(3) of the *NTCAT Act* provides that an application for review of a reviewable decision must be lodged within 28 days of the date of the decision.

29. In accordance with section 31(2) of the Act, the persons who may apply to NTCAT for a review of the decision are the Director and the licensee.



RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
7 July 2020

On behalf of Commissioners Goldflam, Reynolds and McFarland