

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2018/142

LICENCE NUMBER: 80802460

LICENSEE: Antony Zaki Habib

PREMISES: **Bojangles Restaurant and Saloon**
80 Todd Street
ALICE SPRINGS NT 0870

LEGISLATION: Section 110 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: 19 November 2018

DATE OF DECISION: 26 November 2018

DECISION

1. On 20 November 2018, the Northern Territory Liquor Commission ("the Commission") dismissed a complaint against Antony Zaki Habib ("the Licensee"). These are the reasons for that decision.

REASONS

BACKGROUND

2. On 14 December 2016, an "On Licence" licence ("the licence") authorising "the sale of liquor for consumption on or at the licenced premises" known as Bojangles Restaurant and Saloon ("Bojangles") was issued to the Licensee.
3. At 1:40 pm on 13 December 2017, in the course of conducting a joint operation to detect offences against the *Liquor Act* ("the Act") on licensed premises in Alice Springs, Licensing NT and NT Police officers observed a male patron exiting Bojangles with two bottles of wine. The officers approached the patron, who informed them that he had just purchased the liquor for \$50 from a Bojangles employee ("CP") in the Bojangles beer garden, which form part of the licensed premises.

4. Licensing NT subsequently seized CCTV footage from the licensee which substantially supported the patron's account.
5. On 6 February 2018, in accordance with s68(2) of the Act, Holly Sowerby, a Licensing NT Compliance Officer ("the complainant"), lodged a signed complaint ("the Complaint") in the approved form with the Director-General of Licencing ("the Director-General").
6. Section 68(2)(a) of the Act requires that a complaint "specify the ground for the complaint". The Complaint form contains a list of 17 tick boxes headed "GROUNDS OF COMPLAINT – Section 67(3) of the Liquor Act". The tick boxes correspond to the subparagraphs of s67(3), which commences:

Any of the following is a **ground** for a complaint or disciplinary action against a licensee: [emphasis in the original]

The first, and only the first, box in the Complaint was ticked, specifying the ground that the licensee:

- (a) Contravened a provision of the Act (whether or not the provision creates an offence).

The third box in the list ("(c) contravened a licence condition") was not ticked, an aspect of the Complaint, which, as will be seen below, gave rise to contention.

7. In addition, the Complaint particularised the alleged contravention as being a breach of s110 of the Act, both in the heading of the Complaint ("Conduct contrary to: *Section 110 of the Liquor Act*"); and in the body of the Complaint, which includes this passage:

Legislation:

Section 110 of the *Liquor Act*, provides:

110 A licensee commits an offence if:

- (a) *The licensee engages in conduct that results in a contravention of a condition of the licensee's licence.*

As will be seen, this recital of the text of s110 is materially incomplete.¹

8. On 6 February 2018, and in accordance with s68(4) of the Act, a Delegate of the Director-General accepted the Complaint, informed the licensee of the substance of the Complaint, and determined to conduct an investigation of the Complaint.
9. On 22 October 2018, the Director-General, having given the licensee an opportunity to comment on the Complaint, and having completed her investigation, referred the complaint to the Commission for disciplinary action pursuant to s68(5)(b)(iii) of the Act.

¹ Section 110 was subsequently amended by the *Liquor Legislation Amendment (Minimum Pricing) Act 2018*, which commenced on 1 October 2018. Those amendments were not in force at the relevant time and are in any case immaterial to the issues that arise in this matter. References to s110 in this Decision Notice will be to it as in force on 13 December 2017, the date of the alleged contravention.

10. In referring the Complaint to the Commission, the Director-General stated:

I determined that having considered all of the evidence, the Licensee had committed a breach of the Act:

1. That the Licensee engaged in conduct that resulted in a contravention of a condition of the licensee's licence, contrary to section 110 (a) of the Act, by selling take-away alcohol when the premises is licensed for on-premise consumption only.

THE HEARING

11. The matter proceeded as a public hearing on 19 November 2018 at Alice Springs. Ms Monck appeared on behalf of the Director-General. Mr Grove appeared for the Licensee. The Commission thanks both Ms Monck and Mr Grove for their attendance and assistance.

12. At the commencement of the hearing the Licensee raised some "preliminary issues". Following argument in relation to these issues ("the preliminary hearing"), the Commission dismissed the Complaint without proceeding to a substantive evidentiary hearing. The brief of evidence compiled by the Director-General was tendered by consent for the limited purpose of considering the preliminary issues.

13. The attention of the Commission was not drawn to any evidence in the brief tending to prove that the Licensee (or any other employee of the Licensee) had either personally engaged in any relevant misconduct, or been aware of the impugned conduct of CP. The Director-General did not suggest or submit otherwise.

14. Accordingly, in order for the Complaint to be upheld, the Director-General needed to satisfy the Commission that the Licensee was somehow liable for the impugned conduct of CP.

15. In the course of the preliminary hearing, the Director-General filed a document headed "Particulars", the substance of which was as follows:

1. Alleged conduct of Licensee

By virtue of Condition 1 of the License, the Licensee is deemed to be vicariously liable for any breach of the licence conditions as may be caused from time to time by his/her employees.

The licensee's conduct is:

The sale of liquor to a person for take-away purposes where the Licence does not allow for take-away sales.

2. What condition of the Licence has the Licensee allegedly breached?

The Licence does not specify a condition that liquor may not be sold for take-away purposes, but the Authority On-Licence and subsequent conditions require the Licence to be read as a whole.

16. As stated at paragraph 2 above, the Licence authorises the sale of liquor "on or at the licensed premises". These words occur on the front page of the Licence under the heading "**AUTHORITY – ON LICENCE**" alongside a sub-heading "**Sale For Consumption On the Premises**". The remaining 12 pages of the Licence are subsumed in their entirety under the heading "**CONDITIONS**". None of the Conditions expressly states that liquor can only be sold for consumption on the premises.

17. Licence Condition 1 is headed "**Failure to Comply**". It provides:

The licence will be subject to a condition that a breach of the *Liquor Act* by any person employed by or on behalf of the Licensee, shall constitute and be deemed to be a breach of the licence conditions by the Licensee.

THE LICENSEE'S CONTENTIONS

18. The Licensee raised a number of contentions against the Complaint, which can be summarised as follows.

19. The Licensee's first contention was that the sole ground of complaint relied on by the Director-General, that the licensee had contravened a provision of the Act (s67(3)(a)), was misconceived, and that the Director-General should instead have relied on the ground that the licensee had contravened a licence condition (s67(3)(c)). In support of this contention, the Licensee submitted that the only route to liability for the Licensee in this case, where it was the conduct of an employee and not the conduct of the Licensee himself that had been impugned, was by way of Condition 1 of the Licence, pursuant to which a breach of the Act by an employee is deemed to be a breach of a condition of the Licence.

20. The Licensee's second contention was that the Commission did not have power to amend the Complaint to remedy the purported defect identified in the first contention, and that if it did have power, the Commission should not, in the circumstances of this case, have exercised that power. In response, the Director-General contended that power to amend a complaint is conferred by s6(3) of the *Liquor Commission Act*.²

21. The Licensee's third contention was that that the Complaint, including the Particulars filed in the course of the hearing, did not disclose an essential element of the s110 offence, namely that a condition of the licensee's licence had been contravened.

22. The Licensee's fourth contention was that in its terms s110 only applies to conduct by a licensee, and that s123A cannot operate so as to make a licensee liable for the conduct of an employee for contravening s110.

² "The Commission has the power to do all things that are necessary or convenient to be done for, or incidental to, the performance of its functions."

CONSIDERATION

23. In relation to the Licensee's first contention, the Director-General's reliance on the s67(3)(a) ground was consistent with the position maintained by the Director-General in the course of the preliminary hearing that the Licensee had contravened a provision of the Act, namely s110. Accordingly, the Licensee's first contention must be rejected.
24. In relation to the Licensee's second contention, as the Commission has determined that the ground identified in the Complaint did not require amendment, and furthermore, as the Director-General did not ultimately apply to amend the Complaint, it is unnecessary to decide whether the Commission has the power to amend a defective complaint, and, if so, the matters to which it should have regard in deciding whether or not to exercise that power.
25. In relation to the Licensee's third contention, the Commission has come to the conclusion that it is an implied condition of an "On Licence" licence that liquor not be sold for consumption off the premises, and that accordingly such conduct by an employee of the licensee would result in a contravention of the licensee's licence. The Licensee's contention is rejected.
26. For the reasons that follow, the Commission considers that the Licensee's fourth contention is correct, and that accordingly, the Complaint should be dismissed.
27. To establish that the Licensee could be found to have breached s110, the Director-General relied on the Particulars set out at paragraph 15 above, and specifically the contention that "by virtue of Condition 1 of the Licence, the Licensee is deemed to be vicariously liable" for his employees' conduct.
28. Condition 1 of the licence provides, in effect, that there is a licence condition that employees must not breach the *Liquor Act*. It does not either in its express terms or by necessary implication make the licensee vicariously liable for offences committed by an employee. The Commission rejects this contention by the Director-General.
29. The only other potential route to vicarious liability identified by the Commission or the parties was by way of s123A of the Act. Both parties submitted that s123A had no application to this matter, and although the Commission has ultimately accepted that submission, the means by which the Commission reached that conclusion merits explanation.
30. Section 123A of the Act provides:

Prosecution of licensee for actions of employee

Where the actions of a person employed by a licensee would constitute an offence against this Act, the licensee may be prosecuted for the offence (whether or not the person employed is also prosecuted) as if the licensee had personally performed those actions.

31. If a licensee may be prosecuted for an offence under the Act, it follows that the licensee may be convicted of that offence.
32. If a licensee is liable to be convicted of an offence under the Act, that is a contravention of a provision of the Act, which is in turn a ground for disciplinary action (s67(3)(a)).
33. Therefore, if an employee engages in conduct that would constitute an offence under the Act – or in other words, if the employee commits an offence under the Act – then by way of s123A the licensee could be found liable to disciplinary action for contravening a provision of the Act.
34. The brief contains substantial evidence that CP (a licensee's employee) committed an offence against s115 of the Act. Section 115 as in force at the relevant time provided:

Sale of liquor not authorised by licence

A person must not sell any liquor unless the sale is authorised by a licence.

Maximum penalty: 250 penalty units or imprisonment for 12 months.

35. However, as set out in paragraph 7 above, the Complaint was not formulated on the basis that s115 had been contravened, and at the preliminary hearing the Director-General declined to apply to amend the Complaint so as to identify s115 as the relevant offence provision.
36. Having nailed her colours to the mast of s110, the Director-General was obliged to satisfy the Commission that the Licensee could be liable under s110 for the conduct of CP.
37. Section 110 of the Act as in force at the relevant time provided:

Licensee must not contravene licence conditions

A licensee commits an offence if:

- (a) The licensee engages in conduct that results in a contravention of a condition of the licensee's licence; and
- (b) The contravention does not constitute another offence against this Act.

Maximum penalty: 100 penalty units.

38. Section 110 is a penal provision in that it exposes the subject to criminal prosecution and liability to be punished by way of the imposition of a monetary penalty. Accordingly, where there is doubt, it should be construed in favour of the liberty of the subject:

Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.³

³ *Re Bolton; Ex parte Beane* ('*Re Bolton*') [1987] HCA 12; (1987) 162 CLR 514 at 523 per Brennan J. See also at 518, per Mason CJ, Wilson and Dawson JJ.

39. The Licensee noted that s110 in its terms ("A licensee commits an offence if...") is to be distinguished from other offence provisions including s102 (sale of liquor to a person who is drunk), s103 (sale of adulterated liquor), s105 (permitting riotous conduct on licensed premises) and s106B (permitting child to enter or remain in prohibited area of licensed premises), each of which establishes an offence for which "a licensee or employee" may be liable.

40. The Commission also has regard to s109 of the Act, which provides:

Permitting breach of *Gaming Control Act*

(1) A licensee commits an offence if:

- (a) a person is found guilty of an offence against the *Gaming Control Act*, and
- (b) the offence occurred on the licensee's licensed premises.

Maximum penalty: 100 penalty units.

(2) It is a defence to a prosecution for an offence against subsection (1) if the defendant establishes:

- a) that the licensee or, if at the time of the offence the licensee was not on the premises, the person then in charge of the premises, did not know, and could not by the exercise of all practicable diligence have known, that the offence against the *Gaming Control Act* was taking place; or
- b) that the offence against the *Gaming Control Act* took place contrary to the will of the licensee or, if the licensee was not at the time on the premises, contrary to the will of the person who was then in charge of the premises, and the licensee or the person so in charge, as the case may be, took all reasonable steps to prevent the offence against the *Gaming Control Act* from taking place.

41. Section 110 does not contain a provision establishing a defence similar to s109(2). The Commission considers that if the legislature had intended s110 to make licensees criminally liable for the conduct of their employees, it would have either established a defence similar to that set out in s109(2), or expressly stated that employees could be prosecuted for contravening s110, or both.

42. Accordingly, in the Commission's opinion, read in context with the other provisions referred to, the correct construction of s110 is that, as the Licensee has submitted, an offence against that provision can only be committed as a result of conduct by a licensee.

43. It follows that:

- the actions of CP (who was not a licensee) did not constitute an offence against s110;
- the Licensee could therefore not have been prosecuted for an offence against s110 by way of s123A; and
- the Licensee could not have been found to have contravened s110, the sole provision of the Act pleaded by the Director-General.

44. Accordingly, the sole ground (s67(3)(a)) of the Complaint is unsustainable, and the Complaint must be dismissed.
45. If the Commission's opinion that only a licensee can commit an offence against s110 is erroneous, the Commission considers that CP's impugned conduct did not in any case constitute an offence against s110, because, contrary to s110(1)(b), the alleged contravention also constituted another offence, namely the offence of selling liquor without the authority of a licence (s115).
46. It is unnecessary to decide whether the Licensee may have been liable for disciplinary action arising from the contravention by CP of s115 of the Act, whether by way of liability derived from the operation of s123A for a contravention of a provision of the Act (s67(3)(a)), or as a contravention of a licence condition (s67(3)(c)), namely Condition 1, or both.
47. The Commission's tentative view is that a s67 complaint containing more than one ground would not for that reason alone be defective.
48. There was no evidence in the brief to indicate that any proceedings were commenced against CP, and the Commission apprehends that despite the participation by police in the investigation of this matter, CP was not prosecuted for an offence against s115. While acknowledging that there may well have been salient reasons for police not to have referred this matter for the prosecution of CP, the Commission notes with concern that on this occasion a serious contravention of the *Liquor Act* appears to have taken place without any adverse consequences for the person or persons who profited – except the patron, who, after the wine he had purchased had been confiscated, made a statutory declaration to police stating "I feel sad. I can't get that back, my \$50.00 is gone."
49. For the foregoing reasons, the Complaint is dismissed.

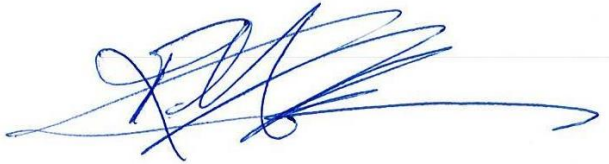
NOTICE OF RIGHTS

50. 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.
51. 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)).
52. 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.

53. 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.

54. 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

26 November 2018

On behalf of Commissioners, Goldflam, Reynolds and McFarland