

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

LICENSEE:	Omnyx Pty Ltd
PREMISES:	Kitty O'Shea's Irish Bar, Café and Nightclub, and The Rox Bar and Nightclub
LICENCE NUMBER:	80300296
PROCEEDING:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> Breaches of Section 102 – Serve Intoxicated Person
HEARD BEFORE:	Mr Richard O'Sullivan (Chairman) Mr Philip Timney Mr Walter Grimshaw
DATE OF HEARING:	2 December 2008
APPEARANCES:	Mr Des Crowe for the Licensee Mr Rob Jobson for the Director of Licensing

BACKGROUND

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- 1) At approximately 22:00 hours on 2 May 2008 Licensing Inspectors Cookson and Russell, during an inspection in conjunction with Northern Territory Police, visited Kitty O'Sheas Irish Bar, Café and Nightclub and The Rox Bar and Nightclub on Mitchell Street Darwin ("the Premises"). Upon entering the Premises Inspectors Cookson and Russell observed a male person displaying obvious signs of intoxication including an unsteady gait, bumping into tables and annoying people he appeared not to know. The male was later identified to the Inspectors as Daniel Brian Elliot Killop.
- 2) Whilst observing Mr Killop Inspectors Cookson and Russell saw a female bar person (later identified as Inga Braukmann) serve Mr Killop with a glass of Bourbon and Cola. . Whilst at the bar the Inspectors noted that Mr Killop continued to be unsteady on his feet. At the time Mr Killop was served he still had another similar drink in his possession and was seen to carry both drinks away from the bar in a very unsteady manner
- 3) Mr Killop was then spoken to by Inspector Cookson who observed that his speech was slurred, his eyes were bloodshot and he remained unsteady on

his feet. Mr Killop was in turn interviewed by Northern Territory Police Officers Godden and Fernandes. Mr Killop was subsequently escorted from the premises. In a statement included in the hearing brief, Mr Godden attested that Mr Killop's speech was slurred and that in his opinion Mr Killop was intoxicated.

- 4) Miss Braukmann was also interviewed and admitted to Inspector Cookson that she had served Mr Killop with the alcohol in question. Ms Braukmann advised Inspector Cookson that she had been employed at the Premises for about a month and that she had received no training in the Responsible Service of Alcohol (RSA) or any proper induction during that time.
- 5) On 6 May 2008 Inspector Cookson notified the Nominee of the premises, Mr Adam Temple, of the alleged breach. He further informed Mr Temple that the breach had occurred in the Garden Bar and that the bar person responsible for serving alcohol to Mr Killop was a Miss Inga Braukmann.
- 6) At this time Inspector Cookson requested from Mr Temple a copy of the CCTV footage relating to the time of the incident. Inspector Cookson was advised that, for some unexplained reason, the cameras in that particular area were not working at the time when Mr Killop was served and the only available footage was of Mr Killop being escorted from the premises. Inspector Cookson took possession of a copy of the available CCTV footage.
- 7) In a letter responding to the complaint, dated 14 October 2008, Mr Mark Gray a Director of Omnyx Pty Ltd, advised that the staff member concerned was now overseas and sought copies of the statements prepared by the Inspectors and the Police.
- 8) In a further letter dated 28 November 2008 Mr Des Crowe, on behalf of the licensee, sought to have the complaint dismissed by the Commission on the basis the incident had occurred on 2 May 2008 with the licensee being notified for the first time in mid October 2008. Mr Crowe submitted that the considerable delay had prejudiced his client in that the CCTV footage of the incident was no longer available and the licensee could no longer contact Ms Braukmann.
- 9) In an email, also dated 28 November 2008, Mr Jobson, on behalf of the Director, advised the Commission that the claims by Mr Crowe were refuted and that Mr Cookson had in fact spoken to then Nominee Mr Adam Temple regarding the incident as early as 6 May 2008, including advising him that Ms Braukmann was the bar person concerned and obtaining a copy of the available CCTV footage.
- 10) The Commission subsequently refused Mr Crowe's request that the complaint be dismissed and confirmed that the matter would be referred to hearing.

THE HEARING

- 11) At the commencement of the hearing Mr Jobson presented an outline of the facts leading to the laying of the complaint and the relevant provisions of the *Liquor Act* ("the Act") alleged to have been breached.
- 12) Mr Crowe informed the Commission that his client intended to enter a plea in response to the complaint and was not contesting the outline of events leading to the complaint or the statement of Inspector Cookson.
- 13) At this point in the proceeding Chairman O'Sullivan raised the issue of his concerns regarding the delay experienced between the date of the incident and the date of the hearing, as raised by the parties in correspondence to the Commission prior to the commencement of the hearing.
- 14) Mr Jobson replied by explaining that on the night in question the Inspectors and Police were engaged in an operation aimed at identifying offences on certain licensed premises and that earlier on the same night the Inspectors had also detected another potential breach relating to the service of intoxicated persons at the Victoria Hotel. Apparently, following investigations into the alleged breaches it was decided that the Northern Territory Police would conduct both prosecutions through the Local Court. Subject to the outcome in the Local Court proceedings, it was proposed at the time that the complaints may subsequently be referred to the Commission for consideration under the provisions of section 124 AAA of the Act (additional penalty).
- 15) It was not until approximately 9 October 2008 that Inspector Cookson was advised, for reasons unknown to the Commission, that the Northern Territory Police had opted not to proceed with Local Court proceedings against either of the licensees. At that point prosecution of the complaint against Omnyx Pty Ltd was taken over by the Director of Licensing who referred the matter for hearing by the Commission.
- 16) Mr Crowe continued with his submissions and confirmed that the facts of the matter were in no way disputed by the Licensee. Mr Crowe then made the following submissions by way of mitigation:
 - a) The sale of liquor to an intoxicated person on licensed premises should be seen at the lower end of the scale as opposed to takeaway sales where the person takes the liquor into the wider community without the controls applicable on licensed premises;
 - b) In the recent decision concerning the Victoria Hotel the Commission issued a formal reprimand for much the same type of offence which involved the serving of two (2) intoxicated persons;
 - c) Omnyx has no record of previous breaches since taking over the licence for the Premises;

- d) The previous Nominee, Mr Adam Temple, has subsequently been replaced by Mr Andrew Chigwidden, a person both more mature and vastly more experienced in the industry.
 - e) Significant steps have been taken by Mr Gray (Director, Omnyx Pty Ltd) in conjunction with Ms Hilary Alcock, senior employee in Mr Gray's overall company structure, to invoke mechanisms and requirements regarding training of staff in the Responsible Service of Alcohol ("RSA") and furthermore captains and leaders were to be appointed in the licensed areas at all venues owned and controlled by Mr Gray.
- 17) In addition, Mr Crowe, tendered a formal apology to Inspector Cookson on behalf of the Licensee for the inference that he had not informed the Licensee of the complaint in a timely manner. Mr Crowe conceded that Inspector Cookson had in fact spoken with Mr Temple shortly after the incident and that CCTV footage was obtained at the time. He conceded that Mr Gray remained unaware of the complaint until mid October as a result of default in reporting the complaint on the part of Mr Temple.
- 18) It was also pointed out by Mr Crowe that recently a completely new CCTV system has been installed at Kitty O'Sheas, this being at an approximate cost of \$60,000 to the Licensee.
- 19) Commissioner Timney questioned Mr Gray regarding the induction procedures for new bar staff at the Premises and the apparent lack of any training whatsoever in RSA provided to Ms Braukmann prior to the breach. Mr Timney referred to the Statutory Declaration in the hearing brief at folio 4 where Ms Braukmann responded to a question regarding her employment and training by advising that she had received no formal training and was merely advised "what sort of drinks there are". Mr Gray responded to the effect that Ms Alcock was currently reviewing the induction procedures and RSA training requirements for all staff employed at premises operated by Mr Gray
- 20) Mr Crowe also informed the hearing that the four (4) hotels and nightclubs within the group controlled by Mr Gray employed on average two hundred and fifty (250) staff and many new initiatives regarding induction, education and RSA courses had been put in place.
- 21) Also team leaders and captains had been appointed on all shifts in all venues, thus helping to facilitate information and control from senior management down to bar staff. In addition a directive had been given by Mr Gray to all Nominees and Managers that any correspondence, requests or queries from Licensing Inspectors in relation to complaints are to be directed straight to him.
- 22) An undertaking was also given by Mr Gray, in response to a request from Commissioner Grimshaw, that a detailed organisational and management

chart relating to staff and structure of the companies and licences under his control be supplied to the Commission within a reasonable time.

SUBMISSIONS ON PENALTY

- 23) Mr Jobson submitted to the Commission that, given the parity in the facts of the breach under consideration and the breach involving the Victoria Hotel, the appropriate penalty would be a formal reprimand, that is the same penalty as was imposed on the licensee of the Victoria Hotel. In support of that submission, Mr Jobson also noted that the Licensee had admitted the breach just prior to the hearing and the measures put in place subsequently by the Licensee to minimise the prospects of similar breaches in the future.
- 24) In response Mr Crowe agreed with the submission put by Mr Jobson that a formal letter of caution was the appropriate penalty.

CONSIDERATION OF ISSUES

- 25) The Commission regards the service of alcohol to intoxicated persons as a very serious offence. The effects of such practices are obvious, not only to the Commission but to the community at large. The potential for anti-social behaviour, violence and self harm resulting from the service of alcohol to intoxicated persons is significant and, rightly, of major concern to the Commission, the Police and the general public. The Commission has publicly stated on a number of occasions recently that it is prepared to impose tough penalties, including the suspension of licences, where licensees breach the Act or the conditions attached to their licence.
- 26) The Commission notes the submissions on behalf of both the Director and the Licensee in respect of the parity in factual background between this breach and that recently found against the licensee of the Victoria Hotel. However, in this instance the Commission is of the view there are a number of distinguishing features between the two breaches. Specifically, the prior unblemished record of the Victoria Hotel and licensee since 1993, the fact that Mr Burns and the licensee had been cooperative from the outset, including the indication of a guilty plea at the first opportunity, and that fact that the licence was to be transferred almost immediately following the hearing, with the result a suspended penalty would be of little punitive effect.
- 27) In that sense the Commission, as currently constituted, views the penalty imposed in the Victoria Hotel decision as something of an anomaly that should be confined to its own specific factual background. The Victoria Hotel decision was predicated significantly on the impending sale of the licensed premises and is one that should not be treated as a general guide for penalty for similar offences.

- 28) The Commission also notes that licensees have been advised, due to the incidence of alcohol related problems in the Northern Territory, that it would be taking a harder line with licensees who breach the conditions of their licence, including the imposition of harsher penalties for offenders.
- 29) In recent decisions the Commission has imposed penalties of a formal caution for the lesser offence of allowing an intoxicated person to remain on licensed premises, albeit without serving the person any alcohol (Mataranka Hotel decision published 3 December 2008) and a one day suspension of licence suspended for 12 months for serving an intoxicated person (Timber Creek Hotel decision published 13 October 2008). The Commission, as currently constituted, considers those decisions as more reflective of the appropriate penalty for offences of this nature and more in line with community expectations of penalties aimed at curbing public drunkenness and the damage that ultimately flows from licensees not enforcing the law and serving persons who are obviously intoxicated.
- 30) In this instance Commission takes account of the submissions on behalf of the Licensee militating towards a penalty at the lower end of the scale. Specifically, the unblemished record of the licensee of the Premises since acquiring the license in June 2007, the steps taken to improve staff training and procedures since the incident, the removal of the Nominee and the admission of the offence at the commencement of the hearing.
- 31) However the Commission also notes that there are a number of factors which distinguish this complaint from the Victoria Hotel matter:
- The relatively short period during which the current licensee has managed the Premises;
 - The distinction with the Victoria Hotel complaint where the duty managers were distracted by the acknowledged presence of the Inspectors and Police on the night and were consequently called away from their normal duties. Those circumstances do not exist in the within complaint;
 - The fact that the licensee did not admit the breaches at the first available opportunity. Despite the retraction and apology to Inspector Cookson made at the hearing, the licensee originally made submissions to the effect the complaint should be dismissed on the basis of prejudice arising from a failure of the Licensing Inspectors to properly inform the licensee of the complaint. As was confirmed during the course of the hearing, the complaint was properly reported to the Nominee who in turn failed to properly deal with the complaint or to report it to his supervisors within the company. As a result the Commission is not inclined to discount the penalty to the extent it may have had the admission been made in the response to the formal notification of the complaint in October, rather than at the date of the hearing;
 - Recent decisions of the Commission referred to at paragraph 29 above.
- 32) The Commission also takes into account a number of aggravating factors in determining the appropriate penalty in this instance.

- 33) The Commission expresses its concern at the evident lack of training provided to Ms Braukmann in the time between commencement of her employment as a bar person at the Premises and the date she served Mr Killop. The evidence presented to the Commission in that respect is included in the statement of Inspector Cookson and was not refuted at hearing. Ms Braukmann advised Inspector Cookson, immediately following the incident, that she had been employed by Russell Temple about a month prior to that night. In response to a question as to whether she had received any training as a bar person Ms Braukmann responded "Not really, just what sort of drinks there are".
- 34) The Commission expresses its disappointment that a person employed in the sale of alcohol at a busy late night trading venue could remain employed for one month without a skerrick of training in RSA, whether through formal accredited training, in house training or, at the very least, an induction course highlighting the principal requirements of RSA.
- 35) This complaint has been a contributor to prompting the full Commission to reconsider the current guidelines and requirements in respect of compulsory RSA accreditation for all persons engaged in the service of alcohol on licensed premises. The Commission acknowledges the transient nature of persons engaged in the liquor and hospitality industries in the NT. However, the failure of a licensee in this instance to provide even rudimentary RSA training to a person who was employed for over a month reflects badly on those charged with ensuring that their staff are adequately trained prior to commencing employment in the liquor industry.
- 36) The Commission takes little comfort from the fact the Nominee at the time of the incident, Mr Adam Temple, has been removed from that position as a result of the breach. The Commission also notes that the new Nominee, Mr Andrew Chigwidden, was the dual Nominee at the time of the Victoria Hotel breach for serving an intoxicated person, referred to elsewhere in this decision.
- 37) The initial submissions on behalf of the Licensee that the complaint be dismissed indicate a clear breakdown in communication between the principal of the business enterprise, Mr Gray, and his Nominee Mr Adam Temple. That breakdown in communication lead to an unfounded submission that the licensee had been prejudiced and that the complaint should be dismissed, coupled with the obvious implication that Inspector Cookson had failed to notify the Nominee of the complaint in a timely manner. Whilst acknowledging the public apology to Inspector Cookson, the Commission expresses its concern that the one arm of management of Omnyx appears, at least in this instance, to have been completely unaware of the actions of another arm. In a regulated industry, and given the number of alcohol related anti-social problems connected with late trading entertainment venues in the Darwin CBD, the Commission strongly recommends that the Licensee implements appropriate procedures for investigating and reporting on complaints received from Licensing Inspectors as a matter of urgency.
- 38) In weighing the mitigating and aggravating factors set out above the Commission is not persuaded that the appropriate penalty in this instance is a

formal letter or caution or reprimand. The Commission is of the view, in all the circumstances, that a harsher penalty is warranted in this case.

DECISION

39)The Commission therefore determines that a penalty of one (1) day suspension of the licence of the Premises is to be imposed with this suspension to be totally suspended for a period of twelve (12) months from the date of this decision. The Commission also directs that a copy of this decision be maintained on the file of the Licensee for reference in the event of any further breaches of the licence conditions or the Act.

40)In addition, the Commission directs that the following condition be included as a condition of the licence for the Premises:

Responsible Service of Alcohol Certificate:

- (a) All new staff engaged in the service of alcohol are required to hold a Responsible Service of Alcohol Certificate within one (1) month from commencement of employment.
- (b) All existing staff involved in the service of alcohol are required to hold a Responsible Service of Alcohol Certificate within a reasonable period to the satisfaction of the Director.

For the purpose of paragraph (b) above, existing staff are required to hold a Responsible Service of Alcohol Certificate within two (2) months of the date of publication of this decision.

Richard O'Sullivan
CHAIRMAN
19 December 2008