

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	TODD TAVERN HOTEL
LICENSEE:	M&J PASCOE AND DAUGHTERS Pty Ltd PEPITY Pty Ltd BONEHEAD Pty Ltd WRIGM Pty Ltd GRJP Pty Ltd STEWIE Pty Ltd
LICENCE NUMBER:	80102200
DUAL NOMINEES:	Leonie Joan Leech Mark George Pascoe
PROCEEDING:	Alleged Breach of Section 110 of the <i>Liquor Act</i> – Breach of Licence Condition – Exceed Patron Numbers
HEARD BEFORE:	Mr Philip Timney (Presiding Member) Ms Helen Kilgariff Mr Paul Fitzsimons
DATE OF HEARING:	9 June 2010
DATE OF DECISION:	2 July 2010
APPEARANCES:	Ms Caitlin McAlister, Counsel for the Director of Licensing Mr Lex Sylvester, Counsel for the Licensee

BACKGROUND

- 1) On 6 March 2010 the Deputy Director Licensing (South) lodged a complaint with the Licensing Commission alleging that the Licensee of the Todd Tavern had committed a breach of Section 110 of the *Liquor Act* (“the Act”).
- 2) The complaint concerned the number of patrons who were present on licensed premises at the Todd Tavern in the bar known as the Riverside Bar on 16 September 2009. The liquor licence for the Todd Tavern contains the usual licence condition relating to the requirements of the Northern Territory Fire and Rescue Service (“the NTFRS”) in terms of the maximum numbers of patrons permitted to be on the licensed premises at any given time. The condition alleged to have been breached reads as follows:

(c) At all times that the licensed premises are trading or are otherwise open to the public for any purpose, the number of persons in or upon the licensed premises or any part thereof shall not exceed the current requirement of the Northern Territory Fire and Rescue Service.

- 3) The alleged breach came to the attention of Licensing Inspectors who were viewing CCTV footage captured on the morning of 16 September 2009 and obtained from the Licensee of the Todd Tavern for the purpose of an unrelated investigation. The Inspectors noticed that a large number of people appeared to be entering the Riverside Bar through the single entrance / exit. The Inspectors conducted a count of persons entering and leaving the premises between 10.08 am and 11.48 am. They estimated that, at 11.48 am, there were approximately 236 patrons present in the Riverside Bar.
- 4) At the time of the alleged breach the maximum number of patrons permitted to be present in the Riverside Bar was set by NTFRS at 100. Around that time, the Riverside Bar was undergoing renovations that ultimately lead to an increase of permitted patron numbers to 150 persons. The increase in permitted patron numbers was formally advised to the office of Licensing Regulation and Alcohol Strategy by Senior Fire Safety Officer Mr John Oliver on 20 November 2009, some two months after the alleged breach.

THE HEARING

- 7) The hearing commenced with Ms McAlister providing the Commission with a summary of facts, agreed by the parties. Those agreed facts are:

“On 16 September 2009 a breach of Section 110 of the Liquor Act occurred at the Riverside Bar of the Todd Tavern Hotel. The substance of the breach is that the Licensee failed to comply with a condition of its licence in that, the maximum number of patrons permitted was exceeded between 11:07 and 11:48 am.

In viewing surveillance footage provided by Nominee Leonie Leech, Licensing Inspectors counted 236 patrons in the Riverside Bar at 11:48am.

- 8) Mr Sylvester confirmed that the Licensee agreed with the facts as presented to the Commission and admitted the breach of licence condition. The Commission formally found the breach as alleged proven and sought submissions from the parties as to the appropriate penalty.

SUBMISSIONS ON BEHALF OF THE LICENSEE

- 9) Mr Sylvester submitted that whilst the Licensee had admitted the breach the case presented on behalf of the Director was circumstantial in that the prime evidence of the breach was the CCTV footage. However, on viewing the footage the Licensee conceded that it appeared that there were 236 people in the Riverside Bar at the relevant time.

- 10) Mr Sylvester advised the Commission that an additional fire escape door had been installed at the Riverside Bar prior to the breach. He submitted that on 16 September 2009 the new exit door was operational and able to be used, however NTFRS had not finally signed off on the door nor formally increased the number of patrons permitted to be in the Riverside Bar. The additional exit door allowed for an increase of maximum patronage to 150 persons, as was confirmed when NTFRS issued its approval on 20 November 2009.
- 11) Mr Sylvester stated that when Ms Leech was advised of the patron numbers in the Riverside Bar on 16 September 2009 she was shocked at the scale of inattention demonstrated by the security guard engaged to monitor that area of the premises. He confirmed that the Licensee had directed that the security guard in question was not to be engaged at the Todd Tavern again. Mr Sylvester submitted that the Licensee had been caught out by the inattention of the security guard who was an independent contractor.
- 12) Mr Sylvester submitted that there was no dereliction of duty on the part of the Licensee who had put its faith in the security firm employed, amongst other reasons, to monitor patron numbers. He submitted that whilst this was an extraordinary breach given the disparity between actual and permitted patronage of the Riverside Bar there was little the Licensee could do about the situation and it was entitled to rely on the independent contractors engaged to provide security services.
- 13) It was noted by Mr Sylvester that Senior Constable Milne visited the Riverside Bar at the time the breach occurred, whilst on duty for another purpose, and yet made no adverse comment regarding patron numbers.
- 14) It was submitted on behalf of the Licensee that, in determining penalty, the Licensee should be given credit for the early admission of the breach contained in the letter from Mr Whitelum dated 11 January 2010 and confirmed at the hearing. Mr Sylvester noted that the Licensee had not been found to have breached the Act for a period of eighteen months and that this was the first breach in respect of excess patron numbers.
- 15) Mr Sylvester submitted that the appropriate penalty in the circumstances was a letter of caution to the Licensee. However, if the Commission was minded to suspend the licence then the suspension should be restricted to the Riverside Bar only.

SUBMISSIONS ON BEHALF OF THE DIRECTOR OF LICENSING

- 16) Ms McAlister submitted written submissions on penalty, summarised as follows. The Licensee is vicariously liable for the conduct of its employees and the culpability of the Licensee is therefore not less than the person who committed the breach. The Licensee is responsible for compliance with the relevant legislation and has failed to exercise that responsibility adequately in this case.
- 17) The Commission was referred to previous breaches of licence conditions by the Licensee of the Todd Tavern. Namely, by decision dated 18 July 2008, the Licensee was found to have breached Section 106B(1) of the Act by

permitting a minor to enter or remain on licensed premises, being the Riverside Bar. For that breach a two day suspension of licence was imposed with one day to be served and the other day to be suspended for a period of twelve months. The penalty was applied only to the Riverside Bar.

- 18) In a decision handed down on 5 November 2008 the Licensee was found to have breached the requirement to scan the ID of clients purchasing take away alcohol and to have sold more than one wine cask to a customer in a single day, for which the Commission imposed a two day suspension of the take away component of the liquor licence.
- 19) Ms McAlister informed the Commission that she had been instructed to make no specific submission on the appropriate penalty in the circumstances of the current breach. The Commission notes that the lack of any submission on the quantum of penalty on the part of the Director is not particularly helpful, more so in a case such as this where there are no precedents for a breach of licence condition relating to patron numbers. It is acknowledged that there may be reasons for the Director's stance in this regard. However the Commission recommends that the Director reconsider his position with a view to making submissions on the range of the appropriate penalty for the purpose of properly informing the Commission of the appropriate penalty range.

CONSIDERATION OF THE ISSUES

- 20) The Commission considers this particular breach of the licence condition to be of a serious nature. At the lower end of the scale, overcrowding has the potential to result in the Licensee being unable to monitor patron behaviour, including the level of intoxication of patrons, to the necessary standard. A more serious risk is the potential for arguments and physical confrontation between patrons vying for space in the premises. At its highest level, in terms of risk posed to patrons, if the need to quickly depart from premises due to an emergency arose, such as in the case of a fire, loss of life or serious injury is a real possibility.
- 21) The materials contained in the hearing brief suggest there was some confusion as to the number of patrons who were permitted to be in the Riverside Bar on 16 September 2009. Mr Whitelum's letter of 11 January 2010 states that the allowable number of patrons was increased on 23 November 2009 by NTFRS and that 150 patrons were permitted in the Riverside Bar after 22 July 2009, that is after the Certificate of Occupancy was issued. In his email of 15 February 2010 Mr Oliver notes that 22 July 2009 is not the relevant date. Regardless of the confusion, it was agreed by the parties at hearing that on 16 September 2009 the Riverside Bar was licensed for a capacity of 100 patrons. On that date for a period of time 236 patrons were present inside the Riverside Bar.
- 22) The Commission accepts Mr Sylvester's submission that at the time of the breach the new fire exit door was in place and operational. As a result of that modification the capacity of the Riverside Bar was ultimately increased by NTFRS to 150. However, the Commission adopts the agreed statement of facts that, at the time of the breach, the maximum capacity was 100 persons. For the purpose of clarity, the Commission regards the overcrowding

permitted by the Licensee on 16 September 2009 to be grossly excessive and of a serious nature, regardless of whether the excess number of patrons was taken to be 136 or 86. An excess number of patrons of 136 or 86 displays a complete lack of attention or care on the part of the Licensee to that condition of the licence and, consequently, the safety of its patrons.

- 23) The submission on behalf of the Licensee that it relied on independent contractors, JASP Security, to monitor patron numbers is noted. Similar arrangements are in place at the majority of licensed premises required by their licence conditions to engage crowd controllers. It is also acknowledged that the crowd controller in question did not monitor patron numbers to any satisfactory level on 16 September 2010.
- 24) Those matters however fall well short of convincing the Commission that it should make any concession that the Licensee is less culpable for the breach due to there being an intervening independent contractor. The Licensee is responsible for compliance with the conditions of licence, not JASP Security.
- 25) A slip of a few patrons over the limit may be excused, given that patrons may enter and exit premises over the course of a day. However, in this instance the breach was so excessive and blatant the Commission is not convinced the Licensee had no way of knowing of the overcrowding, other than to be advised by its contractor security guards. There are other indicators that should have alerted the Licensee to the fact the Riverside Bar was seriously overcrowded. Properly trained bar staff expecting a capacity of 100 patrons must surely have noticed that more than double that number were in attendance. The takings for the day should also have indicated a spike in revenue on the day in question if patron numbers had increased by 130% on the maximum capacity.
- 26) The Commission does not accept Mr Sylvester's submission that the Licensee should be given some credit for the gap in time since the last offence. The Commission notes that this is the third breach of a licence condition by this Licensee since January 2008, albeit the breaches concerned different licence conditions. For the past offences the penalties imposed by the Commission have been suspensions of licence for the particular area of the premises where the offence occurred. The Commission is concerned that the deterrent factor of an actual suspension does not appear to have had the desired effect if sheeting home to the Licensee the consequences of breaching its licence conditions.
- 27) In determining the appropriate penalty the Commission takes into account the fact that the Licensee admitted the breach however it does not accept the excuse that the blame lies with the contractor security firm or that the lack of diligence by the security staff somehow alleviates the responsibility of the Licensee for the proper management of the premises.
- 28) By comparison with similar licensed venues this Licensee is developing a pattern of offending and the Commission would have been minded to suspend the licence for the entire premises were it not for the mitigating factors submitted on behalf of the Licensee. Having said that the Commission is of the view a term of suspension of the licence for at least part of the licence is appropriate given the serious nature of this breach.

DECISION

- 29) The Commission re-affirms that it is the Licensee's responsibility to ensure that the patron capacity limits are adhered to and Licensees must have systems in place to ensure this occurs. Simply delegating the task to a third party is not an acceptable system.
- 30) The Commission views the matter of overcrowding of licensed premises as particularly serious and takes into consideration the need to send a strong message to all Licensees that breaches of this nature will not be tolerated. The potential for real harm to patrons militates in favour of a penalty at the higher end of the scale.
- 31) The Commission has determined to impose a 5 day suspension of the licence for the Riverside Bar during the hours of 10.00 am and 2.00 pm on 5 consecutive days. The suspension period is to commence at 10.00 am on Monday 12 July 2010 and conclude at 2.00 pm on Friday 16 July 2010.
- 32) The Licensee of the Todd Tavern Hotel is warned that a future breach of the conditions of its licence will be treated seriously by the Commission and may well result in a suspension for the entire licensed premises and not just the area where the breach occurred.

Philip Timney
PRESIDING MEMBER

2 July 2010