

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Crossways Hotel
Licensee:	Liquid Management Pty Ltd
Licence Number:	80100963
Proceeding:	Additional Penalty Pursuant to Section 124AAA of the <i>Liquor Act</i> for Section 102 and Section 106B Offences
Heard Before:	Ms Merran Short (Presiding Member)
Date of Hearing:	12 November 2007
Appearances:	Mr John Lawrence for the Licensee Mr Tom Anderson for Director of Licensing

Background

- 1) This hearing was to determine whether to impose an additional penalty (“sanctions”) on the Licensee as allowed for pursuant to Section 124AAA of the *Liquor Act* (“the Act”).

Section 124AAA Additional Penalty.

124AAA *Additional penalty*

- (1) *Notwithstanding anything in this Act, the Commission may, in relation to the finding of guilt of a Licensee for an offence against section 102, 105, 106B, 106C or 121, by notice in writing served on the Licensee and for a period specified in the notice, not exceeding that prescribed by subsection (2) –*

- (a) *suspend the Licensee's licence; or*

- (b) *vary the licence so that the licence applies to and in relation to part only of the premises to which it previously applied,*

or, where the offence is a third or subsequent offence, instead of suspending or varying the licence, cancel the licence.

- (2) *For the purposes of subsection (1), the following are the prescribed periods:*

- (a) *where the offence is the first offence by the Licensee against any of the sections referred to in that subsection – 24 hours;*

- (b) *where the offence is a second offence – 7 days; and*

- (c) *where the offence is a third or subsequent offence – 28 days.*

- (3) *For the purposes of subsection (2)(b) or (c), an offence is a second, third or subsequent offence if the previous offence was an offence, or the previous offences were offences, against any of the sections referred to in subsection (1), whether committed before or after the commencement of this section.*

- 2) Section 124AAA of the Act provides for additional sanctions, to be applied by the Commission to Licensees in circumstances where they have been convicted of an offence as prescribed.

- 3) The circumstances of this matter are that on 14 March 2007 the Nominee of the Crossways Hotel, ("Crossways") Mr Steven Reed, pleaded guilty to two (2) offences without proceeding to recorded convictions in the Katherine Court of Summary Jurisdiction, ("the CSJ"). The two offences were as follows, on:
 - a) 19 August 2006 - permitting a minor to enter and remain on the licensed (Crossways) premises contrary to Section 106B of the Act, ("the first offence");
 - b) 26 August 2006 - selling liquor to an intoxicated person in breach of Section 102 of the Act, ("the second offence").
- 4) Whilst Mr Reed did not personally perform these acts, the prosecution occurred under Section 123A of the Act – which provides that a licence may be prosecuted for the actions of their employees.
- 5) Briefly the facts relating to the first offence a minor ("the minor") entered the Base Nightclub of the premises at around 1.00 - 2.00am on Saturday morning and remained on the premises until 3.30am playing pool until the nightclub closed. Upon exiting the nightclub the minor was involved in an altercation and came to the attention of the Northern Territory Police ("the Police") and he was taken into protective custody.
- 6) The minor admitted in his statement to Police that he was "horrors drunk" (really drunk) whilst within the nightclub but did not purchase any alcohol while on the premises.
- 7) The circumstances of the second offence are that at about 8.30pm on a Saturday, an employee ("the employee") of the Licensee sold alcohol from the bottle shop to an intoxicated person ("the patron").
- 8) The bottle shop of the premises was open from 12.00pm to 9.00pm at that time. Mr Reed was not on the premises at the time.
- 9) The patron was observed by Police purchasing a four (4) litre cask of Barunga Ridge Moselle. It was the evidence of the Police witnesses in the CSJ that the patron appeared to be swaying and "unsteady on his feet, had blood shot eyes and smelt of intoxicating liquor. The patron later returned a blood alcohol of .346%BAC.

Submissions

- 10) Directors of the Licensee, Mr Little and Mr Hack were both present at the hearing as well as Mr Steven Reed. Mr Lawrence agreed to overlook a procedural defect relating to the late notification of the first offence and decided to have the Commission deal with both offences at this hearing. With the procedural matters disposed of Mr Lawrence proceeded with his submissions, one being an objection to the Commission having before us some of the materials included in the hearing brief. In particular the material regarding breaches by Crossways that occurred in 2003 and the Police witnesses' statements regarding these two offences.
- 11) It should be noted that the 2003 breaches by Crossways were committed under the same Licensee but a different Nominee. There were three (3) separate complaints of serving intoxicated persons in August 2003, one of which was upheld. This finding does not amount to a first offence for the purposes of Section 124AAA because there was no "finding of guilt" of this Licensee, in the CSJ.
- 12) It was Mr Lawrence's first submission that the Commission was sitting in a quasi judicial capacity when considering Section 124AAA additional sanction provisions of the Act and ought to therefore only have regard to the matters that were put before the Magistrate in the CSJ. That is, the précis of facts as read into the transcript of proceedings and only matters put before the Court contained in the transcript of proceedings, (Exhibit 1). For the reasons set out below the Commission disagrees with Mr Lawrence.

- 13) Mr Lawrence further submitted that although there were two separate offences referred to in the brief, because they had been dealt with on the same day in the CSJ they were only one offence for the purposes of Section 124AAA of the Act. Mr Lawrence referred the Commission to the matter of *Reid v Rowbottom* (2005) 152 ACrimR in support of this proposition. The substance of his argument was that where legislation refers to an increased penalty for a second offence "...that expression bears the technical meaning of an offence committed after conviction of a first offence unless there is some indication in the Act under review which raises an inference to the contrary", see *Ryszawa v Samuels* [1969] SASR 158 C 159, there being no indication to the contrary in Section 124AAA of the Act it was put by Mr Lawrence that as both offences were dealt with by the CSJ on 14 March 2007, they were, for the purposes of Section 124AAA of the Act, the same offence.
- 14) Mr Anderson agreed with this submission. The Commission accepts this submission and agrees that this is a first offence for the purposes of Section 124AAA of the Act.
- 15) Turning then to Mr Lawrence's first submission, and the basis of his objection to Commissioners having information before them regarding the prior offences by this Licensee and the Police witness statements. The thrust of Mr Lawrence's argument was that the Commission when considering additional sanction under Section 124AAA of the Act, ought to only consider the material put before the CSJ as we are sitting in a quasi judicial role. In support of this argument Mr Lawrence relied heavily on sections of the Second Reading Speech which is set out at paragraph 44 of *O'Neill Hotel Management Services P/L v NT Liquor Commission* [1999] NTSC 124; as read by the then Chief Minister, Mr Marshall Perron on 20 May 1993 Hansard page 8311.
- 16) In particular Mr Lawrence referred the Commission to the phrase and argued a Section 124AAA sanction should only be considered..."if it (the Licensing Commission) believes the Licensee has flagrantly defied the rules..." and "...that a Licensee has tried to act in a responsible manner and that someone has slipped under his guard..." (emphasis added). Mr Lawrence placed much weight on these words and submitted that the intention of the legislature was to catch those Licensees who flagrantly disregarded the Act, not those who had inadvertently let their "guard slip". And, on the facts of this case there was no flagrant defiance by the Licensee but rather a momentary lapse that allowed the employee to "let someone slip under his guard" of the employees, leading to the first and second offence.
- 17) Regarding the first offence the Commission heard evidence from Mr Reed that the minor was 17 1/2 years old, 6 foot 4" about 140 kilograms and he had shown identification previously and had "slipped under the guard" of the security at the door.
- 18) As corroboration of the Licensee acting in a responsible manner, as referred to in the Second Reading Speech, Mr Reed gave evidence of the preventative measures Crossways had in place to prevent these "slips". In particular he advised the Commission of the processes and procedures Crossways has in place to train their staff. He produced a manual which had been implemented about April 2004, so well before these events. The manual is available to all staff and it is also used for staff training.
- 19) In regards to the second offence, Mr Reed went on to tell the Commission that as a general rule he experiences great difficulty recruiting and retaining staff. And, it was for this reason that despite the fact that the employee in the bottle shop was experiencing "relationship difficulties", which according to Mr Reed meant he was "not at the top of his game", Mr Reed elected to keep him on the roster (the employee had formally resigned and was due to leave shortly after these events) because Mr Reed had no one to replace him in the short term. The Commission accepts Mr Reed's evidence regarding the difficulties recruiting and retaining staff and thanks him for his forthright evidence in this regard.
- 20) Mr Reed also told the Commission that the staff had been directed and shown how to identify intoxicated patrons and it was reinforced into staff constantly that "if you are not sure, do not serve".

21) Finally, in further support of his argument, Mr Lawrence submitted that Section 124AAA of the Act fills the gap in the *Sentencing Act* which put the relevance of other matters in question and in those circumstances the Commission should deal with it in the same manner as a court would, namely to only consider those matters put before it. Therefore the earlier breaches by the Licensee were not a matter the Commission could consider unless they were somehow put into issue by Mr Lawrence. Accordingly, in Mr Lawrence's submission the Commission was restricted to consider the matters put before the court, in this case the fact sets out in the transcripts, Exhibit 1.

22) Mr Anderson seemed to agree with the trust of Mr Lawrence's submissions.

23) With respect the Commission disagrees.

24) The Commission does agree with Mr Lawrence that we can gain guidance from the Second Reading Speech. When read in it's entirely the passage of the Second Reading, Speech referred to by Mr Lawrence states specifically -

"It is the government's view that breaches of the Act should be judged individually and that the Liquor Commission is best positioned to make those judgments..." , The suspension penalties continue to be available to the Commission if it believes that a Licensee has flagrantly defied the rules, has irresponsible allowed under-age drinkers onto the premises, has continued to serve drinks to the intoxicated or has failed to prevent riotous conduct and violence on the premises. However, if the Commission decides that a Licensee has tried to act in a responsible manner and that someone has slipped under this guard, then it would have the discretion to impose a more suitable penalty."(emphasis added.)

[See Section 62B of the *Interpretation Act* "Use of Extrinsic Material in *Interpreting Act*".]

25) In our view the intention of Section 124AAA of the Act is to specifically refer matters to the Commission for further consideration regarding any additional sanction because the Commission and the Commission alone is aware of the entire history of the premises in question. Is it not referred to the Commission to fill a gap in the *Sentencing Act* nor out of some eleventh hour consideration but because the Commission is "...*best positioned*..." to consider the matter due to the Commission's knowledge of the background against which the offence is committed and in those circumstances it was intended that the Commission assess whether to impose an additional sanction taking into account the entire background of the premises.

26) It is also the Commission's view that Mr Lawrence's interpretation that the Second Reading Speech –

- only applies in circumstances where there has been a "flagrant defiance" of the Act; and/or
- the Licensee is to be excused if they can demonstrate reasonable steps to prevent someone "slipping under their guard"

is too limited.

27) The Second Reading Speech when read as a whole, as it should be, clearly expresses flagrant defiance as only one aspect. It also refers to irresponsibly allowing under-age drinking or serving and intoxicated person, as actions that can stand alone to attract an additional sanction pursuant to Section 124AAA of the Act. And, whilst demonstration that a Licensee has tried to act in a responsible manner will go some way in mitigation, it will not protect the Licensee entirely from the Commission exercising their discretion to impose a further sanction.

28) What is reasonable is determined against the background upon which the breach (offence) occurs. In this case, the township of Katherine, which unfortunately is experiencing enormous alcohol problems within its society, and has the regrettable statistic of having one of the highest liquor consumption per capita in Australia. Against this society, it is in the

Commission's view, incumbent upon all licensees to be especially vigilant in discharging their duties under the Act.

- 29) Therefore contrary to Mr Lawrence's submission, the Commission is of the opinion that Section 124AAA of the Act does not require that service to a minor or to an intoxicated person must also be in flagrant defiance of the Act, before attracting the attention of the Commission. It only requires that the serving a minor or serving an intoxicated person or acting in flagrant defiance of the Act. Whether that action is mitigated by the responsible conduct of the licensee is a matter to be assessed by the Commission on all the facts before it.
- 30) Further, it is the Commission's view that the submission put by Mr Lawrence is not consistent with the obligations of the Commission set out in Section 3(3) of the Act. Section 3(3) of the Act provides that the Commission must have regard to the objects of the Act and must exercise its power and perform its functions consistent with those objections.

3 Objects

- (1) *The primary object of this Act is to regulate the sale, provision, promotion and consumption of liquor –*
- (a) *so as to minimise the harm associated with the consumption of liquor; and*
 - (b) *in a way that takes into account the public interest in the sale, provision, promotion and consumption of liquor.*
- (2) *The further objects of this Act are –*
- (a) *to protect and enhance community amenity, social harmony and wellbeing through the responsible sale, provision, promotion and consumption of liquor;*
 - (b) *to regulate the sale of liquor in a way that contributes to the responsible development of the liquor and associated industries in the Territory; and*
 - (c) *to facilitate a diversity of licensed premises and associated services for the benefit of the community.*
- (3) *When the Commission exercises a power or performs a function under this Act, the Commission must have regard to the objects of this Act and must exercise the power and perform the function in a way that is consistent with those objects.*
- 31) It would, in the Commission's opinion be contrary to the objects of the Act to ignore relevant matters when considering any matter before it, including matters pursuant to Section 124AAA of the Act.
- 32) In addition the Commission has the power to do all things necessary or convenient to be done for or incidental to the performance of its functions, see Section 5(2) of the *Northern Territory Licensing Commission Act*.
- 33) In this case before determining whether an additional sanction is to be applied the Commission can freely inform itself of all relevant matters, including this case the prior history of the Licensee and the witness statements regarding the first and second offence.

Sanction

- 34) Turning them to the issue of sanction, when Section 124AAA(a)(b)(2)(a) are read together they prescribe that for a first offence the maximum sanction the Commission can apply is to suspend or vary the licence for a period not exceeding twenty-four (24) hours.
- 35) The Commission agrees that this is a first offence and therefore the maximum suspension or variation is twenty-four (24) hours.

- 36) In mitigation of applying the maximum Mr Lawrence referred the Commission to the evidence of Mr Reed of the preventative steps this Licensee, and in particular Mr Reed as Nominee, has taken to counter mistakes of the past and to limit the Licensee's exposure as much as possible to breaches of the Act by their staff.
- 37) The Commission considered Mr Reed to be very helpful honest and straight forward witness who assisted the Commission greatly. The Commission accepts Mr Reed's evidence that the staff manual referred to earlier was prepared prior to these offences and was readily available and accessible to staff.
- 38) The Commission also accepts that there is on-going training for employees of the Licensee and that each of them completes the Responsible Service of Alcohol course at the earliest opportunity. Further, the Commission is satisfied that Mr Reed as Nominee has taken reasonable steps to inform the employees of Crossways of their responsibilities regarding the Responsible Service of Alcohol.
- 39) The Commission accepts the difficulties experienced in recruiting and retaining staff and it is clear that this places a heavy burden on Mr Reed.
- 40) Mr Lawrence made submissions in confidence as to the cost Crossways would incur as a result of any suspensions particularly the closure of the bottle shop which is the main source of income for Crossways. Mr Reed also gave evidence that although most of the staff were casual workers if the bottle shop licence was suspended for any period of time Crossways would still need to pay its employees for the down time or risk losing them as the employees relied on the income of their salaries.
- 41) The question then is what weight the Commission gives these factors? In the absence of any evidence to the contrary the Commission is persuaded that employees will need to be paid for any period of suspensions. The Commission also accepts the difficulties regarding recruiting and retaining staff.
- 42) Arguably given his prior knowledge that the bottle shop worker was not at the "top of his game" Mr Reed ought not to have rostered him on at all, however, the Commission considers that Mr Reed's decision to provide another person to work the bottle shop with him, which by Mr Reed's own evidence is the busiest time of the week, goes some way to limiting the risk. Short of Mr Reed undertaking the shift himself there seemed little else he could do on short notice given the staffing difficulties he was experiencing.
- 43) In hindsight this may have been the better option because clearly the employee was not in the appropriate frame of mind to work in the bottle shop. This is evidenced by his response to Police at the time of the second offence when asked why he had served the intoxicated patron; he replied "well you should lock the drunks up man". In the opinion of the Commission this demonstrates a cavalier attitude regarding his duties and clearly did not fit within the responsible service of alcohol guidelines.

Decision

- 44) It is the view of the Commission that when the objects of the Act are considered along with Section 124AAA of the Act and the Second Reading Speech it cannot have been the intention of parliament to refer a matter back to the Commission for additional sanction yet restrict what the Commission could consider. Further the Commission is not limited to the matters they may take into account when deciding whether to impose an additional sanction but rather the Commission ought properly to consider all the circumstances of the matter before them including any circumstance in mitigation and the society against which the breach (offence) occurred.
- 45) In all the circumstances including taking into account the licensed premises entire history, as well as the society in which Crossways is located, but particularly prior breaches by the Licensee, the Commission has decided to suspend sales from the bottle shop of the

premises, and in accordance with the Commission's policy in the past, the suspension should occur on a Saturday, the same day as the offence.

- 46) Taking all these matters into account, including the circumstances of the offence, the matters in mitigation, and the opening hours on a Saturday in Katherine since the Supply Plan was implemented; the suspension is to occur between the hours of 16:00 and 20:00 on a Saturday at the Director's discretion.

Merran Short
Presiding Member

21 January 2008