

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Hot Potato
Licensee:	Crocosaurus Cove Pty Ltd
Licence Number:	80317973
Proceeding:	Complaint Pursuant to Section 48 (2) of the <i>Liquor Act</i> Licensee to Comply with Licence Conditions: Exceed Patron numbers in breach of section 110 of the <i>Liquor Act</i>
Heard Before:	Mr Richard O'Sullivan (Chairman) Mr Philip Timney (Legal Member) Mrs John Brears
Date of Hearing:	22 February 2011
Appearances:	Mr Ray Murphy for the Licensee Mr Josh Ingrames for the Director of Licensing

Background

- 1) A complaint was lodged with the Director by Inspector Shane McCorkell on 13 October 2010 alleging that Crocosaurus Pty Ltd, trading as Hot Potato, had breached Section 110 of the *Liquor Act* ("the Act"). The complaint alleges that on 26 September 2010 the Licensee had 372 patrons on the premises. This was determined by Inspector McCorkell after watching the CCTV footage of the exit/entry area of the Hot Potato nightclub on the morning in question.
- 2) Inspector McCorkell had sought to review the CCTV footage for the morning of 26 September 2010 as he had received email correspondence from Senior Constable Tammy Watson of Northern Territory Police which stated that she had attended the Hot Potato on the eve of the AFL Grand Final on 25 September 2010 where she was advised that the venue was at capacity and that 346 patrons were on the premises. Her email evidences concern that maximum patron numbers could have been exceeded.

- 3) Section 110 of the Act contains:

110 Licensee to comply with conditions

A licensee shall not contravene, or fail to comply with, a condition of his licence.

- 4) A condition (Condition 5) of the Hot Potato Licence is:

Special Condition, Late Trading Premises

Whichever is the least, the Licensee shall obtain and observe maximum patron limits as recommended by the Northern Territory Fire Service, OR, the total maximum patron numbers permitted shall not exceed 350, as advised to the Northern Territory Licensing Commission by the licence applicant.

- 5) Northern Territory Fire and Emergency Services ("NTFES") have established patron capacity based on fire and safety factors at a maximum of 346 at any time.

- 6) The Commission considered the complaint and following finding that it was not of a frivolous, irrelevant or malicious nature, determined to conduct a Hearing into the matter.

The Hearing

- 7) The Hearing was conducted on 22 February 2010. Mr Ray Murphy appeared as Counsel for the Licensee and Mr Josh Ingrames appeared on behalf of the Director of Licensing. Mr Murphy advised that he would call as witnesses the Nominee of the Hot Potato, Mr Mike Scott, and the Manager of Proactive Security, Mr Adrian Franklin, whose company provides security at the Hot Potato. Mr Ingrames advised he would call Inspector Shane McCorkell as a witness.
- 8) At the outset of the Hearing, Mr Murphy drew attention to his written response to the complaint on 17 November 2010 where he contended that there were nine patrons only in excess of the patron numbers allowed at the venue, and that given all the attempts to control and restrict numbers at the venue, the excessive patron numbers were "*an honest and reasonable mistake*".
- 9) He advised that he would be pursuing an argument that a person has a defence or is excused from criminal responsibility for an act unless it was intended or foreseen, to a degree, by him as per the Criminal Code. Mr Murphy also complained that following the laying of complaint, further and new investigations had been pursued in relation to his client.
- 10) Mr Ingrames contested that the Criminal Code applied to Hearings before the Licensing Commission and also disagreed that following the laying of the complaint, investigations in its support could not be continued.
- 11) Mr Ingrames outlined that on the morning of 26 September 2010, Inspector McCorkell had viewed the CCTV footage for the Hot Potato and determined that 372 patrons had exited the premises between 3.00am, when a lockout is in place, and 4.30am when all patrons vacated the premises. The lockout is a licence condition that prohibits patrons from entering the premises after 3.00am, apart from staff. Inspector McCorkell had used a hand held counter to calculate 372 exiting patrons, 26 in excess of that allowed under the licence condition. He stated that he had assumed that the six persons entering the Hot Potato after 3.00am were staff, and therefore he had also deducted six from his exit count so as to only include patrons in his head count.
- 12) Mr Murphy contended that numbers exiting, as counted by Inspector McCorkell, could include up to seventeen staff members working at the Hot Potato, thereby reducing the excess patron numbers to nine.
- 13) Inspector McCorkell reiterated that he had counted six staff, who he assessed were all entering the premises from The Tap after the lockout and had excluded them from the count. He was cross examined as to whether any other of those persons exiting could or would have been staff members working at the Hot Potato. Inspector McCorkell stated that he made the assumption that only six of the departees were staff that he had earlier seen enter the premises after the lockout. Mr Murphy maintained that would have included Hot Potato staff leaving after their shift and this established that not all 372 persons were members of the public, thereby reducing the number of excess patrons.
- 14) Mr Franklin was called to give evidence and stated that he had been Manager of Proactive Security for ten years and worked in the security industry for approximately twenty years. Mr Franklin gave an outline of a number of security staff and other staff likely to be present at the Hot Potato. Using this information Mr Murphy calculated that the number of persons on the premises undertaking supervision and general staff duties could total seventeen and that this seventeen could have been counted in the exit numbers given by Inspector McCorkell.

- 15) Mr Franklin outlined instructions from Hot Potato Management which had been clear that they were not to allow the premises to exceed 346 patrons and that “*jobs are on the line*” if numbers exceeded that limit. He further outlined an initiative of the Hot Potato, following a breach of patron numbers in March 2010, to better deal with patron numbers which had involved the issuing of tickets to people wishing to enter the Hot Potato who could then have a drink at The Tap while waiting for their number to come up and gaining entry. This system was designed to avoid queuing but had not worked.
- 16) Mr Franklin advised the Hearing that smokers and persons using mobile phones frequently left the premises temporarily and returned, making it difficult to keep an exact account of the numbers inside the Hot Potato.
- 17) He outlined the procedures for the Hot Potato which included regular meetings during the night between security and Duty Managers to assess numbers, with security also entering numbers in a register every hour. He advised that security were generally in an identifiable pink shirt and black trousers while bar staff had no uniforms.
- 18) On the evening in question, the Duty Manager had called in sick. Under cross examination from Mr Ingrams, Mr Franklin reaffirmed that the Duty Manager and security within the venue generally do a head count hourly and confer with security staff at the point of entry, as a safety net to avoid error in patron counting.
- 19) The Nominee, Mr Mike Scott, advised that on the night of 25 September 2010 and the morning of 26 September 2010, there had been a turnover at the venue of 661 paying patrons. He added that this did not include VIP’s and promotional invitees and that the total number of persons who had gone through the premises over the trading period would exceed 1,000.
- 20) He advised the Commission that the message he had conveyed following a previous breach of patron numbers at the Hot Potato that whoever jeopardises the licence through excessive patron numbers would be held accountable. A series of written procedures required to be met by staff and security had been conveyed by him to avoid such breaches. The Hot Potato duty Manager’s report provided in the hearing Brief has the comment:

“Hit capacity at 11.40pm and held that almost to the end of the night. Very happy with the night. It showed door numbers at 12.00pm (340 patrons), 1.00am (345 patrons), 2.00am (344 patrons), 3.00am (340 patrons).”
- 21) He advised that the queuing card system which had been trialled at the venue had not worked as patrons were reluctant to take a ticket and go to The Tap for a drink while waiting for their number to come up.
- 22) He outlined the complexity of using a pass out system for smokers and for persons wishing to use their mobile phones (which do not operate at the basement of the Hot Potato). He advised that if smokers or mobile phone users were not clicked out of the premises they would be one down on their capacity, however, if they were clicked out, they would have to wait in a queue, as their number would have been taken up by a front queue patron.
- 23) Mr Scott acknowledged that a request had been received from Inspector McCorkell to interview staff present at the time of the alleged breach and that staff had not been made available as many are transient and the request was made some ten days after the event.
- 24) He added in relation to the alleged breach, all procedures that can be followed were followed and in his opinion no one had been reckless, negligent or careless if the patron numbers had been exceeded. He referred to an honest, reasonable and understandable mistake.
- 25) In relation to six staff seen entering the Hot Potato after the 3.00am lockout, Mr Scott said it was an established practice for The Tap staff to have staff drinks at the Hot Potato at the end of their shift.

- 26) In summing up, Mr Ingrames advised that a defence of honest and reasonable mistake is applicable in the criminal jurisdiction but does not apply as a defence in a Licensing Commission Hearing. He argued that, if the Commission was against him on that point, it was a matter for the Licensee to satisfy the necessary elements of the defence of mistaken belief and that could only be done through its agent, the crowd controllers who were on duty. His submission to the Commission was that the defence of mistaken belief had not been made out by the Licensee.
- 27) He advised the Commission that a Licensee is vicariously liable for the actions of its agents and it cannot adopt a mistaken belief of its agent, that numbers were properly counted and within the legal limit. Mr Ingrames added that the Licensee is culpable in this instance and remains responsible for the occurrence of the breach. The Licensee must accept a degree of culpability for the excessive numbers and the purpose of establishing a patron capacity was to ensure safety in the event of a fire or other emergency.
- 28) Mr Ingrames provided the Commission with examples of precedents where Licensees had breached capacity limits, including the previous breach by Hot Potato in exceeding patron numbers which occurred in March 2010. He maintained that so far as penalty was concerned a specific deterrence was applicable in this instance and that a general deterrence was also warranted as a warning to other Licensees as to the seriousness of providing for patron safety in fire and emergency circumstances. He drew attention to recent decision of the Commission in relation to the Hot Potato (paragraph 52) stating that breaches of this nature will not be tolerated.

“The Commission reaffirms the views expressed in the Todd Tavern decision that the issue of overcrowding of licensed premises is particularly serious and one that requires a strong message to be sheeted home to all Licensees that breaches of this nature will not be tolerated. The potential for serious harm in the event of an emergency situation requires the imposition of a penalty at the higher end of the scale and one that includes an actual suspension of licence.”

- 29) In reference to the previous Hot Potato decision, Mr Ingrames advised that the penalty imposed took account of the mitigating circumstances of:
- Unblemished record;
 - Early admission;
 - Acceptance of responsibility;
 - Adoption of remedial procedures to remedy breach.
- 30) He submitted that an actual penalty was warranted in this case. The Todd Tavern had a five day suspension imposed and the Hot Potato received a three hours suspension for a first breach with mitigating circumstances. He submitted that the Licensee had tried to control numbers but had not tried hard enough. An actual suspension is warranted and should include a high trading period.
- 31) Mr Murphy submitted that in the letters sent on 17 and 29 November 2010 in response to the complaint had all admitted the breach but stated at worst it was an honest and reasonable mistake. He maintained that with 372 patrons leaving the premises after the lockout, up to seventeen could have been staff members, leaving in excess of nine patrons on the premises.
- 32) He drew the Commission’s attention to Section 124AA of the Act and submitted that a breach of section 110 is a simple offence and not a regulatory offence. A finding of guilt for a simple offence, Mr Murphy stated, required both proof of the physical and mental elements of the offence whereas a regulatory offence requires proof of the physical elements only.

- 33) Mr Murphy maintained that for a simple offence an employee or agent of the Licensee must have had a mental element for the breach to be upheld, i.e. the crowd controllers on the door must have intended to allow excess patrons to enter the premises. He argued that there was a potential for excess patron numbers to enter the premises and therefore procedures had been put in place to prevent this occurring. Security staff would have therefore held the view that patron numbers were within the allowed limit.
- 34) All material presented to the Commission, including the Duty Manager's report, indicated patron numbers were under control and a reasonable assumption of this was therefore adopted. The mental element required under a criminal offence was therefore not present with all reasonable measures to prevent excessive patron numbers taken.
- 35) If the Commission was not minded to accept his argument on the applicability for the Criminal Code, Mr Murphy submitted that there was considerable evidence before the Commission in respect of mitigation to the breach.
- 36) The Licensee is a Body Corporate and can only act through its agents; it is therefore vicariously liable for the actions of its agents. The Licensee has exercised a duty of care and provided instructions and outlined duties to establish procedures to avoid excess patron numbers being on the licensed premises.
- 37) Mr Murphy submitted that the seriousness of the excess numbers in this instance is small and could be as little as 2% over the established limit. With one thousand people coming and going over the evening of 25 September 2010 and morning of 26 September 2010, he argued that the margin of excess patrons is very small.
- 38) Mr Murphy drew attention to previous Commission decisions, which in the case of the Todd Tavern in July 2010, the Licensee had three prior breaches with the numbers in excess of the patron limit totally 120%. In the current case of the Hot Potato, the excess of patron numbers is somewhere between 2%, if Mr Murphy's argument regarding staff members is upheld and 7.5% excess, if figures used by Inspector McCorkell are upheld.
- 39) In the previous breach of numbers by the Hot Potato in August 2010, the numbers were 34% over the legal limit and at that time adequate procedures were not in place or applied compared to the current case where considered measures were put in place by the Licensee to avoid excess numbers.
- 40) Mr Murphy maintained if the breach is proven, the Commission has the power to vary licence conditions or impose a penalty, but in this case the normal penalty tariff should not apply due to mitigating circumstances and the proactive actions taken by the Licensee and impressed on staff members.

Consideration of the Issues

- 41) As a threshold point, the Commission has been presented with argument and counter argument on whether, for a Section 110 breach of the Act to be determined, the degree of proof applicable to simple offences under the *Criminal Code*, is required.
- 42) Mr Murphy submitted that a breach of Section 110 of the Act constitutes a simple offence and therefore an offence to which the *Criminal Code* is applicable. He added that in order for the Commission to determine that the alleged breach of Section 110 is made out it must make positive findings in respect of both the physical and mental elements of the offending.
- 43) The Commission is not persuaded by that submission. If the intent of the Legislature was, at the time the current Act was enacted, that the *Criminal Code* is applicable in respect to breaches of the *Liquor Act* referred to the Commission then it would be expected that clear words to that effect would have been included in the Act. The Commission's view in this regard is strengthened by consideration of the *Alcohol Reform (Liquor Legislation Amendment) Bill* 2011, recently tabled in the Legislative Assembly. Clause 8 of that Bill

prescribes that "Part IIAA of the Criminal Code applies to an offence against this Act". If, as submitted by Mr Murphy, the *Criminal Code* applies to the Act as currently drafted that amendment would be superfluous. Clearly, the Legislature is of the view that the *Criminal Code* does not currently apply to the Act and has taken steps to reverse that situation.

- 44) Inspector McCorkell's evidence is that upon viewing the CCTV footage he hand counted 372 persons exiting the premises from 3.00am on the morning of 26 September 2010. The Commission considers this an honest account, however, how this number relates to the excess of patrons on the premises is not as clear. Inspector McCorkell has stated that he saw six people whom he assumed to be staff enter the premises following the lockout at 3.00am and that he has accordingly assumed that these six persons exited between 3.00am and 4.30am, ie the count of 372 excludes a further six person who exited during this time.
- 45) Mr Murphy's argument that there were up to seventeen staff included in the count is also problematical. During the Hearing Mr Murphy established that with all the bar staff, glass attendants, supervisors, Duty Manager and Master of Ceremonies, there could be up to seventeen staff in total who may have exited the premises during the time of Inspector McCorkell's count.
- 46) The Commission's viewing of the CCTV footage after 4.30am witnessed a number of staff remaining on the premises for clean-up and close up purposes, therefore not all staff on duty at the Hot Potato on the morning of 26 September 2010 were included in Inspector McCorkell's head count. It is more than likely that some of the up to seventeen staff exited the premises during the time of Inspector McCorkell's count but certainly not all of them.
- 47) On this basis it is likely that the number of patrons exceeding the established limit is somewhere between 26, as maintained by the complaint, and the nine maintained by the Licensee. The viewing of the CCTV footage immediately after 4.30am by the Commission has established that there were around five staff remaining on the premises after the completion of the Inspector's head count.
- 48) The excess patron numbers are quantified somewhere around fourteen and this represents around 4% over the limit.
- 49) In terms of appropriate penalty the Commission does reaffirm it's already cited decisions stating that excessive patron numbers will not be tolerated due to unacceptable safety risks. Mr Graham Johnson, of the Community Fire Safety Division of Police, Fire and Emergency Services has provided the following advice dated 4 January 2011 in relation to maximum patron numbers:

"Overcrowding of licensed premises can pose an unacceptable level of risk to patrons. The risk attributed to overcrowding is compounded by unfamiliarity of the premises, subdued lighting, high noise levels and a possible effect of alcohol consumption, leading to confusion during evacuation.

Under the Northern Territory Fire and Emergency Regulations, failure to ensure maximum number of persons are not exceeded is viewed the more serious end of public safety infringements."
- 50) This breach has occurred some six months after a previous and more serious excess patron breach. Countering this is the fact that the Licensee has made considerable effort to avoid excess patron numbers by having security count patrons exiting and entering, having regular head counts and maintaining an hourly summary of door numbers by the Duty Manager.
- 51) The Commission is persuaded by the argument tendered by Mr Ingrames that in this instance it should take into account the need for both a specific and public deterrence with an actual served penalty therefore applicable.

- 52) In determining the penalty the Commission does give credit to the Licensee in admitting the breach, co-operating with the investigation and its actions, albeit flawed on the night in question, in addressing the risk of excess patron numbers.
- 53) The Commission is also minded that the offence occurred during a high trading period following the AFL Grand Final on Saturday 26 September 2010.

Decision

- 54) The breach by the Licensee is admitted with the Commission establishing that the premises exceeded capacity by a margin of around 4%. In itself this is not a large number, but it does follow on the heels of a similar breach of excess patron numbers some six months prior.
- 55) The Commission has therefore determined an actual served suspension is appropriate as a result of the actions of the Licensee and as a warning to other Licensees as to the seriousness of this breach of fire and safety limit numbers.
- 56) As the offence occurred on a Saturday / Sunday trading period, the Commission would normally suspend the licence of Crocosaurus Pty Ltd for the same week day and for a similar period to that for which the overcrowding occurred. However, taking account of the mitigating circumstances and particularly the remedial actions and systems put in place by the Licensee the Commission is minded to impose a penalty of one day suspension of licence to be served on Tuesday 3 May 2011.

Richard O'Sullivan
Chairman

15 April 2011