

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Char Restaurant @ Admiralty 70 The Esplanade Darwin NT 0800
Licensee:	JOHKIL Pty Ltd
Acting Nominee:	Fabian Jenkin
Licence Number:	80817835
Proceeding:	Complaints Pursuant to Section 48(2) of the <i>Liquor Act</i> – Section 25 (5A)
Heard Before:	Mr Richard O’Sullivan (Chairman) Mr Philip Timney (Legal Member) Mrs Kerri Williams
Date of Hearing:	28 September 2010
Date of Decision:	4 October 2010
Appearances:	Mr Mark Wood, for Director of Licensing Mr Chris Higgins, for the Licensee

Background

1. By a report dated 28 July 2010 the Director of Licensing lodged a complaint against the Licensee of the Char Restaurant @ Admiralty (“Char”), JOHKIL Pty Ltd, alleging a breach of Section 25(5A) of the *Liquor Act* (“the Act”), sale of liquor without a nominated manager (“Nominee”) to conduct the business of the licensed premises. By decision made on 25 August 2010 the Licensing Commission determined to conduct a Hearing into the complaint. The Hearing was conducted on 28 September 2010.

Hearing

2. Prior to hearing submissions from the parties, the Chairman queried whether counsel had been engaged to represent the Licensee at the Hearing, as had been previously advised to the Commission. Mr Wood advised that he had been in contact several times with Mr Christopher Watters, a Barrister based in Queensland, who had intended to appear at the Hearing representing the Licensee. Mr Wood had been advised via email yesterday that Mr Watters would not be attending the Hearing. He advised that prior to the withdrawal, he and Mr Watters had negotiated an agreed set of facts between the parties.
3. Mr Higgins informed the Commission that he and Mr Watters were personal friends in Brisbane and that he had contacted him in that capacity for some advice in respect of the complaint against the Licensee. That advice had been presented to Mr Higgins’ Director, however Mr Higgins stated that Mr Watters was not engaged as Counsel for the Licensee at any stage and only consulted in a personal capacity for advice.
4. Mr Wood disputed that submission and stated that it was clear to him in his dealings with Mr Watters that he (Mr Watters) was of the view that he had been engaged as counsel for the Licensee. Mr Wood confirmed that he had negotiated the précis of facts directly with Mr Watters and had been advised that he would be attending the Hearing

in Darwin. Mr Wood tendered an email chain between himself and Mr Watters in which Mr Watters advised, on 27 September 2010, that he had no further instructions from the Licensee and would now not be appearing at the Hearing.

5. Mr Wood formally read the complaint as follows. JOHKIL Pty Ltd, trading as Char, is a body corporate and the holder of Liquor Licence 80817835. At the relevant time, Stephen Leahy and Todd Fullwood were the dual Nominees for the premises. Between 8 July 2010 and 15 July 2010 the Licensee sold liquor in breach of Section 25(5A) of the Act as Mr Leahy and Mr Fullwood had resigned from their employment with Char and no alternate Nominee had been appointed.
6. Mr Higgins, representative of the Licensee, formally admitted the breach of the Act. Mr Wood then presented a précis of the facts leading to the making of the complaint, summarised as follows.
7. Between 22 November 2009 to 25 November 2009 JOHKIL Pty Ltd sold liquor without a Nominee in place. The appointment of a Nominee on 26 November 2009 only occurred after the Licensee was contacted by Licensing, Regulation and Alcohol Strategy ("LR&AS") and advised this was an offence and needed to be rectified. The Licensee was also advised that no further reminders would be issued and any future breaches would result in action being taken. The Licensee subsequently appointed Mr Leahy and Mr Fullwood as Dual Nominees.
8. On 16 July 2010, the Licensee advised LR&AS that one of the Dual Nominees of Char, Mr Leahy, had ceased employment on 7 July 2010. The Licensee requested that Fabian Jenkin be appointed as Nominee, effective immediately. It was also confirmed on that day that the other dual Nominee, Todd Fullwood, had ceased employment at Char on 16 April 2010. This was not notified by the Licensee to LR&AS at the time Mr Fullwood ceased employment with Char.
9. On 21 July 2010 a complaint was lodged with the Director of Licensing alleging that the Licensee had committed a breach of Section 25(5A) of the Act between 8 July 2010 and 15 July 2010 as no Nominee was in place during that period.
10. The Licensee was notified of the complaint by the Director on 28 July 2010 and a response requested by 13 August 2010. The response was not received until 30 August 2010 and stated that, at the time Stephen Leahy's resignation was accepted, he was directed to update and change the details of the Nominee. His failure to do this caused the Licensee to trade without a Nominee after he ceased employment at Char on 7 July 2010. The response also acknowledged the similar breach in November 2009.
11. From 16 July 2010 Char was operating under a certificate nominating Fabian Jenkin as acting Nominee until 27 August 2010. An incomplete application for Mr Jenkin's permanent appointment was received by LR&AS on 26 August 2010. Mr Jenkin's appointment as acting Nominee was subsequently extended for the period 27 August 2010 to 8 October 2010.
12. Mr Higgins advised the Commission that the facts as alleged were agreed by the Licensee.
13. Mr Higgins informed the Commission that the Licensee was having difficulty in securing a long term Nominee for Char. He stated that Mr Leahy had provided a month's notice in mid June and that he (Mr Higgins) travelled to Darwin around 7 July 2010. He noted that Mr Leahy was having personal problems and he instructed him to stay at home until the period of his notice expired, being 18 July 2010. Mr Higgins stated that Mr Leahy was paid out until 18 July 2010 and that during the period 8 and 18 July 2010, whilst he was not actually on duty, Mr Leahy was contactable via mobile phone and available to attend the premises if required.
14. Mr Higgins stated that he held the equivalent of a Nominee's appointment in Queensland and managed licensed premises on behalf of his employer. He confirmed

that he was present at Char between 7 and 18 July 2010 but conceded that he does not hold an appointment as Licensee or Nominee in the NT.

15. At this point Mr Wood referred the Commission to folio 18 of the Hearing Brief, being an undated letter from Mr John Kilroy to Inspector Pippa Pech stating: *“As of the date of 7/7/2010 Stephen Leahy the Char Restaurant manager (Nominee) is no longer employed by Char Restaurant as such we no longer have an appointed restaurant Nominee following his departure.”*. The letter went on to advise that the current duty manager, Fabian John Jenkins, was to be nominated as the new Nominee.
16. The Chairman pointed that the advice in the letter from Mr Kilroy was totally at odds with the submission just made by Mr Higgins that Mr Leahy would be available if required for duty at Char after 7 July 2010.
17. It was also noted from the Hearing Brief that on 17 February 2010 Mr Leahy was appointed as Dual Nominee with Mr Todd Fullwood. Following receipt of the letter from Mr Kilroy, Inspector Pech queried whether Mr Jenkins was to be nominated as dual Nominee with Mr Fullwood. The response on behalf of the Licensee revealed that Mr Fullwood was no longer employed at Char and had ceased employment on 16 April 2010. No advice was provided to LR&AS until the issue was raised by Inspector Pech on 16 July 2010.
18. The Commission also queried Mr Higgins regarding the response from the Licensee to the letter of complaint from the Director, dated 28 July 2010. A response was requested by 13 August 2010. The response was received by LR&AS on 30 August 2010 by way of a letter from Mr Higgins dated “27 July 2010”, the day prior to the Director’s letter. Mr Wood confirmed that the letter was attached to an email dated 30 August 2010 and received by LR&AS on that date. Mr Higgins suggested that the reference to July was an error and the letter was most likely drafted on 27 August 2010.
19. In response to a question from the Chairman, Mr Higgins conceded that the current complaint and the matters referred to in the preceding paragraphs demonstrated sloppy and careless management on behalf of the various Nominees and the management of the licensed premises in general.
20. Mr Higgins added that since he had taken over the position as Group General Manager for Boutique Venues Pty Ltd he has encountered significant management problems with the operation of Char. Many of these had arisen as a result of the failures of Mr Leahy, and particularly his failure to get the necessary licensing paperwork in order prior to end of his employment with Char. Mr Higgins expected the problems to be resolved with the appointment of Mr Jenkins as the permanent and long term manager.

Submissions on Penalty

21. Mr Wood submitted that, on its face, the breach may appear to be of an innocuous nature. However, despite repeated prompts from LR&AS, the Licensee had taken few proactive steps to rectify the situation with the appointment of a Nominee. This had only occurred when LR&AS forced their hand. Mr Wood noted that a similar breach had occurred in November 2009, as acknowledged in correspondence from the Licensee and also by Mr Higgins at the Hearing. He emphasised that the November 2009 breach was not before the Commission but submitted that it confirmed a continuous and careless course of conduct on the part of the Licensee to ensure compliance with section 25(5A) of the Act by having a Nominee engaged at all times.
22. Mr Wood queried whether a formal notice of caution or reprimand to the Licensee would provide any specific deterrence, allowing that various warning and advices had been issued to the Licensee over the past twelve months to little or no effect. He also noted that the Licensee had been advised as far back as February 2010 that no further extensions of acting Nominee appointments would be approved and yet, even at the date of the Hearing, Mr Jenkin held the position as an acting Nominee. Mr Wood also noted that the Licensee had made no attempt to inform LR&AS of Mr Fullwood ceasing to be dual Nominee until

prompted to do so by Inspector Pech, some four months after Mr Fullwood had ceased employment at Char.

23. In terms of Mr Jenkins appointment, Mr Wood asked the Commission to note that he had initially been proposed as Nominee in the letter from Mr Kilroy received on 16 July 2010. As of the Hearing date, a completed application for that to occur has not been presented to the Director. Mr Wood conceded that it regularly takes some time, six to eight weeks, for a criminal history check to be submitted however as far as he was aware there was no impediment to Mr Jenkin submitting the remaining outstanding paperwork associated with the application. He noted that LR&AS regularly issues approvals subject to the later receipt of a criminal history check.
24. Mr Wood noted however an approval in principle could not be issued at this stage as there were additional documents missing from Mr Jenkin's application, including the required business references. Mr Wood submitted that this situation provided a further example of the cavalier attitude of the Licensee in its dealings with LR&AS and in respect of its obligations under the Act even after the formal complaint had been lodged.
25. Mr Wood conceded that no additional breaches of the Act had occurred during the periods a Nominee was not in place. He added however that was a matter of good fortune and the requirement to have a Nominee in place at all times existed for good reasons. He submitted that the penalty imposed by the Commission should reflect an element of general as well as specific deterrence. He referred the Commission to the decision of Thomas J in the matter of *O'Neill Hotel Management Services v The NT Licensing Commission* [1999] NTSC 124, and in particular to paragraphs 43 and 44 of Her Honour's decision:

[43] The Liquor Act 1980 s 12 inserted s 66(1)(a) and (b) in its present form. Section 124AAA was inserted as a new Section in the Liquor Act in s 5 of the Liquor Amendment Act 1993.

[44] During the course of the Second Reading Speech in respect of this latter amendment, the then Chief Minister, Marshall Peron, stated on 20 May 1993 Hansard p 8311:

"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,

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."

26. Mr Wood advised that his initial consideration on penalty was as discussed and agreed with Mr Watters, namely that the appropriate penalty would be for the Commission to issue a direction under section 65 of the Act, directing the Licensee to promptly complete the application process for the appointment of a Nominee for the premises.
27. However, Mr Wood noted that since that agreement the Licensee had further demonstrated its poor management practices, including the confusion created as to whether or not Mr Watters was actually briefed and the fact that, despite the obvious urgency of the matter and the conduct of the Hearing, the Licensee had still not completed the paperwork to achieve the appointment of Mr Jenkin as Nominee.
28. Mr Wood submitted that given the on-going course of conduct by the Licensee up to the date of the Hearing, the indications were that a direction to the Licensee would have little practical impact in terms of deterrence. He submitted that, in the circumstances, the appropriate penalty would be a suspension of the Licence pursuant to section 66 of the Act until such time as the Licensee demonstrated that it had its affairs in order.

29. Mr Wood made no submission as to whether any suspension imposed should be suspended for a period.
30. Mr Higgins reiterated that the Licensee was having significant difficulty in recruiting a competent and long term Nominee and had recently suffered from a "revolving door of managers". Mr Higgins submitted that the need for compliance with requirements of the Act had been reinforced with Mr Leahy however the Licensee had been let down in this regard through Mr Leahy's failure to comply with specific directions or to submit paperwork to LR&AS in a timely manner. He stated that Mr Leahy had been directed to complete the application for a change of Nominee at the time he had given notice of ceasing employment but had failed to complete that task prior to ceasing with Char on 7 August 2010. In Mr Leahy's defence, Mr Higgins emphasised that he was under significant pressure prior to his departure from Char due to serious personal issues.
31. Since the issues with the management of Char had arisen all induction guides had been rewritten and a formal management structure for Char had been put in place. The Licensee has also engaged the services of a contracted Liquor Licensing Auditor to assist and advise in respect of liquor related compliance.
32. Mr Higgins conceded that the breach of the Act and the requirement for a Hearing had arisen due to sloppy management practices coupled with the difficulties with managing the premises when the principals of the Licensee were based in Brisbane. However, he was confident that the management practices put in place recently will prevent any recurrence and he was confident that Mr Jenkin would prove to be a capable and competent Nominee. Mr Higgins submitted that, with Mr Jenkins's appointment, the Commission could be satisfied that the Licensee had in place a Nominee who would accept responsibility for the proper management of the premises.
33. Mr Higgins apologised to the Commission for the requirement to conduct a Hearing into the complaint. He submitted that the Licensee had never deliberately breached the Act and the complaint was a result of the Nominee's failure to comply with specific directions. He added that, regardless of who was at fault, the Licensee accepted full responsibility for the breach.
34. Mr Higgins concluded by stating that he would be disappointed if the licence were to be suspended and suggested that a more appropriate penalty in the circumstances would be the issue of a formal caution by the Commission.

Considerations of the Commission

35. The Commission acknowledges that in terms of serious breaches of the Act, the failure of a Licensee to have a Nominee present on the premises for the relatively short period of eight days sits towards the lower end of the scale. What is of concern to the Commission in respect of the management of the licensed premises is the Licensee's systematic failure to correct the situation, even after having been advised by Licensing Inspectors to do so. The evidence presented at Hearing demonstrates a particularly cavalier attitude towards compliance with the requirements of the Act and a continuing course of conduct and failure to comply with the regulatory requirements.
36. As stated by Mr Higgins during the course of the Hearing, the principals of the Licensee Company reside in Queensland. That situation emphasises the requirement for a capable and competent Nominee to be appointed at all times to deal with the day to day management of the business conducted under the liquor licence in Darwin. The Commission notes the submissions regarding the difficulty the Licensee has experienced in securing the services of a long term and capable Nominee. However, that is a matter that the Licensee must address.
37. The Commission was not impressed with a number of the submissions made by Mr Higgins during the course of the Hearing. The assertion that Mr Leahy was available to be called back to duty during the period when the breach occurred was clearly wrong in the face of the written advice from Mr Kilroy. Similarly, the Commission views the

submissions by Mr Higgins in respect of the nature of the dealings with Mr Watters with significant scepticism.

38. The issue of the failure by the Licensee to complete and lodge the paperwork necessary to install Mr Jenkin as the permanent Nominee of Char is of significant concern to the Commission and compounds the doubts raised about the management of the premises. Mr Jenkin was first proposed as Nominee in the letter from Mr Kilroy, received by Inspector Pech on 16 July 2010. As of the date of the Hearing, more than two months since the original notification and despite the lodgement of a formal complaint and the notification of a Hearing, the application remains incomplete.
39. As was pointed out during the course of the Hearing by Mr Wood, the Application for Change of Manager is a relatively simple form. The fact that Mr Jenkin's application for permanent appointment as the Nominee remains incomplete, despite the fact that a complaint has been lodged against the licensee for failure to have a Nominee in place, does not instil any confidence in the Commission that the changes in management processes identified by Mr Higgins are actually working or effective.
40. The Commission notes Mr Wood's submission that no actual harm arose from the fact the Licensee operated the premises without a Nominee. Given the acknowledged sloppy management practices of the Licensee, that is almost certainly a case of good fortune. The potential for a breach of the Act and for a failure to properly monitor patron behaviour and the like is obviously heightened in circumstances where there is no person authorised to manage the premises. That potential is clearly increased when the principals of the Licensee Company reside interstate, as is the case with Char.
41. The Licensee can take little comfort or credit for the fact that no real harm arose from the failure to have a Nominee at the premises on two separate occasions. However, the Commission takes that factor into account in determining the appropriate penalty in the circumstances of this breach. Had there been additional breaches or any identifiable harm arising from the failure to have a Nominee in place the Commission may have seriously looked at an immediate and actual suspension of licence, more so given the prior warnings by LR&AS staff to the Licensee and the failure to rectify the situation.

Decision

- 6) The Commission notes that the temporary appointment of Mr Fabian Jenkin as acting Nominee for the licensed premises expires on 8 October 2010.
- 7) The Commission, pursuant to Section 65 of the Act, directs the Licensee of Char Restaurant @ Admiralty to complete and submit to the Director the necessary paperwork to have Mr Fabian Jenkin formally appointed as the Nominee prior to the expiry of his temporary appointment, being 8 October 2010. The Licensee is further directed to ensure that at all times whilst the premises are open for the sale of alcohol a person is engaged who is formally appointed as the Nominee for the conduct of the business under the liquor licence.
- 8) In the event that the Licensee fails to comply with the above direction in respect of the appointment of Mr Jenkin within the time specified the Commission intends to issue a notice pursuant to Section 66 of the Act suspending licence number 80817835 until such time as the Licensee complies with the direction.
- 9) The Licensee is also cautioned that, given its conduct over the past nine to ten months in respect of the failure to continually have a Nominee in place and the failure to advise the Director of changes in respect of the Nominee, any further breach of Section 25(5A) of the Act will be treated seriously by the Commission and may result in the immediate suspension of the Licence.

Richard O'Sullivan
Chairman

4 October 2010