

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: *DISCIPLINARY ACTION AGAINST KINGS CANYON RESORT*
[2024] NTLiqComm 15

REFERENCE: LC2024/003 and LC2024/007

LICENCE NUMBER: 80204644

LICENSEE: Discovery Holiday Parks Pty Limited

PREMISES: Kings Canyon Resort
Luritja Road
Watarrka National Park, NT 0870

LEGISLATION: Part 7 Division 4 of the *Liquor Act 2019*

HEARD BEFORE: Mr Russell Goldflam (Deputy Chairperson)
Mr Bernard Dwyer (Health Member)
Ms Katrina Fong Lim (Community Member)

DATE OF HEARING: 27 March 2024

DATE OF DECISION: 27 March 2024

DECISION

1. On 27 March 2024, the Northern Territory Liquor Commission (**the Commission**) heard two complaints against Discovery Holiday Parks Pty Limited (**the licensee**). The Commission dismissed complaint L2024/003 (**the first complaint**), upheld complaint LC2024/007 (**the second complaint**), and took disciplinary action against the licensee pursuant to s 165 of the *Liquor Act 2019* (NT) (**the Act**) by imposing a monetary penalty of 45 penalty units.
2. At the conclusion of the hearing the Commission pronounced its decision and stated that it would issue a decision notice including reasons for the decision as soon as practicable.

STATEMENT OF REASONS

BACKGROUND

3. In March 2021 the licensee acquired the Kings Canyon Resort (**the premises**), which is located within the Watarrka National Park, about halfway between Mparntwe/Alice Springs and the Uluru/Kata Tjuta National Park. Since acquiring the premises, which were in a rather dilapidated and rundown state, the licensee has committed tens of

millions of dollars to refresh, refurbish and develop the premises, with the immediate objective of restoring visitation to its pre-pandemic levels of about 300,000 annually.

4. As part of this development, in August 2023 the licensee made applications (**the licensee's applications**) to vary its liquor licence (**the licence**) by changing the licence authorities and conditions, and for approval of various material alterations to the premises.
5. On 7 September 2023, the Licensing NT senior licensing officer assigned to process the licensee's applications attended the premises. During this visit the officer observed apparent breaches of the licence conditions that led to the laying and acceptance by a delegate of Director of Liquor Licensing (**the Director**) of the first complaint, on 21 November 2023.
6. The first complaint alleged that the licensee had contravened conditions of the licence by selling liquor at an area of the premises known as the "Sunset Viewing Area":
 - a. without confirming that the customers were bona fide lodgers;
 - b. other than champagne or beer, the only types of liquor the licensee is authorised to supply at that area of the premises; and
 - c. in unopened containers.
7. On 10 January 2024 the Commission heard the licensee's applications. During the hearing the Commission received evidence that led the chairperson of the Commission to write to the Director requesting him to conduct an investigation into whether the licensee had breached s 98 of the Act. On 15 January 2024 the second complaint, which concerned the matters raised by the chairperson, was laid and accepted by a delegate of the Director.
8. The second complaint alleged that the licensee had contravened s 95 of the Act by making material alterations to the premises without having obtained prior written approval of the Commission.

THE HEARING

9. The hearing of the first and second complaints proceeded as a public hearing on 27 March 2024. Mr Wood appeared on behalf of the Director. Dr Ford of counsel appeared on behalf of the licensee, instructed by HWL Ebsworth Lawyers.

THE FIRST COMPLAINT

10. In support of the first complaint, the Director tendered a brief of evidence that was admitted without objection. The brief included:
 - a. Statutory declarations by licensing officers
 - b. Licence, with blank page, dated 23 August 2023 (**first amended licence**)
 - c. Licence with blank page removed, dated 23 August 2023 (**second amended licence**)
 - d. Licence dated 25 August 2023 (**third amended licence**)

- e. Licence dated 8 September 2023 (**fourth amended licence**)
- f. Correspondence between licensee's solicitors and Licensing NT
- g. Complaint dated 21 November 2023
- h. Licensee's response to complaint dated 5 December 2023

11. In both the licensee's response to the complaint and in its helpful written submissions to the Commission, the licensee admitted the alleged conduct the subject of the first complaint. However, the licensee submitted, and at the hearing the Director effectively conceded, that the complaint should be dismissed.
12. Section 160(1)(a) of the Act provides that it is a ground of complaint that a licensee has contravened a condition of the licence. Although this was the sole ground identified in the complaint, as particularised, the complaint alleged that employees of the licensee had contravened s 293 of the Act by engaging in conduct that resulted in the three contraventions of licence conditions briefly described at paragraph 6 above.
13. Section 293 establishes an offence with two distinct fault elements. The first is that the impugned conduct must be intentional. It is common ground that the impugned conduct in this case was intentional. The second fault element is that, if the conduct resulted in a contravention of a condition of the licence, the licensee was reckless in relation to that result.
14. The Commission observes in passing that it was perhaps not strictly necessary for the Director to particularise the complaint by reference to s 293. However, even if the Director had not done so, in the view of the Commission, it would have been appropriate for the Commission to have regard to the fault elements contained in s 293 before determining whether to uphold the complaint. The statutory ground of complaint ("the licensee contravened a condition of the licence") does not expressly refer to any fault element, and accordingly, in applying s 160(1)(a) without regard to other provisions of the Act, a decision-maker could in theory be satisfied that this ground for disciplinary action is made out irrespective of the licensee's intention or awareness of the contravention of the condition. However, s 165(1) of the Act provides that the Commission may only take disciplinary action against a licensee if satisfied not only that a ground for disciplinary action exists, but also that the disciplinary action is appropriate for that ground. In the tentative view of the Commission (which has not heard submissions on this point), it would only be appropriate to take disciplinary action against a licensee for contravening a condition of the licence if it were satisfied that the fault elements for the offence of contravening a condition of a licence as set out in s 293 have been proven.
15. In this case, it would also have been open to Licensing NT to lay a complaint on the ground in s 160(1)(b), that "the licensee or the licensee's employee contravened another provision of this Act or the regulations, whether or not it constitutes an offence".¹ This alternative course may have been preferable for two reasons. Firstly, it would more unequivocally ensure that the fault elements set out in s 293 are engaged in consideration of the complaint.

¹ The Commission notes that this is the course taken by the Director in laying the second complaint.

16. Secondly, it would avoid the risk of a complaint being dismissed on the ground that the impugned conduct was not the conduct of “the licensee” but of an employee of the licensee. Indeed, the licensee advanced just that argument in this case.
17. In the view of the Commission, such a contention would not necessarily serve to absolve a licensee of criminal responsibility: s 306 attributes liability to an individual who is a licensee for an offence against the Act committed by an employee of the individual who was acting in the course of their employment. Similarly, Part IIAA Division 5 of the Criminal Code provides for the criminal responsibility of a body corporate for its employees.
18. However, in contrast to this vicariously derived corporate criminal responsibility, it is less clear whether and if so how responsibility for conduct the subject of a complaint under the Act can be vicariously derived. As the Commission has dismissed this complaint for other reasons, it is unnecessary for the Commission to now further consider this question.
19. Section 8 of the Act provides that Part IIAA of the Criminal Code 1983 (NT) (**the Criminal Code**) applies to an offence against the Act. Part IIAA of the Criminal Code includes s 43AK(1), which provides:
- A person is reckless in relation to a result if:
- (a) the person is aware of a substantial risk that the result will happen;
and
 - (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
20. Section 43AK(3) provides that “the question whether taking a risk is unjustifiable is one of fact”.
21. Prior to 23 August 2023, the licence stated that the sale of liquor in the Sunset Viewing Area was subject to the following conditions:
- all alcohol to be sold in open containers;
 - alcohol to be sold only to bona fide lodgers and their guests;
 - no takeaway sales permitted; and
 - sale to be limited to Champagne and or/ orange juice and beer.
22. On 14 April 2023 the licensee applied to Licensing NT to approve Mr Todd Roberts as the licensee’s nominee.
23. On 1 August 2023 the licensee applied for, among other things, variation of licence conditions with the objective of imposing a uniform set of conditions to replace the existing piecemeal assortment of conditions that applied to different facilities within the resort, and including the removal of the conditions summarised at paragraph 21 above

for the Sunset Viewing Area. (In January 2024 the Commission approved the removal of these conditions.²)

24. On 23 August 2023 the application to appoint Mr Roberts was approved, requiring the issue of an amended licence incorporating the name of the new nominee. Unfortunately, due to an administrative error, the page containing the Sunset Viewing Area conditions was omitted and replaced by a blank page in this document, the first amended licence. On receipt of the licence, the licensee's solicitors noted the error and queried it with Licensing NT.
25. In response, Licensing NT removed the blank page and sent the licensee's solicitors the second amended licence.
26. On 25 August 2023, by emails sent at 8:15 AM and 1:59 PM the licensee's solicitors wrote to Licensing NT specifically noting that the Sunset Viewing Area conditions were still omitted, and requesting that the licence be reissued and corrected as a matter of urgency. In addition, the solicitors sought clarification of additional conditions to the licence that appeared to have been made without notice to the licensee in the second amended licence.
27. Later that same day, Licensing NT sent the licensee's solicitors the third amended licence, which now included the Sunset Viewing Area conditions, but also the additional conditions the subject of the request for clarification that had been made on behalf of the licensee. The licensee's solicitors immediately responded, again seeking clarification in relation to the additional conditions. Licensing NT did not respond to this request, which was subsequently repeated in writing on at least two occasions.
28. The licensee's solicitors did not forward the third amended licence to their client. In the circumstances, the Commission accepts that this was a reasonable course, as the actual terms of the licence remained unclear.
29. Licensing NT issued the fourth amended licence dated 8 September 2023, including the Sunset Viewing Area conditions but omitting the contentious additional conditions.
30. On 13 September 2023 Licensing NT sent the fourth amended licence directly to the licensee's nominee, with a copy to the licensee's solicitors.
31. The Commission has carefully considered the above rather convoluted sequence of events. For the purpose of considering this matter, the Commission assumes without finding that the employees of the licensee who were selling liquor at the Sunset Viewing Area on 7 September 2023 were aware that there was a substantial risk that as a result of their conduct the licence conditions would be breached as alleged. However, the Commission is not satisfied that, having regard to the circumstances known to the employees, it was unjustifiable for them to take the risk. The Commission makes the same assessment of the managers who were supervising those employees, including the licensee's nominee at the time.
32. Accordingly, the Commission is not satisfied that the employees, their managers or the licensee's nominee were reckless for the purpose of s 293 of the Act. Similarly, with reference to s 43BM of the Criminal Code (which provides for criminal responsibility for

² *Kings Canyon Resort Applications* [2024] NTLiqComm 4 (29 January 2024)

a body corporate where recklessness is a fault element), the Commission is not satisfied that the licensee expressly, tacitly or impliedly authorised or permitted any of its employees to commit an offence against s 293.

33. For these reasons the first complaint must be dismissed. The licensee also advanced additional grounds for dismissing this complaint, but it is unnecessary to consider those submissions.

THE SECOND COMPLAINT

34. On 29 January 2024 the licensee provided a written response to the second complaint, in which it admitted the complaint and made submissions in mitigation.

35. Coincidentally, on the same date the Commission issued a decision notice allowing the licensee's applications made on 1 August 2023, including the following findings of particular relevance to the second complaint:³

64. The licensee also seeks approval for refurbishment, renovation and construction works it has undertaken or plans to undertake at the licensed premises. Some of the works carried out by the licensee, such as the construction of new bars in the Kings Canyon Bar and Grill and at the Luritja Lookout, were obviously material alterations. Whether or not some of the other works carried out were material alterations is less clear. For example, the works undertaken at the Kings Canyon Bar and Grill included the replacement and relocation of customer bathrooms and toilets, and the works at the Luritja Lookout included the construction of a new toilet block.

65. Material alterations requiring the Commission's prior approval are described by s 95(1) of the Act as follows:

- (a) a significant increase in the area of the premises used for the sale, supply, service or consumption of liquor;
- (c)⁴ a change to an entrance to or an exit from the premises;
- (d) a significant change to the external appearance of the premises;
- (e) a significant change to the premises' facilities related to the sale, supply, service or consumption of liquor.

66. The Commission considers that the meaning of the text of s 95(1)(e) is not altogether clear. Section 62B of the *Interpretation Act 1978* provides that reference may be had to extrinsic material to assist with the confirmation of the meaning of an ambiguous or obscure statutory provision. Accordingly, the Commission has turned to the Explanatory Memorandum to the *Liquor Legislation Amendment Act 2021*, s 22 of which repealed s 95(1)(b) of the Act. The Memorandum states:

³ See *Kings Canyon Resort Applications* [2024] NTLiqComm 4 (29 January 2024). The particular locations of "the Kings Canyon Bar and Grill" and "the Luritja Lookout" are given at paragraphs 5(b) and 5(f) of that decision notice. The Commission notes that the Luritja Lookout is the same place as the Sunset Viewing Area referred to earlier in the instant decision.

⁴ Section 95(1)(b) has been repealed, as discussed below.

Not all structural alterations impact on the sale, supply and service of liquor, for example expansion of bathroom areas. Approval should only be required where structural alterations are likely to increase the supply of alcohol, for example installation of a new bar area. Section 95(1)(b) of the Act, which refers to structural alterations to any part of the premises where liquor is sold, supplied, served or consumed, is omitted.

67. In the view of the Commission, the relocation of bathrooms and toilets in the Kings Canyon Bar and Grill was not likely to increase the supply of alcohol, but the construction of a toilet block at the Luritja Lookout (where previously, there had been no toilets) was likely to increase the supply of alcohol.
68. The Commission finds that the works undertaken by the licensee [at the Kings Canyon Bar and Grill and the Luritja Lookout] are material alterations requiring Commission approval. The Commission finds that the remainder of the works that the licensee has informed the Commission it has carried out or plans to carry out (notably, the refurbishment and construction of accommodation units) are not material alterations requiring Commission approval.

...

72. The Commission notes that in his oral evidence given at the hearing, Mr White provided to the Commission an explanation for not seeking prior approval for the material alterations at the Kings Canyon Bar and Grill. Those works were completed in about March 2022, shortly following which Mr Giles brought to the attention of Mr White that material alterations require the prior approval of the Commission. Mr White also gave evidence that it was unclear to the licensee whether some of the works undertaken after that date constituted material alterations or not. The Commission accepts Mr White's evidence (which was confirmed by Mr Wood) that in late 2022 or early 2023 he informed the office of the Director that works had been undertaken, were underway or were planned that might constitute material alterations.
73. The Commission notes with particular concern that some nine months after the licensee's legal manager had been alerted to this issue, the licensee, without seeking the prior approval from the Commission, proceeded to make what the Commission considers was obviously a material alteration, namely the installation of the "container bar" to replace an old caravan that had been used as a bar at the Luritja Lookout.

36. At the hearing of the second complaint the licensee confirmed that it did not challenge the above findings.

37. The Commission upholds the second complaint on the ground specified in the complaint, namely that the licensee or the licensee's employee contravened a provision of the Act. The complaint identified s 95 as the provision of the Act that had been contravened. Section 95 provides that prior written approval of the Commission is required before any material alterations are made to licensed premises. The Commission also finds that the licensee contravened s 98 of the Act which establishes as an offence of strict liability the making of a material alteration without the prior approval of the Commission. Section 166(4) provides that "the Commission may hear a matter not referred to it but which arises from a matter that was referred to it." The Commission considers that the contravention of s 98 arises from the second complaint.

38. To supplement the evidence referred to at paragraph 72 of the Commission's decision notice of 29 January 2024 given by Mr White, the legal manager of the group of companies of which the licensee is a member, gave further evidence, which can be summarised as follows:

- a. In April or May 2022, Mr Giles, a principal of the licensee's Darwin solicitors, informed Mr White, who is based interstate, that pursuant to the Act, material alterations require the prior approval of the Commission.
- b. Mr White immediately instructed Mr Giles to seek approval for the works that had been completed, were underway or were being planned at the premises. It took several months for Mr White to obtain the detailed plans and drawings required to support the licensee's application. This was because:
 - i. the then recently engaged development team that was carrying out the works was "quite siloed";
 - ii. details kept changing as the work progressed, requiring further drawings from the architects; and
 - iii. achieving compliance with the various regulatory regimes applicable to the project was complex.
- c. There was "a bit of a division in the office" as to whether the Luritja Lookout works constituted a material alteration or not. Ultimately, the licensee decided to "move to a more conservative approach" and ask the Commission to decide this issue.

39. Mr Giles gave brief evidence that corroborated the account given by Mr White, which the Commission accepts.

40. The Commission considers that the appropriate disciplinary action in this case is the imposition of a monetary penalty.

41. In *Nulite Pty Ltd v Northern Territory Liquor Commission; Director of Liquor Licensing* [2023] NTCAT 20, the Northern Territory Civil and Administrative Tribunal (**NTCAT**) considered the principles applicable to the fixing of a civil penalty by the Commission. Member McCrimmon stated [footnotes omitted]:

45. In *Australian Building and Construction Commissioner v Pattison* [2022] HCA 13; (2022) 274 CLR 450, the High Court noted at [15] that, "it has long been recognised that, unlike criminal sentences, civil penalties are imposed primarily, if not solely, for the purpose of deterrence". The High Court went on to cite with approval the factors identified by French J (as his Honour then was) in *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152-52,153, which informed the assessment of a penalty of appropriate deterrent value. The High Court noted at [18] of *Pattison*:

In *CSR*, French J listed several factors which informed the assessment under the *Trade Practices Act 1974* (Cth) of a penalty of appropriate deterrent value:

“The assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases. These include the following:

1. The nature and extent of the contravening conduct.
2. The amount of loss or damage caused.
3. The circumstances in which the conduct took place.
4. The size of the contravening company.
5. The degree of power it has, as evidenced by its market share and ease of entry into the market.
6. The deliberateness of the contravention and the period over which it extended.
7. Whether the contravention arose out of the conduct of senior management or at a lower level.
8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.”

46. The High Court went on to note at [19] of *Pattison*:

It may readily be seen that this list of factors includes matters pertaining both to the character of the contravening conduct (such as factors 1 to 3) and to the character of the contravenor (such as factors 4, 5, 8 and 9). It is important, however, not to regard the list of possible relevant considerations as a “rigid catalogue of matters for attention” as if it were a legal checklist. The court’s task remains to determine what is an “appropriate” penalty in the circumstances of the particular case.

47. In *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2016] FCA 453; (2016) 242 FCR 389, Greenwood J noted at [58]:

In *Australian Competition and Consumer Commission v Kokos International Pty Ltd* (No 2) [2008] FCA 5; [2008] ATPR 42-212 at 48,813, French J at [51] accepted that the following three matters are also relevant to the exercise of the discretion (continuing my numbering):

10. Whether the respondents have engaged in similar conduct in the past.
11. The financial position of the respondents.
12. The deterrent effect of the proposed penalty.

42. In assessing the amount of the monetary penalty, the Commission has had regard to the above-listed factors as well as s 167 of the Act, which provides that a monetary penalty must not exceed 200 penalty units.
43. The licensee has no previous history of non-compliance with the Act, and co-operated with Licensing NT and the Commission in responding to this complaint.
44. Although the Commission has dismissed the first complaint, the Commission notes that on being notified of the first complaint and confirmation of the licence conditions the licensee swiftly undertook further staff training to ensure compliance with the Sunset Viewing Conditions as then in force. The Commission is satisfied that the licensee has a corporate culture of compliance, at least in relation to the operation of its existing licensed premises.
45. The Commission finds that the Luritja Lookout is a relatively small outlet for the supply of liquor, frequented on a day during the tourist season by up to about 100 guests who typically remain in the area for an hour or an hour and a half to view the sunset and have a drink. The unauthorised material alterations that were carried out are unlikely to result in a substantial increase in the amount of liquor being supplied or consumed at the Sunset Viewing Area, which the Commission considers is a low-risk venue that is unlikely to result in significant alcohol-related harm.
46. The Commission also accepts the submissions of the licensee that it has invested heavily in the Kings Canyon Resort at a time when the economy of Central Australia, and in particular the Central Australian tourism industry, is struggling, and that it was challenging to comply with the myriad regulatory provisions applicable to this major and complicated development project being undertaken in a remote area.
47. The Commission finds that the alterations to the Kings Canyon Bar and Grill were not deliberately undertaken without authorisation: they were completed before Mr Giles had alerted Mr White to the applicable statutory provisions. That of course does not excuse the breach, but it makes it less serious than the subsequent breach occasioned by the construction of the new bar and associated facilities at the Luritja Lookout, several months after the licensee had become aware of the need to seek the Commission's approval to make material alterations.
48. The Commission finds that Mr White was aware of a substantial risk that the construction of the new bar and associated facilities at the Luritja Lookout would result in the commission of an offence under s 98(1) of the Act.
49. This risk was presumably taken for commercial reasons, to minimise the cost of disrupting and delaying the licensee's building program at the premises. The Commission finds that having regard to the circumstances known to Mr White, it was unjustifiable to take the risk, and that accordingly, Mr White acted recklessly.
50. Section 43BM(6) of the Criminal Code provides that a high managerial agent of a body corporate "means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy". The Commission finds that Mr White, as the legal manager of the licensee's company group, is a high managerial agent of the licensee.

51. The Commission finds that a high managerial agent of the licensee recklessly engaged in the relevant conduct, and that, pursuant to s 43BM of the Criminal Code, this recklessness is attributable to the body corporate licensee.
52. This feature of the licensee's conduct significantly elevates the seriousness of the contravention.
53. The Commission considers that a factor of particular importance in this matter is the deterrent effect of the proposed penalty. A penalty must be imposed that is high enough to deter licensees from recklessly taking the risk of breaching the provisions of the Act.
54. This is the first occasion on which the Commission has taken disciplinary action for a breach of this type, and so there is no "tariff" to refer to when fixing a monetary penalty. The Commission has determined to impose a monetary penalty of 45 penalty units, or \$7,920.
55. Section 167(3) of the Act requires a licensee to pay a monetary penalty imposed by the Commission within 28 days after notice of the penalty was given to the licensee unless the Commission allows a longer period. The licensee declined to apply for a longer period within which to make payment.
56. The Commission is satisfied in accordance with s 165(1) of the Act that a ground for the disciplinary action exists and that the disciplinary action it has taken is appropriate in relation to that ground.

NOTICE OF RIGHTS

57. Section 31(1) read with s 166(7) of the Act provide that the decision set out in this decision notice is reviewable by the NTCAT. Section 94(3) of the *NTCAT Act* provides that an application for review of a reviewable decision must be lodged within 28 days of the date of the decision.
58. In accordance with s 31(2) of the Act, the persons who may apply to NTCAT for a review of the decision are the Director and the licensee.



RUSSELL GOLDFLAM
DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

3 April 2024

On behalf of Commissioners Goldflam, Dwyer and Fong Lim