

Northern Territory Licensing Commission

Reasons for Decision

Premises:	The Katherine Club
Licensee:	The Katherine Club Ince
Licence Number:	81400598
Proceeding:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i>
Heard Before:	Ms Brenda Monaghan (Legal Member)
Date of Hearing:	12 August 2009
Appearances:	Mrs Malgorzata Dean, the Complainant Mr Graham Cole of behalf of Licensee Inspector Mark Wood for Director of Licensing

Background

- 1) The complaint made by Mrs Dean, a club member, against the Katherine Club was initially considered at a hearing in Katherine on 12 August 2009. The principal aspect of the complaint can be summarised as an alleged breach of privacy when the Club responded to a phone call made to the nominee by Mrs Dean's husband threatening to menace the premises and damage the gaming machines with 'a baseball bat or shotgun' if Mrs Dean was allowed to continue to gamble there.
- 2) This threat of violence towards the Club was not an isolated event. Undisputed evidence from the Club is that Mr Dean had also previously attended the venue and shouted threats to the patrons and staff of the gaming area because of his anger or distress over his wife spending money there on the gaming machines and his belief that she was a problem gambler.
- 3) Following the second occasion of threatening behaviour by Mr Dean, the allegation is that the Club nominee not only banned Mrs Dean from the Club but allegedly went beyond his powers and breached federal privacy laws by distributing a faxed photograph and perhaps other personal information about her to the Katherine Hotel so that they could ban her also. When Mrs Dean later attended at the Katherine Hotel, she was asked to leave.
- 4) At hearing, several submissions were made by Mr Cole on behalf of the Club including a denial that there had been any breach of either the *Liquor Act* or the *Gaming Machine Act*. Further, the Club placed reliance on a defence that the provision of private information to another licensed venue was protected by a signed Accord between various liquor Licensees in town. It was submitted that the Accord allowed for the dissemination of a banned patron's private information between some Licensees so to ensure responsible management of licensed premises in Katherine
- 5) Mrs Dean advised at hearing that her main aim in making this complaint was based on her concern at the unacceptable treatment of her by the Club and to obtain an apology from them. Mrs Dean also wanted to seek some surety that future patrons will not be treated in a similar manner to the treatment she encountered
- 6) After oral submissions were made by Mrs Dean, Mr Cole for the Club and Inspector Wood for the Director, the hearing was adjourned to allow written submissions to be received. The Commission was particularly interested in hearing further information about the Licensee's

Accord and any pamphlets, Accord rules, Club rules or other evidence indicating the steps the Club and Accord members normally took to ensure a patron's privacy was not unnecessarily breached.

- 7) Some delay occurred while the complainant was overseas but submissions from both parties and from the Director of Licensing have since been received and considered. Of most importance is the acknowledgement by the Club that, whilst a document was signed at an earlier stage, there is currently no working Liquor Accord between licensed premises. Thus, the submission that such an Accord gives protection to the Licensee in these circumstances is not correct. Mr Cole still submits however that there is no material breach that the Commission has power to consider and that the complainant should attempt to seek redress from the Federal Privacy Commissioner if she so desires.
- 8) Mr Piper, counsel for Mrs Dean confirmed in a letter dated 28 September 2009 that Mrs Dean seeks the following:
 - a) an apology from the Club for causing her embarrassment by disseminating her photograph and other information to Licensees;
 - b) A retraction of any statement made about Mrs Dean to other Licensees and to do all things necessary to recover those photos and other materials regarding her that have been disseminated to other Licensees; and
 - c) an order from the Commission to the Club that it desist from disseminating photos or information of other persons who game at their club to other Licensees in the future.

Matters taken into consideration

- 9) This is an unusual matter in that the complaint is brought under the *Liquor Act* relating to an alleged breach of the *Gaming Machine Act* and *NT Code* regarding an alleged breach of privacy - a matter normally dealt with by the Federal Privacy Commissioner. The alleged breach has been laid as a complaint under the Section 48 of the *Liquor Act* on the basis that it relates to "a matter arising out of the conduct of the business at licensed premises". These general words allow the Commission to consider more general concerns than simply alcohol-related matters.
- 10) After a Section 48 hearing, the Commission has specific powers of redress including changing licence conditions and requiring action to be taken or restraining the Licensee from taking certain action. The relevant sections of the *Liquor Act* are as follows:

S49(4) Where the Commission conducts a hearing in relation to a complaint pursuant to subsection (2)(c), the Commission may, in addition to any other action the Commission may or is required to take under the provisions of this Act, after that hearing:

- (a) amend the conditions of a licence or vary the type of licence;*
- (b) in accordance with section 65, by notice in writing, direct the Licensee to take, or to refrain from taking, within such time as the Commission shall in that notice specify, a specified action; or*
- (c) defer further consideration of the complaint for such period and subject to such conditions, including that an application for the transfer of the licence be lodged, as the Commission thinks fit.*

S65 Where a Licensee:

- (a) has contravened or failed to comply with a condition of his licence;*
- (b) has permitted or suffered the premises in respect of which he holds a licence to be so used as to cause undue disturbance or inconvenience to:*

(i) *persons who are lawfully on or at those premises; or*

(ii) *persons who reside in the neighbourhood of those premises; or*

(c) *has contravened or failed to comply with a provision of this Act or a law of the Territory which regulates, in any manner, the sale or consumption of liquor or the location, construction or facilities of premises which are used for such a purpose,*

the Commission may, from time to time by notice in writing, direct the Licensee to take, or to refrain from taking, within such time as the Commission shall in that notice specify, a specified action to rectify or minimize the effects of:

(d) *the Licensee's contravention or failure to comply, referred to in paragraph (a) or (c); or*

(e) *the undue disturbance or inconvenience, referred to in paragraph (b), as the case may be.*

11) The Katherine Club is licensed under the *Gaming Machine Act* and is required to comply with the NT Code. The Code sets out information regarding responsible gambling practices, interaction with customers and community, training and skills development, the manner of exclusion of problem gamblers, the provision of a physical environment of the gaming venues, advertising and promotion and privacy.

12) The aim of the Code is to support responsible gambling. It defines problem gambling as:

a) *the gambler suffering excessive financial losses relative to the gambler's means;*

b) *Adverse personal affects on the gambler, his or her family and friends;*

c) *Adverse affects on employers and work performance; and*

d) *Other costs which are borne by the community.*

13) The Commission fully supports Licensees who attempt to deal responsibly with problem gambling. While the Commission forms no personal view on whether or not Mrs Dean is a problem gambler, her husband certainly had concerns about her and his aggressive actions gave the Club good reason to take precautions to protect their property and staff. They could have involved the police when threats were made by Mr Dean. Instead, they chose to cease their association with Mrs Dean by banning her. Whether this banning process was handled in the most appropriate manner and in accordance with their Constitution is debateable but that is not the issue before the Commission. The issue is the Club's actions in warning another licensed premise of the fact that Mrs Dean was banned and providing a CCTV photo of her to them.

14) In the NT Code, at Paragraph 9, it is stated:

Privacy Policy

The gambling provider must maintain the privacy of player information and must ensure as far as possible, that there is no unauthorised or inappropriate disclosure of personal information obtained or kept under this Code of Practice.

15) There is no dispute that a CCTV photograph was disseminated by the Club to the Katherine Hotel by fax. I am assuming that the fax also contained Mrs Dean's name although a copy of the fax has not been provided. For the purposes of this hearing, I intend to limit my consideration as to whether the disseminated CCTV photo of Mrs Dean falls within the category of information '*obtained or kept under the Code of Practice*'.

16) The use of camera surveillance as a means of responsible supervision of gaming machine players at hotels and Clubs is common practice. I am advised that the Katherine Club has camera surveillance throughout the licensed premises including its gaming area. These

same cameras are also used for the purposes of general security and for responsible supervision of drinkers in accordance with the Club's licence conditions.

- 17) I am satisfied that CCTV photos of Club members retained and used for many purposes including monitoring gamblers and identifying banned people falls within the definition of information '*obtained or kept under the Code of Practice*'. It is a requirement of the NT Code that Licensees maintain the privacy of player information and ensure as far as possible, that there is no unauthorised or inappropriate disclosure of personal information obtained or kept under the Code. The question is whether the disclosure of Ms Dean's photo and other information to the Katherine Hotel was an "*unauthorised or inappropriate disclosure of personal information obtained or kept under this Code of Practice*".
- 18) There appears to be no dispute that the federal *Privacy Act* is the relevant legislation to consider when deciding whether the privacy provisions of the NT Code have been breached. The *Privacy Act* establishes national standards for the handling of personal information by certain private sector organisations in order to ensure that such information will be properly stored, used and disclosed.
- 19) An organisation such as the Club must comply with the National Privacy Principles (NPPs) contained in the *Privacy Act 1988* or develop its own 'Privacy Code' to regulate the handling of personal information. Schedule 3 of the *Privacy Act* sets out the ten NPPs, which legally bind organisations in the way they must handle personal information. NPP 2 prohibits the use and disclosure of personal information for a secondary purpose unless it falls within one of the categories listed in the NPP. These categories include situations where the person has consented to disclosure or should reasonably expect it.
- 20) There is no doubt that Mrs Dean did not have knowledge of or consent to her personal information being provided to the Katherine Hotel; nor would she have anticipated that such information would be passed on to them. Its dissemination was not protected by a Licensees' accord or other law. Further, despite the threats made, I am not sufficiently persuaded that there was a serious or imminent threat to an individual's life, health or safety or a serious threat to public health and public safety to support the action taken. I conclude on the balance of probabilities that there has been a breach of the NPP principles regarding use and disclosure and that this amounts to a breach of the NT Code.
- 21) Does a breach of the NT Code amount to a breach of the *Gaming Machine Act*? The answer is yes. The conduct in question arises out of the *Gaming Machine Act* and the *Northern Territory Code of Practice for Responsible Gambling* (the NT Code) made pursuant to s193A of the *Gaming Machine Act* which states:

193A Codes of Practice

- (1) *For the purpose of providing practical guidance to persons granted licences under this Act on any matter relating to this Act, the Minister may, by notice in the Gazette, approve a code of practice.*
- (2) *A code of practice may consist of a code, standard, rule, specification or provision relating to matters in this Act formulated, prepared or adopted by the Minister and may apply, incorporate or refer to a document formulated or published by a body or authority as in force at the time the code of practice is approved or as amended, formulated or published from time to time.*
- (3) *A notice under subsection (1) must indicate where a copy of the code of practice to which it relates, and all documents incorporated or referred to in the code, may be inspected by members of the public and the times during which they may be inspected.*
- (4) *A person who is the holder of a licence granted under this Act must not contravene or fail to comply with a code of practice approved under this section.*

Penalty: \$10 000 or imprisonment for 2 years.

- 22) The matter before the Commission however, is not a prosecution against the Licensee for an offence against the *Gaming Machine Act*. It is a Section 48 complaint under the *Liquor Act* 'arising out of the conduct of the business at the licensed premises'.
- 23) The Commission finds on the balance of probabilities that the Club was not properly protecting the privacy of its member's personal information when it provided a photo (and perhaps other information) to another Licensee. Whilst the Club nominee's intentions were based on a harm minimisation strategy to protect Club property and staff from Mr Dean's threats and also to protect someone who they had reason to believe was a problem gambler, they did not follow the correct process to enable them to pass on that information to another Licensee. There are preparatory steps they could have taken (or that they can take in the future) to enable such a sharing of information but those steps were not taken in Mrs Dean's case.
- 24) I have considered carefully what (if any) action is appropriate for the Commission to take in this matter. The Commission reiterates its support for gaming venues taking responsible steps to ensure that the gaming environment they offer is safe and that any adverse social impact of gambling is reduced. In this matter, the Club was confronted with an angry aggressive husband who on two occasions threatened harm if his wife continued to play on the gaming machines at the Club.
- 25) In hindsight, the Club management no doubt agree that they should have followed the processes set out in their Constitution if they wanted to prevent Mrs Dean from entering or from continuing on as a member at the Club. Alternatively, they should have involved the police following the threats made by her husband. The issue here is not what they did but how they did it. It is suggested that an apology to Mrs Dean is not unreasonable.
- 26) There is nothing to prevent the Club banning a person for valid reasons or from sharing that information with another licensed venue so long as they ensure that they establish beforehand proper processes to comply with the law-including in this case the *Privacy Act*, the *Gaming Machine Act* and the *NT Code*. To this end, it is important for the Club to gain a better understanding of its obligations in the area of privacy law and to ensure that its staff has access to information regarding the use and disclosure of their members' and patrons' personal information.

Decision

- 27) Pursuant to Section 65(c) of the *Liquor Act*, the Licensee is directed to refrain from disclosing personal information on its members for any secondary purpose until it has established necessary internal guidelines for staff and other processes to ensure that the principles of the *Privacy Act* are adhered to.

Brenda Monaghan
Legal Member

30 December 2009