

# NORTHERN TERRITORY LICENSING COMMISSION

## REASONS FOR DECISION

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| <b>PREMISES:</b>        | <b>TIWI SUPERMARKET</b>   |
| <b>LICENCE NUMBER:</b>  | 80903294  |
| <b>COMPLAINANT:</b>     | Director of Licensing   |
| <b>HEARING:</b>         | Penalty re: Breach of Licence conditions contrary to sections 110 and 106C of the <i>Liquor Act</i> (Supply of Liquor to a Minor) |
| <b>HEARD BEFORE:</b>    | Mr Richard O'Sullivan (Chairman)<br>Mr Paul Costigan<br>Ms Brenda Monaghan  |
| <b>DATE OF HEARING:</b> | 15 July 2007  |
| <b>APPEARANCES:</b>     | Complainant – Mr Phil Timney<br>Licensee – Mr Peter Elliott<br>Counsel for New Proprietors- Ms Sue Porter <sup>1</sup>            |

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- 1) On 13 July, the Commission reconvened to hear submissions on penalty following a finding that the Licensee of Tiwi Supermarket had breached her licence conditions and Section 106C of the *Liquor Act* when one of her staff members knowingly sold liquor to a minor. At the outset, Counsel for the Director, Mr Timney made it clear that he was instructed by the Director of Licensing to seek an order that the Licensee is not a fit and proper person to hold a liquor licence and that cancellation of the licence is the appropriate course of action for the Commission to take. The imposition of any such decision was considered to be manifestly excessive by Counsel for the Licensee, Mr Elliott who submitted that there were other options available to the Commission. These options, it was submitted, included approving the transfer of the application to the proposed new Licensee who has purchased

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<sup>1</sup> Leave was granted to Counsel for the new proprietors, Ms Porter to make submissions on penalty in acknowledgment of the equitable interest her clients hold in the licensed business.

the business.

- 2) The *Liquor Act* (the Act) governs the scope of the Commission's powers following a breach of the licence or the Act or following a finding that the Licensee is not a fit and proper person to conduct the business of the premises. The options are<sup>2</sup>:
  - a) Suspension of the licence;
  - b) Cancellation of the licence;
  - c) A variation of the terms of the licence;
  - d) A requirement to do certain actions or to refrain from so doing; and
  - e) The ability to defer any decision making to allow for a transfer of the licence.
- 3) Submissions were initially made by both Mr Elliott and Ms Porter, Counsel for the new owner of the business (and the proposed Licensee), that the Commission's power of cancellation under Section 72(5) of the *Liquor Act* required a separate hearing and could not simply be imposed following a complaints hearing. They both acknowledged however, that the Director could validly seek cancellation by separate application. In an effort to prevent further delays in this matter, both Counsel ultimately advised that they wished to proceed with the penalty hearing and both conceded that for the purposes of this decision, they would not challenge the Commission's power to cancel the licence if it considered that to be the appropriate outcome.
- 4) The Commission must now decide on the appropriate penalty to impose following the breach. As part of that process, the Commission must consider whether the Licensee is a fit and proper person to hold a liquor licence. It is only once a judgment has been made on this issue that the Commission can decide the appropriate course of action in this matter. When considering "fit and proper", the Commission must take into account the following:
  - a) The prior history of this Licensee as regards breaches of the Act and licence conditions;
  - b) The circumstances of this most recent breach;
  - c) The seriousness of the breach; and

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<sup>2</sup> For the purposes of this matter, the relevant sections are Sections 49(4), 66 and 72(5) of the *Liquor Act*

- d) The Commission's confidence in the Licensee's ability to properly conduct the business of a licensed premise.
- 5) The previous history of proven breaches against the Licensee is as follows:
- a) In a decision dated 7 March 2002, the Commission found that the husband of the Licensee, Mr Mathers, served an intoxicated person when he sold him a takeaway wine cask then attempted to reverse the sale. The incident was seen by police. A one(1) day partial suspension was imposed. When handing down the decision the Commission made comment about management issues in the following terms: *"We have taken this course as being just the very faintest touch of the lash, if I might use that expression. We do regard the incident as indicative of a culpable slackness of management at that time, but we have had to factor into our deliberations that the particular transaction complained of did involve what we have accepted as having been an attempted reversal of the sale, certainly of supply at the time, and we have accepted what you say as to the outlook for the future."*
- b) In a decision dated 24 February 2005 following four separate (4) breaches of the "bookup" provisions of the *Liquor Act*, the Commission imposed a seven (7) day suspension and made the following comments:

*"The remaining complaints 2, 3, 4 and 5 related to allegations that the Licensee of the Tiwi Store, through her employees, engaged in the practice of book-up of liquor for customers on four occasions between Saturday, 29 May 2004 and Wednesday, 27 October 2004, contrary to the "Credit" condition of the Tiwi Store liquor licence*

*We view the matter of supply of alcohol on book-up to anybody to be a serious breach of the licence conditions, as does the Legislation as emphasised by the recent amendments to the Liquor Act (see Division 2A which commenced on 1 September 2004).*

*We view the suspension as proposed by Mr Perry [Counsel for the Director of Licensing] as being very tolerant or lenient in view of the seriousness of the breach. We note that there was a repeat of the breach after inspectors had been on the premises on 12 May 2004 and the last breach on 27 October 2004 occurred after the legislation had changed to incorporate the special provisions relating to book-up of liquor. At the very least, we are of the view that there was a complete lack of supervision or direction given by the Licensee to her employees.*

*In favour of the Licensee, it can be said that the voluntary suspension in opening hours she has imposed over the past few weeks is*

*commendable, as is the new system ensuring that grocery purchases are individually itemised. These measures are indicative of a responsible attitude and we would sincerely hope that they continue. Mrs Mathers has also provided us with glowing references as to her honesty and integrity.*

*We view the suspension proposed jointly by the parties as being exceedingly light and instead suspend the licence for a period of one week from Thursday 24th March 2005 to Wednesday 30<sup>th</sup> March 2005 inconclusive.”*

- c) In a decision dated 18 August 2006 following one proven breach of the Bookup provisions in the Act and another of retaining a customer’s PIN, a fifty six (56) day suspension of the liquor licence was imposed. In handing down its decision, the Commission stated:

*“We have listened to Mrs Mathers and read her personal references. We accept that she is a person of good character but we do not accept that she has properly conducted the business of the licensed premises with regard to the question of book up. We note that Mrs Mathers is not involved full time in the management of the Tiwi Supermarket business and that she herself was not personally involved in the latest breaches on 7 December or in any of the prior breaches that have been dealt with by the Commission. We are fully aware that she genuinely believes that her husband as manager and her staff would not be knowingly involved in breaching the licence or the Act. As we have preferred the evidence of Mr Pascoe and his cousin to that of Mr Mathers and the other staff member, we can only question Mrs Mathers’ blind faith in those she relies on to protect her interests.*

*Since taking over the licence some six (6) years ago, this Licensee has appeared in front of the Commission on three (3) occasions. On the first occasion, the complaint was for selling liquor to an intoxicated person. Whilst there were some mitigating factors in that Mr Mathers tried to “reverse” the sale when he realised that the customer was intoxicated, the complaint was upheld and a one (1) day partial suspension was imposed. The penalty was described by the Presiding Member as “the very faintest touch of the lash”. He went on to say however, “We do regard the incident as indicative of a culpable slackness of management at that time...”. The Commission also noted the submissions placed before them that Mrs Mathers would be “more hands on and be able to be more dedicated to managing the licence”.*

*Despite submissions made about better supervision of her licence, Mrs Mathers appeared before the Commission in 2005 when she admitted to four (4) complaints of bookup. Once again, these incidents were circumstances where she herself was not responsible for the breaches but*

her employees were. The complaints related to incidents that occurred over an extended period (in May, June, July and October 2004) when liquor was sold on book up to various customers. In considering penalty for those breaches, the Commission gave the Licensee credit for admitting the breaches and noted that had they been upheld after a full hearing, "a lengthy suspension" would have been imposed. Once again the Commission commented on the level of supervision of the Licensee as follows: "At the very least we are of the view that there was a complete lack of supervision or direction given by the Licensee to her employees." The Commission then gave what we see as a modest penalty of seven days (7) for these breaches.

Mrs Mathers once again finds herself before us – and once again it is not for her own deliberate actions but those of her employees including her husband. This is no excuse however. Mrs Mathers is the Licensee and she must "conduct the business" of the licensed premises. She remains responsible for the actions of her husband and her staff in the course of their duties undertaken on her behalf. It appears to us that Mrs Mathers is either unwilling or unable to control her agents.

Mr Timney submitted persuasively that we should cancel the Liquor Licence relating to these premises. He emphasised that these breaches were serious in that the likely results of selling takeaway alcohol by book up include anti social behaviour and public drunkenness. He emphasised the steps taken by parliament to try to prevent these sales.

We have seriously considered cancellation of this licence. It seems that two (2) previous appearances before the Commission when a more lenient approach was taken have had no impact on the conduct of the Licensee or her staff. We can see the major failing of this Licensee is the inability to properly supervise and control her staff and this is an ongoing concern for us.

Ultimately, however, we have decided not to cancel the licence but to do what we have threatened to do in the past, which is to impose a lengthy suspension. We see the imposition of this suspension as a last chance for Mrs Mathers to ensure she maintains proper control of her licence. Further breaches of a similar nature will undoubtedly lead to a cancellation of this licence. Under these circumstances, we intend to impose a suspension of fifty-six days (8 weeks) commencing fourteen days (14) after the date of this decision."

- 6) As regards the most recent breach, Ms Rachael Hewitt, a long-term employee of the Licensee, sold takeaway liquor on two separate occasions to a minor aged thirteen (13) years. At the time of the sales, the Commission found that Ms Hewitt was aware that she was selling to a minor and that the liquor was

purchased by him to be shared with a group of some eight or so other 13 and 14 year olds who should have been in school. Alternatively, she was reckless about his age and made no attempt to seek confirmation by asking for proof of age. Instead, she simply warned him (and the rest of the group) not to stay near the shop to drink the liquor in case the police came by. The evidence before the Commission supports a finding that at least two of those minors became very intoxicated and school staff had concerns for the safety of one student when they could not locate him. He was later found slumped over a bubbler, "*By that I mean he was really intoxicated*"<sup>3</sup>. It is accepted by the Commission that his level of intoxication may well have been from the combined effect of the alcohol purchased from the Licensee's premises and the alcohol he had consumed earlier that morning at his home. The state of another (female) student interviewed by school authorities is described as "*she was really intoxicated*"<sup>4</sup>.

- 7) The service of takeaway liquor to a minor is clearly one of the most serious breaches of the *Liquor Act*-if not the most serious breach. In this instance the Commission formed the view that Ms Hewitt was aware that the alcohol was to be shared with other minors waiting in the vicinity of the shop. There is no way that the safety of these minors can be protected in such circumstances and the actions of Ms Hewitt in serving Student K are abhorrent. Further, this is not the first time Ms Hewitt has been found breaching the *Liquor Act* as she was the employee responsible for allowing a patron to book-up liquor in 2005 - with Mr Mather's consent. That breach culminated in a heavy suspension and clear warnings to the Licensee that the Commission would not tolerate her blind faith in her staff (including her husband) and her obvious lack of supervision of them. The fact that the same employee has now sold liquor to a minor simply confirms the concerns that the Commission has raised in the past that Mrs Mathers is not properly supervising her staff – a major responsibility for any Licensee and particularly one who is not running the business on a full time basis.
- 8) Further, Mrs Mather's evasive and incorrect responses on one particular issue relating to this most recent breach tends to place her personal integrity and honesty in some doubt. She has on prior appearances before the Commission obtained credit for the fact that she apparently imposed a voluntary limit on trading hours at the shop so that liquor was only sold after 2.00pm. The till tapes tendered as exhibits at the most recent hearing clearly show that there were numerous liquor sales before 2.00pm on 15 March 2007 – a situation completely at odds with Mrs Mathers comments to Licensing Inspectors when first approached when she insisted that the voluntary 2.00pm rule was still enforced. She either took so little notice of what was happening at the store that she was unaware that liquor sales were occurring against her instructions or she turned a blind eye to any risky behaviour that

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<sup>3</sup> Statement of Ms A-S (Exhibit 3)

<sup>4</sup> Statement of Ms A-S (Exhibit 3)

would make a profit and told the inspectors what she wanted them to hear.

- 9) Is the Licensee a fit and proper person to hold a licence in the Territory? The Commission has considered the history of this Licensee as outlined above and concludes that she is not. Despite several opportunities and warnings, Mrs Mathers has consistently failed to conduct the business of the licensed premises in a manner required by a Licensee. What is the impact of this finding that the Licensee is not fit and proper? Mr Timney submits that the only appropriate sanction is cancellation of the licence. Mr Elliot submits that such a sanction would be manifestly excessive. Mr Elliott's submissions on this issue are supported by Ms Porter, Counsel for the recent purchaser of the supermarket and the proposed Licensee. Mr Elliot submitted that the Commission's role is not to punish but to protect the public. Noting the reasoning of Thomas J in *O'Neill Hotel Management v NT Liquor Commission [1999] NTSC124*, the Commission agrees that this is correct and we have proceeded to consider what is the appropriate sanction "in the public interest". In *New South Wales Bar Association v Evatt (1968) 117 CLR 177* at pages 183-184 the High Court stated that disciplinary sanctions were "entirely protective, and, notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved". Whilst this decision refers to different subject matter, the approach that the Licensing Commission should adopt when considering sanctions is the same.
- 10) Mr Elliott draws the Commission's attention to the fact that the supermarket business has recently been sold - without the benefit of legal advice by either party. Regrettably for the new purchasers, the business sale appeared to take account of the existence of a liquor licence and liquor stocks and to anticipate the transfer of the licence to the new owners. It did not appear to make the sale conditional upon such a transfer. We are lead to believe that the full purchase price has been paid and the new owners have been running the store for the past three (3) months or thereabouts - but without a liquor licence as it remains suspended. An application for transfer has been lodged by the new owner but has not yet been fully processed, pending the outcome of this hearing.
- 11) Both Mr Elliott and Ms Porter submit that cancellation of the licence is not the appropriate penalty - particularly in circumstances where there is no need to protect the public from the continuing irresponsible behaviour of an unfit Licensee. Mr Elliott submits that Mrs Mathers has gone and does not intend to seek a liquor licence in the future. He also submits that it is open to the Commission to protect the public by transferring the licence and that any sanction imposed by the Commission - apart from a finding that his client is unfit - will only impact on the new owner. As cancellation of the licence may well result in action being taken by the new owners against the Licensee in another venue, we consider that the Licensee's motives are not so clearly

altruistic but we do accept that cancellation will have a considerable impact upon the new owners - especially in circumstances where a moratorium<sup>5</sup> prevents them from applying for a new licence for the store.

- 12) One of the Commission's main reasons for imposing sanctions is because they act as a deterrent to other Licensees in the industry and assist in emphasising that breaches will not be tolerated. If the Commission defers its decision and allows the licence to be transferred, then we are sending a message to Licensees that they can behave irresponsibly and then effectively sell their interest in the licence to someone else and walk away without sanction. This perception of a lack of real penalty is not in the public interest particularly when the breach involves takeaway alcohol sales to minors where consumption and resultant behaviour are unchecked and unregulated.
- 13) The Commission takes very seriously any breaches of the *Liquor Act* – particularly those breaches that involve the irresponsible supply of liquor to the public. Licensed neighbourhood supermarkets have been the subject of particular concern for some time – both to the public and to the Commission. An irresponsible sale of takeaway liquor to a person who then consumes it in a Public Park or residential neighbourhood often has unacceptable consequences for those living there such as antisocial behaviour, violence, littering and noise. It was against this background that the Commission in June 2006 made the following public announcement:

*“The Northern Territory Licensing Commission has today announced a harsher approach to Licensees who disregard their obligations under the Liquor Act and do not comply with the conditions of their liquor licences.*

*The Licensing Commission recognises that the majority of Licensees are vigilant in complying with legal requirements aimed at ensuring the responsible provision of alcohol in the community. It wants the few who are not so compliant to change their ways and a tougher regime of penalties is to be applied.*

*Many licensed premises work hard to ensure they meet all the conditions set by legislation and the Commission, and they are commended. But there are also those who deliberately flaunt the conditions of their licence or continually stretch the boundaries of what is acceptable. Tougher penalties are being introduced to make those Licensees think again about how they are behaving”* says John Flynn, Chairman of the Licensing Commission.

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<sup>5</sup> Pursuant to 67 of the *Liquor Act* and with the Minister's approval, the Commission in June 2006 published a guideline imposing a moratorium on the granting of new takeaway liquor licences within the NT. The moratorium has since been extended and will remain in place until the commencement of the new *Liquor Act* (currently being drafted.)

*“Licensees who serve minors or drunks or who are found to be blatantly breaching their licence conditions must accept the consequences of their actions.” Mr Flynn stated today. “We fully support a vibrant and progressive business and entertainment industry in the Territory but we will not tolerate irresponsible service of alcohol or a casual approach by Licensees to their obligations under the Act or their licence conditions. Our primary responsibilities as a Licensing Commission emphasise harm minimisation and the protection and enhancement of community amenity. Requiring all Licensees to act responsibly and imposing meaningful penalties on those that don’t is one way we can fulfil these aims.”*

*The Licensing Commission has endorsed a general policy that it will impose tougher penalties for licence and Liquor Act breaches. Tougher penalties will include longer periods of suspension of a liquor licence and the imposition of more restrictive licence conditions. This will help bring non-compliant Licensees into line. It should also reduce the time spent by the Commission on dealing with complaints and transgressions. This will allow the Commission to instead devote its attention to other more innovative and positive approaches to alcohol issues.”*

- 14) It is in the light of the above history, both of this particular Licensee and of the Commission’s public stance on harsher sanctions, that we now consider the appropriate sanction we should impose for this most recent breach. Our options are:
- a) Suspension of the licence;
  - b) Cancellation of the licence;
  - c) A variation of the terms of the licence;
  - d) A requirement to do certain actions or to refrain from so doing; and
  - e) The ability to defer any decision making to allow for a transfer of the licence.
- 15) This breach is a very serious one. The failure of a Licensee to exercise substantive and effective control over the day to day business of the licensed premises can have dire consequences. Further, the general public must have trust and faith in Licensees, they must be assured that people who hold themselves out as being licensed and skilled in the responsible sale of liquor are in fact able and willing to undertake their duties effectively. The blatant sale of takeaway liquor to a minor by a long term staff member who has breached the *Liquor Act* before is something that the Licensee must accept responsibility for and the public (including other Licensees) must see a

meaningful sanction imposed.

- 16) Despite the fact that the new owner appears to be a decent person and despite our sympathy for her and the predicament she now finds herself in, we do not consider that the licence should be transferred. This decision has not been made lightly but only after considerable reflection on the merits of the options available to us. The option of transferring the licence imposes no meaningful sanction on the outgoing Licensee and has no deterrent element. The option of a long - term suspension of the licence was put forward as a second alternative by counsel for the Director. We note that it was not suggested as an appropriate alternative to cancellation by the other Counsel for the current and proposed Licensee. Ultimately, in circumstances such as these where the Licensee has left the premises, a suspension would simply penalise the new owner and in the Commission's view would not adequately convey to the public our refusal to tolerate such serious breaches. It would also fail to act as a sufficient deterrent to other Licensees.
- 17) For these reasons, the Commission has ultimately, following detailed and careful consideration, elected to cancel the liquor licence. Knowingly serving a minor takeaway liquor on two (2) occasions in one morning (albeit included in one complaint) is a breach of sufficient gravity to justify cancellation, particularly when the breach is the last of a number of breaches over the years (as outlined above) that all display a reckless attitude towards the public interest. The Licensee cannot claim that she has not been warned because she has, both individually in earlier decisions and through the media along with other Licensees.
- 18) The enormous problems takeaway liquor causes in the Northern Territory are well documented and there is wide public concern that meaningful steps be taken to sanction irresponsible Licensees and protect the community. This is not the first matter in recent times where the Commission has chosen to cancel a liquor licence rather than to allow it to be transferred. The Borroloola Inn<sup>6</sup> lost its licence last year when the Licensee showed herself to be unfit. The behaviour of the Licensee in that matter was appalling and the Commission had no hesitation whatsoever in cancelling the licence rather than allowing it to be transferred. The conduct of Mrs Mathers is not as blatant but it still displays a pattern of behaviour over a long period of time where the clear warnings of the Commission have been ignored for the sake of profit and to the detriment of the public. The Commission accepts that cancelling the licence is a serious step to take in the public interest but it does not consider such a decision to be manifestly excessive. Other jurisdictions have taken a firm stance when faced with similar situations<sup>7</sup> and none of them

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<sup>6</sup> see decision published 14 December 2007

<sup>7</sup> See for example the decisions of *Sotomayor v Registrar of Liquor Licenses* (1990) 100 FLR at 249 and *Coatz v Director of Liquor Licensing* [2000] WASCA at 126

have the alcohol consumption rate and level of alcohol abuse that the Territory is currently facing-stemming particularly from the sale of takeaway liquor. Police and Licensing Inspectors cannot watch every sale made by a Licensee and the number of breaches that come before the Commission or the Court are only the tip of the iceberg. All the more reason for the Commission to impose a meaningful sanction on those Licensees who are caught.

19) In accordance with the Object of the Act, we make the following decision:

- a) Mrs Jannie Mathers is not a fit and proper person to hold a liquor licence in the Northern Territory and any future application by her either within the Territory or elsewhere should take account of this finding.
- b) Liquor Licence Number 80903294 is cancelled.

Richard O'Sullivan  
CHAIRMAN

23 July 2007