NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

LICENSEE:	**Jones Cattle (NT) Pty Ltd**
PREMISES:	Top Springs Hotel
LICENCE NUMBER:	81203330
PROCEEDING:	Complaint Pursuant to Section 48(2) of the *Liquor Act* Breaches of: Section 102 –Liquor not to be sold to an Intoxicated Person; Section 121 – Failure to Remove or Exclude Intoxicated Person from the Licensed Premises;
HEARD BEFORE:	Mr Richard O'Sullivan (Chairman) Ms Brenda Monaghan (Legal Member) Mrs Jane Large
DATE OF HEARING:	25 February 2009
APPEARANCES:	Mr Alan Woodcock for the Licensee Mr Ray Murphy for the Director of Licensing

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BACKGROUND

1) On 25 February 2009, the Licensing Commission conducted a hearing relating to two complaints brought by Licensing Inspector Wood against the Licensee and Nominee of Top Springs Hotel. The complaints allege breaches of Sections 102 (serving an intoxicated person) and 121 (allowing an intoxicated person to remain on premises) of the *Liquor Act.*

2) The circumstances of the alleged breaches arose out of incidents that took place at Top Springs Hotel on Monday 24 March 2008. In summary, the first complaint is that a patron, Sam Webb (Webb) was intoxicated at the time he was served liquor by hotel staff in breach of Section 102. The second complaint is that Webb, despite being intoxicated, was allowed to remain on premises in breach of Section 121. The Licensee and Nominee deny the allegations.

HEARING

3) At the outset of the hearing, a preliminary issue was raised as to whether on the basis of the written complaint filed in respect of the Section 102 breach, the complainant could submit that both Osborne and Webb were the subjects of the complaint. Upon considering the documents filed, the Commission noted that the original letter of complaint served on the Licensee and Nominee specifically detailed Webb and not Osborne as the intoxicated person. On the grounds of fairness, the Commission indicated its intention to limit the complaint to consideration of the actions of Webb only. The hearing proceeded on that basis.

4) At the hearing, Counsel for both parties relied on documentary evidence including signed witness statements, statutory declarations and a taped electronic record of Police interview. Witnesses also attended in person before the Commission both in person and by phone and were cross examined. In reaching a decision on the weighting to be given to each piece of evidence, the Commission has had to balance witness credibility on one hand against evidential reliability on the other.

5) The need for care and a balanced approach was relevant as follows:

   a) The evidence given by two witnesses (namely Chris Dormer and Lindall Watson) who were not examined and cross examined in person but by phone. Despite the difficulties caused by taking evidence remotely, their evidence in fact echoed a truthfulness of accounting and credibility of content that was less apparent in some of the evidence provided by witnesses who appeared in person and were cross examined.

   b) The videotaped record of Police electronic record of interview (EROI) with Sam Webb appeared truthful and credible with Webb giving an honest account of his antics the day before as he remembered them. He was not however available to be examined and cross examined and this was a factor that was taken into account by the Commission.

   c) The quality and veracity of some witness statements was an issue. In corroboration of her oral evidence, for example, the Nominee relied on the written statements of Jamie Essex and Tristran McLoughlin. These statements each contain exactly the same sentence on a crucial matter - "*Over a period of one and a half hours, Sam was served two handles of bundy and lemonade by Pauline Haseldine."* As neither was available for cross examination, the Commission has had to consider the likelihood of corroboration and therefore the weight (and reliability) to be given to such statements.

   d) A typed, signed statement of Sam Webb submitted in evidence as Exhibit 4 was dated the day of the hearing and faxed to Top Springs. This statement emphasises a responsible supply of alcohol to him by Top Springs Hotel on the day in question. In doing so, it conflicts in many areas with the more credible EROI of Webb with Police on 25 March 2008.

In this particular situation, the Commission preferred the EROI and has disregarded the contents of Webb's written statement as being unreliable and suggestive of collusion.

e) A final consideration for the Commission was the paucity of and/or inconsistencies in the evidence tendered as regards many crucial issues including timeframes and alcohol service. Whilst the Commission might have strong suspicions on particular issues, it has necessarily taken a cautious approach in circumstances where evidence is lacking, conflicting or unsupported.

6) After considering all of the evidence provided, the Commission is satisfied on the balance of probabilities that:

a) Owen Osborne (Osborne) and Jamie Essex (Essex), both workers from Camfield Station had been staying at Top Springs Hotel for a few days of R&R. They were due back at work on the day in question- Monday 24 March 2008.

b) Early on Monday 24 March, Osborne and Essex rang Camfield Station and asked for a lift back from the Hotel. According to Tristran McLoughlin (McLoughlin), he left the Station with Sam Webb (Webb) and travelled to Top Springs Hotel in Osborne's car to collect his workmates. The Commission is aware that the length of the trip is 90 or so kilometres on a sealed road. In Webb's statement in his EROI, he advised that they arrived at Top Springs Hotel at around 9.00am. This departure time does not accord with the recollection of Haseldine and Osborne who suggest the men arrived around 11.00am. As the evidence provided by these two witnesses appeared to be intended to limit as far as possible both the time Webb spent in the bar and the amount he consumed, the Commission considers that on the totality of the evidence, an earlier arrival time than 11.00am is more likely.

c) Soon after arrival (and after buying smokes and coke from the front shop), Webb joined Osborne, Essex and McLoughlin in the Back Bar. Based on the evidence of Haseldine, Osborne, Essex and McLoughlin, over a one and a half hour time frame, Webb was served two alcoholic drinks by the Nominee Pauline Haseldine (Haseldine) while the others drank soft drinks. Other evidence suggests Webb was served more than that. In his EROI taken by Police the following morning, Webb appeared to give very candid evidence about his behaviour the day before. His evidence was that the others were also drinking alcohol. He admitted to drinking a lot more than two (2) handles of rum and lemonade and even spoke of drinking double nips towards the end of the session. Webb described himself as having been "pretty drunk, pretty pretty drunk" and "very pissed." His admissions accord with the evidence of others including Haseldine and his Camfield workmates on his visible level of intoxication. That he could become so intoxicated on two (2) handles of rum and lemonade defies belief. Further, the Commission does not accept the evidence of Haseldine and Osborne that Webb was only in the Back Bar for one and a half hours that morning

but considers it more likely on the evidence before it that he was there a much longer period.

d) Haseldine was particularly busy on that day because an employee had not turned up to work to assist her. She was dividing her time between the Back Bar, the Front Bar, the shop and petrol sales. Her evidence was that she popped in and out of the Back Bar as required to serve patrons and to check on them. The Commission's knowledge of the layout of the premises supports a finding that a person has no clear view into the Back Bar from the shop. Haseldine's husband Biggs and the yards man Marty were in the vicinity but were generally occupied with other jobs.

e) By early afternoon (around 12.30pm), Webb was visibly intoxicated. He became angry when he was refused service by Haseldine and he was told by her to leave the Back Bar. He left the Bar and the others remained.

f) There is little reliable evidence as to what was happening in the Back Bar between 12.30pm until 3.00pm when Dormer and Watson entered the bar for a drink. It is likely however early in the afternoon, Webb returned to the Back Bar to join his friends. During the afternoon, a limited amount of time was spent by Osborne, Essex and Haseldine retrieving belongings from the hotel room earlier occupied by the men while Webb and McLoughlin remained in the Bar. The items were packed in Osborne's vehicle and then they returned to the bar to join the others. Later, Essex made takeaway purchases of a meat pie and a six pack. How much time that afternoon was spent by Webb and his friends in the Bar is unclear but on the balance of probabilities, Webb is likely to have been in the Bar for a considerable period.

g) When Dormer and his wife Watson entered the Back Bar at around 3.00pm, Webb and Osborne were seated at the far end of the bar. Both appeared to Dormer and Watson to show significant signs of intoxication. Webb was slumped over his drink and his speech was affected. Watson's evidence was that each man had a drink of some kind before him. Dormer could not recall.

h) At the time of their arrival, Haseldine advised Dormer and Watson that she would serve them shortly and then she returned to the shop to serve a customer. Soon after, they were served a drink by either Biggs or Marty. Haseldine may have been the main person "on duty" in the Back Bar on the day in question but she was not the only person serving alcohol to patrons on that day. Osborne also gave evidence that Haseldine, Biggs and Marty had all served liquor during his 3 day stay. Whilst this evidence is disputed by Haseldine, the Commission prefers Osborne's evidence on this issue.

i) An intoxicated Webb soon struck up a conversation with Dormer but quickly took offence at the fact that Dormer was a teacher at Lajamanu, an Aboriginal community. He removed his shirt and was agitated and abusive towards Dormer.

j) This behaviour resulted in Webb being reminded that he was earlier asked to leave and was again told to leave the premises by Haseldine who had by then returned to the Back Bar. Her evidence is that after asking him to leave, she watched him get off his chair as if he intended to leave. She did not remain to ensure that he left the premises however as she was called away to the shop to serve a customer.

k) At around that time and in response to Webb's drunken, aggressive behaviour, Dormer and his wife decided to leave the premises. While they were attempting to leave, Web attacked Dormer from behind and they fell to the ground. Webb bit him on the stomach and was abusive and threatening. He also smashed the shop's bain-marie to the floor. Even as they found refuge in their car and attempted to drive away, Webb continued being violent and threatening bashing his fist against the car window. Osborne and Biggs attempted to restrain Webb and Police were called by Haseldine at 3.30pm.

7) Overall the Commission has not been convinced of the honesty and veracity of all evidence and statements provided by Nominee, Ms Hazeldeine and station employees, McLoughlin, Essex and Osborne. As already stated above there is strong suspicion of collusion leading to the identical nature and wording of statements. This includes the almost identical reference to the arrival of Webb and McLoughlin at Top Springs at 11.00 am and references to Webb's consumption of two (2) handles or rum and lemonade over a one and one half hour period. There is also suspicion of why Webb, on the day before hearing, changed his EROI evidence to match that of Hazeldeine and his former work colleagues.

8) To the Commission, greater credibility attaches to Webb's original statements to Police where, on video, he appears resigned to his predicament and candid in his recounting of his actions and events leading to his being taken into custody. He gains no benefit from the admissions of intoxication, being served at Top Springs and his time on the premises and this adds to the credibility of his apparent frankness in these statements.

9) The video interview displays a high level of candour, credible to the point where these statements would not likely have been contrived as they would not have been to his advantage in subsequent court proceedings.

10) The Commission's suspicions are also founded on the likelihood of stockman spending between four (4) to six (6) hours at Top Springs Hotel drinking coke when they were due and expected for work at Camfield Station. The evidence of Webb, Dormer and Watson would indicate that more than one person was drinking at the premises and that more than one person was intoxicated. However, the inability to have Webb present as a witness and available for cross examination lessens the account and weight able to be placed on the EROI evidence.

11) Two decisions must be made by the Commission: whether there is sufficient evidence to find on the balance of probabilities that there were breaches of Section 102 (serving an intoxicated person) and/or whether there were breaches of Section121 (allowing an intoxicated person to remain on premises) of the *Liquor Act.*

12) Section 102 of the *Liquor Act* states:

A Licensee or a person employed by a Licensee shall not sell or supply liquor to a person unless the person to whom it is sold or supplied is not intoxicated at the time (the onus of proof of which lies with the defendant).

The Commission stated in a previous decision (Scotty's Place, Feb 2000):

"Once there is a case to answer in relation to a breach of Section 102, which is to say, once a sale or supply is demonstrated, together …… with any reasonable ground to suspect that the recipient may have been other than not intoxicated, an onus of proof shifts to the Licensee, who must prove that (the patron) was not intoxicated, or alternatively must sufficiently undermine the evidence of the sale or supply having occurred."

13) In the matter before the Commission, it is not contested that Webb was served alcohol whilst in the Back Bar of the Top Springs Hotel on the morning of Monday 24 March. Haseldine admits to selling him two handles of rum and lemonade but denies selling him any more alcohol. Written statements provided by Osborne, Webb, Essex and McLoughlin all support Haseldine and Osborne's oral evidence on this issue of service.

14) As previously stated, the similarity of wording and content of the written statements tendered and aspects of the oral evidence of Haseldine and Osborne left the Commission with doubts as to the veracity of this evidence of such limited service upon Webb and no service of liquor to his workmates. It beggars belief that workers about to return to work and expected at a remote cattle station would elect to remain in the hotel all day drinking soft drink.

15) The Commission strongly suspects that Webb was supplied more alcohol from the premises over the course of the morning than the two (2) handles admitted to but there is insufficient evidence before us to be satisfied on the balance of probabilities that this occurred. So much of what happened that day is unknown or the evidence is unreliable. Webb may have supplemented his alcohol intake with drinks from another source (eg from his friends or from the car). He may have taken other drugs. Whilst the EROI appeared to show Webb giving an honest, candid account to Police of his intoxicated exploits of the day before, the Commission's inability to have Webb examined and cross examined on issues of service and supply are factors that have been taken into account.

16) In summary, during the morning in question until he was asked to leave at 12.30pm, Webb was served alcohol and by the early afternoon he was visibly intoxicated but there is insufficient evidence to support a finding that he was intoxicated at the time of service. There is also no adequately strong evidence of service of alcohol upon Webb between 12.30 and 3.00pm apart from evidence of Watson that he was sitting slumped over his drink when she arrived (and the EROI information supplied by Webb). Whether the drink referred to by Watson was alcoholic is unknown. The Commission may be left with strong suspicions but, even with the reverse onus, and despite some misgiving, no finding of a breach of Section 102 is made against the Licensee and the complaint is accordingly dismissed.

17) The second matter for the Commission's consideration is whether the Licensee breached Section 121 in failing to remove Webb from the premises.

The section states:

121 Power to exclude or remove persons

(1) A Licensee or employee of the Licensee shall, or an inspector may, exclude or remove a person, not being a bona fide resident of the Licensee's licensed premises, from the licensed premises if the person is intoxicated, violent, quarrelsome, disorderly or incapable of controlling his behaviour.
(1A) A Licensee, an employee of the Licensee or an inspector may exclude or remove from the Licensee's licensed premises:

(a) a bona fide resident of the premises, if that resident is intoxicated, violent, quarrelsome, disorderly or incapable of controlling his behaviour;
(b) subject to any other law in force in the Territory, any person (including a bona fide resident), if the presence or continued presence of the person on or at the premises would or might:

(i) render the Licensee liable to a penalty under this Act or any other law in force in the Territory; or
(ii) in his opinion, disrupt the business of the Licensee or unreasonably interfere with the wellbeing of other persons lawfully on the premises; or

(c) for or during a period not exceeding 12 months from the time a person was found guilty of an offence relating to the possession or supply of a drug on licensed premises, that person.

(2) A person to whom subsection (1) or (1A) is applicable shall immediately leave licensed premises on being requested to do so by the Licensee, an employee of the Licensee, an inspector or a member of the Police Force.
(3) A member of the Police Force shall, on the demand of the Licensee, an employee of the Licensee or an inspector remove or assist in removing from licensed premises a person who has been requested by the

Licensee, an employee of the Licensee or an inspector in accordance with subsection (2), to leave the premises.

(4) A Licensee, employee of a Licensee, inspector or a member of the Police Force exercising a power under this section may use such force as is reasonably necessary for the purpose.

18) It is not contested that at around 12.30pm, Haseldine refused an intoxicated Webb service of liquor. When he became agitated, she asked him to leave the bar and he obeyed. Webb returned to the Back Bar however and was still there at 3.00pm when he was to be seen slumped over the bar intoxicated. Haseldine's evidence was that on returning to the Back Bar, she noticed an intoxicated Webb sitting on a bar stool and again told him to leave. He got off his bar stool and she assumed he was leaving. She saw two (2) customers (Dormer and his wife Watson) at the bar and told them she wouldn't be long and would serve them in a minute. She then had to leave as she had to attend to someone who wanted to buy fuel –a time consuming process as the fuel has to be prepaid. In the interim, Watson visited the bathroom, Marty or Biggs served Watson and Dormer a drink and Webb became abusive and aggressive after a brief conversation attacking Dormer as the teacher was attempting to leave. Haseldine was unaware of any of these developments until she heard a commotion from the Back Bar area and she saw that Webb had tackled Dormer to the ground.

19) Counsel for the Licensee and Nominee, Mr Woodcock submits that that there was nothing more that his client was required to do to comply with Section 121. She saw that Webb had returned to the bar and that he was intoxicated. She told him to leave and assumed by his actions that he was intending to obey her. He submits that Haseldine had no duty to do anything more.

20) The Commission disagrees. Haseldine already knew that Webb was not to be trusted. She has made him leave the Bar earlier in the day because he was intoxicated and behaving badly and he had soon returned. Had Haseldine or her staff noted this fact and had they removed him once again in accordance with Section 121, then Dormer would not have been hurt and abused.

21) Telling an intoxicated, volatile patron such as Webb to leave and simply assuming they will do so is not sufficient compliance with Section 121. Under the Act, the Licensee <u>must remove</u> such a patron and may use such force as is reasonably necessary to do so. It is simply not an acceptable excuse to leave the bar to attend to other duties prioritising them over a Licensee's duty under Section 121 to keep licensed premises safe and well managed. If short staffing meant that the Back Bar could not be properly managed on the day in question, then it should have been closed for the day.

22) For the above reasons, the Commission finds that there has been a breach by the Licensee and Nominee of their Section 121 duties. Submissions on penalty will be accepted either in writing or through Counsel within fourteen (14) days of the date of service of this decision.

Richard O'Sullivan
CHAIRMAN

23 March 2009