

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	TIMBER CREEK HOTEL
LICENSEE:	VIC RIVER PTY LTD
DUAL NOMINEES:	Clive Edward Stone Rachael Pauline Stone
LICENCE NUMBER:	80304074
PROCEEDING:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> – Conduct Contrary to Sections 102 and 121
HEARD BEFORE:	Mr Richard O’Sullivan (Chairman) Mr Philip Timney (Legal Member) Mrs Jane Large
DATE OF HEARING:	15 September 2010
DATE OF DECISION:	19 October 2010
APPEARANCES:	Mr Mark Wood, for the Director of Licensing Mr Gus Bernardi, Counsel for the Licensee

BACKGROUND:

- 1) By report dated 6 July 2010 the Director of Licensing recommended that the Commission conduct a Hearing in respect of an alleged breach of Sections 102 and 121(1) of the *Liquor Act* (“the Act) by the Licensee of the Timber Creek Hotel, Vic River Pty Ltd. The Director noted that, should the Licensee admit the breach of Section 102 then the Section 121(1) complaint would be withdrawn on the basis it arose from the same factual matrix.
- 2) The background to the complaint is as follows. On 15 April 2010 Senior Constable Dean McKie, Acting Officer in Charge of Timber Creek Police Station, contacted Licensing Inspector Mark Wood regarding an incident that had occurred at the Timber Creek Hotel that afternoon. Constable Robert Griffiths and Senior ACPO Anthony Ah Kit had attended the Timber Creek Hotel just prior to 14:00 hours and as they entered the premises they observed a female and male sitting at the bar. They approached the bar and observed the female who was handed money by the bar attendant. The female spoke with the male and handed the money to the male. In doing so

the female dropped some of the money and it was observed that her movements were slow and unsteady.

- 3) Constable Griffiths spoke with the bar attendant, later identified as Mr Stephen Scarlioli, and asked if he thought the woman was intoxicated to which the attendant replied with words to the effect "No I don't think so, maybe after one more beer I will stop serving her". Constable Griffiths then observed the female pick up a can of beer and walk to the jukebox. His observations were that she was unsteady on her feet. During this period the attendant commented to Constable Griffiths: "See she can walk in a straight line".
- 4) Constable Griffiths and ACPO Ah Kit left the premises and returned to the Police Station. A short period later they returned to the premises with Senior Constable McKie. Upon entering the premises Senior Constable McKie observed a female who appeared to be slumped forward at the bar, Constable Griffiths identified her as the person he had earlier considered intoxicated. Senior Constable McKie spoke with the Mr Scarlioli and asked "Is she not too drunk to be served?" to which he replied with words to the effect "Yeah, she now looks too drunk, but she looked OK when I served her".
- 5) Senior Constable McKie then instructed the female to leave the premises pursuant to Section 121 of the *Liquor Act* and escorted her from the premises. Constable Griffiths identified the female outside the premises as Ms Roslyn Marchant who, when questioned about how much she had drunk, replied 'I don't know, to be honest, big mob'. Ms Marchant was conveyed to the Timber Creek Police Station where she consented to a breath analysis test which returned a reading of 0.267% BAC at 14:31 hours.
- 6) By letter dated 12 May 2010 the Director informed the Licensee of the substance of the complaints and invited the Licensee to provide a written response. Mr Stone, on behalf of the Licensee, provided a response dated 3 June 2010 advising that "the charges speak for themselves, .267%" and "there is no sensible way I could possibly dispute this finding".
- 7) By a decision made on 3 August 2010 the Commission determined to conduct a Hearing into the complaint.

HEARING

- 8) At the commencement of the Hearing Mr Wood informed the Commission that the matter would proceed by way of plea and that he was withdrawing the complaint pursuant to Section 121 of the Act as it was based on the same factual matrix as the Section 102 complaint. Mr Wood then provided the Commission with a précis of facts, consistent with the matters set out in paragraphs 2 to 5 above. Mr Bernardi informed the Commission that the facts were agreed by his client. The Commission formally found that the complaint as alleged was proved and sought submissions on penalty from the parties.

- 9) Mr Wood submitted that the Licensee should be given credit for the early acknowledgement of the breach at the first available opportunity by Mr Stone in his letter to the Director dated 3 June 2010. Mr Wood also acknowledged that the Nominees had co-operated fully in the investigation of the complaint. In response to a query from the Chairman in respect of Ms Stone's reluctance to hand the till tapes to the Police Officers at the time of the incident, Mr Wood confirmed that Ms Stone immediately did so once he confirmed to her that the police had the power to seize the till tapes.
- 10) Mr Wood submitted that the Commission should take account of the following matters in determining the appropriate penalty. Ms Marchant had commenced drinking at the premises at 10.00 am. The Timber Creek Hotel currently has a self imposed restriction limiting sales up until midday to light and mid strength beer only. Ms Marchant had obviously switched to drinking VB some time prior to the arrival of the Police and the BAC reading of 0.267 indicated a high level of intoxication by 2.00 pm.
- 11) Mr Wood submitted that in considering penalty the Commission was obliged to take the objects of the Act into consideration, including the provisions of Section 3(1)(a) relating to the minimisation of harm associated with the consumption of liquor. Mr Wood submitted that it was fortunate that Police had intervened and escorted Ms Marchant home preventing any harm from actually occurring to her. However, the potential for harm was significant given the high level of intoxication.
- 12) Mr Wood referred the Commission to previous decisions where breaches of Section 102 of the Act had occurred. In particular, the Jabiru Golf Club decision (11 November 2008) and the Gove Yacht Club decision (8 November 2007), both of which resulted in a penalty of one day suspension of licence. Mr Wood conceded that in both those matters there was an element of aggression on the part of the intoxicated persons that did not arise in the current matter.
- 13) Mr Wood informed the Commission that Vic River Pty Ltd is currently the Licensee of the Timber Creek Hotel. The former Licensee of the premises was the Timber Creek Hotel Wayside Inn Joint Venture Pty Ltd. Whilst the Joint Venture Company had been dissolved in 2009, the Nominees for both entities were Mr Clive Stone and Ms Rachael Stone. Mr Stone has been a director of the entity holding the liquor licence for the Timber Creek Hotel since 1997.
- 14) Mr Wood advised that the Licensee of the Timber Creek Hotel had previously been found to have breached Section 102 of the Act (serve liquor to an intoxicated person) on 8 May 2008. By decision of the Commission dated 13 October 2008, a penalty of one day suspension of licence was imposed, suspended for a period of twelve months. Mr Wood confirmed that, whilst technically Vic River Pty Ltd had not been previously found to have breached the Act, the prior breach whilst the current Nominees were in control of the premises should be taken into account.

- 15) Mr Wood closed by submitting that the appropriate penalty in all the circumstances would be a suspension of the licence for a period of one day, with the penalty to be served on a like day to that on which the breach occurred.
- 16) Mr Bernardi submitted that, in determining penalty, the Commission should afford credit to the Licensee for the early admission of the breach and for co-operating in the investigation of the complaint.
- 17) Mr Bernardi referred to a previous decision of the Commission relating to the Crossways Hotel (decision dated 23 January 2006) and the discussion relating to the use of blood alcohol readings as evidence of the level of intoxication. In that decision Mr Withnall stated, in respect of the acceptance of Blood Alcohol Certificates by the Commission:

“Historically then, the Commission has tended to receive the actual reading into evidence but then to await and require additional evidence to indicate what weight it may be given in the matter before it.”

- 18) Mr Bernardi submitted that the decision indicated that the Commission should not attach significant weight to Ms Marchant’s BAC reading in isolation and some further indicia of intoxication would need to be demonstrated.
- 19) Mr Bernardi acknowledged that the BAC reading of 0.267 and its introduction into evidence before the Commission was not disputed by his client. However, he submitted that Ms Marchant, despite the relatively high reading, was not displaying the indicia of intoxication that would normally be expected from a person with a reading at that level. He noted that no evidence had been presented to the Commission that Ms Marchant was staggering or tripping over or that she was loud or agitated, as may have been expected from a person at the recorded level of intoxication.
- 20) Mr Bernardi emphasised that Ms Marchant had been co-operative with Police and that her responses to questioning at the time she was removed from the Hotel by the Police Officers were intelligent and coherent. Whilst the Police had noticed some fumbling with change during the first visit there was no evidence that Ms Marchant was falling over or causing any other type of disturbance within the premises. She admitted frankly that she had “big mob of cans to drink”.
- 21) Mr Bernardi acknowledged that, in terms of the seriousness of the offending, the harm that may have been suffered by an intoxicated person is a relevant consideration for the Commission. He submitted that in this instance there was no evidence of actual harm to Ms Marchant nor was there any evidence of potential harm apart from the BAC reading itself. The Police Officers, even after the conduct of the breath test and the resultant high reading, did not place her in protective custody, she was instead delivered home into the care of a sober relative.

- 22) In respect of the prior breach on 8 May 2008, Mr Bernardi submitted that at the time of that offence the Nominees (Mr and Ms Stone) were not in complete control of the Timber Creek Hotel, having entered into a joint venture with the Licensee of Timber Creek Wayside Inn. He referred the Commission to paragraph 18 of the decision arising from that complaint where the Commission noted *"the extreme pressures that are continually brought to bear on the management group from the joint venture partners regarding increased financial returns"*. On that basis Mr Bernardi submitted that this breach should be treated as a first offence by this Licensee, albeit Mr Stone and Ms Stone were Nominees in both instances.
- 23) By way of further mitigation, Mr Bernardi asked that the Commission note that his clients had been Licensees / Nominees in Timber Creek for a significant period and had resided in the community for more than fourteen years. They maintain a good relationship with the local Police and the Night Patrol. The liaison with the Night Patrol includes the voluntary early closing of the premises when requested.
- 24) The management of Timber Creek Hotel maintains an incident register and a banned person register, which is enforced rigorously. During 2009, forty-nine persons were barred from the premises and the barring is applied to entire communities when warranted. Mr Bernardi submitted that these voluntary measures were an indication of a community conscious Licensee who is prepared to absorb financial losses for the greater benefit of the Timber Creek community and its residents. In addition, the Licensee has voluntarily restricted the terms of its licence by limiting sales prior to midday to light beer and by closing the premises at 8.30 pm.
- 25) Mr Bernardi also noted that, due to the remote location of the premises, it was difficult to train and maintain staff with the resultant reliance on backpackers and other transient staff. Despite the staffing difficulties his clients are proactive in their efforts to ensure that all staff, including short term staff, are properly trained. His clients also have a policy of trying to ensure that at least one experienced staff member is on duty in the bar area at all times.
- 26) Mr Bernardi concluded by submitting that the Commission, were it minded to impose a suspension of Licence, then that suspension should be suspended for a specified period.

CONSIDERATION OF THE ISSUES

- 27) As expressed in numerous previous decisions, the Commission regards the service of alcohol to intoxicated persons as being at the more serious end of offending under the Act. The anti-social behaviour, violence and self harm resulting from the sale of alcohol to persons who are already intoxicated impacts significantly on the wellbeing of the person themselves and on the community at large, more so in a remote or isolated locations such as Timber Creek. Recent decisions reflect the Commission's attitude in imposing tough penalties, including the suspension of licences, where Licensees continue to serve patrons beyond the point of significant and noticeable intoxication.

28) Section 124B of the Act provides:

124B Results of breath analysis as evidence

In proceedings for an offence against this Act in which the question of whether a person was or was not intoxicated is in issue, the result of a breath analysis, by the use of a breath analysis instrument prescribed for the purposes of the Traffic Act, is admissible and is prima facie evidence of the person having, at the time the sample of breath to be analysed was taken, a concentration of alcohol in his or her blood not less than the concentration assessed by the analysis.

- 29) The Commission notes the significant level of intoxication of Ms Marchant, being recorded by Police as a 0.267 blood alcohol level, and is entitled to accept BAC as prima facie evidence of the level of that person's intoxication. A reading at that level is regarded by the Commission, adopting a common sense approach, as an indicator of intoxication at a relatively high level.
- 30) In reaching that conclusion the Commission acknowledges the submission of Mr Bernardi that a BAC reading alone cannot support a finding that a person was served alcohol when intoxicated. As he rightly pointed out, bar staff do not have access to breath analysis equipment and must rely on observing other indicia of intoxication. As the Commission has determined in the past (Crossways Motor Hotel decision dated 23 January 2006) there must be other physically observable indicators that the person served was intoxicated at the time of service.
- 31) In this instance the Commission accepts that Ms Marchant was not displaying all the indicia of intoxication that would be expected to be shown by a person with a BAC of 0.267. There were however indicia of intoxication that should have been observed by Mr Scarlioli at the time Ms Marchant was served. Constable Griffiths and ACPO Ah Kit arrived at the premises at the same time, or shortly after, Ms Marchant was sold 2 beers. Constable Griffiths stated, in his sworn statutory declaration, that when he entered the premises Ms Marchant appeared to be intoxicated, she had bloodshot eyes, her movements were slow and, after being served, she dropped some of the change on the ground. When Ms Marchant stood up from the bar Constable Griffiths observed that she was unsteady on her feet. Constable Griffiths raised his concerns regarding Ms Marchant's state of intoxication with Mr Scarlioli who did not agree she was intoxicated beyond the point that she should be served. This occurred at approximately 1.50 pm. Constable Griffiths' observations and evidence were not challenged at the Hearing.
- 32) When Senior Constable McKie returned to the premises with Constable Griffiths at approximately 2.15 pm he noted that Ms Marchant appeared to be intoxicated and was slumped forward in a bar stool in a drowsy state. At that time Mr Scarlioli conceded that Ms Marchant now looked drunk but stated that she did not appear to be intoxicated when he last served her.
- 33) Ms Marchant's evidence was that she was "feeling happy and drunk. I was too drunk, I shouldn't have been in the pub". Again, that evidence was not challenged during the course of the Hearing. The BAC reading supports Ms Marchant's own assessment of her state of intoxication as it does the

observation of the police officers that Ms Marchant was displaying signs of intoxication.

- 34) In the Commission's view, based on the evidence presented, Mr Scarlioli should have noticed the indicators that Ms Marchant was intoxicated. The Police Officers saw the indications within a very short period of observing Ms Marchant. The failure on the part of Mr Scarlioli is heightened by the fact he failed to see the signs of intoxication, or to remove Ms Marchant from the premises, even after Constable Griffiths observed she was intoxicated and pointed this out to Mr Scarlioli.
- 35) The Commission notes that this is a second similar breach of the Act by the Licensee of the Timber Creek Hotel within a relatively short period of time. The first breach resulted in a one day suspension of the licence, with that penalty suspended for a period of twelve months. The Commission is not persuaded by the submission that it should treat this as a first breach by the current Licensee. As was noted during the Hearing, Mr Stone and Ms Stone were the Nominees when both breaches occurred. The Commission does not accept that a change of corporate entity, involving the same persons, should wipe the slate clean so far as prior offending is concerned.
- 36) Accepting the current complaint of a second breach of Section 102 for serving an intoxicated person, the Commission is not persuaded by the submission that any penalty imposed in this instance should again be suspended. The Licensee was warned of the consequences of a subsequent breach in the decision published on 13 October 2008. The latest breach occurred on 15 April 2010 with the result the Commission now considers that a suspension of the licence was now warranted.
- 37) In determining penalty the Commission does however take account of the Licensee's relatively good record over a period of some fourteen years and the early admissions made by Mr Stone. The Commission also notes that voluntary measures implemented by the Licensee aimed at alcohol related harm minimisation within the Timber Creek Community. The Commission is also mindful that a suspension of the licence will impact not only on the Licensee but will also cause inconvenience to travellers, allowing there is only one licensed outlet in Timber Creek.
- 38) The Commission has taken these mitigating factors into account in imposing a penalty that is somewhat less than would normally be applied in respect of a second breach for serving an intoxicated parton in breach of Section 102 of the Act.

DECISION

- 39) The Commission determined to impose a one day suspension of the licence of the Timber Creek Hotel with that penalty to be imposed on a Thursday, being the day of the offence. The suspension is to take place on Thursday 4 November 2010.
- 40) The Commission further directs that the Director retain a copy of this decision on the file of the Licensee for reference in the event of any future offence on the part of the Licensee.

- 41) The Licensee is again warned that any further breaches of a similar nature will likely result in a more significant period of suspension of the Licence. In issuing that warning the Commission notes the penalties prescribed for a third offence under Section 124AAA of the Act. Whilst not applicable to matters that are referred directly to the Commission, as opposed to those referred to the Courts in the first instance, the penalty prescribed for a third breach of Section 102 is a suspension of licence for a period of up to twenty-eight days.

Richard O'Sullivan
CHAIRMAN

19 October 2010