

# NORTHERN TERRITORY LICENSING COMMISSION

## REASONS FOR DECISION

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<b>PREMISES:</b>	<b>TENNANT CREEK MEMORIAL CLUB</b> Patterson Street TENNANT CREEK NT 0860
<b>LICENSEE:</b>	Tennant Creek Memorial Club Inc
<b>LICENCE NUMBER:</b>	81402774
<b>NOMINEE:</b>	Mr Leon Douglas Logan
<b>PROCEEDING:</b>	Pursuant to Section 124AAA of the <i>Liquor Act</i> Further Penalty Subsequent to Finding of Guilt
<b>HEARD BEFORE:</b>	Mr Philip Timney (Presiding Member) Ms Helen Kilgariff Mr David Brooker
<b>DATE OF HEARING:</b>	6 July 2011
<b>APPEARANCES:</b>	Mr John Stirk Counsel for the Licensee Inspector Tony O'Donohoe for the Director of Licensing

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### BACKGROUND

- 1) On 15 May 2011 the Court of Summary Jurisdiction found the Tennant Creek Memorial Club Inc, the Licensee of the Tennant Creek Memorial Club ("the Club"), guilty of the offence of selling liquor to an intoxicated person in breach of Section 102 of the *Liquor Act* ("the Act"). The Licensee was convicted of the offence and fined \$250 plus a \$40 victim's levy.
- 2) The statement of facts presented to the Court by the prosecution alleged the following:

*Between 10 am and 5 pm on 15 May 2010 Mr Bernard Freeman consumed approximately 12 pints of XXXX Gold and two rum and cokes. By 5 pm on that date Mr Freeman was intoxicated and wished to continue drinking. He and a friend then walked from the friend's residence to the Tennant Creek Memorial Club.*

*As he was walking to the club he was noticed to be unsteady on his feet and stumbling. On entering the club he made his way to the bar, ordered a pint of XXXX Gold from bar staff. He was then provided with and paid*

*for the pint of XXXX Gold. He then walked from the bar to a table of fellow patrons near by where he consumed his pint.*

*At the time of the offence Mr Freeman was intoxicated. The XXXX Gold that was sold to Mr Freeman was liquor. The Tennant Creek Memorial Club was licensed premises and the staff member that sold the pint of XXXX Gold to Mr Freeman was an employee of the licensee.*

- 3) The Licensee pleaded guilty to the offence and the facts outlined in the preceding paragraph were admitted. The maximum penalty for a first offence of a breach of Section 102 of the Act is a maximum fine of \$1,000 or a term of imprisonment for up to 6 months. At the time of the offence the Nominee for the premises was Mr Leon Logan.
- 4) On 8 May 2011 the Commission determined to conduct a Hearing to consider the imposition of an additional penalty pursuant to Section 124AAA of the Act. The Hearing was convened in Tennant Creek on 6 July 2011.

## **THE HEARING**

### **Submissions on behalf of the Licensee**

- 5) Mr Stirk called Mr Jonathan Baker, the current Nominee for the premises, to give evidence. Mr Baker advised that he has resided in Tennant Creek for 43 years and was previously the Nominee of the Club from 2001 to 2006. He has recently returned to the position and noted that of 14 current employees only 2 were employed at the Club at the time of the breach. Mr Baker informed the Commission of the in-house training that had been conducted for all staff in respect of the responsible service of alcohol and gaming responsibilities including the implementation of procedures for regular staff meetings and feedback on performance from management. He noted that all relevant staff were RSA accredited as required by the licence conditions and several were undertaking formal tertiary training in hospitality and gaming.
- 6) Mr Baker also informed the Commission of significant upgrades that had been undertaken with the CCTV equipment in the Club with the aim of providing management with better patron control and surveillance. The Club also has access to 9 trained security personnel. Mr Baker noted that the Club was currently trading profitably and significant funds had been expended in improving the standard and amenity of the premises. The Commission then conducted a view of the premises which confirmed Mr Baker's evidence in respect of the improved CCTV system and amenities improvements. The Commission noted that the CCTV system was of a particularly high standard, as were the amenities available to members and guests.
- 7) In respect of Mr Freeman, Mr Baker stated that he was a regular patron of the Club and well known to staff. He also stated that Mr Freeman was a large man who had the capacity to consume a significant amount of alcohol without demonstrating any outward signs of intoxication. He added that he had been informed that Mr Freeman had been offered a lift home in the Club's courtesy bus on several occasions but had refused and insisted on making his own

way home, with tragic consequences as he was involved in a serious accident shortly after leaving the Club.

### **Submission on penalty on behalf of the Director**

- 8) Inspector O'Donohoe commended the club on its on-going training initiatives but noted that it is a condition of licence that all staff be RSA accredited. He noted that the prescribed penalty for a first breach under Section 124AAA of the Act is a suspension of licence for a period of up to 24 hours.
- 9) Inspector O'Donohoe informed the Commission that the offence came to the attention of Police as Mr Freeman was injured after leaving the Club on the night in question and suffered head trauma which required him to be transported to Adelaide. Mr Freeman was found to have a BAC of 0.265% at the time of the accident and confirmed, in a statement to Police, the amount of alcohol he had consumed prior to being served at the Club. Inspector O'Donohoe tendered a document detailing the injuries suffered by Mr Freeman as a result of the accident and submitted that the Commission should take account of the actual repercussions of serving Mr Freeman when he was significantly intoxicated in determining the appropriate penalty.
- 10) Inspector O'Donohoe concluded by stating that, given the alcohol related problems occurring in Tennant Creek it was time to take a firm stance in respect of the service of intoxicated persons and submitted that the appropriate penalty was that prescribed by the Act, namely a one day suspension of licence fully served on a like day to that on which the offence occurred, being a Saturday.

### **Submission on penalty on behalf of the Licensee**

- 11) Mr Stirk submitted that the offence occurred as a result of the fallibility of the staff of the Club and not through any negligence or lack of care on the part of the Licensee or management of the premises. He noted that the Club is a community owned organisation that has held a liquor licence for some 64 years with only one prior offence being recorded against the Licensee for a relatively minor breach in 2006.
- 12) Mr Stirk submitted that the Commission could be satisfied from the evidence presented by Mr Baker and from its viewing of the premises that the management of the Club was "as good as it gets" in terms of responsible service of alcohol, staff training and its CCTV system. He noted that the CCTV system had been significantly improved since the incident and was currently as good as, if not better than, any systems installed in similar licensed premises and presented as an effective tool in monitoring patron behaviour.
- 13) He submitted that in determining the appropriate penalty the Commission should take into account the previous good record of the Licensee over a very long period, the unlikelihood of a recurrence of this type of offending given the remedial measures implemented and the need for specific or general deterrence in the particular circumstances of this matter. He noted that "drawing a line in the sand" in respect of breaches of Section 102 of the Act

dealt only with deterrence and not the specific factors relating to the Club that should be taken into account.

- 14) Mr Stirk referred the Commission to folio 8 of the Hearing Brief, being the Commission's decision to conduct a Hearing to allow the licensee to be heard in respect of any additional penalty that may be imposed under Section 124AAA. He noted that it was open to the Commission to impose the statutory penalty without a Hearing and yet it had declined to do so. The Licensee had taken up the opportunity to present its case for leniency and, through Mr Baker's evidence, had presented cogent reasons why a suspension of licence should not be applied.
- 15) In terms of penalty, Mr Stirk submitted that the Commission should exercise the discretion available to it and impose no further penalty. He also submitted, in the alternative, that if the Commission was inclined to suspend the licence for a period that penalty should be suspended on the basis of the good record of the Licensee and the proactive steps taken by the Club's management and Mr Baker to ensure no similar offences occur in the future.
- 16) Mr Stirk also noted that the *Liquor Act* has been amended effective from 1 July 2011 and that Section 124AAA has been repealed. He noted that he was unsure as to whether there were transitional provisions in place and requested the opportunity to make written submission in that regard following the Hearing. The Commission agreed to that request and afforded Mr O'Donohoe the same opportunity.

#### **CONSIDERATION OF THE ISSUES:**

- 17) The Commission received written submissions from the parties in respect of the threshold issue of the repeal of Section 124AAA and any transitional provisions.
- 18) The submission on behalf of the Licensee was received in a letter dated 11 July 2011 from Mr Luke Gardiner of Povey Stirk Lawyers and Notaries. Mr Gardiner submitted that the Commission is now without power to impose any penalty under the repealed Section 124AAA as that Section was repealed in its entirety by the *Alcohol Reform (Liquor Legislation Amendment) Act 2011* which took effect from 1 July 2011. He also submitted that Section 124 of the amended Act prohibits the Commission from taking disciplinary action where an infringement notice has been issued. Mr Gardiner also referred to the second reading speech in reference to Sections 124 and 124AAA in which the Minister stated the aim of the amendment was to:

*“avoid two actions being taken in two different fora to ensure that a licensee cannot be punished twice for the same offence”.*

and submitted that the legislature had expressly intended that Section 124AAA would cease to have force and effect immediately upon it being repealed.

19) The advice presented on behalf of the Director was prepared by Ms Ros Chenoweth, Senior Policy Officer with the Department of Justice. Ms Chenoweth confirmed that there is nothing in the *Alcohol Reform (Liquor Legislation Amendment) Act 2011* providing transitional provisions around what happens in relation to Section 124AAA offences that occurred prior to 1 July 2011. She submitted that no such transitional provision was necessary as the situation currently before the Commission is covered by Section 12 of the *Interpretation Act* that provides relevant to this issue:

### **12 Effect of repeal**

*The repeal of an Act or part of an Act does not:*

*(b) affect the previous operation of the Act or the part of the Act so repealed, or anything duly done or suffered under the Act or the part of the Act so repealed;*

Ms Chenoweth submitted that, on the basis of that Section, it remained open to the Director to apply to the Commission under Section 124AAA for an additional penalty where an offence occurred and was dealt with by the Courts prior to 1 July 2011. The submission received from Povey Stirk made no reference to the *Interpretation Act*.

20) The Commission does not agree that the words from the second reading speech, quoted above, express a clear intention on the part of the Legislature that Section 124AAA would cease to have effect immediately from the date of its repeal. Those words do express a clear intent so far as the situation after the repeal is concerned but do not go so far as to oust the Commission's jurisdiction of the offences that occurred prior to 1 July 2011.

21) The Commission is satisfied that Section 12(b) of the *Interpretation Act* gives on-going effect to the repealed Section 124AAA for offences that occurred prior to 1 July 2011. As a result, the Commission's jurisdiction to hear the application before it remains in force.

22) Section 124AAA of the Act is prescriptive in terms of the additional penalty able to be applied by the Commission following a finding of guilt by the Court for a breach of Section 102. Section 124AAA provides that, for a first offence, the Commission may suspend a licence for a maximum of 24 hours. In determining the appropriate additional penalty in the case of the Tennant Creek Memorial Club the Commission considered that the following factors were persuasive in indicating a penalty at the lower end of the scale:

- The unblemished record of the Licensee over a period of six years since the last offence and the otherwise good record over a period in excess of 60 years;
- The steps taken by the Licensee since the breach in respect of training of all staff members and significant upgrading of the CCTV system, designed to prevent future sales of alcohol to intoxicated persons;

- The Licensee's admission of the breach at the first opportunity, both before the Court and the Commission; and
- The Licensee's co-operative approach in its dealings with the Inspectors and before the Commission.

23) There are however factors that militate towards the application of a suspension of the liquor licence for the prescribed period, namely:

- Mr Freeman was significantly intoxicated when he entered the Club and purchased alcohol, as evidenced by his BAC reading of 0.265% obtained by Police after the accident;
- The fact that the Club has been subject of a prior complaint, albeit some time ago in 2006, for which the Club received a penalty of one days suspension of licence, fully suspended;
- The requirement to impose a penalty that reflects general and specific deterrence, not only for licensees but also to members of incorporated clubs who need to be aware that purchasing alcohol whilst intoxicated is likely to result in a suspension of licence affecting not only themselves but all club members;
- The significant measures that have been put in place in Tennant Creek, and more recently throughout the Territory, aimed at reducing the harm and anti-social behaviour associated with the excessive consumption of alcohol. The effectiveness of many of those measures relies significantly on the diligence of Licensees in ensuring compliance with the requirements of the Act.

24) In balancing the factors for and against the Licensee in this instance the Commission reiterates that the sale of alcohol to intoxicated persons is a serious offence and one that impacts not only on the intoxicated person but potentially on other patrons, family members, Police resources and the wider community.

25) The Commission is mindful that the Tennant Creek Memorial Club is one of the main social venues within the Township and one that enjoys the patronage of a large proportion of the Tennant Creek population. The Commission is also aware that a suspension of licence on a Saturday, one of the main trading days, is likely to have a significant impact on many patrons, including those who consume alcohol in a responsible manner. However, the Commission must balance those considerations against the requirement to send the message to Licensees and patrons alike that the service of alcohol to intoxicated patrons is not acceptable and is likely to have significant consequences.

26) In this instance the Commission has determined that the appropriate penalty is the suspension of the licence for the period prescribed by Section 124AAA(2)(a), that is a one day suspension of licence. However, taking account of the mitigating factors, and in particular the good track record of the Licensee since the last offence and over a very long period of trading,

the Commission has determined that only 4 hours of the suspension is to be served with the balance to be suspended for a period of twelve months.

## **DECISION**

- 27) The Commission determines, pursuant to Section 124AAA(2)(a) of the Act, to suspend the Liquor Licence of the Tennant Creek Memorial Club for a period of 24 hours. The penalty is to be served on a like day to that on which the offence occurred, namely a Saturday. Four hours of the penalty are to be served between the hours of 10.00 am and 2.00 pm on Saturday 12 August 2011, the remainder of the penalty is suspended for 12 months from the date of this decision, to be taken into account in the event of a further breach of Section 102 during that period.
- 28) The Commission emphasises to the Licensee that it should expect little lenience if a further finding of guilt for a breach of Section 102 of the Act occurs. Whilst significant weight has been given to the unblemished record of the Licensee in this case the Licensee should not expect that degree of leniency for any future breach.

Philip Timney  
PRESIDING MEMBER  
(Legal Member)

4 August 2011