

# **NORTHERN TERRITORY LICENSING COMMISSION**

## **REASONS FOR DECISION**

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<b>PREMISES:</b>	<b>GAPVIEW RESORT HOTEL</b>
<b>LICENSEE:</b>	CC1 Pty Ltd
<b>LICENCE NUMBER:</b>	80102399
<b>NOMINEE:</b>	Greg Boaz
<b>PROCEEDING:</b>	Complaint pursuant to s.48(2) of the <i>Liquor Act</i>
<b>COMPLAINANT:</b>	Stn Sgt Craig Ryan, Snr Const Lindsay Westphal
<b>CORAM:</b>	Mr John Withnall (Chairman) Ms Annette Smith Mr Craig Spencer
<b>DATE OF HEARING:</b>	17 August 2004
<b>DATE OF DECISION:</b>	18 August 2004, 27 August 2004
<b>APPEARANCES:</b>	Mr Rob Burgoyne, for the Complainant Mr Murray Preston, for the Licensee

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1. There were two complaints originally set for hearing at this time. The complainant being unable to proceed on the complaint of breach of the licence condition restricting alcohol sales prior to 11.30 a.m. to light beer, this hearing proceeded on only the complaint of breach of s.121 of the *Liquor Act*. The basic facts as to this complaint were agreed. We say "basic" facts because there were some challenges by Mr Preston as to various details which were argued not to be able to be relied upon by the complainant as not being part of the factual package as agreed.
2. In essence though, there has been no unresolved contest on any critical facts, and in the result the Licensee has in effect thereby conceded that the patron, Jeremy Allen was observably intoxicated and in need of eviction certainly by the time that Mr Mendes says he actually evicted him. The issue, and the basis of the complaint, is whether the necessary observation and consequential eviction should have occurred earlier than it did, given the mandatory obligation imposed on the Licensee by Section 121 of the *Liquor Act*.

3. Mr Burgoyne is correct when he argues that “shall” in Section 121 imposes a mandatory requirement on a Licensee. The Northern Territory Court of Appeal in *Northern Territory Liquor Commission, Raeburn and Power v. Rhonwood Pty Ltd* in 1997 made it quite clear that “shall” in the section imposes an unavoidable obligation on a Licensee to cause an intoxicated person to be excluded or removed.
4. The Police officers concerned in this matter say that they observed indicators of Allen’s intoxication the moment they entered the premises at 11.32am.
5. That in itself is not evidence of a breach of Section 121 by the Licensee. The Commission has consistently held in many different decisions on s.121 that the observable indicators of intoxication of a patron need to be shown to have been on display for a time sufficient for the Commission to reasonably expect an adequately staffed Licensee to pick up on them and act on them.
6. We have also acknowledged in the past that allowance should be made, on a case by case basis, for the desirability of evictions to be staged with as minimal confrontation as can realistically be managed in the given situation.
7. We reproduce part of the Commission’s Reasons For Decision dated 31 July 2003 on an earlier complaint against the Gapview for a breach of s.121 of the *Liquor Act*:

The Commission readily accepts that the removal from licensed premises of persons not actually causing any trouble by their intoxication is best effected with a minimum loss of face for the patron concerned and a minimum of aggravation. However, s.121 necessitates the employment and deployment of staff in such numbers and rosters as to ensure that intoxication on the part of any patron will be detected and acted on effectively. Mr Boaz admits that despite his efforts there were in fact intoxicated persons present upon the arrival of the police whose removal should have been in train....

8. The problem that the Licensee has in the present case is that no process at all was put in train until almost twenty minutes into the Police observations of Mr Allen’s intoxication, and only after the eventual interceder, Mr Mendes, had noticed the Police officers taking notes. In that time the Police officers had noticed Allen’s stumbling, slurred speech and strong smell of liquor (the latter perhaps more particularly noticeable in the situation where at the time of the police arrival no patron could have lawfully been drinking anything more than light beer on the premises that morning).
9. Significantly, so had Mr Mendes noticed Mr Allen’s condition. Mr Mendes had even seen Mr Allen stumble at one stage but not, Mr Mendes thought, in any way that looked like he might collapse (to quote Mr Mendes).

10. Intoxication, undefined in the *Act*, has frequently been held by this Commission to be something less than drunkenness or high nuisance value. In our well-published view, on all the authorities bearing on the issue a person is intoxicated if showing obvious indicators of his or her faculties being adversely affected by liquor. Significantly, Mr Mendes would appear not to disagree with that approach: Folios 6 and 7 of Exhibit 1 (the record of interview between Senior Constable Westphal and Mendes) together with the overlay of Mr Mendes' testimony at the hearing, makes it quite clear to the Commission that Mr Mendes also formed an opinion much earlier to the eventual eviction that Jeremy Allen was intoxicated. Indeed, the repeated admission of Mr Mendes during the on-site interview with the police was that Mr Allen was "definitely" intoxicated. However, inasmuch as Mr Allen in Mr Mendes' view:

- was not causing harm to himself or others,
- was not "playing up", and
- was very placid

Mr Mendes decided, in his own words, to be "lenient" and let the intoxicated patron finish his pool game without even broaching with him the subject of his exclusion from the premises.

11. Mr Mendes clearly admits what amounts to a breach of Section 121 in the circumstances but pleads in effect that he had decided to be "nice" (again his word) in order to "save hassles". However, the Nominee Mr Boaz assures us that his patrons leave immediately upon request, that they know if they do not leave straight away upon request they are barred for a week, and (a direct quote) "these people leave without any fuss".

12. In the Commission's view if the exclusion of Mr Allen was unlikely to be a fuss then there is no argument against that exclusion needing to have been put in train well before it was. It is not in train only by dint of a staff member deferring an eviction decision without any notification to the patron concerned. Mr Mendes, as Mr Burgoyne suggests, made a judgment call as if Section 121 was phrased in terms of "may" instead of "shall".

13. We appreciate the possible irony of Mr Boaz's situation if the compliant attitude of his patronage, as he maintains, is indeed the result of his management initiatives having led to the current level of mutual respect, such that - Mr Boaz in essence suggests - he should be left in effect to continue to manage evictions with appropriate diplomacy. It would however put Police and other Inspectors of Licensed Premises in an unworkably nullified position if every query or complaint as to the continuing presence of any observably intoxicated person on the premises could be thwarted by an assurance from the Licensee that in the interest of harmony the situation was being weighed up for eventual diplomatic action as the Licensee saw fit.

14. As the Commission has said to Mr Boaz in two separate previous decisions, on 9 May 2003 and 31 July 2003 respectively, the requirements of the *Liquor Act* are for the most part strictly regulatory, and s.121 specifically so. This now makes three times we have had to make this statement to Mr Boaz. On the

agreed facts in this present matter, together with the tendered documentation and *viva voce* evidence, the Commission has no hesitation in upholding the complaint. The inaction of Mr Mendes to the situation observed by the police for so long was in breach of the Licensee's obligations under s.121, and the breach is sheeted home to the Licensee (see the decision in *Rhonwood, supra*). Indeed we note that in any event Mr Allen was not actually excluded at all, in that he was not taken beyond the boundary of the licensed area.

*(This decision to this point was delivered ex tempore on the morning of 18 August 2004, whereupon the Commission was addressed as to penalty. The Commission reserved its decision on penalty, which it now delivers hereunder).*

15. The Licensee has a suspended penalty hanging over it from a previous complaint hearing. We reproduce part of that prior decision:

The Commission will defer the second and third days' suspension in the following manner. Notification of dates on which the second and third day's suspension is to take effect will not be given unless and until any further complaint may be upheld in relation to on-premises trade at the licensed premises which involves a contravention of a licence condition or provision of the *Liquor Act*, and which first comes before the Commission pursuant to s.48(6)(c) of the *Act* within a period of twelve months from today.

16. That decision was dated 31 July 2003. This present complaint was made to the Director of Licensing in June 2004 and first came before a meeting of the Commission on 20 July 2004. This present decision can therefore trigger the imposition of the previously suspended penalty before we even consider the question of penalty in the present case.

17. Mr Preston correctly argues that activation of the suspended part of the previous penalty is not automatic, and that in our discretion we should refrain from activating it. He argues that the complaint presently upheld is both different in nature from the situation in the previous proceeding and of lesser seriousness. He points out that inasmuch as Mr Mendes' inaction was in the face of the known police presence, what we are dealing with in the present instance is in the nature of a wrong judgment call, rather than any inability to cope or systemic indifference to statutory obligations.

18. We can accept that Mr Mendes saw himself as doing his job in the best interests of the hotel and its patronage, but there is obviously still some real systemic weakness in terms of both screening and monitoring if the police can walk in only minutes after anything other than light beer has become legally available that morning and immediately notice indicators of a patron's intoxication, and then continue to make those observations for almost another twenty minutes. There has been no contest as to Mr Allen's intoxication. If the police officers could pick it so quickly and (as admitted) correctly, then it should have been just as conspicuous to the staff of the hotel, who were hardly under any sort of pressure with only 20 – 30 patrons in the bar.

19. We have given much consideration to Mr Preston's submissions, but have come to the conclusion that the Commission's system of suspended penalties must be demonstrated to be a real sanction, or lose any real effectiveness. The suspension of penalty in the previous proceeding was intended as an incentive to ongoing compliance, and must be seen to have remained a very real part of the penalty on that occasion, a real sword of Damocles.
20. This is the third proceeding against the current management of the licensed premises in just over fifteen months. All have been complaints involving intoxicated patrons, and all upheld. The perceived need for both personal and general deterrence leads us to now impose the two day suspension that was deferred on the last occasion.
21. Pursuant to s.66(2)(b) of the *Liquor Act*, the licence suspension of two days notified in the Commission decision of 31 July 2004 in relation to the Gapview licensed premises will now take effect on 7<sup>th</sup> and 8<sup>th</sup> September 2004. Such suspension will cover and prohibit all on-premises liquor trading, except only in relation to any in-house guests. Given that the bottleshop has had its own separate suspended penalty hanging over it, the suspension now notified is not to affect the bottleshop, which may remain trading on the designated days.
22. Moving on to an appropriate penalty for the breach found in the present proceeding, we take the view that this third breach of the *Act* is of sufficient gravity to again justify suspension of the licence. However, having considered the submissions of both Mr Preston and Mr Burgoyne, the new suspension will itself be fully suspended, such that the two days already imposed from the previous proceeding will be the limit of the actual suspension to be served on this occasion.
23. Therefore, a further suspension of licence for one day will be deferred in the following manner. Notification of a date on which the suspension is to take effect will not be given unless and until any further complaint may be upheld in relation to the licensed premises which involves a contravention of a licence condition or provision of the *Liquor Act*, and which first comes before the Commission pursuant to s.48(6)(c) of the *Act* within a period of nine months from today.
24. What this means is that if no further complaints in relation to the operation of the licensed premises have been forwarded to the Commission or the Director of Licensing by 27 May 2005 then this matter will be at an end. If however any complaint against the licensee or nominee in relation to the licensed premises is made before 27 May 2005 and is subsequently upheld by the Commission against the licensee or nominee as constituting a breach of the *Liquor Act* or of any licence condition, then in addition to whatever penalty may be imposed in relation to the further complaint, the Commission may also notify a date for the deferred part of the suspension hereby imposed to be served in relation to this present matter.

25. It remains to be said that if the Licensee may be in any way confused or doubtful as to the mechanism of the penalties now imposed, or perhaps wishes to challenge the same, the Commission indicates that its alternative reasoning in this regard is that the outcome of two days actual suspension with a third day deferred is considered by the Commission to be an appropriate outcome of the present breach alone, given the Licensee's previous record with the Commission and the perceived need for personal and general deterrence in relation to the tolerance of intoxicated persons on licensed premises.
26. Both complainant and police have liberty to apply in the event that any aspect of the foregoing decision may cause any unforeseen interpretational or practical difficulties.

John Withnall  
Chairman  
27 August 2004