

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Ski Club Conacher Street, Fannie Bay
<b>Licensee:</b>	NT Water Ski Association Inc
<b>Licence Number:</b>	81401269
<b>Nominee:</b>	Donald James Firth
<b>Proceeding:</b>	Section 48 Complaints
<b>Heard Before:</b>	John Withnall (Chairman) Ms Shirley McKerrow Mrs Barbara Vos
<b>Date of Hearing:</b>	27-30 August 2002 and 07 October 2002 28 and 29 November 2002
<b>Date of Decision:</b>	11 November 2002 and 30 December 2002

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By written decision handed down on 11 November 2002, the Commission for reasons therein particularised expressed its loss of confidence in the fitness of the Northern Territory Water Ski Association Inc (“the Club”) to continue to hold and operate the Ski Club liquor licence.

The Club availed itself of the opportunity extended to it by the Commission to show cause why the Commission should not proceed to formally make a determination along those lines and cancel or suspend the licence. At the Club’s request to be heard on that issue, a further hearing was convened on 28 and 29 November 2002, before the same hearing panel of three Commission members who had heard and upheld the original complaint as to liquor trading having taken over as the prime Club activity at the expense of the Club’s constitutional objectives.

Since then, the term of Mrs McKerrow’s appointment as a member of the Commission has expired. The situation of a member becoming unavailable to complete a hearing has arisen several times in the past, for various reasons, and the Commission’s position in this circumstance is now well established. The Commission follows legal precedent in taking the view that the hearing may continue to be dealt with by such number of remaining members of the hearing panel as have jurisdiction, which in liquor hearings is one member. Sec. 51(2A) of the *Liquor Act* provides that at a hearing under that Act the Commission may be constituted by one or three members. The *Northern Territory Licensing Commission Act* does affect any alteration to that requirement.

So while the “Interim Decision” of 11 November 2002 stands as a published decision of a three-member hearing panel in upholding the complaint on the facts before it, this current decision in relation to the Club’s subsequent case against the threatened consequences of that earlier decision can be only a decision of the presiding member now sitting alone. A consequence of this conclusion is that if the Club is not satisfied with this present decision (as to the consequences of the first decision) it now has a right to apply to the Chairman for a new hearing. Two essential points need to be noted in this regard:

- A decision as to whether to grant a new hearing is a matter entirely for the Chairman’s discretion;
- If a new hearing was to be requested and granted, in our view it would be restricted to those issues dealt with subsequent to the decision of 11 November 2002; that is, it could relate only to the consequences of that decision as herein dealt with, not to the earlier decision itself.

The Club was not legally represented at the renewed hearing on 28 November 2002. The Club's nominated manager Mr Firth explained that quite apart from the onerous cost of legal representation the Club was acknowledging the reality that it was entirely up to the Club itself to demonstrate its fitness.

Mr Firth advised of various members of the Board of Directors (colloquially referred to as the Committee) having spoken with Mr Bryant at the office of Consumer and Business Affairs, and told the Commission that the Club's present position in relation to the two versions of the Constitution was to recognise that the active constitution remains the "old" or original constitution. This accords with the Commission's view, but does have repercussions as touched on later.

Mr Firth demonstrated several new initiatives following the Commission's decision of 11 November 2002:

- The membership forms have been redesigned;
- A new procedures book has been created, in effect a constitutional manual for all types of meetings, with inbuilt sections for the recording of minutes;
- The system of visitors' sign-in books that has been in use was recognised as "archaic", and a "Kalamazoo" type of visitors recording system had now been instituted;
- A computer program specifically designed for incorporated association management ("Clubsinc") is being considered, as suggested by Mr Bryant;
- All Board (or "Committee") members have now read the Constitution, and have their own copy;
- ordinary membership fees have been raised from \$5.00 to \$20.00 (\$30.00 for families).

In demonstration of the Club's assurance of new-found constitutional focus, many members of the Board attended this further hearing, although conspicuously not "all" as Mr Firth maintained: the constitutional "Executive" of President, Vice-President and Treasurer (per clause 16(9) of the Constitution) did not attend. No reason was proffered for the absence of the Executive. We heard evidence from seven persons:

- Mr Luke Nolan explained that his current membership renewal particulars (noted in para. 21 of the earlier decision as recording Mr Nolan to be of no fixed address in the suburb of "long grass" in the State of "drunk") actually reflected his "mental state at the time" in the face of business and personal problems and his then drinking pattern. He acknowledged that when he became President (in early 2000) the Club "had seriously lost its way". Among the changes he said he made was the reintroduction of "proper membership", for which initiative he "got into dramas because of it". He could not explain the second AGM in 2000, at which he is recorded as one of only three members present; he does not believe there was a second AGM in 2000, and puts it down to a "book-keeping error".
- Mr Dave Eves is the Public Officer, now familiar with the constitution which they now know applies, focussed on "getting skiing up where it should be" and keeping the Club "legit".
- Ms Nicole Turner is the Disabled Director. Having arrived in Darwin from Brisbane in March this year, she is investigating ways of initiating skiing for disabled persons.
- Mr Marshall Haritos (Jr.) is the Ski Racing Director, and has lived in Darwin all his life. His task is to keep himself and the Club up to date with what is still a national sport, to be ready to "get back into it when we can".
- Ms Amy Irving is the Disabled Judge. She is a nurse from Perth, a qualified social trainer for disabled people, and joined the Club in July this year. She too is investigating avenues of participation for disabled people. She spends time monitoring entry into the Club at weekends, and insists that new applicants at the door are now treated as visitors until accepted by the Board.

- Mr Rob Burstall is a convert to skiing member from ordinary member, was a member of a marine rescue organisation in Queensland, and holds an open Coxswain's ticket. He is enjoying learning to work with kids within the Club's focus on junior skiing.
- Mr Robin Davy is Junior Judging Co-ordinator. He is a long time Darwin resident who has been involved with the Club seemingly for as long as it has existed. His son is now a junior skier. He holds a Master Class V qualification, and is adamant that the Club is now doing its best to "get up to where it was".

All the foregoing witnesses confirmed possession of a copy of the Constitution, and expressed a belief that the fee structure should not be such as to discourage membership, and should allow affordable access to water skiing which is an activity otherwise too expensive for most people.

The enthusiasm of the younger witnesses was patent, while it was notable that the older witnesses conceded that the Club has in fact gone through a period of reduced vitality in terms of its primary purpose, but that everybody was now working towards restoration to what it used to be.

The Commission also received into evidence a statement from the Club's accredited skiing coach, whose work commitments prevented personal attendance at the hearing.

In assuring the Commission that all membership applications are now properly filled out, properly moved and seconded and correctly processed, Mr Firth referred to a membership register which the Commission at the earlier hearing had been informed did not exist outside of a tendered box of application forms. Mr Firth's explanation of believing that the current register was not permitted to leave the licensed premises did not accord with our memory of what we were told at the time in response to what we had asked for at the time, and we therefore attended the Club premises to view the membership recording system that was in place.

There we discovered that the assurance as to all applications being properly filled out and processed rang rather hollow.

While there is in fact a computerised membership database, the hardcopy records show that membership applications go to the Board still without a proposer or seconder to the application. It was explained to the Commission that signatures of proposer and seconder are appended in blocks by Board members when the applications come before the Board for approval.

Consistent with that advice, inspection of the Club noticeboard revealed dozens of membership applications on display as required by the constitution, but none of which bore the names or signatures of any proposing or seconding member of the Club, despite the clear requirement of clause 5.2 of the constitution that names and addresses of applicants for membership are to be displayed together with the names and addresses of *the persons proposing and seconding the application*. This is still quite openly not done.

We said in our 1999 decision that memberships were not being processed constitutionally, we repeated in our decision of 11 November this year that membership was still not being properly processed despite the previous warning, and now we find that memberships are *still* not being properly processed. There is little point in all putative Board members having a copy of the Constitution if they do not read it; there is little point, in arguing against any finding of continuing ineptitude, in the Board members reading the Constitution if they fail to absorb its basic requirements.

The situation is not susceptible to any protestation of the failing being only "technical" or otherwise only a minor matter. It goes right to the heart of the complaint that was upheld on 11 November 2002. A core issue has always been the deliberately slack approach of the Club's controlling group to the formalities of induction in relation to the "social" membership that has comprised the vast bulk of the Club's membership. Certainly applications for membership are at least now going before a putative Board, but persons are still being allowed through the doors to access Club facilities and entertainment events without needing to be warranted by any existing members by way of proposing or seconding the application forms. The forms are going up on the noticeboard without the identified commitment to each application of proposing and seconding members.

To learn at this late stage that the proposing and seconding is virtually rubber-stamped en bloc at the Board meeting at the time of admission to membership does not assist the Club at all in refuting the accusations of dilution of club purpose, of too much pubness and too little clubness, that founded the complaint that has been upheld.

And in any event, we reiterate that the process does not comply with the Constitution, with the result that persons being elected to membership in this way are no more members of the Club for the purpose of the sale or supply of liquor under the Club's liquor licence than any of the then social members who have ostensibly been admitted to membership since the Commission's 1999 decision. Not forgetting, of course, that the 1999 decision was commenting on a situation that had existed for some time even prior to that.

The issue of valid election to membership obviously remains a continuing administrative blind spot. The problem compounds in that only persons validly elected to membership under the Constitution can propose or second anybody else's application for membership, or can elect or be members of the Board.

It is to be noted that our dissatisfaction is directed to the initial induction process, not to any annual renewal process. The Constitution does not provide for any annual renewal of membership, as distinct from renewal of subscriptions. The situation is set out in clause 7.4 of the Constitution: anybody whose annual subscription remains unpaid after 31 July each year may be removed by the Board from the list of members. Anybody so removed for non-payment of dues ceases to be a member, and must re-apply from scratch. Anybody not so removed from membership remains a member even though unfinancial, and does not have to re-apply for membership upon payment of the due subscription. The process whereby everybody gets fresh membership with accompanying new membership number each year is quite unusual, and would seem to have no basis in any combination of any part of the constitution with any minutes of any relevant Board meeting.

However, defective initial admissions to membership have been the norm since 1999, and continuing.

The Commission, along with the current Board members, would still be unable to verify the constitutionally valid admission to membership of most of the thousands of people currently listed as ordinary members who used to be called social members.

In any event, no social member - even assuming valid admission to membership - was aware at the time of the last annual general meeting (or any AGM, for that matter) that he or she was actually a sub-category of full member and entitled to vote at AGMs. When one then factors in the ineffectiveness of the process of admission to social membership over the years, the holding of the AGM can be seen to have been an administrative shambles even before any consideration of the effect of a lack of a quorum.

The Club did not attempt to address this problem, which was put to the Club in the following terms as part of the Commission's decision of 11 November 2002:

**Without in any way limiting the breadth of the Commission's foregoing concerns, there are two major concerns that potentially affect the ability of the Club to continue to trade in liquor:**

- **At this stage the status of the second constitution as the current constitutional platform for the liquor licence is doubtful, and if the original Constitution still applies there is no provision at all for a category of social membership;**
- **The most recent AGM was prima facie unconstitutional and thus did not constitute a lawfully effective election of the present Board, a circumstance that also has repercussions as regards the current social membership.**

The first of those matters has been faced up to by the Club, although seemingly without an appreciation of the flow-on effect upon at least the most recent AGM. The problem of the seeming invalidity of the election of the present Board has not been addressed.

An ineffectively elected Board not only cannot admit any persons to membership of the Club, as it has now recently been purporting to do, but cannot as a Board implement any process to ratify previous ineffective admissions. On the other hand, persons not validly elected to membership cannot take part in any meeting to elect or ratify the election of the Board, or be members of the Board. Until that circle of frustration is broken and the validity of all current membership established, with proper constitutional procedures identified and established for the future, the Commission cannot share Mr Firth's confidence that everything is now being done correctly.

We agree with Mr Buckley that it is not the task of the Licensing Commission to be concerned with the minutia of day to day administration of licensed clubs. In the case of clubs, our concern is with the proper administration of a type of liquor licence the very basis for which is a purposeful associational structure. Adherence to the constitutional formalities is an unavoidable prerequisite for the continuation of such a licence.

The still ongoing disregard of the constitutional requirements for the election of members remains redolent of a tavern mentality, and is still indicative of liquor trading being the primary focus of the Club despite the ski-oriented initiatives that have been formulated since the complaint was originally laid at the beginning of this year. Given the sorry history of delays in financial reporting, admitted shortcomings on the part of prime office bearers, ineffective meeting processes, abysmal record keeping, non-compliance with licence conditions and ignorance of a quite specific warning in the Commission's 1999 decision, the utter confusion that still surrounds the validity of membership of both the Club and its Board prevents the Commission from being able to have confidence in the fitness of the Club to continue to operate a liquor licence which is predicated on adherence to a formal membership structure.

The history does not inspire any confidence that the situation is unlikely to continue unaddressed by the Club. The outlook at this time is insufficiently reassuring.

We have had regard to the tendered legal authorities on the concept of "fit and proper", and remain satisfied that the Northern Territory Water Ski Association Inc is not at the present time a fit and proper operator of a club liquor licence.

The consequence provided by the Liquor Act in this situation is cancellation of the licence (sec. 72(5)(c) refers).

The Commission is reluctant to cancel the licence, given what appears to be the beginnings of the Club's belated awakening to its situation, but we cannot any longer permit the ongoing sale of liquor to persons whose membership of the Club continues to be in such a state of confusion.

Cancellation would effectively remove all incentive for administrative rehabilitation. We therefore choose to read sec. 72(5)(c) as permissive, in the sense of prescribing the maximum sanction, such that any lesser consequence than cancellation is to be seen as an available option. If we were shown to be wrong in this approach, we indicate that in that event we would see the Commission as having no choice but to cancel the licence. However, at this time we propose to suspend the licence rather than to cancel it.

A suspension may be revoked at any time for cause shown, which we see as leaving the Club with an incentive to put its corporate house in order.

The formal order is that Licence No. 81401269 will be suspended as from 0400 on 1st January 2003, until further notice.

The licensee is to have liberty to apply at any time for the reinstatement of the licence. The matters that need to be immediately addressed by the Club before coming back to the Commission are (1) the current process of election to membership, with proper constitutional procedure identified and established, and (2) the need for an acceptable plan for effective ratification of the current membership of the association and of the Board.

"Liberty to apply" means that any application for revocation of the suspension does not need to be the subject of a formal written application lodged with the office of the Director of Licensing, but may be made when ready by directly telephoning the Commission's Ms Robyn Power (at 89

991826), who will arrange for the Club to again appear before the Commission to present its case for reinstatement at that time.

It remains to clarify that the Club premises may remain open during suspension for all purposes other than the sale or supply of liquor. The Commission has neither the jurisdiction nor any desire to “close” the Ski Club. Suspension of a Club’s liquor licence goes no further than rendering the sale or supply of liquor unlawful during the suspension. It is of course a serious predicament, but it is not of itself a closure of the Club.

John Withnall  
Presiding Member

30 December 2002