

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Club
Licensee:	Northern Territory Water Ski Association Inc
Licence Number:	81401269
Nominee:	Donald James Firth
Proceeding:	Consequential upon Sec 48 complaints: show cause against cancellation or suspension
Heard Before:	Mr John Withnall (Presiding Member)
Date of Hearing:	28-29 November 2002
Date of Decision:	Delivered 06 January 2003
Appearances:	Mr D Firth, Nominee for the Licensee Mr G Buckley, Counsel Assisting the Commission

1. By written decision handed down on 11 November 2002, the Commission upheld a complaint in essence that liquor trading had taken over as the prime Club activity at the expense of the Club's constitutional objectives. For reasons particularised in that decision the Commission at that time 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.
2. 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 the licence, or at least to suspend it as a consequence of having upheld the complaint. 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 complaint.
3. 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 together have jurisdiction, which in liquor hearings is one member only. 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 not affect any alteration to that requirement.
4. 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.
5. 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.
 6. 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" constitution lodged with the Office of Business Affairs on 28 September 1994. This accords with the Commission's view, but does have repercussions as touched on later.
 7. 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), although the Commission notes that the Constitution requires both a nomination fee and an annual subscription to be determined by the Board.
 8. 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: no member of the constitutional "Executive" of President, Vice-President and Treasurer (per clause 16(9) of the Constitution) was in attendance to give evidence. No reason was proffered for the absence of any input from the Executive at this stage, given this critical opportunity. 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 August 2000, at which he is recorded as one of only three members present; he does not believe there was a second AGM in August 2000, and puts it down to a "book-keeping error".
 - Mr Dave Eves is the Public Officer and Membership Registrar, now familiar with the constitution which they now know applies. Since January 2002 he has been actively 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 was a member of a marine rescue organisation in Queensland and holds an open Coxswain’s ticket. He is a recent member of the Club and 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”.
9. All the foregoing witnesses confirmed having now read 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.
 10. 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 of the Club to what it used to be.
 11. The Commission also received into evidence a statement from the Club’s accredited skiing coach, whose work commitments prevented personal attendance at the hearing.
 12. As well as the focus on skiing activities and initiatives, Mr Firth addressed the Commission’s criticisms of the casual approach to the membership structure. 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.
 13. There we discovered that the assurance as to all applications being properly filled out and processed rang rather hollow.
 14. While there was in fact a computerised membership database, the hardcopy records showed that membership applications were going to the Board still without a seconder to the application, much less a seconder “who shall be an elected member of the Board of Directors or a Division or the House Committee” (as required by clause 5.2 of the Constitution). It was explained to the Commission that signatures of proposer were appended by various full members stationed at or near the gate and that signatures of seconders were not appended until done so in batches by Board members at the time the applications actually came before the Board for approval.
 15. Consistent with this 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 of any 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 was still quite openly not being done.

16. To learn at that stage of the proceedings that the seconding of applications was still taken so casually and virtually rubber-stamped at the Board meeting at the time of admission to membership was disappointing. The process of election to membership still did not comply with constitutional requirements, and persons ostensibly elected to membership in that 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 "social" and/or ordinary 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.
17. The Commission was in the process of finalising an outcome of the proceedings which reflected our disappointment, when as a result of further information received the hearing was reconvened on 30 December 2002 for the purpose of the Commission's further inspection of the Club's record systems.
18. On this occasion the Commission found that entrance procedures and new membership systemisation had at last been upgraded to fulfil constitutional requirements (putting aside for the moment the elected status of the Board itself). The Commission's Presiding Member was addressed on site by various members of the Board, and was told that following the hearing on 29 November 2002:
 - the members of the Board had taken over from the manager the direct "hands-on" management of entrance monitoring and the reception and processing of applications for membership;
 - newly instituted processes now see names and addresses of applicants for new membership being displayed with the identified commitment to each application of both proposer and seconder;
 - in pursuance of the Board's new-found awareness of the non-existence in the Constitution of any category of provisional membership, all applicants for membership wishing to avail themselves of Club facilities prior to their acceptance by the Board are now required to be formally signed in as visitors until such time as they actually become members;
 - all non-members entering the premises and not applying for membership are not only required to be signed in as visitors but are advised that they may not be signed in as visitors on more than three occasions per year, with the new-style visitors book being carefully monitored to strictly enforce such limitation.
19. The Presiding Member verified that the display of new membership information on the noticeboard was now in compliance with the Constitution by clearly including the names of proposer and seconder, and that all applicants had in fact been properly signed in as visitors on the occasion of their signing of their application forms. Further inspection of the new-style visitors book detected no irregularities in terms of the requirements of either the Constitution or the liquor licence.
20. This eleventh-hour awakening of the present Board members has avoided by a hairsbreadth a declaration that the Club is not a fit and proper licensee, and the cancellation of the licence that in all likelihood would have followed such a declaration. While the Commission may not have been confident on 29 November 2002 that the Club was not a fit and proper licence holder at that time, given the sorry history of the matter to that point, we are now sufficiently confident of having witnessed the genuine beginnings of administrative rehabilitation to allow the Club the benefit of a more favourable re-assessment of its fitness at the time of this decision.

21. We have no doubt that the current Board members fully realise what a close call the Club has had. This is not to say that the Club is going to escape without penalty for the years of contempt for due process, or that there are no ongoing problems arising out of that chronic situation still needing to be addressed.
22. The Commission's decision of 11 November 2002 found that the process of election of persons to social (now ordinary) membership had remained unconstitutional ever since a warning had been sounded in an earlier hearing in March 1999. Defective elections to membership have been the norm since before March 1999. While we accept that the issue of valid election to membership is no longer an administrative blind spot for the Board, the problem has been compounding for the Club 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.
23. Even if the process of admission to social membership over the years had been valid, the social members were not aware at the time of the last annual general meeting (or any AGM, for that matter) that they were actually "ordinary" members, a sub-category of full member, and as such should have been entitled to vote at AGMs. The holding of the April 2002 AGM can be seen to have been an administrative shambles even before any consideration of the effect of incomplete advertising, unconstitutional timing (August was mandatory) or lack of a quorum.
24. The Club has not attempted to address this problem, which was put 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.
25. The first of those matters has been faced up to by the Club, although apparently 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.
26. 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 of ratification of previous ineffective admissions. On the other hand, persons not validly elected to membership of the Club cannot take part in any meeting to ratify their own election to membership of the Club or 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, the Club continues to be in breach of the licence condition restricting service to members as defined in the licence (persons entitled *under the Club's rules* to exercise the rights and privileges of membership) and to visitors as defined in the licence (persons needing to have been signed in by a valid member).
27. The situation is not susceptible to any protestation of the failing being only "technical" or overly legalistic. It goes right to the heart of the complaint that was upheld on 11 November 2002, a core issue having been the deliberately casual approach of a small controlling group within the Club to the formalities of the non-skiing "social" membership that has comprised the vast bulk of the Club's membership for many years. We agree with Mr Buckley that it is not the task of the Licensing Commission to normally be concerned with the minutiae of day to day administration of licensed clubs, however in the case of clubs and associations we must have concern for the proper administration of a type of liquor

licence the very basis for which is a purposeful associational structure. Adherence to the constitutional formalities in relation to that structure is an unavoidable prerequisite for the continuation of such a licence.

28. Non-compliance with constitutional requirements also involves failure to comply with licence conditions. In this case, the upholding of the primary complaint involved findings of long-term contraventions in relation to frequency of minuted Board meetings, supervision of visitors and maintenance of the visitors book, effective supervision of the Club's manager, and most critically (and still ongoing) the basic requirement that all customers must be either members or visitors, as defined. Our consideration of an appropriate outcome also takes into account the admitted breaches on 28 April 2002 of the licence condition as to public advertising and of sec. 121(1) of the Liquor Act.
29. Given the history of ineffective management of constitutional processes, admitted shortcomings on the part of prime office bearers, abysmal record keeping, ignorance of the warning in the Commission's 1999 decision, and the confusion that still surrounds the validity of membership of both the Club and its Board, the Commission has determined to deal with the totality of non-compliance with licence conditions by a combination of suspension, directions pursuant to sec. 49(4)(b) of the Liquor Act and variation of licence conditions pursuant to sec. 49(4)(a) of the Act.
30. We have already indicated that the present Board has done just enough since 11 November 2002 to just avoid cancellation of the licence. However, the licence will be suspended for a finite term. Pursuant to sec.66(1)(b) of the Act, the Commission declares that it is satisfied that the totality of the contraventions, and indeed even the long-term contravention of Special Conditions 11 and 12 standing alone, are of sufficient gravity to justify the suspension of the licence.
31. As to the term of the suspension, we agree with Mr Buckley that there should be a deterrent factor for the Club. Years of inveteracy calls for more than a perceived slap on the wrist.
32. Licence No. 81401269 will therefore be fully suspended for a period of 42 days, to commence on and from close of business on the night of 17 January 2003 (ie. from 0200 on the morning of 18 January), and concluding at the end of what would have been the normal trading period on 28 February 2003 (ie. the Club may recommence liquor trading as from 10 AM on 1st March 2003).
33. In the meantime the licensee will need to take further positive action towards putting its house in order. Pursuant to ss.49(4)(b) and 65(d) of the Liquor Act, the licensee is directed to notify the Chairman of the Commission in writing by 7th February 2003 of its proposal for effective ratification and regularisation of the current membership of the association and of the Board.
34. The conditions of Licence No. 81401269 will be varied by the inclusion of new special conditions in the following terms:
 - **Compliance with Constitution:** 18. The Licensee shall at all times and in all matters conduct its affairs in accordance with its Constitution.
 - **Visitor Returns:** 19. Within fourteen days from the end of each calendar month the licensee shall file with the office of the Director a return of visitor numbers for the preceding month. The return shall declare the total number of visitors for the month, the number of those visitors who were repeat visitors, and the number of those visitors who at the time of the visit applied for membership of the association.
 - **Noise Disturbance:** 20. The licence shall not permit or suffer the emanation of noise from the licensed premises of such nature or at such levels as to cause unreasonable disturbance to the ordinary comfort or lawful occupiers of any residential premises.

- **Review of Fitness:** 21. The Commission on its own initiative at any time may convene a hearing for the purpose of conducting a review of the fitness of the licensee to continue to be the holder of the licence, and may invite such persons as it sees fit to offer evidence or make submissions at such hearing in relation to any matter the Commission may deem relevant. Without in any way limiting the generality of this provision the Commission may include any noise disturbance issues in its considerations of the licensee's fitness, and may have reference to evidence and undertakings given by the licensee at any prior hearing before the Commission.
35. The licensee is at liberty to contact the Commission at any time for clarification of any aspect of the foregoing decision or for a ruling, direction, guideline or order in respect of any issue or matter arising therefrom.
36. 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 the desire to "close" the Ski Club. Suspension of a Club's liquor licence goes no further than rendering the premises unlicensed for the duration of the suspension. It is of course a serious outcome of the proceedings, but not of itself a closure of the Club. All other Club facilities may remain in use.

John Withnall
Presiding Member

06 January 2003