

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Katherine Hotel Katherine Terrace Katherine NT 0850
Licensee:	DEEMAT Pty Ltd
Licence Number:	80101789
Proceedings:	To Undertake a Hearing to Consider a Complaint Alleging that the Licensee Committed the following Offence: Section 102 of the Liquor Act, namely, a Licensee or a person employed by a Licensee shall not sell or supply liquor to a person unless the person to whom it is sold or supplied is not intoxicated at the time.
Members:	Mr Richard O'Sullivan (Chairman) Mr David Brooker Mrs Jane Large
Attendees:	Inspector Mark Wood, for the Director of Licensing Mr John Lawrence SC for the Licensee, Deemat Pty Ltd
Date of Hearing:	9 August 2011

Background

- 1) A complaint has been lodged pursuant to Section 48(2) of the *Liquor Act* ("the Act") against the Licensee of the Katherine Hotel alleging that contrary to Section 102 of the Act the Licensee on 19 January 2011 at around 2.30pm sold takeaway liquor to an intoxicated person. Section 102 of the Act states:

102 Liquor not be sold to intoxicated person

A licensee or a person employed by a licensee shall not sell or supply liquor to a person unless the person to whom it is sold or supplied is not intoxicated at the time (the onus of proof of which lies with the defendant).

- 2) The complaint alleges that Mr Robert Campbell had been consuming alcohol on the premise and at around 2.30pm entered the bottleshop area of the hotel and presented at the counter to purchase takeaway alcohol. It is alleged that Mr Campbell at this time was unsteady on his feet and showing other signs of intoxication. Senior Constable Carney Ganley viewed Mr Campbell carrying the takeaway to a taxi and observed that he was unsteady on his feet and was wobbling all over the place. On being spoken to by Senior Constable Ganly, Mr Campbell stated that he had consumed "*more than a dozen cans*".
- 3) In response to the complaint Legal Counsel, Mr Micheal Whelan, on behalf of the Licensee stated that Mr Campbell suffered from a disability caused by a gunshot wound which makes his "*legs go silly*" and also results in Mr Campbell medicating on Panadeine Forte. Mr Whelan proffers that this impact of disability and infers that the intake of Panadeine Forte were the cause of his unsteady gait at the time of purchasing takeaway alcohol. Mr Whelan also stated that Mr Campbell had advised him that *he was not intoxicated on the day and had only had around three to four beers*".

- 4) Subsequently Mr Whelan advised that Mr Campbell was not on Panadeine Forte at the time and had been consuming heavy beer prior to the purchase of takeaway.

The Hearing

- 5) Inspector Wood, on behalf of the Director of Licensing, advised that the matter would proceed by way of a plea and that he would present an agreed Statement of Facts. Mr Lawrence, Senior Counsel on behalf of the Licensee, stated that the breach was admitted and advised the Commission that he had only had opportunity to view the CCTV footage of the incident the day prior to Hearing, making it possible to admit to the breach only at this late date.
- 6) Inspector Wood then outlined the complaint, presented as an agreed Statement of Facts.
- 7) On 19 January 2011 Mr Mitchell Young sold a thirty can pack of Victorian Bitter ("VB") alcohol to Mr Campbell who was at the time intoxicated, activating a breach of Section 102 of the Act. At around 2.30pm on that day Senior Constable Ganley was making a foot patrol of the area and during this time he saw Mr Campbell staggering and carrying a thirty VB pack to a taxi.
- 8) On speaking to Mr Campbell, Senior Constable Ganley noticed that Mr Campbell was unsteady on his feet, had slurred speech and appeared to have trouble in keeping his eyes open. On questioning Mr Young who sold Mr Campbell the liquor, Mr Young presented that he thought Mr Campbell was not intoxicated at the time and attributed his unsteady gait to a leg injury. Mr Young had arranged for a taxi for Mr Campbell and put the carton of beer outside, against the driveway wall, for Mr Campbell.
- 9) These facts are admitted by both parties.
- 10) The Commission then viewed the CCTV footage which included four cameras covering the general area of the bottleshop. The camera footage at around 2.27pm shows Mr Campbell walking into the bottleshop area unsteadily and shaking his leg. Mr Campbell is seen to approach the counter and remains there for around four minutes during which time he is seen to hang onto the counter for support.
- 11) At 2.33pm an attendant (Mr Young), after serving Mr Campbell, puts the carton to the side of the drive through. Mr Campbell is then clearly seen to unsteadily approach the carton and while waiting for a taxi, he consistently shows signs of intoxication. At 2.34pm he unsteadily picks up the carton and walks towards the taxi, using a number of bollards along the driveway for support.
- 12) A Police Officer is then seen to speak to Mr Campbell, Mr Young and the driver of the taxi, Mr William Barrett.

Submissions on Penalty

- 13) Inspector Wood tendered a number of Commission Decisions relating to service of intoxicated persons and failure to remove intoxicated persons from the licensed premises. Inspector Wood outlined that Mr Campbell had a physical impediment. He drew the Commission's attention to an inconsistency on what Mr Campbell said to Police and later to Solicitor Whelan acting on behalf of the Licensee. The former, based on a Statutory Declaration from Senior Constable Ganley, is that Mr Campbell said he had consumed "*more than a dozen cans*" whereas Mr Whelan says he is advised by Mr Campbell that "*he had only had three to four beers*" at the time and was not intoxicated.
- 14) Inspector Wood stated that a staff member (Mr Young) had made a bad call in assessing Mr Campbell's intoxication. He referred to the need for better oversight of liquor sales and drew on the procedure of the nearby Woolworths Mac's Liquor where security are present at all times during trading hours. In Inspector Wood's submission, offences of Section 102

relating to takeaway have long been regarded as more serious than similar offences occurring with consumption on premises.

- 15) He submitted that the penalty should be a two day suspension of the bottleshop or a one day suspension for the whole hotel. Additionally, he submitted that a condition should be placed on the licence for licensed security to be present to monitor patron intoxication at all trading times.
- 16) Mr Lawrence proffered a number of mitigating factors as follows:
- The facts are admitted and therefore guilt is admitted.
 - It should be taken into account that Senior Counsel only recently spoke to the Licensee, and prior to that, he had been acting on instructions from Mr Whelan, therefore an early plea was not possible under the circumstances.
 - The hotel deserves the benefit of not admitting guilt at the outset for the above reasons.
 - Mr Campbell suffers a disability, which is well known. A bullet has some time ago lodged in his spine and he therefore walks with difficulty.
 - Once Mr Campbell's physical state was pointed out by Police, Mr Young conceded he did not appear intoxicated, although he did not present such intoxication at the time of being served.
 - Mr Young had placed the VB carton next to the driveway as he was aware that Mr Campbell had a physical disability. Mr Young has since seen the video and now realises he was affected, likely through his on premise consumption of alcohol.
 - Mr Young has learned his lesson, he is only twenty-three years of age, has worked at the hotel for fourteen months, has trained as a chef and is hard working.
 - Mr Young only saw what he could see with Mr Campbell presenting at the counter. He readily conceded Mr Campbell's condition when Senior Constable Ganley brought it to his attention.
- 17) In relation to penalty Mr Lawrence conceded that the hotel had been dealt with by the Commission in recent times so cannot get relief or benefit of a clean record. He pointed out that as of 1 July 2011, the onus or proof in relation to intoxication now rested with the complainant and as of that date, a breach is also a Regulatory one and therefore the complainant must prove some element of intent in relation to the breach.
- 18) He submitted the hotel in recent times had prior breaches relating to Sections 106B and 121 of the Act outlined in a Decision of 8 April 2011 and a breach referred to the Commission pursuant to Section 124AAA of the Act, and a Decision of 12 July 2010 pertaining to further penalty subsequent to a Court finding of guilt under Section 102 of the Act. This related to the service of takeaway alcohol to an intoxicated person.
- 19) In relation to 8 April 2011 Decision, the Commission imposed a five day suspension of trading with three days to be served and two days suspended. Paragraph 26 of that Decision states:

"The suspended two day penalty will remain suspended for a further twelve month period from the date of this decision. Should no further breach of a similar or greater seriousness occur within the twelve month period then this suspended penalty will lapse at the end of that period. However, if within the next twelve months there is a proven breach of either the Act or the licence conditions that is of a similar or greater seriousness to this matter then the two day suspension will come into effect, together with any other penalty that may be imposed for the subsequent breach."

Mr Lawrence submitted that the two day suspension hanging was not enlivened as that Decision relied on a future breach being of “*similar or greater seriousness*”. His submission was that the sum of penalty being a three day served and two day suspended indicated the current breach was a lesser seriousness.

- 20) The Commission Decision of 12 July 2010 imposed a penalty of the suspension of the bottleshop licence area for one day with “*the suspension to be wholly suspended for a period of twelve months from the date of publication of this decision*”. Paragraphs 14 and 15 of that Decision state:

“The Commission reiterates its long held view that the sale of service of alcohol to persons who are intoxicated is a serious offence and one that may result in a suspension of licence.

In this instance the Commission warns the Licensee of the Katherine Hotel that a further finding of guilt for a breach of Section 102 of the Act within the next twelve months carries with it a maximum penalty of eight days suspension of licence, being the penalty day suspended under this decision plus the seven day penalty period prescribed by Section 124AAA(2)(b) of the Act for second time offenders. 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. The Licensee should also be aware that any penalty imposed for subsequent breaches may not be limited to the bottle shop area of the licensed premises and may apply to the liquor licence generally.”

- 21) Mr Lawrence submitted that to excite this suspended sentence, a finding of guilt was required within twelve months of that Decision being handed down, that is 12 July 2010. A period exceeding this had transpired as at the date of this Hearing.
- 22) Mr Lawrence advised that his client was willing to abide by the requirement in its licence condition that security be in place at the bottleshop during trading hours. Following questioning from Commissioners he stated that his client would be willing to accept this condition for a six month trial period to determine its effectiveness in combating service of alcohol to intoxicated persons.

Consideration of the Issues

- 23) The Commission is convinced, consistent with the admission plea, that Mr Campbell was intoxicated at the time of being served takeaway alcohol. His unsteady walk on entering the bottleshop area, his subsequent reliance on the bar for support while waiting to be served and his unsteady and at times, uncontrolled movements following his service.
- 24) The Commission also gives some credit to the parties for the agreement reached over the Precis of Facts as submitted by Inspector Wood.
- 25) Given recent penalty Decisions of the Commission, the hotel clearly has issues it needs to address to conform with its licence obligations. In the matter currently before Commissioners, the attendant who served Mr Campbell did not have the benefit of seeing his client’s arrival into the bottleshop area, which would have clearly demonstrated to him his unfitness to be served. However, the duty of persons serving clients at hotels and bottleshops is to clearly ascertain the state of sobriety of the customer and in this case Mr Young clearly got it wrong as in his viewing of CCTV footage and in discussions with Police after the sale, he has reappraised his view of the fitness of Mr Campbell to be served. This does not exonerate the Licensee from responsibility.
- 26) In the matter of the two previous penalty Decisions of the Commission, the Licensee is advantaged by timing factors and by the conditions placed on suspended penalties. In the Decision of 8 April 2011 the Commission suspended a two day penalty for a period of twelve months, ie to 8 April 2012. While the breach and the conduct of the Hearing and this Decision is within time, the Commission, in attaching a condition to the enlivenment of the

penalty, has left an opening for the Licensee to avoid any immediate imposition of the suspended sentence.

- 27) In that earlier Commission determination, the activation of the suspended sentence requires a breach of a *“similar or greater seriousness”* to occur. That earlier penalty related to allowing a minor to remain on the licensed premises (breach of Section 106B of the Act) and failing to remove two intoxicated persons from the licensed premises (a breach of Section 121 of the Act) is probably of greater cumulative seriousness than that currently before the Commission. Indeed, Inspector Wood on behalf of the Director, has not argued to the contrary.
- 28) The other outstanding suspended sentence relates to a penalty delivered pursuant to Section 124AAA of the Act and in this instance it follows the Licensee being fined \$300 plus a \$40 Victim’s Levy, with no conviction recorded, as determined by the Court of Summary Jurisdiction.
- 29) This matter is out of time as the penalty imposed on the Decision of 12 July 2010 requires a *“finding of guilt of Section 102 of the Act within the next twelve months”*. The Hearing date for this matter was 9 August 2011, some thirteen months following that twelve month period of suspension.
- 30) Before the Commission at present therefore exclusively is the matter of the admitted breach with the Commission rightfully to take into account the history of the Licensee and its recent offences.
- 31) Both parties have agreed to the stationing of licensed security at the bottleshop to prevent repeats of what has occurred. The Commission is mindful that this current breach occurred at peak time and that the stationing of the security throughout the whole trading period might not at all times be justified in being a deterrent or a preventative of serving intoxicated persons. Takeaway only commences in Katherine at 2.00pm on Sundays and week days and 12.00midday on Saturdays and Public Holidays, and evidence available to the Commission indicates that the post opening hour is by far the most busy. It is at peak trading times that security could be a preventative to breaches such as the one presently under consideration.
- 32) The Commission is therefore loathe to impose a permanent licence condition requiring licensed security to be present during all takeaway hours and it is not convinced that the cost burden imposed would be warranted at all times. Rather, it considers that the Licensee needs to meet its obligations and have risk adverse approaches to its operations developed by management rather than the Commission. However, the Commission strongly advises the Licensee to use its hotel security to include the bottleshop at times of peak demand for takeaway.
- 33) Senior Counsel Lawrence has submitted (paragraph 16) a number of mitigating factors to be taken into consideration when the Commission is determining penalty. The late admission of guilt is justified on the basis that he only saw the CCTV footage of the breach on the day prior to the Hearing. The Commission, however, notes that Solicitor Whelan, acting on behalf and under instruction from the Licensee did not admit to guilt, but rather, contested that Mr Campbell suffered from a disability and initially inferred he was on medication. Therefore the Commission attaches little weight on mitigation to the claim that a plea was entered after Senior Counsel viewed the CCTV footage.
- 34) In relation to actual penalty, the Commission is in broad agreement with the penalty proposed by Inspector Wood, that is a suspension penalty of either two days for the bottleshop or one day for the whole hotel. However, it is not inclined to the other element of the penalty submitted by Inspector Wood, that relating to stationing of licensed security. In deleting this costly measure the Commission is minded to keep the penalty proportionate to that recommended by Inspector Wood through imposition of additional penalty. As the matter before the Commission relates to the sale to an intoxicated person at the bottleshop,

the Commission determines it appropriate that this trading entity of the Licensee be directly subject to any penalty imposed.

- 35) The Commission has been advised of the trading figures for the hotel as a whole and for the bottleshop for a Wednesday, the day of this breach occurring.
- 36) The Commission also agrees with the submission of Inspector Wood that the breach of serving intoxicated persons takeaway is of more seriousness and can potentially result in greater harm than the breach of serving intoxicated persons within a regulated and controlled premise. It is therefore determined that an actual licence suspension penalty is warranted in this instance.
- 37) In relation to the seriousness, the Commission notes that on determining Mr Campbell was intoxicated, Police apparently did not view him as a danger to himself or to others, as they allowed him, together with the alcohol he had purchased, to be driven home rather than being taken into protective custody. Had Mr Campbell's level of intoxication necessitated his being taken into Protective Custody, then the Commission would have determined greater seriousness of the breach and imposed a more severe penalty. However, the penalty imposed does need to take account of the recent history of breaches by the Licensee.

Decision

- 38) The Commission imposes a penalty of three days suspension of the bottleshop trading, those days being consecutive from Tuesday, Wednesday (the day of which the breach occurred), and Thursday. These days are to be Tuesday, 27 September 2011, Wednesday 28 September 2011 and Thursday 29 September 2011. The Licensee is also strongly advised to pay greater heed to its licence obligations and to deploy security at the bottleshop during peak times and occasions where bottleshop staff might be too occupied attending to and serving customers to fully observe the state of all persons presenting to the counter. If, following this Decision and following monitoring of the situation, the Director advises the Commission that management and control of the bottleshop area is problematic, the Commission would then consider following Hearing the imposition of licence conditions mandating improved surveillance and control of the bottleshop area.

Richard O'Sullivan
Chairman

13 September 2011