

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Borroloola Inn
Licensee:	O'Brien Holdings (Townsville) Pty Ltd
Nominee:	Ms Terry O'Brien
Proceeding:	Sec 48 Complaint by Const Darius Malisaukas
Heard Before:	Mr Peter Allen (Chairman) Mr John Withnall (Legal Member) Mrs Shirley McKerrow (Member)
Dates of Hearing:	21-23 November, 28 November 2000
Date of Decision:	Delivered 12 January 2001
Appearances:	Mr Lex Silvester, for the Licensee Mr Ben O'Loughlin, Counsel Assisting the Commission

A complaint against the Borroloola Inn was made to the Licensing Commission under Section 48 of the *Liquor Act* by Constable Darius Malisaukas by letter dated 29 August 2000. The written complaint constitutes Exhibit 1.

Apart from general allegations, the complaint detailed specific instances of two breaches of the *Liquor Act* on each of two separate occasions, firstly that on 15 July 2000 one Evonne McKennon was intoxicated within the licensed premises, and one "Bardarmias Isaac (DOB 14-07-1983)" was both intoxicated on the premises and under age, and secondly that on 17 July 2000 one Jason Green was intoxicated on the licensed premises, as was one Ivan Hogan who entered the lounge bar area while Police Officers Malisaukas and Cook were observing Jason Green and who proceeded to create such disruption that the Police Officers had to deal with him forthwith.

It is convenient to deal with these allegations in reverse chronological order, as the allegations in respect of Bardarmias Isaac are the most contentious, occupied the greater part of the hearing, and are best dealt with later in these reasons.

At about 2.40pm on 17 July 2000 Officers Malisaukas and Cook conducted a foot patrol of the Borroloola Inn, and discovered an intoxicated aboriginal person named Jason Green sitting in a plastic chair just inside the front gate of the middle bar area. A view of the area by the Commission during the hearing indicated that Mr Green had been only a very short distance inside the outer perimeter of the licensed premises. Mr Green was asked by the officers where he had been drinking, and he replied "Here", pointing at the middle bar.

The officers got no further in interrogating Mr Green because while talking to him they were distracted by another person, Ivan Hogan, who at that time rushed in from the street "yelling and screaming" and captured the officers' immediate attention.

There is no evidence that Mr Green was served while intoxicated; the recency of his drinking at the middle bar was not investigated by the police officers, undoubtedly because their attention was so quickly diverted to Mr Hogan's entrance.

However, evidence was that the whole incident occupied about five minutes, during which time there appeared to be no staff in the area, not even behind the counter. There was no security on the front gate. The allegation is that Messrs Hogan and Green should have been excluded or removed by the licensee's staff pursuant to Section 121(1) of the *Liquor Act* and that the failure of the staff to exclude these two persons constituted a failure by the licensee (as per the decision of

the Northern Territory Court of Appeal in *Northern Territory Liquor Commission et ors -v- Rhonwood Pty Ltd* delivered on 8 September 1997; in any event, condition no.1 of the licence provides that any breach of the Act by any employee or contractor will constitute a breach of the licence conditions by the licensee).

Dealing with Mr Hogan first, it seems clear to the Commission that the staff of the Inn had no opportunity to be confronted by Mr Hogan as a management problem as that patron came under Police management almost immediately upon his entrance. This was at 2.40 on a Monday afternoon, not a time when the licensee would normally be expected to have dedicated security personnel stationed at each gate. The test for the licensee in that situation can only be how quickly and effectively Mr Hogan's entry in an intoxicated condition would be dealt with, but the police took immediate control of the situation themselves as soon as Mr Hogan came in. This would seem to have been an unavoidable and commendable imperative, but the Commission is not prepared to read any operational deficiency on the part of the management into the non-intervention of staff in relation to that incident.

In the case of Mr Green, it cannot be said that he was not also confronted by the police officers immediately upon his entry on to the premises, because the police gathered no information as to the circumstances of his presence nor had they observed him non-confrontationally for any length of time that clearly showed that the staff were not doing their duty.

It is not unlawful on the part of anyone for a patron on licensed premises to become intoxicated; the statutory obligation of the licensee is only to remove a person who *is* intoxicated.

Staff can act only on observable indicators. The issue in Section 121(1) cases is not just whether the patron is intoxicated, but whether the circumstances were such that signs of intoxication were there to be read by a body of staff assumed to be employed and deployed in such numbers and rosters as to ensure that intoxication on the part of any patron will in fact be perceived, assessed and acted on effectively. This must involve allowing **some** period of time, however brief it sometimes may need to be, over which it can be held that the signs of intoxication should have been picked up and acted on. No representative of the management was given any opportunity to verify and possibly explain Mr Green's condition in that location at that time. The police did not conduct any interviews or make any other investigation. In that circumstance, **some** period of un-confrontational observation by them was necessary so that the Commission could determine that the staff should have been making the same observations and should have come to the same conclusions as the police.

As in the present case, it is generally insufficient evidence to simply offer a "snapshot" of a patron's intoxication and the opinion that he should not have been there in that condition. The Commission needs to be satisfied, on the strong balance of probability, that the circumstances of the patron's condition were such as needed to have been acted upon by a properly observant staff, but had not been. The evidence required in that regard will vary from case to case. The onus will be easier to discharge in some cases than in others.

The evidence before us suggests that the police confronted Mr Green immediately that they saw him. We do not know how long Mr Green had been sitting on the chair at the gate; given the location at the perimeter, he may have only just entered the premises himself on that particular occasion. The police were unable to say otherwise. They elicited only the one word from Mr Green, and spoke to no-one else. The patron's brief admission as to **where** he had been drinking does not take the matter far enough; we do not know **when**. There is no evidence of any continuity of his drinking on the premises up to the time of his apprehension, and given his location just inside the gate and the single word of his response, that would be an unsafe assumption to make. He may have been referring to an earlier session and had only just returned. We do not know otherwise. Since we cannot know that when apprehended he had been on the premises on that occasion for any time earlier than immediately prior to that apprehension, we are unable to say that he should have been removed any earlier.

He could even have been finishing a last drink after being told to finish up and leave, a possibility that leads us to a further consideration militating against a finding of a breach of the *Act* in relation to the Green incident, and that is the omission by the police to point out or identify to the licensee's

management staff at the time those persons whom it is alleged should have been excluded before the Police arrival. Normally police or liquor inspectors would bring the patrons in question to the attention of the Nominee or Shift Manager or Bar Manager, as the case may be, together with the allegation of intoxication and failure to remove from the premises. Where this is not done, as in this case, the evidentiary handicap for the licensee is all too obvious; the licensee is quite unable to adduce any evidence of its own in rebuttal or explanation of the later allegations. The licensee has been denied an opportunity to itself assess the condition and investigate the circumstances of any person the subject of the allegations and to give any evidence in that regard.

This is not a criticism of the police officers on the day; it is obvious on the evidence of Constable Malisauskas that the disruptive arrival of Mr Hogan had to be dealt with as a matter of some urgency, but unfortunately it interrupted the sequence of evidence-gathering in relation to Mr Green that presumably may otherwise have been the case.

Another concern is the absence of any corroboration of the testimony of the only one of the two police officers to give evidence, that officer having been aware of the significance of the suspended penalty already hanging over the licensee to be activated in the event that this complaint should be upheld. We deal with this aspect in some detail later in these reasons. While it is not seen as a *Jones-v-Dunkel* situation in terms of any assumptions as to the unhelpfulness of the evidence of the second officer, nevertheless the absence of such evidence in this particular case has to be a negative factor in our assessment of the strength of the complaint.

In the result the Commission cannot be positively persuaded that the licensee has been shown to have been in breach of Section 121(1) of the *Liquor Act* on 17 July 2000.

We now consider the evidence of Constable Malisauskas as to the events of the evening of 15 July 2000.

At about 11.30pm, answering a call from the Inn requesting Police attendance to a disturbance there, Constable Malisauskas and Sergeant Compton arrived to find a number of intoxicated persons in the car park outside what has been agreed by the parties as the perimeter of the licensed area. On entering the premises they observed one Evonne McKennon supporting herself "up against the iron sheeting fence near the gate" of the Lounge Bar area. She was holding a three-quarters full can of VB beer in her hand. In the opinion of Constable Malisauskas she was so intoxicated that he could not understand what she was trying to say. She had been two metres inside the gate. He took her out to the car park, only some four or five metres, and then immediately continued a walk-through of the premises with Sergeant Compton and saw Barnabas Timothy in the area by the pool, holding a cup of what appeared to be beer. Constable Malisauskas in evidence-in-chief volunteered the information that Barnabas Timothy was also known as Barnabas Simon and Bardarmius Isaac, and was known to the Constable as then being between sixteen and seventeen years old. The Constable described the indicators of intoxication, and testified that he escorted the young man out before confronting the Acting Manager, Cleet O'Brien, who was the Nominee's son filling in for her as a result of his mother's recuperation in Darwin following a local vehicular accident.

The Constable asked nearby security staff member, Mr Terry Miller, whether he knew that this person was under age, to which Mr Miller was said by the Constable to have replied "yeah, he keeps coming back."

Constable Malisauskas then confronted Cleet O'Brien with the allegation of intoxicated people on the premises, although in answer to a question by Commission Member Mr Withnall, Constable Malisauskas conceded that he did not actually point out or identify any specific person to Cleet O'Brien as being intoxicated, other than Bardarmius

Isaac. He did not investigate the circumstances of Evonne McKennon's intoxication.

Constable Malisauskas agrees that there was a security staff member close by Evonne McKennon at her position just inside the main gate, and concedes that it could have been Terry Miller. Mr Miller, in his evidence, testified that it was indeed himself who was there, and that he had been in the process of seeing Evonne off the premises, having made the decision that she was intoxicated

and should be excluded. Both he and Mrs Terry O'Brien, the Nominee, described their system of two-stage eviction whereby a person to be excluded for intoxication is escorted to an area just inside the front gate where there is a roof and some plastic chairs and which operates in effect as a sort of departure lounge where such persons are allowed to finish their drink and then leave the premises from there.

The system is said to enable such removals to be made with a minimum loss of face for the patron concerned and consequently a minimum of aggravation. Allowing the patron to finish the last drink in the pergola area at the front gate tended to avoid the violence that so often otherwise accompanies an eviction from the premises in such circumstances.

The various accounts of Evonne's confrontation by Constable Malisaukas are not significantly inconsistent. Terry Miller says that she was sitting in the pergola area, Constable Malisaukas says she was standing. Mr Roy Hammer may well have resolved this apparent evidentiary conflict when he testified that he saw Terry Miller in attendance on Evonne on the night and saw her stand up "as Darius came in the gate".

Constable Malisaukas made no enquiries of Terry Miller as to how long she had been on the premises, the circumstances of her condition, what she was doing in the pergola area, how long she had been there, or anything at all that Miller may have had to say about her. The Constable had gone straight back in to the licensed premises to catch up with Sergeant Compton and continue the walk-through. In cross-examination Constable Malisaukas said that if he had conducted any investigation and had discovered that the staff were in fact in the process of removing Evonne he would still have made the complaint, because she should not have been served that much alcohol, and should not have been permitted to become as intoxicated as she was. However, Mr Miller's account of Evonne's circumstances was neither requested by Constable Malisaukas at the time nor was attacked during the hearing; it was not put to Mr Miller that he had not been in the process of removing Evonne McKennon in the manner he had testified.

On the evidence, the Commission finds that Mr Miller was in the process of complying with Section 121(1) of the *Liquor Act* at the time Constable Malisaukas entered the licensed premises. In that circumstance the only effective element of the complaint with which Constable Malisaukas can persevere is that such removal should have occurred earlier, but in the absence of any investigation at the time of the circumstances of her condition, the Commission is unable to make that finding. We cannot even assume that she purchased the last can of beer which she was still holding; it may well have been given to her by someone else. There is no evidence of her condition at any time before Mr Miller made the decision to remove her from the premises, and on the evidence it is not possible for the Commission to find that he should have made that judgment call at any earlier time.

As we have mentioned, the reason Constable Malisaukas made no enquiries in relation to Evonne McKennon was his anxiety to continue on the walk-through of the premises with Sergeant Compton. On resuming the walk-through, he straight away came upon a young person whom he knew to be under age, and who in his opinion was intoxicated, holding a cup of what the Constable testified smelled like beer.

Constable Malisaukas testified that such person told him that he was Bardarmius Isaac. By the time the Constable made the written complaint on 29 August 2000, he had obtained a date of birth for Bardarmius Isaac from the local Health Clinic, so that the written complaint identified the minor as "Bardarmius Isaac (DOB 14.07.1983)". The police day journal in relation to the event (Exhibit 7) contains the entry that "Malisaukas observed Bardamius (*sic*) Isaac (aged 17)".

There is no note or mention of any aliases for Bardarmius or Bardamius Isaac in the Constable's running notes, the journal entry, the written complaint, or presumably in his request to the Health Clinic. Yet six days before the hearing was scheduled to commence the licensee's legal representatives were provided with a copy of a witness statement in statutory declaration format dated 31 October 2000 by one Barnabas John Timothy (Exhibit 2) and were told that this was the evidence that would be lead in relation to the intoxicated minor on the premises. In anticipation of the contentiousness of the identity issue thus raised, Counsel Assisting the Commission introduced Barnabas Timothy to the hearing during the evidence-in-chief of the complainant, and had

Constable Malisauskas identify Barnabas Timothy as being the minor to which his evidence related, whom he had apprehended on the night of the 15th July within the licensed premises. He was absolutely and unshakeably adamant that Barnabas Timothy was that person, and Barnabas Timothy eventually gave evidence generally consistent with the statutory declaration, albeit with some changes in detail but admitting that it was indeed him who had been apprehended by the Constable in the Borroloola Inn on the night.

The statutory declaration was witnessed by Mr John Lalbich, whose evidence was such that the Commission initiated the recall of Constable Malisauskas so that the allegations of Mr Lalbich could properly be put to him for response.

Mr Lalbich is an elder of considerable standing in the local community. He testified that “three weeks ago” Darius asked him to help find Barnabas Timothy, that Darius said to him that he wanted to find Barnabas Timothy “about throwing the rock at the pub”.

Mr Lalbich had already described in evidence driving the night patrol vehicle to the pub on the night of 15 July 2000 just before 11.00pm to see Barnabas Timothy outside in the car park, very angry at having been prevented entry into the licensed premises. Mr Lalbich described him as “really drunk” and “really angry”, picking up and throwing rocks at the front fence. According to Mr Lalbich, when Darius came Barnabas Timothy ran away when he saw the Police car.

Moving forward to 31 October 2000, Mr Lalbich accompanied Barnabas Timothy to the Police Station and was present throughout the interview that produced the execution of Exhibition 2 by both Barnabas Timothy and John Lalbich. Lalbich said in evidence that Darius asked Barnabas Timothy about throwing the rock when he couldn’t get into the pub because he was really drunk. As a result of the otherwise unrecorded question and answer session, Exhibit 2 was printed out as a statement for Barnabas Timothy and read to him by Constable Malisauskas. Reference by members of the Commission to the audio recording of the hearing confirms the following exchange between Counsel Assisting and Mr Lalbich:

“What was the statement about?”

“About how he throw the rock, he really drunk, he didn’t know what he was doing.”

Mr Lalbich later said in evidence that although Barnabas said he got into the pub, Lalbich was there “and he didn’t”.

The implications of such evidence are obvious, and the Commission had little hesitation in extending the proceedings to encompass the later recall of Constable Malisauskas.

Constable Malisauskas not surprisingly says that Mr Lalbich must be mistaken. He remembers that some time before October, about August, Lalbich came into the Police Station and made a statement himself in relation to somebody throwing a rock at his night patrol vehicle.

The Constable made the valid point that any allegation of his mispreparing the statement and misreading it to the witness is inconsistent with the witness having given evidence at the hearing generally in accord with the thrust of the statement.

It is perhaps appropriate to emphasise at this point that Barnabas Timothy gave oral evidence in the proceeding, accompanied by an aunty as guardian, that on the night of 15 July 2000 he had drunk beer and rum and coke in the Borroloola Inn from 8.30pm to 11.30pm, had never been asked for ID at any stage, and was “full drunk” by the time he was approached by “Constable Darius”.

So why then, it may be asked, given the Constable’s own evidence, should that not be the end of the licensee’s resistance? The short answer is that the defence position is that the complaint relates to a different person altogether, being a person whom staff member Terry Miller *had* evicted from the premises on three prior occasions that evening but who had managed to sneak back in for a fourth time (with a third change of shirt!) when Constable Malisauskas in the company of Terry Miller came upon him by the pool area. The licensee says in effect that there was an ongoing

pattern of compliance with section 121(1) and 106B of the Act throughout the evening in relation to the minor the subject of the complaint.

The licensee's position is that this is not a case of an alias (an "a.k.a") grounding the minor's name being corrected or expanded, but a complaint relating to a different person altogether. The licensee essentially admits the complaint in relation to Bardarmius Isaac being on the premises, with an eye to the excuse which is available in relation to that person but not in relation to Barnabas Timothy.

Both Roy Hammer and John Lalbich confirm that Bardarmias Isaac is a different person, the son of John Isaac, whereas Barnabas John Timothy is described as Kerry Simon's son. Mr Hammer, senior elder, Chairman of the local Council and head of the night patrol, was emphatic that Barnabas Timothy was not also known as Bardarmias Isaac: "Barnabas Timothy has no other name."

Mr Hammer, as well as Mr Lalbich, says that he saw Barnabas Timothy on the night of 15 July 2000 involved in a disturbance *outside* the boundary of the hotel, on the Robinson Road side.

An application during final submissions by Counsel Assisting the Commission to amend the complaint to read Barnabas John Timothy (DOB 14-8-1983) in lieu of Bardarmias Isaac (DOB 14-7-1983) was refused by the Commission on the broad ground that in all the circumstances and on all the evidence it would have put the licensee in an unfair position in relation to her defence at such late stage of the proceeding. She essentially admitted the facts of the complaint as it stood in relation to Bardarmius Isaac, subject to the explanation applicable to that person. Given the intended admission, there had been no need for her to consider calling Bardarmius Isaac to give evidence. If the complainant was allowed to now allege a different person from Bardarmius Isaac as the subject of the complaint (rather than an allegation of an "a.k.a"), there was an obvious need for the defence to have called Bardarmius Isaac himself, who was known to be in a remote Queensland location and in all practicality unable to be called.

It may be thought that this was too demanding or legalistic an approach by the Commission to the particularity and exactitude required of the written complaint, that the complainant would have been understandably taken aback that his letter of complaint should be treated as being in the nature of a legal pleading. In making the ruling against the amendment of the complaint the Commission took into account that the author was an enforcement officer and also a liquor inspector, ie. a professional complainant, that the complaint related to an under-age person such that identity and age were critical allegations, and that in those circumstances it was no more than procedural fairness that such a critical substitution should not be permitted so late in the day.

The refusal to allow the formal amendment does not spell the end of the complaint. The "a.k.a" argument remained open. It remained open for the complainant to persuade us that the person called Bardarmius Isaac (DOB 14-07-1983) in the complaint was in fact the same person, called Barnabas Timothy, who gave evidence of drinking on the premises and being confronted by Constable Malisauskas.

Unfortunately for the complainant, that is not the evidence. The Commission has no difficulty in finding on the evidence that while "Bardarmius Isaac" (as per the complaint, Exhibit 1), "Bardamius Isaac" (per the day journal entry, Exhibit 7) and "Bartimazous Isaac" (per Rural Health Centre notes, Exhibit 4) are one and the same person, this person is not Barnabas John Timothy who is a different person altogether, being the son of Kerry Simon with a different birth date (see Exhibit 5), and that Bardarmius or Bardamius Isaac is not known (to anybody other than Constable Malisauskas) as Barnabas Timothy.

The problem that Constable Malisauskas had was in explaining to the Commission why he supplied the name Bardarmius Isaac to the Health Centre when seeking a date of birth to include in the complaint, **knowing that this was the wrong name**. Although Constable Malisauskas insisted twice in his evidence that the person he apprehended, whom he now insists is Barnabas Timothy, told him that his name was Bardarmius Isaac, the Constable admits that he knew at the time that such name was false. In answer to a question from Commission Member Mrs McKerrow, Constable Malisauskas said that when he went looking for the person in order to get a witness

statement he asked around for “Barnabas” rather than Bardarmius or Bardamius because he had had “two previous run-ins with Barnabas Timothy” and knew who he was looking for. Commission Member Mr Withnall followed that up by asking Constable Malisaukas if that meant that he knew Barnabas Timothy’s name as at 15 July 2000, and the answer was “yes”. When reminded by Mr Withnall that he had testified that Timothy had told him on the night that his name was Bardarmius Isaac, the Constable said “yes, he has given me a false name before”.

If the Constable knew at the time that he was given the name Isaac by the young person that it was really Barnabas Timothy giving him a false name, the Commission remains at a loss to understand why the Constable persevered with the name he now says he *knew* to be false, in such notes or reports as produced the day journal entry in the known false name (Exhibit 7) and in seeking a date of birth from the Health Centre for the false name. It is to be remembered that the sole purpose of seeking the date of birth was to identify the person as under age. Constable Malisaukas conceded that inasmuch as he had been provided with the date of birth for Isaac, then that was the name that must have been the subject of his enquiry to the Clinic, yet at the time (he now says) he already knew the person to be Barnabas Timothy who had given him the false name on a previous occasion.

The Commission’s confusion is such that, given Constable Malisaukas’ evidence of his knowledge of the proper identity of the person who told him he was Isaac, the reference to Isaac *and Isaac’s date of birth* in the complaint cannot be taken by the Commission to have been another identity for Barnabas Timothy *of different birth date*.

That being so, as Mr Barr of Counsel points out in his intervention on behalf of Constable Malisaukas, the complaint is limited to the Commission’s consideration of the admitted presence on the licensed premises of Bardarmius Isaac.

As we do not accept that Barnabas Timothy can be the subject of this complaint, it is not necessary for us to rule on the conflict in evidence between John Lalbich and Constable Malisaukas regarding the circumstances of the taking of the statement of Barnabas Timothy, although we note that the evidence of Timothy in the witness box was in verification of the main thrust of the statement as written rather than as Mr Lalbich says it was taken and read out to Timothy.

It is also unnecessary for us to rule on the credibility of Barnabas Timothy, as our previous ruling and consequential findings mean that he cannot be the subject of a complaint against this licensee in *these* proceedings. We note, however, the extreme unlikelihood of the chronology of Timothy’s written account of the sequence of events after the entry into the licensed premises of Constable Malisaukas. It is clear on the evidence that whether Constable Malisaukas walked Evonne McKennon out of the premises for a few metres or not, he was only involved with her for a few moments. He quickly continued with the walk-through, with Terry Miller following, and immediately came upon Bardarmius Isaac/Barnabas Timothy with a cup of beer near the pool outside the Lounge Bar. Timothy, however, says that when he saw Constable Malisaukas come in to the pub he went into the toilet to hide from him (because he was afraid of him) and when he came out of the toilet he went back to the pool table area **and had a couple of glasses of beer**. Only then did he go back outside to the pool area with a cup (not a glass) of VB when Darius came up to him and confronted him with being under eighteen. Terry Miller confirms that after stopping to empty Evonne’s drink out, Darius continued straight over to the pool area (where he says, of course, that they found Bardamius Isaac, not Timothy). At the very most Constable Malisaukas would have taken no more than just a few minutes to get to the pool after first coming in the front gate. Whether or not it was he or Miller who escorted Evonne the five metres or so out of the premises, he did not tarry long at the gate. Yet Timothy in his statutory declaration would have us believe that in the time that Constable Malisaukas took to get from the front gate to the pool, Timothy had time to go and hide in the toilet for a while, and then emerge to have a couple more glasses of beer before Constable Malisaukas got to him.

We do not rule on Timothy’s credibility, but if we did so, we would have trouble in accepting the chronology of his written account of those events. The fact that his testimony in the witness box involved some necessary changes to that account only compounds the issue further.

Given the ten days' suspension hanging over the licensee's head as a result of previous proceedings, it is regrettable that Sergeant Compton could not have been called to assist in resolving the confusion that developed in relation to the Isaac/Timothy dichotomy of identity. Although Constable Malisauskas made reference to Sergeant Compton having resigned from the Police Force and going to Western Australia, we were not told what, if any, efforts had been made to try and secure his attendance at the hearing (or in relation to Constable Cook in respect of the observations and events concerning Messrs Green and Hogan on 17 July 2000). Mr Silvester urged a *Jones-v-Dunkel* submission upon us, but as Mr Barr points out, the failure to call corroborative witnesses cannot reflect on Constable Malisauskas, as that was not a decision that was his to make. As far as Constable Malisauskas was aware, Sergeant Compton and Constable Cook may well have been called, and whatever the reason for their failure to assist at the hearing, their absence cannot reflect on the credit of Constable Malisauskas.

It only remains, as Mr Barr submitted, to deal with the admission by the licensee of this part of the complaint as it stands, namely that Bardarmius Isaac was intoxicated on the licensed premises on the night of 15 July 2000.

It is Terry Miller's story in effect that Bardarmius Isaac had been the subject of Section 106B compliance on three prior occasions that evening, and that he had sneaked back in yet again in yet another change of shirt when discovered by Malisauskas and Miller.

In order to demonstrate that this story was not a recent invention, Mr Miller told us that the day after the event (ie. the day after 15 July 2000) he had staff member "Ben" make a note of Miller's account of the event, when Ben had returned from holiday. This note, said to be in Ben's handwriting, constitutes Exhibit 3. It is unfortunate that the Commission only noticed after the conclusion of the hearing that Exhibit 3 is written on the back of a TAB form guide for the Mooney Valley Races of 29 July 2000. Given that this discrepancy in chronology was not addressed during the hearing, the Commission is prepared to apply its corporate knowledge of acceptances for Saturday race meetings being only two or three days, never more than three, before the relevant meeting. The form on the back of which Exhibit 3 was written ostensibly on 16 July 2000 could not have come into existence as a printed form before 27 July 2000. Further, it can surely be assumed that the likelihood was that it was not used as notepaper by Ben until it had become waste paper in terms of its printed content, ie. not until *after* the race meeting of 29 July.

However, Mr Miller was neither examined nor cross-examined on this aspect, and it would be essentially unfair to use it as a basis for a ruling adverse to his credit when it has not been put to him for a specific explanatory response. Further, Constable Malisauskas agrees that Terry Miller had immediately protested to him *on the night* that the minor had already been evicted several times that evening but kept coming back. Constable Malisauskas agrees that when he confronted Acting Manager Cleet O'Brien, Terry Miller again said that he had already thrown the particular underaged person out three times that night. This story remains uneroded; no investigation of it was undertaken by Constable Malisauskas.

Given that Cleet had called the Police for assistance to a disturbance by young people at the hotel's perimeter, in the Commission's view it would be unjust to find a failure to comply with either Section 106B or 121(1) of the *Liquor Act* when Mr Miller's vigilance had established a pattern of compliance in relation to that particular minor such that it would be reasonable to assume (and we so find) that Mr Miller would probably have soon caught up with him for the fourth time that night in any event. It is the *pattern* of ongoing compliance that is important in coming to this conclusion. As we are not now talking about Barnabas Timothy, again there is no evidence as to how long Isaac had been back on the premises the fourth time, and hence no indication of whether or not there had been any reasonable opportunity for identification and removal to have been effected yet again, before the arrival of the police. In all fairness, this complaint too cannot be upheld.

Although all four complaints before us have failed, the licensee may not yet be out of the woods. We understand that similar allegations are the subject of complaints under the Justices Act, to be heard by a Magistrate in the Court of Summary Jurisdiction. We are unaware of any details of these complaints or their current hearing status. We are unaware of the identity of the defendant or defendants. We are unaware whether there is any complaint in that jurisdiction the particularity of

which involves the identifying of Bardarmius Isaac or Barnabas Timothy. If there is, we are unaware as to whether the prosecutor in that case may see a need to amend such complaint, or indeed whether he would be held by the Magistrate to be out of time within which to do so. We do sound the warning to the licensee, however, that should the licensee or a member of the licensee's staff be convicted of an offence under the Liquor Act specifically in relation to Barnabas Timothy, then such conviction could trigger the imposition by the Commission of the currently suspended penalty of ten days closure of the premises. This could happen because the proceedings before the Commission did not involve the determination of a complaint relating to the person who is Barnabas Timothy, so there could be no arguments of res judicata, issue estoppel or double jeopardy if the Commission subsequently takes action on a conviction for an offence specifically in relation to Barnabas Timothy committed during the time for which the existing ten day penalty has been suspended.

Peter Allen
Chairman

12 January 2001