

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Melanka Lodge
Licensee:	Pinecot Pty Ltd
Licence Number:	80203189
Nominee:	Mr Jason Zammit
Proceeding:	Complaint pursuant to Section 48(2) of the <i>Liquor Act</i> arising out of the conduct of the business at the licensed premises
Complainant:	Licensing Inspector MacKenzie
Heard Before:	Mr Peter Allen Mr John Withnall Mr Brian Rees
Date of Hearing:	13 March and 2 April
Date of Decision:	4 April 2002, with addenda 5 April & 11 April 2002
Appearances:	Mr John Stirk for the Licensee Mr Peter Wilson assisting the Commission

The complaint in this matter alleges the sale of takeaway liquor at Melanka Lodge contrary to the terms of its liquor licence. Unusually, the licence contains a specific prohibition against takeaway, in the following terms:

There shall be no sale of takeaway liquor to any person at any time.

Normally the licensee of on-licence premises would be prevented from selling liquor for consumption elsewhere simply by the absence of any enabling provision in the licence: section 115 of the Liquor Act forbids the sale of any liquor unless such sale is authorised by a licence.

In the case of Melanka Lodge the proscription of takeaway liquor was reinforced by the purposeful insertion of a specific prohibition in the licence as part of the Commission's decision in an earlier hearing in August 2001. As a result of that hearing the Commission removed from the then licensed area the poolside area and the adjoining "Backpacker Accommodation" wings, leaving the licensed premises as the main bar/dining/entertainment auditorium, and the motel units with their "mini bar" service.

In its written decision at that time the Commission sounded the caution that the main auditorium and the motel units

are separate licensed areas and that the area between the two is not licensed.

The present complaint and supporting testimony of Licensing Inspector Marc MacKenzie details his personal observations in the licensed premises at about 9.20 PM on the night of Sunday 27th January 2002. He said that he saw two females approach the bar, one carrying a backpack. After a conversation with these persons the bar attendant took a bottle of white wine from the refrigerator and opened it. He took two clean wine glasses from a shelf behind him and presented the bottle and glasses to the two female patrons.

A further conversation then ensued between the ladies and the bar attendant, after which he put the cork back in the top of the wine bottle and returned the glasses whence he had obtained them. He handed the cork-stoppered bottle to the female with the backpack who then "secreted" the

bottle in her pack. Mr MacKenzie explained that he used that expression because he saw the patron open the backpack, remove some clothing, place the bottle in the pack and then replace the clothing over the bottle. She did this at the bar. Mr MacKenzie could not say whether the bar attendant was observing this manoeuvre because of the focus of his (Mr MacKenzie's) attention on what the female patron was doing with the backpack, but he says that she neither moved from nor turned away from the bar while putting the bottle away in the backpack.

The females then crossed the floor and departed from the licensed area through a set of double doors signposted as a fire exit at the north-east side of the bar area. The doors had been closed. The girls opened the doors, and after their exit a member of the bar staff shut the doors behind them.

No part of this evidence was challenged; Mr Stirk on behalf of the Licensee neither attacked Mr MacKenzie's credibility nor called any evidence in response.

The following day Mr MacKenzie had a conversation with the bar attendant, Mr Michael Smith, who had sold the bottle to the two girls. Mr Smith's explanation is reproduced in the Nominee's written response at folio 5 of Exhibit 1. He said that he was only fifteen minutes into his shift, and when the girls told him they did not require glasses he assumed that it was their second bottle and that they were happy to use the same glasses. "He did not hesitate to re-cork the bottle when the girls asked for the cork as it is a common occurrence that patrons either ask to inspect the cork or prefer the bottle with the cork included. Almost every restaurant/bar in Alice Springs serves their wine bottles with the cork accompanied" (per Mr Zammit, folio 5, Exhibit 1).

Mr Smith told Mr MacKenzie that he was unaware that the girls had put the wine into the backpack and walked out with it, as he was busy serving other customers.

Mr MacKenzie testified that apart from staff and the two girls who made the purchase, there were only about four other patrons in the area at the time.

It is unfortunate that Mr MacKenzie did not interview either of the two young ladies involved in the purchase, but as he explains, he needed to first check the terms of the licence to confirm that in-house guests were not exempt from the prohibition on take-away sales. Such is the case; there are no exemptions or permissions specified in the licence.

The licensee's case is essentially that on the foregoing facts there is insufficient evidence on which to uphold the complaint, that the licensee chooses not to answer the case for the complainant because on the evidence no answer is required.

The basis of Mr Stirk's submission in that regard is that there is insufficient evidence that the bar attendant Mr Smith sold liquor which he *knew* was to be taken off-premises, that his involvement in the wine being taken away must be a knowing one at the time of sale for the complaint to be sustainable. Mr Stirk bases this approach not only on general principles but also by reading sections 110 and 124AA of the Liquor Act together.

Section 110 makes it an offence to contravene or fail to comply with a condition of a liquor licence. Section 124AA sets out (by section numbers) the offences under the Act that are regulatory, and section 110 is not included. A regulatory offence is essentially one constituted by the facts regardless of the absence of any *mens rea* or guilty mind.

Mr Stirk thus argues that because section 110 is not made a regulatory offence, guilty knowledge becomes an essential ingredient in any prosecution for a breach of licence condition, and that such principle should therefore be seen to be of general applicability in relation to a breach whether it is prosecuted in a court of law or pursued before this Commission.

It is an engaging submission, but not one accepted by the Commission. There have been previous attempts to tie the Commission's procedures and hearing protocols to sections of the Liquor Act dealing with offences.

In 1997 there was an issue in a hearing involving the Walkabout Arnhemland Resort as to whether section 123A of the Act, which also deals with offences under the Act, was applicable to complaint

proceedings before the Commission. The Northern Territory Court of Appeal in *Northern Territory Liquor Commission et. ors. -v- Rhonwood Pty Ltd (1997) 117 NTR 1* held that complaint proceedings before the Commission

are not in the nature of a prosecution for an offence and s123A is of no application to them.

In *O'Neill Hotel Management Services P/L v NT Liquor Commission [1999] NTSC 124*, the Northern Territory Supreme Court determined that

The Commission does not make a finding of criminal guilt. However, the Commission can find a section of the Act has been breached in relation to (a) condition....of the plaintiff's licence

and went on to say

the Legislature intended the exercise of separate jurisdictions by the Liquor Commission and by the Court of Summary Jurisdiction under the Act.

*The Act makes provision for two distinct roles in enforcing the statutory regime with respect to the sale and consumption of liquor, **including in respect of breaches of the Act** (emphasis added).*

The Court also determined that

The Commission is not required to follow the procedures of the Justices Act for summary prosecution of an offence.

A consideration of the full reasons for decision in those cases convinces us that the Commission is not constrained in any way by section 123AA of the Act in determining whether there has been a breach of licence condition. The section is not relevant to the Commission's deliberations in this regard.

That being so, giving plain and ordinary meaning to the words used in the condition we conclude that what was observed by Mr MacKenzie constituted a takeaway sale. The sale was made and the liquor was taken away from the licensed premises. It would appear to have been one of the very situations that the earlier changes to the licensed area and the added condition were intended to prevent, and in the Commission's view there is no defence or exculpation to be had by staff paying insufficient attention to matters critical to the liquor licence and then pleading unawareness. In the situation of a bottle of wine requested to be re-corked, and glasses declined, a claim of lack of knowledge or reasonable foreseeability of the bottle's immediate destination is more a damnation than a defence.

However, we do not accept that Mr Smith was unaware or did not suspect that the bottle was to be, or was likely to be, taken out of the licensed premises. *Mens rea* can be a matter of culpable inattention to an outcome of reasonable foreseeability. We draw from Mr MacKenzie's evidence the inference, much more probable than not, that the bar attendant was either aware of or should have foreseen the reasonable likelihood that the bottle was not going to be consumed on the premises. We particularly note that it was after closing time for takeaway bottle shops in Alice Springs on Sunday nights, that the bar was far from busy, that the purchaser put the bottle into her backpack before moving away from the bar, that a relevant caution had been sounded by the Commission in its earlier decision after a complaint by the Police as to liquor leaving the premises, and that the explanation by the nominee Mr Zammit as to the re-corking was just plain silly.

We do not disagree that in most restaurants the wine is served "with the cork accompanied", the bottle either being opened at the table or presented with the cork, but not with the cork stuck back in the neck of the bottle. To say that the re-insertion of the cork back in the opened bottle should be seen as some sort of normal or unexceptional presentation of the cork is to suggest to the Commission that there had been something of a search for excuses. The explanation given is particularly unpersuasive.

It must also be noted that no explanation was proffered by the bar attendant at the hearing. Mr Smith was not called.

A relevant inference from established facts is as much evidence as the facts from which the inference can be properly drawn (*Jones -v- Dunkel (1959) 101 CLR 298*). The licensee elected not to call Mr Smith to cast any doubt on the drawing of adverse inferences, with no explanation of his absence other than the general submission of insufficiency of the complainant's evidence. The Commission therefore assumes that Mr Smith's evidence would have been unlikely to assist the licensee's position in the matter.

The following passages from the judgments in *Jones -v- Dunkel* have long been applied as general propositions of the law on the issue of uncontested inferences:

Menzies J: where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.

Kitto J: any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence....It would be proper...to conclude that if (the witness) had gone into the witness-box his evidence would not have assisted the defendants by throwing doubt on the correctness of the inference

The Commission therefore concludes that the evidence of Mr Smith was unlikely to have cast doubt on the inference that Mr Smith either knew what was going on, that the wine was or was likely to be taken away, or that he was recklessly indifferent to the bottle's destination in the particular circumstances.

A breach by the servant being a breach by the licensee (see *Northern Territory Liquor Commission et. ors. -v- Rhonwood Pty Ltd (1997) 117 NTR 1*, and see also condition No. 1 of the licence itself), the complaint is upheld on the joint and several bases that: (1) the facts constitute a "sale of takeaway liquor" regardless of the knowledge or state of mind of the bar attendant; the plain and purposeful wording of the condition makes it in effect a "regulatory" condition, but (2) in any event, requisite awareness or foreseeability on the part of the bar attendant is inferred by the Commission on a strongly persuasive balance of probability which remains uneroded by any evidence on the part of the licensee.

Following the handing down of the foregoing decision on 2 April, Counsel were invited to make submissions as to penalty.

Mr Stirk for the Licensee called Mr Jason Zammit who gave evidence in relation to the training program and staff policies developed and implemented by the licensee since the incident that gave rise to the current breach. The training programs and staff policies prohibit the returning of corks to wine bottles as occurred on this occasion and generally prohibit the resealing of open containers. All staff are required to study the conditions of the licence and affirm by signature that such conditions have been studied and are understood. The Commission accepts the evidence of Mr Zammit and notes the training programs and staff policies are designed to specifically prevent breaches of the Act and licence conditions.

As to penalty, Mr Stirk for the licensee submits that as a first breach by the licensee and in recognition of the appropriate measures taken since, leniency would be appropriate. Further, Mr Stirk submits that if the Commission is minded to impose a suspension of the licence, the suspension should itself be suspended. Mr Stirk submits that in the event the Commission adopts the latter position, the suspended suspension ought to have no effect beyond a period of six months, rather than the twelve months normally imposed by the Commission.

The Commission agrees that this was the first finding of a breach against this licensee and acknowledges that in many circumstances a first breach might elicit no greater penalty than a formal recording of the breach on the files held by the Director of Licensing. The Commission does not however regard a limited penalty of such a nature as appropriate in the current circumstances. This was not a breach of a technical or general licence condition; this was a breach of a unique licence condition, purposefully designed to specifically prohibit, without exception or qualification, the behaviour that led to Licensing Inspector Mackenzie's complaint. Of additional concern to the Commission is the fact that the liquor re-corked and taken away from the premises was sold at a time of day when "take-away" sales are prohibited throughout Alice Springs and beyond. It is also of interest to the Commission that the breach occurred during a period of heightened and widespread debate within the community regarding liquor licence conditions and the consideration of various proposals to limit trading hours.

In these circumstances the Commission regards the breach as being of sufficient gravity to justify the suspension of the licence. Pursuant to section 66(1)(b) of the *Liquor Act 1978*, the licence will be suspended for a period of two days.

The first day of suspension will be Sunday 7 April, the day of the week on which the breach occurred. The actual period of suspension will be congruent to the trading period that commences on Sunday 7 April and shall be from 5:00PM on Sunday 7 April to 4:00AM on Monday 8 April. The licensee is cautioned that the suspension is of the licence in its entirety and thus includes the mini-bars in the accommodation units. The Director of Licensing is directed to conduct inspections of the licensed premises during the period of suspension and to provide a report as to compliance. The Director's report is to be received by the Commission prior to close of business on Monday 8 April.

The Commission, taking particular note of Mr Stirk's submissions as to deferral of licence suspensions and Mr Zammit's evidence regarding training programs and staff policies will defer the second day of the suspension in the following manner:

Notification of a date on which the second day's suspension is to take effect will not be given unless and until any further complaint may be upheld in relation to the licensed premises which involves a further contravention of a licence condition or provision of the Act, and which is lodged prior to 4 April 2003.

What this means is that if no further complaints are lodged and later upheld in relation to the licensed premises, either by the Commission or by any Court, then this matter will be at an end. If however any complaints are lodged prior to 4 April 2003 and are upheld against the licensee or nominee as constituting a breach of the Act or of any licence condition, then in addition to whatever penalty may be imposed in relation to the further complaint, the Commission may also impose the second day's suspension, to be served in relation to this matter.

The Commission will also embody in the licence conditions the licensee's commendable new rule as to no liquor being served which is other than opened and unstoppered.

Pursuant to section 49(4) of the *Liquor Act*, the conditions of the licence are varied by deleting the Special Condition headed "Take-away" and substituting in its stead a new condition in the following terms:

There shall be no sale of take-away to any person at any time.

Without in anyway limiting the generality of the licensee's obligations by virtue of this condition, the licensee

- (i) shall not supply to any person any liquor in any container which is not opened and unstoppered, and
- (ii) shall not permit or suffer any patron to exit the licensed premises with any liquor supplied by the licensee.

Peter R Allen
Chairman

4 April 2002

Addendum #1

Upon the handing down of the Commission's decision on penalty, Mr Stirk for the licensee sought a stay of the suspension of the licence to provide opportunity for the licensee to commence proceedings for judicial review of the Commission's decision.

The Commission response to Mr Stirk's submission is as follows:

The Commission will vacate its notification date of the first day's suspension.

In its place the licensee is now notified that the date of the first day's suspension will be Sunday 5 May unless before that time the licensee shall commence proceedings in the Supreme Court of the NT for a judicial review of any aspect of the Commission's decision, in which event the suspension shall be stayed pending the outcome of judicial review.

Peter R Allen
Chairman

5 April 2002

Addendum #2

The Commission is advised by a letter from Mr Stirk dated 10 April that the licensee

does not wish to pursue the option of judicial review and on that basis wishes to serve the suspension which was a result of the decision of 4 April 2002.

The Commission is further informed by Mr Stirk's letter that the licensee seeks the suspension for Sunday 14 April.

The Suspension will apply on the date sought and will be in effect from 5:00PM Sunday 14 April to 4:00AM Monday 15 April.

This addendum stands as the sole variation to the decision made 4 April 2002.

Peter R Allen
Chairman

11 April 2002