

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Old Elsey Roadside Inn
<b>Licensee:</b>	Fynroo Pty Ltd
<b>Licence Number:</b>	81301695
<b>Nominee:</b>	Helen Hawkins
<b>Proceeding:</b>	Complaints pursuant to s48(2) of the <i>Liquor Act</i> , and in relation to s60(5) of the <i>Gaming Machine Act</i>
<b>Complainants:</b>	(1) Colin Smith, Helen Coffey, Janet Leather (2) Sgt. Christopher Wilson
<b>Heard Before:</b>	Mr Peter Allen Mr John Withnall Ms Annette Milikins
<b>Date of Hearing:</b>	7, 8, 9 January 2003
<b>Date of Decision:</b>	21 February 2003
<b>Appearances:</b>	Mr Greg Weller for the Licensee Ms Cassandra Tys, Counsel Assisting the Commission

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1. This hearing involved a bundling of two sets of complaint against the Old Elsey Roadside Inn:
  - (i) By letter dated 30 August 2002, three Mataranka residents (Colin Smith, Helen Coffey and Janet Leather) raised complaints as to (a) noise disturbance (b) toilet hygiene, and (c) poor condition and unsightliness of the building.
  - (ii) By fax dated 24 September 2002, Sgt Chris Wilson, the OIC of the Mataranka Police Station, complained of:
    - (a) the licensee's failure on 9 August 2002 to remove one David Daniels who was observed inside the perimeter of the licensed premises lying on the ground in an intoxicated state;
    - (b) the sale of a carton of beer on 10 September 2002 to one Jason Tyson outside of takeaway trading hours;
    - (c) on the same night, permitting three patrons to be accompanied in the gaming area by their dogs; and
    - (d) allowing the only staff member on duty on 17 September 2002 to be a person without a gaming machine manager's licence, having to rely for payouts on the availability of an off-duty licensed machine manager who lived at the back of the premises in a caravan.
2. A letter dated 25 September 2002 from the Mataranka Community Government Council expressing its concern in relation to the increasing incidence of public drinking in Mataranka was not accepted by the Commission as a complaint against the Old Elsey Roadside Inn. This letter was signed by Colin Smith as Council Clerk, and was in identical terms to an earlier letter under the signature of a previous Council Clerk which appeared not to have been received as a letter in the office of the Director.

3. Ms Coffey in the course of her evidence also raised the issue of public drunkenness, mostly of aboriginal persons, saying that while she had never seen any intoxicated persons being served with alcohol at the Old Elsey, it was in her view a case of “where else?” This issue was not raised in her written complaint, and again was not accepted by the Commission as a complaint against the particular licensed premises.
4. An earlier complaint of Sgt Wilson, relating to a gaming machine manager playing the machines and making payments to herself, had been dealt with in the office of the Director and not put before the Commission.
5. In relation to (i) above, evidence was given by Ms Helen Coffey and Mr Colin Smith, the latter emphasising that he had lodged the complaint in his personal capacity, and not as Council Clerk of the Mataranka Community Council. Ms Coffey is the proprietor of the Stockyard Gallery, which adjoins the licensed premises. The different elements of their complaint are dealt with separately as follows.

## Noise

6. The basis of Ms Coffey’s complaint was “dirge”-like music emanating from the Old Elsey’s jukebox, as late as 5 am. The complaint related to “quite a few nights”, although she kept no record of dates and times.
7. However, Ms Coffey conceded that the noise had abated following her complaint, and that it was no longer a problem for her. Mr Smith confirmed that the jukebox had ceased to be a disturbance since the complaint had been lodged.
8. Nominee Ms Hawkins pointed to the absence of any complaint to the hotel management. Mr Smith said that he had not contacted the hotel management about the noise before lodging the formal complaint because “I don’t work that way”.
9. In those circumstances, the Commission proposes to take no action in relation to the noise aspect of the complaint, other than to impose what is fast becoming the Commission’s standard “noise condition” for on-licensed premises. Pursuant to s.49(4)(a) of the *Liquor Act*, the conditions of licence No. 81301695 will be varied by the addition of a special condition in the following terms:

**Noise disturbance:** licensee shall not permit or suffer the emanation of noise from the licensed premises of such nature or at such levels or at such times as to cause unreasonable disturbance to the ordinary comfort of lawful occupiers of any residential premises.

10. This new condition is to take effect immediately, and the licensee is directed to comply with its terms even though the condition may not at any time have been embodied in the licence document.

## Condition of building

11. Ms Coffey had no comment to offer on this aspect of the complaint. The complaint had actually been drafted by Mr Smith, and Ms Coffey did not subscribe to the “Black Hole” description. Her own view was that the building “has its own character”. In his own evidence in this respect Mr Smith’s descriptions were “pretty dingy”, “dirty” and “unkempt”. He felt that the building may have been “fantastic a hundred years ago”.
12. Ms Hawkins’ description, on the other hand, was “historic”, and she referred to a level of favourable tourist comment.
13. Issues of public health and safety apart, the Commission agrees with Mr Weller that the presentation of the building is a question of taste. Mr Smith even conceded that “everyone has a right to their own opinion”. The Commission is not the aesthetic police, and we do not propose to take any action in respect of this aspect of the complaint.

## Toilets and hygiene

14. Mr Smith testified to having personally used the toilets at the rear of the beer garden on several occasions, and found their condition to be disgraceful. There was no cistern in the urinal, and no water available to the urinal.
15. Ms Coffey had not personally seen the toilets, but related the distress of tourist Richard Hanks in August 2002 as he told her, while in her Gallery, of his disgust with the toilets, describing urine an inch deep on the floor, faeces on the outside of the pan and on the walls, and the toilet stuffed with empty VB cans. Ms Coffey suggested to Mr Hanks that he write the letter to the Mataranka Council which comprises folios 20 and 21 of Exhibit 1.
16. Mr Hanks gave evidence by telephone, confirming the detail of his letter.
17. Ms Hawkins explained that Mr Hanks must have attempted to use the southern side toilets which were non-functional and not in use at that time, but had neither been signposted as closed nor been boarded up against access - an omission since rectified. As to the beer garden toilets which remained in use, the problem had been the Council's night time closure of the town's public toilets, with the hotel's toilets bearing the consequential burden and concomitant vandalism. However, a key system was now in place. The toilets are cleaned twice a day, once in the morning and again "after lunch".
18. In relation to the closure of the southern side toilet, Counsel Assisting the Commission Ms Tys called Anthony Morley, Environmental Health Officer for the Department of Health and Community Services, Katherine Region. Mr Morley had conducted a health inspection of the premises on 13 September 2002 as a result of a complaint by a female tourist as to a blocked toilet, and a complaint as to dogs behind the bar.
19. Mr Morley's report on his inspection at that time is to be found at folio 27 of Exhibit 1. He found the southern side toilets to be filthy. He notified the licensee of three requirements:
  - Leaking pan seals in the beer garden toilet were to be replaced, and the male urinal to be rendered fully functional;
  - Use of the southern side toilets was to be discontinued until a new septic system was in place, with the existing ablution block to be upgraded or replaced; and
  - Vinyl flooring throughout the area behind the serving bars was to be replaced.
20. Mr Morley gave the licensee 120 days (from 25 September 2002) within which to complete the new septic system. The southern toilets were described in Mr Morley's report as having a history of numerous complaints and inspections, in support of which Mr Morley tendered the following correspondence, which had also raised other ongoing matters of public health and hygiene:
  - Letter of 6 October 1999 confirming to Gerard Maley, then Inspector of Licensed Premises, works that Mr Morley had required the licensee to carry out in the short term in the face of the effluent disposal areas needing renewal or replacement;
  - Letter dated 23 October 2000 from the EHO Katherine to the Old Elsey Roadside Inn, following complaints as to the condition of the outside toilets, noting that inspection on 23 October 2000 had revealed, inter alia, a blocked male toilet, faeces on the floor and the absence of any urinal although there were strong indications that the area was still being used as a urinal. There was no water to the handbasin in the female toilet. As well as requiring those issues to be addressed, the letter required the commencement within six months of the upgrade of the toilets to the legislated standards;
  - Letter dated 18 January 2002 from the EHO Katherine to Mr Harding and his nominee detailing twelve items requiring urgent attention, mostly in relation to standards of food preparation and conditions in the food preparation area ("Kelly's Kitchen"), but also

requiring the repair of the tap in the women's toilet and the toilets "to be cleaned on a regular basis";

- Letter dated 4 March 2002 from the EHO Katherine to Mr Harding reiterating ten of the above requirements as still being outstanding, including those as to the toilet tap and the need for regular cleaning of the toilets to be attended to "forthwith". Mr Morley testified that three of those requirements were *still* outstanding at the time of the hearing, including the major problem of the cold room operating at too high a temperature;
  - Letter dated 28 February 2002 from Mr Morley to Mr Harding as to an inspection the day before, following numerous complaints as to odour and effluent discharge from the Old Elsey's septic tank. Mr Morley discovered that a portable pump on top of the tank was being used to pump effluent directly on to the ground along the rear boundary fence. Mr Harding was required to make immediate arrangements with a suitable contractor for removal of the effluent.
21. A Health inspection on 8 March 2002 revealed that Mr Harding had emptied the tank by pumping it out on to his fruit trees. He was reminded of the work to be undertaken and the documentation to be attended to in relation to the effluent.
  22. Inspection on 8 May 2002 revealed that the sullage tank was being pumped out on a daily basis. Mr Harding was given a written notice "for rectification works to be undertaken prior to the end of July".
  23. Mr Smith testified as to having to stop Mr Harding's effluent contractor from dumping the Old Elsey effluent on Crown land. Mr Harding testified that he did not know where it was being dumped, and still does not know.
  24. Mr Harding's response at the hearing to the foregoing history of health issues was to describe it as "all ongoing maintenance". As to Mr Morley's requirements of 25 September 1999, Mr Harding testified that he didn't know what Mr Morley meant (but could not explain why he had not endeavoured to clarify his mystification). As to the requirement of 23 October 2000, Mr Harding testified that he did not know which toilet facilities he was being required to upgrade (but could not explain why he had not asked). He had put in a concrete floor, he said, but as to the rest "it depends what he wants" (but could not explain why he had made no attempt to clarify what was wanted).
  25. Mr Harding was asked if he was going to have complied with the requirement to have installed a new septic within 120 days of 25 September 2002, as the time for compliance only had a few weeks left to run at the time of the hearing. Mr Harding's response was that it depended on him finding out if certain anticipated contractual resources would be available to him, but admitted that he had made no specific enquiries in that regard.
  26. Towards the end of his testimony Mr Harding was able to identify his problem: "When I get (Health notices) I tell people to do it, but tend not to follow them up. (They) tend to go into the background".
  27. In the Commission's view, the time has come for the outstanding health issues to occupy the foreground of Mr Harding's attention. Compliance with the relevant health authority is a requirement of the liquor licence, and s.31 of the *Liquor Act* - especially s.31(2)(f) - clearly enables the Commission to impose such a condition.
  28. At the time of these Reasons for Decision almost a month has passed since the deadline for the new septic system, which is to pave the way for the renovation of the southern side ablution block. If that requirement has not been complied with, given Mr Harding's casual approach to the matter for so long we can see no reason for allowing the licensee to continue to trade in breach of the liquor licence. The same comment applies to items 4,5 and 6 of Exhibit 7 which were outstanding at the time of the hearing *after almost twelve months*.

29. The continuation of the liquor licence is now dependent on the Commission being satisfied as to none of the foregoing health requirements being still unreasonably outstanding.
30. Pursuant to ss.49(4)(b) and 65(a) of the *Liquor Act*, the licensee is directed to furnish to the Commission by close of business on 28 March 2003 satisfactory written evidence that all of the requirements of the Environmental Health Officer Katherine Region that were outstanding in relation to the licensed premises at the time of the hearing have been satisfied.
31. This gives the licensee another five weeks from now, and a total time of 78 days following the hearing, remembering that Mr Weller assured us that his client licensee would be galvanised into attending to the issues that had arisen from the hearing.
32. The licensee should clearly understand that an unsatisfactory response to this formal direction of the Commission will in all probability result in the Commission meeting to determine whether to suspend the liquor licence.
33. We now move on to the complaint of Sgt Wilson.

### **Failure to exclude or remove intoxicated person (Daniels)**

34. Mr Harding maintains that he had spoken to Mr Daniels some five to ten minutes before the arrival of the police, and that at that stage he “seemed okay”. Mr Harding is therefore unable to argue that Mr Daniels must have only just arrived and that the staff had not had a reasonable chance to detect and act upon his condition.
35. It is generally insufficient evidence for the complainant 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 should 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.
36. In the present case it is a reasonable inference that the signs of deterioration of Mr Daniels, to the point of falling to the floor, had been 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. Five to ten minutes is sufficient time for the Commission to reasonably expect Mr Daniels’ condition to have been effectively assessed and acted upon.
37. The complaint is upheld. We find the licensee to have been in breach of s.121(1) of the *Liquor Act*.

### **Selling takeaway outside trading hours**

38. The relevant till tape shows a sale of a carton of beer at 10.05. The till tape timer was two minutes behind Sgt Wilson’s wrist watch. Thus it is suggested by that evidence that the carton was sold at 10.07.
39. The till tape timer was three minutes ahead of the hotel wall clock. That is, at 10.05 by the till tape the wall clock would have been showing 10.02.
40. We are unable to find that Sgt Wilson’s watch was accurate, and the wall clock slow.
41. The significant element is that the licensee’s own time would have indicated to the licensee that the sale was taking place at two minutes after 10 pm. There is a subjective culpability of at least two minutes.
42. On that basis, the complaint is upheld.

## Dogs in the bar area

43. Mr Harding maintained that he is forever hunting dogs off the premises. Sgt Wilson's evidence however suggests that the three dogs he complains of had settled in, and that the vigilance of the bar attendant was wanting.
44. Mr Harding told us that he was aware that dogs and cats are not allowed in eating areas. It would seem though that there is a house exemption for the house cat that was very much in evidence in the bar areas and on the bars during the Commission's view of the premises.
45. We do not propose to take any further action on this occasion in relation to this aspect of the complaint. We are confident that by the close of the hearing Mr Harding and Ms Hawkins were very aware that this aspect too is a health issue that is gathered up by the licence condition as to compliance with health requirements. Any similar instances in the future will be dealt with against the background of this warning.

## No gaming machine manager on duty

46. This element of Sgt Wilson's complaint raises an interpretative issue as to the extent of the Old Elsey "premises" within the meaning of the *Gaming Machine Act*.
47. S.60(5) of the *Gaming Machine Act* requires that "*when gaming is being conducted on the licensee's licensed premises there is in attendance on the premises at least one licensed machine manager....or an applicant for a machine manager's licence....*"
48. Mr Harding argues that such was the case at the time Sgt Wilson complains of, inasmuch as there was a licensed machine manager present in her caravan within the boundary of the licensed premises, albeit off duty but available to be called upon for payouts.
49. We accept that the caravan was within the boundary of the premises licensed under the *Liquor Act*.
50. The *Gaming Machine Act* defines licensed premises for the purposes of that Act as "*premises on which a licensee is licensed to conduct gaming*", which only begs the question as to what were the premises licensed to conduct gaming. Reference by the Commission to the actual gaming machine licence issued by the Director of Licensing in respect of the Old Elsey premises surprisingly revealed that the licence was issued without any reference to the premises in respect of which the licence was issued. It bears only the name of the licensee, and not the premises.
51. Gaming machine licences are granted by the Commission but issued by the Director. While the skeletal form of the licence is within the requirements of s.28(2) of the *Gaming Machine Act*, it is of no assistance in determining the premises intended to be covered by such a licence.
52. The answer is to be found in s.24 of the *Gaming Machine Act*: an applicant for a gaming machine licence must be the holder of one of certain types of liquor licence, and an application may be made only in relation to "the premises specified in the applicant's liquor licence".
53. As Mr Harding only holds the one liquor licence, he is therefore correct in his assertion that a gaming machine manager in the caravan was within the premises licensed by his gaming machine licence for the conduct of gaming.
54. However, the requirement of s.60(5) of the *Gaming Machine Act* is for a licensed machine manager to be "*in attendance*" on the premises. The implication is surely that the manager must be attending *for the purposes of the Act*, ie. on duty. The Commission cannot accept that a machine manager off duty in his or her private quarters somewhere within the premises is "in attendance" on the premises within the meaning of s.60(5); the section

requires the machine manager to be on duty, actually managing the machines, in attendance for all purposes prescribed under the Act.

55. In our view a prosecution of the licensee for the breach of s.60(5) of the *Gaming Machine Act* on the occasion complained of by Sgt Wilson would be successful. Upon conviction the Commission could suspend or cancel the licence (s.49(1)(b)(ii)). The Commission's power to suspend otherwise is perhaps not so clear cut: the situation would need to be seen as caught by s.49(1)(a)(iii).
56. It is open to the Commission to tailor a special condition for the licence, such that a future breach of the new condition would directly ground a suspension of licence at that time (s.49(1)(a)(v)). However, the same effect can be achieved even more directly, and in all the circumstances the Commission proposes to deal with the breach in the following manner.
57. Pursuant to s.49(1)(b)(v) of the *Gaming Machine Act*, the licensee is hereby *directed* to comply with s.60(5) of the Act on the express basis that the requirement for a licensed machine manager to be "in attendance on the premises" requires a machine manager to be actually on duty in the relevant bar area at all times that the machines are available for the public to play.
58. The licensee should carefully note that any future non-compliance with this direction will be an immediate ground for suspension or cancellation of the gaming machine licence under s.49(1)(b)(v) of the *Gaming Machine Act*.

## Conclusion

59. After much consideration, the Commission has determined not to impose any suspension of licence for the failure to remove Mr Daniels or for selling a carton of beer a few minutes after time. We agree with Mr Weller that Mr Harding will have benefitted as a licensee from the experience of the hearing, and if our expectation in that regard should prove misplaced Mr Harding may reasonably expect to learn of our disappointment.
60. The breaches will be recorded, which means that on the occasion of any future breach the licensee will be unable to plead an unblemished record. These prior breaches will be able to be taken into account at that time.
61. As well as sustaining the recorded breaches, the licensee as a result of the hearing now has additional compliance issues in relation to:
  - the new noise disturbance condition;
  - the Commission's formal direction as to satisfaction of outstanding public health issues; and
  - the Commission's direction as to a gaming machine manager being on duty in the bar area.
62. We again impress upon the licensee the importance of addressing the health issues. We believe that the additional time we have allowed is quite generous in all the circumstances, but it remains a serious situation for the licensee. A continuation of the almost disinterested approach to these matters that the licensee has exhibited in the past would see the liquor licence at risk.
63. There are other issues that the Commission sees as having arisen out of the hearing, but inasmuch as they are entirely unrelated to the complaints the Commission will take such matters up direct with the licensee rather than by way of these Reasons For Decision.

Peter R Allen  
Chairman

21 February 2003