

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Jabiru Sports & Social Club
<b>Licensee:</b>	Jabiru Sports & Social Club Pty Ltd
<b>Licence Number:</b>	81401108
<b>Proceeding:</b>	Complaint Pursuant to Section 48(2) and Section 124AAA of the <i>Liquor Act</i> Breaches of Section 102-Liquor not to be sold to an Intoxicated Person; Section 121-Failure to Remove or Exclude Intoxicated Person from the Licensed Premises; Section 110-Failure of Licensee to Comply with a Condition of Liquor License
<b>Heard Before:</b>	Mr Richard O'Sullivan (Chairman) Mr Philip Timney (Legal Member) Mr Walter Grimshaw
<b>Date of Hearing:</b>	3 February 2009
<b>Appearances:</b>	Mr Steven Josh, Nominee Mr Jim Orum, President, Jabiru Sports and Social Club Inspectors Allan Borg and Peter Cookson for the Director of Licensing

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## Background

- 1) The Jabiru Sports and Social Club Inc ("JS&SC") is the holder of liquor licence number 81401108 in respect of the business operated at Lakeside Drive Jabiru ("the Premises"). On 25 November 2007 the JS&SC was found guilty in the Jabiru Court of Summary Offences of three (3) offences under the *Liquor Act* ("the Act"), namely breaches of sections 102 (sale of liquor to an intoxicated person), 121 (failure to remove an intoxicated person from licensed premises) and 110 (failure to comply with a condition of licence). The JS&SC pleaded guilty to the offences and the Court imposed an aggregate fine for the three (3) offences of \$2,500 plus \$600 victims' levies.
- 2) The prosecution for the offences arose following an inspection of the Premises by Licensing Inspectors Borg and Cookson on 21 August 2008. In the course of the inspection the Inspectors observed a Matt Dunne exit the Premises at approximately 23.00 pm. The Inspectors observed that Mr Dunn was displaying significant signs of intoxication including urinating in the garden, being unsteady on his feet, staggering on to the roadway and speaking in a slurred manner. Both the CCTV footage and the staff members on duty confirmed that Mr Dunn had been served a number of alcoholic drinks prior to him exiting the Premises. Inspector Borg stated that the CCTV footage supported the allegation that Mr Dunn was showing signs of intoxication at the time he was served alcohol on the night in question. Further investigations revealed that Mr Dunn was not a financial member of the JS&SC on 21 August 2008, and that he had not signed in as a visitor on that night as required by Condition 11 of the JS&SC Liquor Licence.
- 3) Following receipt of a complaint from the Director of Licensing the Commission determined to conduct a hearing pursuant to section 124AAA of the Act for the purpose of determining whether any additional penalty should be imposed on the licensee, as a result of the Court's findings in respect of the offences.

## Hearing

- 4) The hearing was convened at the Jabiru Court House on 2 February 2009. Inspector Borg provided the Commission with a précis of the background events leading to the complaint including his observations in respect of Mr Dunn's level of intoxication at the time of the offences.
- 5) Inspector Borg informed the Commission that he and Inspector Cookson had initially visited the JS&SC following a number of calls from Mr Jim Orum, President of the JS&SC, expressing concerns relating to the operation of the Premises and issues that had arisen between his committee and staff, regarding the manner in which the Premises were being managed. Inspector Borg confirmed that there had been on-going issues with the management and operation of the JS&SC prior to Mr Orum contacting Licensing & Regulation for assistance. Following Mr Orum's call, both Licensing Inspectors and staff of the Registrar of Associations attended at the JS&SC for information and training sessions with JS&SC staff. Those sessions took place at Mr Orum's request. Inspector Borg informed the Commission that Mr Orum had contacted Licensing and Regulation on a number of occasions seeking assistance and / or guidance in respect the compliance of the JS&SC with regulatory requirements. The last of those calls resulted in the Inspectors visiting the premises on 21 August 2008, and subsequently making the complaints that were referred to the Court.
- 6) Inspector Borg noted that whilst the staff on duty on the night of the incident involving Mr Dunn, did not concede that Mr Dunn's level of intoxication was excessive, the Licensee, through Mr Josh, had made full and frank admissions when appearing before the Court and in subsequent dealings with the Licensing Inspectors. Inspector Borg also advised the Commission that the Licensee had cooperated fully with his investigation and had provided the CCTV footage on request despite there being no condition of licence that they do so.
- 7) Inspector Borg informed the Commission that he had copies of the CCTV footage covering the times when Mr Dunn was served alcohol on 21 August, however the footage could not be viewed on the equipment available in the Jabiru Court House. He advised that, should the Commission wish to view the footage, this could be arranged at the Jabiru Police Station.
- 8) The Nominee, Ms Steven Josh, on behalf of the Licensee, agreed to the précis of facts presented by Inspector Borg and confirmed the convictions and penalties imposed by the Court for the offences cited.
- 9) Mr Josh advised that he had only recently taken up the position as Nominee and asked that the Commission note that this was only the second offence to be brought against the JS&SC in almost 30 years of holding a Liquor Licence. Mr Josh requested that in determining penalty, the Commission take note of a number of initiatives recently implemented by the JS&SC in respect of staff training, management of the Club, the responsible service of alcohol and harm minimisation in respect of the Club's gaming facilities.
- 10) In respect of staffing issues, Mr Josh advised that the three (3) staff members on duty at the time of the incident involving Mr Dunn were no longer employed by JS&SC and that following a review of all positions the employment of approximately half of the staff was terminated. In addition, he stated that all current staff had received RSA training. Mr Josh also advised that whilst there had been issues with the previous management of the Club, there had been a significant improvement since Mr Orum's intervention and the appointment of a new management committee.
- 11) Mr Josh also referred the Commission to other initiatives implemented by the JS&SC in respect of the responsible service and consumption of alcohol. He informed the Commission that those initiatives included consultation with the local Police, health workers and schools in respect of the impact of alcohol consumption on the Jabiru community. He stated that the JS&SC had suspended trading for five (5) days from 11 September 2007, for

the purpose of reviewing the operation and aims of the JS&SC. In addition, the Premises remained closed, at the volition of the Licensee, on Mondays for a significant period and trading hours were voluntarily restricted to an opening time of 14.00 pm from Monday to Friday. Mr Josh advised that the voluntary restriction on opening time remains in place as at the date of the hearing.

- 12) In respect of gaming activity, Mr Josh advised that the management committee of the JS&SC had made a conscious and deliberate decision to change the culture of the Premises from a drinking / gaming establishment to a social and community oriented club. From 11 September 2007, the gaming machines remained closed to patrons for a period of 8 weeks. He stated that following the period of closure one of the major initiatives was to restrict the operation of the gaming machines so that gaming was not available until 18.00 from Monday to Friday. Mr Josh confirmed to the Commission that the initiatives had been well received by the authorities and the community at large and there was a generally held view that the restricted gaming machine hours were a factor in the recent improvement in school attendance.
- 13) In respect of the complaint regarding service to Mr Dunn when he was not a member, Mr Josh advised that whilst Mr Dunn had previously been a member, his membership had lapsed as at 21 August 2008. He advised that since the incident in question the Premises had been altered to permit only one entrance point to the licensed areas. The visitor sign in book had been relocated to the bar to ensure that all guests and visitors sign in. In addition, Mr Josh also advised that membership cards had recently been issued. In response to a question from the Chairman, Mr Josh advised that in the past membership renewal notices were not issued as individual memberships expired 12 months from the anniversary of the person's joining date. The JS&SC rules have recently been amended to provide that all memberships expire on the same date and that renewal notices would be sent to members in the future.

## **Submissions on Penalty**

- 14) Inspector Borg advised the Commission that JS&SC had previously been the subject of a complaint in 1996 in which it was alleged that the Licensee had demonstrated continued reluctance to enforce Section 121 of the Act, namely; "Power to Exclude or Remove Persons". In that instance the Commission, by way of penalty, suspended the licence of the JS&SC for one full trading day, to be a Thursday during the month of December 1996.
- 15) Inspector Borg advised further that the JS&SC had been the subject of a further complaint to the Commission in 2003. In that matter the Commission noted that the licensee admitted a breach of section 121 of the Act, permitting an intoxicated person to remain on licensed premises. For that breach the Commission imposed a penalty of suspension of licence for two (2) days, suspended for a period of six (6) months.
- 16) Following a brief adjournment the Chairman advised the parties that the Commission had determined that, given the Licensee's admission of the breach, there would be no requirement for the Commission to view the CCTV footage of the incident involving Mr Dunn. The Chairman further advised that the Commission did not intend to take the 1996 breach into account in determining penalty in this instance due to the age of that complaint and its relevance in terms of section 124AAA hearings. The Chairman advised that the 2003 complaint was more recent and may be taken into account by the Commission in determining penalty, subject to relevance in accordance with the provisions of section 124AAA. The Chairman then invited the parties to continue with submissions on penalty.
- 17) Inspector Borg noted and confirmed the submission's of Mr Josh, in terms of the initiatives put in place by the JS&SC since Mr Orum's initial contact with Licensing and Regulation and in the latter half of 2008. He confirmed that the Licensee, through Mr Josh, had initiated the review of the Licensee's practices in respect of the responsible sale of alcohol, management of the gaming component of the licence and general compliance with the

requirements of the *Associations Act*. Inspector Borg also confirmed that Mr Orum had initiated the information session involving Licensing Inspectors and Business Affairs staff.

- 18) Inspector Borg referred the Commission to section 124AAA(2) of the Act and the prescribed penalties set out in that subsection. He informed the Commission that the Court had imposed what he considered to be a penalty at the higher end of the scale for the offences involving Mr Dunn. Inspector Borg explained that the Court appeared to treat the section 102 complaint as a first offence and then proceeded to regard the section 121 and section 110 complaints as subsequent offences in determining an aggregate penalty of a fine of \$2,500 plus victims' levy.
- 19) Inspector Borg noted the Court had found the JS&SC guilty of three (3) offences following the hearing on 25 November 2008, with the result section 124AAA(2)(b) applied and provided for a maximum penalty of seven (7) days suspension of licence. Inspector Borg submitted that in the circumstances of the current complaint, and taking account of the previous offence heard before the Commission, the appropriate penalty should be a suspension of licence for a period of between four (4) and seven (7) days.
- 20) In response Mr Josh submitted that the Commission should issue a caution or formal reprimand to the JS&SC by way of penalty. In support of that submission Mr Josh informed the Commission that the Club had recently undergone a significant review of its management structure and procedures. He conceded that there had been issues with the way in which the Club had been run in the past however the current committee had taken significant steps to improve the image of the JS&SC in the Jabiru Community. He emphasised the voluntary restrictions on trading hours for the both the sale of alcohol and the operation of the poker machines were indicators of the attempts to change the culture of the premises from a drinking establishment to a family oriented social venue.
- 21) Mr Josh submitted that the management of membership records had been significantly improved since the incident involving Mr Dunn. Whilst the self imposed restrictions had affected the financial bottom line, the Club was currently trading profitably whilst not generating the same levels of income as previously when the trading hours for alcohol sales and gaming were not voluntarily restricted. Mr Josh emphasised that Mr Orum had been totally supportive of the restrictions placed on the hours the gaming machines were available for use. Mr Josh stated that these restrictions had been one of the factors that contributed to a significant improvement in school attendances.
- 22) Mr Josh also submitted that the Commission should take into account the JS&SC's assistance to the community and the fact it had made donations in the order of \$20,000 to community based organisations over the past 12 months. He stated that this was a significant increase over what had been occurring under the previous management.
- 23) In response to a query from the Chairman Inspector Borg confirmed that the JS&SC's income from gaming machines had fallen considerably since the change of management and the restriction on trading hours. He agreed to provide the Commission with the gaming revenue figures for the JS&SC for the previous years.

## **Matters taken into Consideration**

- 24) As expressed in recent decisions, the Commission regards the service of alcohol to intoxicated persons as being at the serious end of offending by Licensees. The anti-social behaviour, violence and self harm resulting from the service of alcohol to intoxicated persons is significant and impacts on the community at large, more so in a remote location such as Jabiru. Recent decisions reflect the Commission's attitude in imposing tough penalties, including the suspension of licences, where Licensees continue to serve patrons to the point of significant intoxication.
- 25) The Commission notes its concern at the level of intoxication of Mr Dunn, as described by the Inspectors in their evidence. In particular, Mr Dunn was acting in a manner whereby his own physical safety and that of passing traffic was at risk. Clearly he should have been

refused service earlier than the time when he was eventually put off tap. The indicators of intoxication noted by the Inspectors should have been equally evident to the duty manager and bar staff at the JS&SC. The Court treated the offence seriously and imposed a monetary fine at the higher end of the scale to what would normally be expected, a further indicator of the seriousness of the offending.

- 26) In determining the appropriate additional penalty in this instance the Commission must take account of the penalties prescribed by section 124AAA of the Act which provides as follows:

**124AAA Additional penalty**

(1) *Notwithstanding anything in this Act, the Commission may, in relation to the finding of guilt of a licensee for an offence against section 102, 105, 106B, 106C or 121, by notice in writing served on the licensee and for a period specified in the notice, not exceeding that prescribed by subsection (2):*

(a) *suspend the licensee's licence; or*

(b) *vary the licence so that the licence applies to and in relation to part only of the premises to which it previously applied,*

*or, where the offence is a third or subsequent offence, instead of suspending or varying the licence, cancel the licence.*

(2) *For the purposes of subsection (1), the following are the prescribed periods:*

(a) *where the offence is the first offence by the licensee against any of the sections referred to in that subsection – 24 hours;*

(b) *where the offence is a second offence – 7 days; and*

(c) *where the offence is a third or subsequent offence – 28 days.*

- 27) A threshold question arises as to how the Commission is to regard the prior offending of the JS&SC in the context of whether the appropriate maximum penalty is prescribed by subsection 2(a) or (2)(b).

28) As noted above, the Commission determined during the course of the hearing to treat the 1996 breach as a "spent conviction" for the purpose of the current hearing. Regardless, that issue is a moot point so far as a hearing pursuant to section 124AAA is concerned. Subsection (1) refers to a "finding of guilt". The 1996 complaint was heard before the Licensing Commission and not the Court. As a result there can have been no finding of guilt on the basis that only a Court, and not the Commission, is capable of making a "finding of guilt".

29) Similarly, the complaint in respect of the 2003 breach was heard before the Commission and, as such, is not relevant in terms of the imposition of the appropriate additional penalty pursuant to section 124AAA.

30) The proceeding before the Local Court on 25 November 2008 is patently relevant and was in fact the trigger for this section 124AAA hearing. In that proceeding the JS&SC was found guilty of three (3) offences in respect of the incidents involving Mr Dunn. The three (3) offences arose from the same factual matrix. Namely, that on 21 August 2008, Mr Dunn entered the premises whilst not a member of the Club and without signing the visitor register, he was served alcohol whilst he was intoxicated and he was not removed from the premises when he was intoxicated.

31) As noted above, Inspector Borg informed the Commission that, in imposing its penalty the Court appeared to have treated the sale to an intoxicated person (breach of section 102) as a first offence for which it found the defendant guilty. In Inspector Borg's view the Court

then treated the second breach (fail to remove intoxicated person – breach of section 121) and third breach (failure to comply with condition of licence – breach of section 110) as second or subsequent offences for the purpose of determining penalty pursuant to section 124 of the Act. In determining penalty in this hearing the Commission may only take account of the breaches of section 102 and 121, as a breach of section 110 of the Act is not a relevant offence for the purpose of imposing an additional penalty under section 124AAA.

- 32) In determining penalty in this instance the Commission is minded to treat the two (2) relevant convictions of the licensee on 25 November 2008, as a first offence. Whilst the Court may appropriately have treated the complaints as separate offences the Commission notes that the licensee was not legally represented in the Court proceeding and entered a guilty plea at the first opportunity. The Licensee apparently adopted that course without any attempt to reduce the number of charges brought before the Court by way of “plea bargain” or to make submissions for a reduced penalty on the basis of the early plea. The Commission is not able to conclude that with legal representation in the Court proceeding, the Licensee would have been successful in negotiating a plea to a lesser number of charges. However the Commission is aware that such a course is regularly adopted by prosecutors where the defendant enters a guilty plea at the first opportunity.
- 33) The Commission has determined, in all the circumstances, that the appropriate penalty in this instance is the penalty prescribed by section 124AAA(2)(a) of the Act, that is a suspension of licence for a period not exceeding 24 hours.
- 34) The Commission has further determined that the penalty of one day suspension of licence is to be suspended for a period of 12 months. In making that concession the Commission was particularly persuaded by the recent efforts of both the Nominee and the President of the JS&SC to transform the manner in which the Premises operates. The Commission heard that Mr Josh was recently engaged at the JS&SC, having previously managed licensed premises in a competent and responsible manner. Similarly, Inspector Borg confirmed that Mr Orum had made significant progress in changing the focus and practices of the Club since the election of a new management committee. The Commission notes and supports the significant efforts of Mr Josh and Mr Orum in respect of the voluntary reduction of trading hours for the sale of alcohol and, in particular, the significant restriction of the operating hours for the gaming machines.
- 35) The Commission also notes the commendable efforts of both Mr Josh and Mr Orum to change the culture of the Club from that of predominantly a drinking and gaming establishment, to that of a family friendly social club incorporating increased family oriented functions and activities. The success of the management in achieving that aim to date was acknowledged during the hearing by Inspectors Borg and Cookson.
- 36) In addition, the figures for the gaming machine revenue provided by Inspector Borg after the hearing revealed that turnover for 2005 - 2006 was \$756,066 increasing to \$952,117 in 2006 – 2007 and \$1,610,402 in 2007 – 2008. Mr Orum’s evidence was that the significant and continuing increase in gaming revenue was an indicator to him that the JS&SC had lost focus on the purpose of its existence as a community facility and was one of the main drivers for the recent change in management and future direction. The Commission was advised by Mr Josh that revenue from gaming had fallen significantly in the period between July 2008 and January 2009. Inspector Borg confirmed subsequent to the hearing that gaming revenue for the period September 2008 to January 2009 had decreased by 60% as a result of the measures now in place at the JS&SC..
- 37) The Commission commends the initiatives of the JS&SC to take a proactive stance in improving the management of the Premises, training staff and the attempts to minimise the harm associated with alcohol consumption and gambling. Those matters carried significant weight in respect of the Commission’s decision to suspend the penalty imposed.
- 38) In further support of the decision to suspend the penalty the Commission notes that the complaint arose, at least in part, as a result of Mr Orum’s contact with Licensing and Regulation to obtain assistance and guidance in respect of the management of the JS&SC.

The Commission also notes that the staff members involved in the incident involving Mr Dunn are no longer employed at the JS&SC and that all staff are now RSA trained.

- 39) The Commission reiterates however that it regards the serving of alcohol to intoxicated persons as a serious offence under the Act and one that will not be tolerated by the Commission or the community at large. The Licensee is cautioned that any further offences of a similar nature in the foreseeable future, will almost inevitably result in an actual suspension of the licence.

## **Decision**

- 40) The Commission directs a one (1) day suspension of the licence of the Jabiru Sports and Social Club Inc to be imposed and that penalty to be imposed on a Thursday, being the day of the offence. Taking account of the matters set out above and in particular the proactive steps taken by management of the Premises since the offence, the Commission further directs that the suspension be totally suspended for a period of twelve (12) months from the date of this decision. The Commission further directs that the Director retain a copy of this decision on the file of the Licensee for reference in the event of any future offence on the part of the Licensee.

Richard O'Sullivan  
Chairman

13 February 2009