

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Corroboree Park Tavern
<b>Licensee:</b>	Lynnette Virginia Burton
<b>Licence Number:</b>	80304179
<b>Proceeding:</b>	Complaints pursuant to s48(2) of the <i>Liquor Act</i>
<b>Complainants:</b>	Ms Michelle Delaney and Mr John Gosen Ms Kaye Hamilton and various petitioners
<b>Heard Before:</b>	Mr John Withnall Mrs Barbara Vos Mr Craig Spencer
<b>Date of Hearing:</b>	17 March 2003
<b>Date of Decision:</b>	30 May 2003
<b>Appearances:</b>	Licensee in person Ms Michelle Delaney for herself and Mr Gosen; Ms Kaye Hamilton for herself and petitioner; Mr Beau Brycker and Mr Gary Carter

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1. This was a hearing of what might be termed a package of complaints against the Corroboree Park Tavern.
2. The complaints came before the Commission by way of two separate sets of documentation:
  - (1) Michelle Delaney complained both by letter and supporting statutory declarations that:
    - her partner John Gosen, before he was barred from the premises, had regularly (and expensively) been allowed to drink on into an intoxicated state long after hours, to 04.00 a.m. and 06:00 a.m. at times;
    - she and several other members of the local community by being barred from the tavern are unable to access fuel, mail and public telephone services which are within the boundary of the licensed premises;
    - she and Mr Gosen were assaulted by Mr Rob Burton at the licensed premises at about 01:30 a.m. on 17 August 2002, Mr Gosen sustaining injuries as a result;
    - the licensee Mrs Lynette Burton has shown a pattern over the years to indicate that she is not a fit and proper person to hold the licence, and that new management ought to be put in place.
    - Mr Gosen co-signed the letter, and submitted a copy of two statutory declarations he had made in August 2002 as to the alleged assault.
  - (2) Kaye Hamilton submitted under s.48 of the *Liquor Act* a petition whereby some ninety or so signatories called for the revocation of the tavern's liquor licence on the ground that that it was not in the community interest for the liquor licence to be "under the control of the Licensee and family".

3. The Licensee Mrs Burton responded to the petition with, inter alia, a “counter-petition” of about the same number of signatures in “support (of) the fact that Lyn has and can run Corroboree Park Tavern”.
4. All of the petitioning complainants give Darwin rural residential addresses, most being able to be fairly described as locals in relation to the tavern, whereas there is no facility in the petition supporting the licensee for any addresses of signatories to be recorded. On the other hand, the signatures on the licensee-supporting petition are for the most part accompanied by individual complimentary comments. Several signatories on the petition of complaint subsequently recorded their withdrawal from the petition.
5. Whatever the stand-alone evidentiary value of the petitions, it would appear to be about equal. All that can be fairly said in that regard is that a significant segment of the local community was obviously sufficiently unhappy with the Burtons to publicly record their disaffection, and about the same number of persons had been moved in the course of patronising the premises to record their support for the licensee’s management.
6. The viva voce evidence in support of the removal of the Burtons thus became determinative, and the battle lines in that regard were quite sharply drawn: the six persons who gave evidence against the Burtons are the only six people to have been barred from the premises. Although their individual grievances in that regard were obviously genuine, their evidence as to the reasons and respective triggering events was at odds with the Burtons’ evidence as to the “real” reasons in each case.
7. There were sufficient admissions and cross-examination remarks in this area of the evidence to indicate to the Commission that there were certainly two sides to the picture in this regard, and we do not propose to make findings as to respective credibility’s on this issue or to rule on the reasonability of the respective exclusions. A licensee is entitled (and indeed, expected) to take measures to prevent disturbance as he or she apprehends it. It is not a case of how fair or unfair that may be in the case of a particular individual. The licence is not a roadside inn; statutory discrimination issues apart, the licensee has no legislative imperative, social obligation or community covenant to permit access to the tavern to all who demand it.
8. This is not to say that a licensee may develop a history of obvious capriciousness in this regard without attracting the attention of the Commission, or may implement any policy of exclusion on any discriminatory basis, but the evidence here falls well short of raising any such issue. Ms Hamilton complains that the licensee uses the licence as a personal vendetta, but the over-all picture is of only some half dozen exclusions over the course of several years, all for rationalised perceptions of infractions of house rules or simply discomfort with a standard of conduct or behaviour. On the evidence we are unable to criticise any of the licensee’s stated judgment calls in this respect.
9. Interestingly, Ms Hamilton and her fellow petitioners noted that it is acceptable to them that “a handful of residents...have been barred due to aggressive provocation or minor misdemeanours...except these people are also refused use of the public phone, mailbox etc.”
10. It also perturbs the Commission if the exclusions extend to the mailbox and public phone box which are within the perimeter of the licensed premises. Our concern does not extend to the refusal of access to the shop or the fuel bowzers; these are facilities that the licensee is not obliged to provide, and can lawfully cease providing at any time or in relation to any particular persons at her entire discretion. Admittedly the public phone and mailbox are also privately owned by the licensee, and therefore also a discretionary service, but in the context of the nature of that service, the location of the premises and the area’s rural subdivisional demographic, the exclusion from the public phone and mailbox services of persons excluded from the tavern adds a dimension of neighbourhood concern with which we concur.

11. Mrs Burton assured us that she has never prevented persons barred from the tavern from using the public phone or mailbox, but that is certainly not the local perception, and the situation would present obvious difficulties in the case of trespass orders. The Commission would like to see this aspect resolved in some unequivocal way, and suggests to the licensee that she might take such professional advice as she sees fit with a view to perhaps applying to redefine the outer perimeter of the licensed premises to exclude the mailbox and the telephone. Should she prefer to leave the boundary of the licence as it is, such that the mailbox and public telephone remain under the Commission's jurisdiction in matters pertaining to the sale and consumption of liquor within that boundary, the Commission may well look to its powers of amendment of licence conditions to arrive at some reasonable resolution of community concern and Mrs Burton's undertakings in this regard.
12. The complaint of the petitioners was taken no further by any of the witnesses, who each simply added their agreement with the general issue raised by the petition that the tavern was not being run to the benefit of the community.
13. Unlike some interstate jurisdictions, community benefit is not per se a requirement of the grant or continuation of a tavern licence, or of any type of liquor licence, although it can be an element in the Commission's consideration of community needs and wishes. The Commission has historically approached the assessment of needs and wishes more in the nature of gauging public support within a community, having regard to variables such as the location and nature of the particular precinct and the type of licence involved.
14. The ways in which a licence may be "revoked" or cancelled by the Commission are set out in Division 3 of Part VII of the *Liquor Act*, and the petitioners have not made out any of those grounds. The waning of public support, even if satisfactorily demonstrated, is not of itself such a ground.
15. The other way of removing a licensee from licensed premises is by way of a finding that the licensee is not a fit and proper person to hold the licence, and this is a remedy specifically sought by Ms Delaney's complaint. Further, this element of her complaint is based on some specifics in addition to her unhappiness with the lack of peripheral services and the manner in which she was barred from the premises.
16. In this context, several breaches of existing licence conditions on the part of the licensee emerge from the rest of the evidence.
17. Mr Gosen and his partner Michelle Delaney gave evidence of arriving at the tavern at 01:30 a.m. on 17 August 2002, because they saw that there was a crowd of people and lights on in the bar. There were about ten people drinking on the premises, and playing pool. Ms Delaney immediately made her way to the toilets. Mr Gosen asked for a couple of drinks, Mr Burton said the premises were shut, that it was a private party. Mr Gosen made a cynical remark, whereupon Mr Burton began shouting abuse at Mr Gosen for getting people to sign a petition against him, and then (says Mr Gosen) Mr Burton "lost it". Mr Gosen describes himself as being "king hit" by Mr Burton, hit in the face and head several times with both fists. Mr Gosen fell backwards, hurting his hands as he attempted to break his backwards fall. Mr Burton then punched him several times when he was on the ground, until several army personnel pulled Mr Burton off him, helped Mr Gosen to his feet and recommended he leave immediately. Several of them accompanied him to the front exit.
18. Ms Delaney arrived back from the toilet to see John out the front with a crowd of people around him. As she arrived, according to both her and Mr Gosen, Mr Burton came "flying" up to her and gave her a heavy shove together with a colloquial admonition to leave the premises.
19. John and Michelle left in their motor vehicle, with John complaining on the way home of the pain in his hands. Upon arriving home several minutes later Ms Delaney telephoned the police and was advised to come to the Palmerston police station next day to give statements.

20. Ms Delaney then drove back to the licensed premises to retrieve some personal effects. It is common ground that she returned about ten minutes after the event.
21. She was unable to enlist any co-operation in attempting to obtain the names of witnesses to the event.
22. Mrs Burton on the other hand says that it was John Gosen who first pushed her husband, stepping out of his thongs as he did so and asking Mr Burton "Are you having a go at me?" Mr Burton pushed back, and one of the Army reservists on the premises then separated them and steered Mr Gosen out the door. Mrs Burton explained that the persons on the premises were Army reservists who had hired a "Troopie" en route to the Mary River and had received her permission to put their swags down in the camping grounds for the night.
23. Mr Burton also insisted that Mr Gosen had pushed him first, that he had only pushed back. Several of the Army personnel then interceded and escorted Mr Gosen out. Mr Burton had no idea of "where or how" Mr Gosen might have suffered injury that night. He went further than that, suggesting in his cross-examination of Mr Gosen that there could not have been anything much wrong with his hands when he left because he was driving, and that if he suffered injury that night it must have occurred after he left the tavern.
24. There is no doubt that Mr Gosen's hands, inter alia, suffered injury that night; Exhibit 3 is a medical certificate of Dr GA Goodhand dated the same day, 17 August 2002, reporting that Mr Gosen described having been assaulted "last night" at the Corroboree Park Tavern, and noting that Mr Gosen had sustained the following injuries:
  - (1) Soft tissue injury to forehead, lip, back of head;
  - (2) Injury to both hands and thumbs with possible # distal 1st meta carpal.
25. The medical report is entirely consistent with and supportive of Mr Gosen's account of the encounter with Mr Burton. For Mr Burton to imply that Mr Gosen somehow suffered the injury as a result of some other event after leaving the premises and in the ten minutes or so before Ms Delaney arrived back seeking evidence, having conspired with her in that time to blame these injuries on Mr Burton, is to stretch the Commission's credulity beyond breaking point.
26. In the light of the medical report, the early complaint (to Police, Mr Burton and Dr Goodhand) and our observations of the respective witnesses as they gave their evidence, the Commission is persuaded on a strong balance of probability that the incident took place much as Mr Gosen described it, and we make that finding. Whatever the perceived provocation, the degree of Mr Burton's reaction was unacceptably aggressive. We also find on the balance of probability that Mr Burton pushed Ms Delaney as she testified. This too constituted an assault, although it is the finding in relation to Mr Gosen that grounds our following comments.
27. That finding of *itself* does not ground a complaint, as Mr Burton is not the licensee. Although he is Mrs Burton's partner in the business that operates the tavern, they are both insistent that he is not an employee of the licensee, nor does he any longer live on the premises. The issue on that basis then is whether the violence on the part of a non-resident non-employee should reflect adversely on the licensee, other than it following from our finding that we do not believe that Mrs Burton has been candid with the Commission in her evidence as to the violence of Mr Burton's encounter with Mr Gosen.
28. It cannot be said that she ought to have excluded Mr Burton from the premises before the event, because there is no evidence of any indicators to the event before it erupted. What does follow from our finding is that the licensee should have immediately excluded Mr Burton from the licensed premises in compliance with s.121 of the *Liquor Act*. In our view Mr Burton's behaviour was unjustifiably violent and demonstrated an inability at that time to control his behaviour. He was not so excluded, and was still on site when Ms Delaney

returned. We therefore find that the licensee's inaction in this regard was in breach of s.121.

29. It was suggested by several witnesses that Mr Burton has a reputation for reacting with disproportionate force, but on the evidence we are unable to make any adverse finding other than in relation to the event described. We would think that in taking over and operating a rural tavern in the Top End the ability to take care of oneself, and to be known to be able to, would go with the territory, but Mr Burton was neither the licensee nor an employee of the licensee at the time of the encounter with Mr Gosen and we remain convinced that the injuries inflicted on Mr Gosen in the early hours of 17 August 2002 was an inappropriate and unacceptable reaction to that person's presence, regardless of whatever flippant remark Mr Gosen may have made. Thereafter Mrs Burton as licensee was obliged to deal with the event and with Mr Burton in terms of s.121.
30. Mr Gosen also gave candid and credible evidence in support of Ms Delaney's complaint of Mrs Burton allowing very late drinking sessions, often all night, by Mr Gosen. Not surprisingly, Mr Gosen indicated that he personally was not a complainant on these grounds, but testified as to a period when he would have a late "bender" at the tavern as regularly as every second weekend. On those occasions Mrs Burton would "disappear", leaving "just Rob". Mr Gosen would pay his way on these occasions. Indeed, it was the ongoing cost of the late night parties that was a major element in Ms Delaney's complaint, in which she adverts to both an emotional and financial toll on their relationship.
31. Wayne Hamilton also indicated that he had regularly been "dragged out by the ear" at 06:30 a.m. over a period of some years.
32. Closing time for the tavern is midnight.
33. Mr Burton conceded that he and Mr Gosen might have stayed on "a couple of times" after closing time, although he says that Mr Gosen was not charged on those occasions. It has to be said that the scenario of all of Mr Gosen's after- hours drinking having been "on the house" also stretches the Commission's credulity, and we do not accept that such was the case.
34. On the whole of the evidence in relation to this issue, the Commission formed the view that there has been a culture at the tavern of quite casual observance of closing time and those requirements of the *Liquor Act* and the conditions of the licence as are pertinent to observance of licensed hours, and in those general terms we uphold Ms Delaney's complaint in that respect.
35. The night of 16/17 August was itself a case in point. There was the suggestion that the Army people had their own beer supply, but Mrs Burton admitted shouting them at least one round because "they'd spent so much". She could not say if it had been before or after midnight because, as she put it, "I don't sit there and watch the clock".
36. If paying patrons are present at closing time plus thirty minutes, Mrs Burton cannot allow them to remain consuming liquor in breach of s.104(1) of the *Act* by simply regarding their status as having changed to "guest" within the meaning of s.104(3)(d). Even if such patrons are only consuming drinks "shouted" by the management after closing time, the licensee does not thereby cease to "sell" such liquor within the appropriate definition in s.4 of the *Act*. The Commission does not accept that s.104(3)(d) provides the licensee with the shield she argues; the scheme of the section when read with the *Act* as a whole does not permit such mockery of licensed trading hours.
37. Mr Gosen's late night sessions were similarly unprotected by s.104(3)(d) even in the highly unlikely event that all drinks after closing time were shouted by the licensee.
38. Moving on to another matter, Mrs Burton acknowledged to the Commission that she is now aware that at one stage her grandson was given spells of duty behind the bar while under age, a confession to a breach of s.116A of the *Act*.

39. And finally, we have explained to Mrs Burton that because her shop and the mail, telephone and fuel facilities are within the perimeter of the licensed premises, she has also been in breach of s.104(1) of the *Act* in allowing any access at all to those facilities outside liquor trading hours, and needs to seek the appropriate exemption from the Commission under s.104(3)(g).
40. We have therefore in summary found the licensee to have breached ss.104 (patrons remaining after hours), 110 (failure to comply with licence conditions as to trading times), 115 (failure to sell liquor only as authorised by licence), 121 (failure to exclude Mr Burton) and 116A (permitting minor to sell liquor).
41. Is Mrs Burton then a fit and proper person to hold the liquor licence? In our view it was certainly arguable as at the night of 16/17 August last year, given our foregoing findings and her casual attitude to afterhours liquor consumption (as particularly evidenced by her not knowing whether the drinks the Army personnel had in their hands at the time of the assault on Mr Gosen had been from their own supply or hers, or at what stage in the sequence of their on-premises liquor consumption closing time had come and gone). We are concerned that she may have a problem as licensee in controlling the on-premises behaviour of her husband. Her flippant query to the Commission in final submissions as to whether she should divorce her husband if he is such a problem as alleged may well bespeak an actual problem area for her. We can only reiterate that the statutory obligation to control the premises is hers, even if at any time it is her husband who may be the problem.
42. However, Mrs Burton has acknowledged to us her awareness that managerial responsibility for the liquor licence can only be hers alone, and most importantly she is now on record as acknowledging her understanding of the Commission's interpretation of s.104. In our view she will have benefited considerably from the experience of the hearing, and in the circumstances we do not make any adverse ruling in relation to her fitness to continue to hold the licence from this point forward. It is pertinent to point out that if her fitness to hold the licence was to again become an issue at some future time, the matters dealt with in this present decision could again be taken into account at that time.
43. There is still the question of a penalty for the various breaches we have found.
44. Although we are looking at a bundle of findings of non-compliance, it remains a relevant matter that this is the first occasion that any complaint against the licensee has been upheld by the Commission. Although our findings indicate our acceptance that the licensee has taken too casual an approach to the supply and consumption of liquor after hours over an extended period, the specific basis of Ms Delaney's complaint in this regard is now rather old news, dating back prior to Mr Gosen taking the job in East Timor.
45. What we therefore propose to do is to impose a fully suspended penalty, to keep the licensee focussed on compliance issues. This involves suspending the liquor licence for four days for the bundle of breaches we have found, but suspending the whole of that penalty against the licensee's "good behaviour" for the next twelve months.
46. The formal outcome is therefore as follows. Pursuant to s.66(1)(b) of the *Liquor Act* the Commission is satisfied that the licensee's contraventions of the licence and the *Liquor Act* are of sufficient gravity to justify the suspension of Licence No. 80304179 for four consecutive trading days inclusive of a week- end, which is to say that all liquor trade in or from any part of the licensed premises will be prohibited during the course of such suspension.
47. However, notification of dates on which the suspension is to take effect will not be given unless and until any further complaint against the licensed premises may be upheld which involves a contravention of a licence condition or provision of the *Liquor Act*, and which first comes before the Commission pursuant to s.48(6)(c) of the *Act* within a period of twelve months from today.

48. What this means is that if no further complaints in relation to the Corroboree Park Tavern have been forwarded to the Commission by 30 May 2004 then this matter will be at an end. If however any complaint against the licensee comes before the Commission before 30 May 2004 and is subsequently upheld against the licensee as constituting a breach of the *Liquor 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 notify dates for the deferred suspension hereby imposed, or any part of it, to be served in relation to this present matter.
49. Inasmuch as we were told that the Burtons have the tavern on the market, we specify that the suspended penalty hanging over the licence is not to affect the processing of any application for transfer of the licence, and cannot affect or be implemented against a new holder of the licence. It is licensee-specific, and therefore presents no problem for any potential transferee. We can appreciate that the complainants too would not wish to see any impediment to a change of management.

John Withnall  
Presiding Member

30 May 2003