

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Milikapti Sports & Social Club
<b>Licensee:</b>	Milikapti Sports & Social Club
<b>Licence Number:</b>	80803649
<b>Nominee:</b>	Mr Nicholas Heenan
<b>Proceeding:</b>	Complaint pursuant to Section 48(2) of the <i>Liquor Act</i> arising out of the conduct of the business at the licensed premises
<b>Complainant:</b>	Sergeant Peter Cumming
<b>Heard Before:</b>	Mr Peter Allen
<b>Date of Hearing:</b>	28 May 2001
<b>Date of Decision:</b>	6 June 2001
<b>Date of these Reasons:</b>	8 February 2002
<b>Appearances:</b>	Mr Ben O'Loughlin for the Licensee Mr Peter Wilson assisting the Commission

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The Complaint was made out in a letter to the Director of Licensing from Sergeant Peter Cumming, Officer in Charge, Tiwi Islands Police. The letter is dated 27 December 2000 and conforms to the requirements of Section 48(3) of the *Liquor Act 1978*; it is in writing, was lodged with the Director and signed by the person making the complaint.

In a letter dated 4 January 2001 the Director of Licensing informed the Licensee that a Complaint had been lodged pursuant to Section 48 of the Act in relation to the conduct of the business at the Club.

The Director's letter described the substance of the complaint as follows:

*The Milikapiti Club is not complying with the conditions imposed within the licence and are (sic) selling takeaway liquor to members of the community who do not hold permits and to other residents of the Tiwi Island (sic).*

*One specific incident is that on Saturday 16 December 2000 the Tapalinga football team from Nguuu were (sic) served takeaway beer which was then loaded onto the bus and transported from the community.*

*In addition to this incident, members at Nguuu Police Station based on Bathurst Island have in the past weeks on several occasions confiscated liquor from residents of Nguuu who state they purchased the alcohol from the Milikapiti Club.*

The Director's letter invited the Licensee to respond in writing and gave the closing date for correspondence as 29 January 2001.

The Nominee responded by fax timed at 11:28AM on 26 January 2001.

The Complaint, the Nominee's response and a report from the Director were put before the Commission at its business meeting held; 12, 13 & 14 February 2001. The Commission's decision at that meeting was to conduct a hearing on a date to be set.

The Licensee was informed of the date and time of the proceedings by Notice of Hearing dated 16 February 2001.

In order to clarify the particulars of the complaint, it was defined by agreement at the commencement of this hearing as being limited in every respect to the words contained in the second paragraph of the letter of complaint lodged by Sergeant Cumming.

Thus, for the purposes of the hearing, the complaint was defined as follows.

*that the Milikapiti Club is not complying with the conditions imposed within the licence and are (sic) selling takeaway to members of the community who do not hold permits and to other residents of the Tiwi Islands.*

Evidence in support of the complaint relied in the main on the statement and testimony of Ms Pamela Warlapinni, an Aboriginal Community Police Officer (ACPO) resident at Milikapiti. The statement is dated 19 December 2000, three days after the date of the incident described within the statement.

In her statement, ACPO Warlapinni asserts that on Saturday 16 December she flew into Milikapiti from Darwin, that she arrived at about 4:30PM and went straight to the Milikapiti Social Club where she observed a community bus preparing to return the Tapalinga team to Bathurst Island. Approximately twenty people boarding the bus were carrying plastic bags containing six-packs of beer. In particular, the ACPO named Cisco Babui as carrying a six-pack and Nilus Kerinauia as carrying "two bags of beer". After the bus departed, Ms Warlapinni entered the Club and although not able to locate Nominee Heenan, identified the Club President as being on the premises, Kenny Brown as serving behind the bar and Jacinta Lorenzo as selling beer tickets. Ms Warlapinni reported her observations to the Officer-In-Charge of the Police Station at Garden Point.

The substance and detail of ACPO Warlapinni's statement was confirmed during her evidence with the additional and important detail that she did not see any of the liquor actually being purchased from the Club. The ACPO confirmed that all persons she observed boarding the bus were from Bathurst Island. In the ACPO's estimation there were twenty-three liquor-permit holders at Milikapiti.

In cross-examination the number of persons carrying six-packs or bags of beer was confirmed as twenty, albeit approximately. In further cross-examination Ms Warlapinni stated she had nothing to drink at the Club and that she took her own six-pack home. Ms Warlapinni agreed that she was aware of rumours that six-packs could be obtained for forty dollars from unnamed sources in the community.

The other principal witness in this matter was Nicholas Matthew Tipiloura of Nguiu Community on Bathurst Island. On Saturday 16 December, the date of incident described by ACPO Warlapinni, Mr Tipiloura was taken into Police custody at Bathurst Island, a restricted area pursuant to Part VIII of the Act. Mr Tipiloura was detained when disembarking from the Nguiu culture boat. In his statement to Police, Mr Tipiloura stated that he was at the Milikapiti Community watching football, that after the game he went to the Club and drank six cans of beer and that prior to leaving the Club he purchased forty-two cans of beer from Nicky Heenan.

In his evidence Mr Tipiloura confirmed the details provided in his earlier statement to Police. Mr Tipiloura said that he purchased the forty-two cans using beer tickets, that he had \$250, that he purchased beer tickets with \$160 and that Nicky Heenan (the Nominee) had given him six-packs in plastic bags. In cross-examination Mr Tipiloura stated that he had not purchased the beer from a permit holder. Mr Tipiloura indicated he was aware that beer could be purchased from other sources at Milikapiti and elsewhere on the island.

The Club's Nominee, Mr Nicholas Heenan, asserted that it was a normal day although there were a lot of people at the Club. Mr Heenan was not able to remember Mr Tipiloura being at the Club but was certain he would refuse to sell forty-two cans of beer to anyone. Mr Heenan indicated he had heard that cartons could be obtained from elsewhere on the island, for example, at Pirlangimpi. Mr Heenan described the beer ticket system that applies to take-away sales and stated that the

names of permit holders are listed and that names are ticked when take-away liquor is purchased. Mr Heenan believed there were fifty-to-sixty permit holders.

In his evidence Club President Andrew Bush stated that although it was a busy day he did not see or believe that Nicholas Tipiloura or Cisco Babui were sold take-aways. Mr Bush believed the whole community had permits and asserted that he knows people who live on Bathurst Island and who have permits.

Kenny Brown, a staff member at the Club, stated that he not give “any of the mob take-away”.

Chris Tipiloura, a staff member at the Club, stated that he only sells take-away as six-packs to permit holders. Mr Tipiloura stated that Nicholas Tipiloura is a relative and that he did not sell forty-two cans as take-away to Nicholas or anyone else.

In final submissions, Mr O’Loughlin for the Club submitted that when considering the evidence I should be mindful of *Briginshaw -v- Briginshaw (1938) CLR 339*. Accordingly Mr O’Loughlin submitted I would need to be satisfied well beyond balance, that the circumstances leading to the complaint actually occurred in accordance with the substance and detail described in the complaint. Mr O’Loughlin also referred to *Neat Holdings -v- Karajan Holdings and Ors (1992)*.

Mr Wilson, Counsel Assisting the Commission, submitted that it was clear the evidence in this hearing confirmed the information in the statements of ACPO Warlapinni and Nicholas Tipiloura and it was open to me to find that Mr Tipiloura, a person not a resident of Milikapiti, was sold liquor for take-away, a breach of the licence conditions.

The hearing was adjourned to 6 June 2001.

My decision, given ex tempore 6 June 2001, and edited for the purposes of publication, follows.

When considering my decision I referred to the authorities referred to by Mr O’Loughlin and also to *Helton -v- Allen (1940) 63 CLR 691*. I also examined earlier decisions of the Commission in which the Presiding Member had relied on *Briginshaw -v- Briginshaw*.

In *Delicious Blue* the Presiding Member said,

The standard of proof applied by the Commission is the civil standard of balance of probability but with the requirement in matters of complaint that the balance must be clearly weighted in favour of a finding of probability.

In *Liquorland Fairway Waters* the Commission said,

On a contested issue we require to be positively persuaded rather than indulging in any artificial or mathematical weighing exercise.

It was on the basis of being required to be positively persuaded that I considered the evidence in this matter, a complaint that the Milikapiti Club did not comply with the conditions imposed within the licence and has sold take-away liquor to members of the community who do not hold permits and to other residents of the Tiwi Islands.

In my examination of the testimony of Mr Nicholas Tipiloura I found his evidence to be unequivocal and unambiguous. He was at the football. He went to the Milikapiti Club. He purchased forty-two cans from Mr Heenan who we know to be the Nominee of that Club. Mr Tipiloura admitted that from time to time liquor can be purchased at other places and that he may have done so, but it is clear on the evidence, that on this occasion he purchased the liquor from the Club and I am positively persuaded to this effect.

The evidence of ACPO Warlapinni is equally clear and unambiguous. She was at the Club. She saw twenty persons (or thereabouts) carrying six-packs in plastic bags. These persons included Cisco Babui and Nilus Kerinaia. No evidence was adduced to deny the presence of these persons or their possession of liquor. Ms Warlapinni did not sight the actual sale and it was suggested to her that the liquor may have come from permit

holders, other sources at Milikapiti or from elsewhere on the island. No evidence to this effect was adduced.

On the evidence presented I am positively persuaded that twenty or so persons, not being permit holders and in particular Nicholas Tipiloura, Cisco Babui and Nilus Kerinauia purchased take-away liquor at the Club. Indeed, to suggest that the liquor was obtained from sources other than the Club is to stretch credulity somewhere near to breaking point. This is particularly so when one considers that at the time of the incidents leading to the complaint there were only 23 permit holders listed at Milikapiti.

My finding is, that on 16 December 2000, the Milikapiti Club breached the conditions of its licence by selling take-away liquor to persons who were not residents of Milikapiti and not permit holders.

In regard to penalty, Mr O'Loughlin for the Club submitted that in most circumstances the Commission would consider a penalty designed to affect the "hip pocket" of a licensee or nominee and be tempted to suspend the licence to affect the hip pocket and thus cause management to change its ways. Mr O'Loughlin submitted that in this instance there was no hip pocket as such and that a suspension would simply mean less money going back into the community.

Mr O'Loughlin also submitted that were I to suspend the licence I would be exposing residents to the likelihood of injury or fatality in their travels to obtain liquor at other locations on the island and elsewhere. Further, a lengthy suspension of the licence may encourage residents to relocate to Darwin.

Mr O'Loughlin advised that the Club has organised a night patrol and that it employs several staff, both full and part-time. A suspension would mean loss of earnings for casual and part-time staff and place the full-time staff on holiday pay.

Cognisant that the complaint was not the first time the Club had appeared before the Commission, Mr O'Loughlin submitted that if I were minded to impose a penalty, it should not be in the vicinity of a week for such a period would be unduly harsh. He submitted that two days might be more appropriate in the circumstances. Mr O'Loughlin also submitted that in considering penalty I should be mindful that the Club was not similar to a licensed venue in Darwin and that as the Commission would be well aware, special and difficult circumstances exist in regional communities throughout the Territory.

Finally, Mr O'Loughlin submitted that he presumed the Commission's main point as in any sentencing aspect is to give a specific deterrent and a general deterrent and that the licensee would receive a very clear and specific message if its licence was suspended for two or three days. Mr O'Loughlin submitted that if such a suspension was published, all licensees would reflect upon it and regard it as a harsh penalty.

Mr Wilson, Counsel Assisting the Commission indicated that having found the breach proven, there was a range of penalties that might be imposed including suspension of the licence pursuant to Section 66, subject to my being of the opinion that suspension is necessary for the protection of the public or I am satisfied that the breach is of sufficient gravity to justify suspension.

Mr Wilson referred to two prior matters and suggested that these could be taken into account when considering the prior conduct of the licensee. In the first of these, the breach was of an identical nature in that the licensee sold take-away beer to a person not being a resident of Milikapiti and not being the holder of a permit for that purpose. On this occasion, being a first complaint and in consideration of the full and frank admissions made, no penalty was imposed.

The second complaint was dealt with by the Commission on 5 November 1998. The Commission heard evidence from one witness that he was served forty-two cans of beer. On this occasion the licence was suspended for two days.

Mr Wilson submitted these prior breaches should weigh heavily on my mind in the current matter and that it was appropriate I suspend the licence, amend the conditions of the licence or vary the type of licence. Mr Wilson suggested that in considering these options I could have regard to the

fact that the breaches do not relate to matters within the club, such as sales to minors or intoxicated persons. Mr Wilson suggested that in the circumstances no useful purpose would be served by suspending the licence in its entirety and that it might be appropriate to limit my actions to the take-away provisions of the licence. Mr Wilson submitted that given the unchallenged evidence of ACPO Warlapinni, an appropriate penalty could be to amend the licence to revoke the provision that permitted take-away beer to be sold.

Mr O'Loughlin for the licensee submitted that such an amendment would punish the otherwise law-abiding citizens of Milikapiti.

In response to this, and related submissions I advised Mr O'Loughlin that I was not considering a permanent variation of the licence. Mr O'Loughlin agreed that a temporary suspension of the take-away provisions may be an apt penalty but submitted that such a penalty, if imposed, should be limited in time and not amount to "weeks and weeks".

My decision on penalty, given ex tempore 6 June 2001, and edited for the purposes of publication, follows.

The Commission and myself as its Chairman spend many hours embroiled in the alcohol debate. Much of the debate revolves around the excess consumption of liquor by Aboriginal people. There are many people, both Aboriginal and non-Aboriginal who argue that there should not be clubs on Aboriginal communities. There is research published by academic institutions that grimly details the deleterious effects of some clubs or so-called wet canteens. Nevertheless the Commission continues to defend its position and continues to approve licensed clubs in communities because the law allows Aboriginal people to seek such clubs as a matter of community choice.

The Commission sees no value in prohibition. Indeed, we are amazed it has advocates. There are Aboriginal clubs that are well managed and have been so for extended periods. The Milikapiti Club has operated fairly well for extended periods.

Because the law allows for any person or group to seek a liquor licence and because the Commission appreciates that the management skills of licensees in most communities need time to develop, we are inclined to allow, at least initially, a lower hurdle for Aboriginal licensees. We don't turn our minds as to whether our attitude is discriminatory. We simply believe it is necessary to provide an opportunity for local management of what can be a valuable community resource.

The Milikapiti Club has two previous breaches recorded and in the second a penalty applied. The decisions involved hearings of a sort. While having the status of a hearing, the proceedings were conducted in the manner of a community meeting with a great deal of animated discussion and at times, many of those in attendance speaking simultaneously. We didn't mind for the hearings were conducted at Milikapiti for the purpose of being in the community.

When presented with this complaint the Commission decided it was time to raise the hurdle with the expectation that a formal hearing, conducted in Darwin, would show the hurdle had been raised a notch and that a complaint regarding the conduct of a liquor licence was a serious matter.

The Commission takes the view that as communities obtain experience in the conduct of licensed premises, it must raise the hurdle to the height and to the standard required of all licensees. If we fail to do this, we are not doing our job under the Act. Indeed, we believe we have little choice but to progressively and incrementally guide club and community licensees to appropriate and professional standards.

It should be clearly understood that if a licensee in the Darwin CBD was to sell quantities of take-away liquor outside the conditions of its licence, a lengthy suspension of the licence would be inevitable and cancellation a possibility. On this occasion I will not raise

the hurdle of expectations to the level demanded in Darwin and other urban centres. I will raise it another notch, but the licence as a whole, will not be suspended.

Mr O'Loughlin made very valid submissions regarding the need "to keep the money in the community". We see the funds of Aboriginal people splashed around Darwin, Katherine, Tennant Creek and Alice Springs and we see clubs in Kalkaringi, Gunbalunga and Milikapiti working to keep their money recycling within their community. Sound policy and a worthy economic objective for those communities.

Also at issue is the potential problem of people from Milikapiti travelling to other communities to purchase liquor. The Commission has regularly taken a soft approach, cognisant of people driving to other communities along highways or through the bush, buying liquor elsewhere and becoming fatalities along the road back to their own communities. The Commission is very mindful of these issues and I am pleased to be reminded of them by Mr O'Loughlin.

This complaint was about take-away liquor and having found a breach occurred, I propose to suspend that part of the licence that permits the sale of liquor for consumption away from the premises.

Mindful of the amount of liquor involved and the number of persons to whom unauthorised take-away liquor was sold; the period of suspension will not be insignificant. The penalty to be imposed is a twenty-eight day suspension of that portion of the licence that allows liquor to be sold for consumption away from the premises.

In his submissions, Mr O'Loughlin spoke of a specific and a general deterrent. I do not regard this penalty as a general warning. I see it as specific to this licensee. The period of suspension is intended as a very clear warning to this licensee that it must trade in accordance with the conditions of the licence.

I make no adverse finding regarding permits. Persons resident at Milikapiti have been able to seek permits for some time and can continue to seek permits. I see no reason why the Director of Licensing should not continue to consider and subject to merit, approve permit applications. This process can continue throughout the period of suspension. The Commission will in time want to view a list of permit holders.

I make no finding in relation to the Nominee, Mr Heenan. The possibility of a finding was not canvassed during these proceedings. I do however advise that should there be any further complaints regarding the conduct of the business at the Milikapiti Club, the Commission may wish to hear from Counsel for the Club regarding the fitness and properness of Mr Heenan.

The suspension is effective immediately.

Peter R Allen  
Chairman