

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Borroloola Inn
<b>Licensee:</b>	O'Brien Holdings (Townsville) Pty Ltd
<b>Nominee:</b>	Ms Terry O'Brien
<b>Proceeding:</b>	Sec 48 Complaint by Ms Linda Purcell and Mr Cliff Lockwood
<b>Heard Before:</b>	Mr John Withnall
<b>Date of Hearing:</b>	04 to 06 April 2000 in Borroloola 12 April 2000 in Darwin 05 to 08 June 2000 in Borroloola
<b>Date of Decision:</b>	08 June 2000
<b>Appearances:</b>	Complainants in Person Mr Ben O'Loughlin, Counsel Assisting the Commission Mr Patrick Loftus, for the Licensee

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***The hearing commenced being heard before Chairman Mr Peter Allen, and members Mr John Withnall and Ms Shirley McKerrow. For reasons beyond the control of the Commission Mr Withnall sat alone on the hearing as from 5th June 2000. The decision that follows is therefore the decision of Mr Withnall as a hearing panel of a single member.***

***Mr Withnall delivered the following decision ex tempore on the morning of 8th June 2000. Some non-substantive editing has taken place for the sake of improved readability, and some gaps in the recording have been filled from Mr Withnall's notes.***

Mr Withnall: I will be unable to hand down anything in writing this morning, Mr Loftus. What will happen is that we'll type up from the transcript what I now deliver. Grammar will be corrected, allusions will be improved, references will be put in, and any formal orders will be included. We'll see how we go. The first thing I think we need to focus on to mention is that this is not an inquiry into the circumstances of the dismissal of Lockwood and Purcell. It's not an inquiry into the fairness or the unfairness of that dismissal. That is, of course, a matter for another jurisdiction and, as I understand it, is in fact at the moment in another jurisdiction. This is a hearing into those aspects of the complaints of Purcell and Lockwood which are regulated by the Licensing Commission.

The motivation of the complainants is only relevant insofar as it may go to their credibility. Mr Loftus does raise the complainants' motivation as a live issue, and on the basis inter alia of questionable or improper motive he urges me to make such general or all encompassing findings adverse to the complainants' credibility as would then have me dismiss the complaints in their entirety, holus-bolus as it were. The fact that a complaint may be motivated by a sense of grievance, or even malice I think, on the part of the complainants, does not necessarily militate against the credibility of their evidence. It does become a relevant circumstance to be factored into the process of weighing the evidence.

Now, there are conflicts in the evidence. There are conflicts between each of the complainants and witnesses on behalf of the licensee. There are some conflicts between the two complainants. Putting that aside for the moment, and putting aside, again for the moment only, Cliff Lockwood's notebook, I think a large part of the evidence of the complainants relating to the management of the hotel can be seen to be rather generalised or impressionistic and has been largely answered by the licensee, through the nominee Mrs O'Brien, partly by specific explanations, partly by the

provision of context or broader picture, and indeed partly, in my view, by admissions against interest by Terry O'Brien as to the actuality of at least one of the matters complained of.

An example of what I mean by impressionistic is the evidence of both complainants as to Terry O'Brien's intoxication, which was said to be daily, albeit with special emphasis on the memorable day of 14 November. Both complainants make it clear in their evidence that this was very much a subjective judgment on their part, that there were minimal observable indicators, that you actually have to know Terry to know that she's intoxicated. As late as 11 pm on the contentious 14 November, it was Cliff Lockwood's evidence that, and I quote him:

*Just by looking at her you wouldn't have known she'd had a drink.*

He then went on:

*In looking at Terry most occasions you would swear she had not had a drink.*

That's at page 191 of the transcript. There was also the evidence of Sylvia Dean in this respect, the clinic sister, when Terry subsequently attended the clinic to pick up the injured Brendan Willis. She gave the nurse, and I quote now from the nurse herself:

*No reason to even imagine that she might be intoxicated.*

And this was at the end of a long and certainly eventful day, which the complainants promoted as a prime and specific example of Terry O'Brien's intoxication on the licensed premises. Now, I already indicated to Mr Loftus part way through his case that he need not address this particular issue any further because in the absence of any casually observable outward indicators of intoxication on the part of Terry O'Brien on that occasion and, according to Cliff Lockwood, on most other occasions, it's impossible for the complaint of her intoxication to be upheld. There are simply no empirical observations that I can judge.

The evidence as to underage persons being allowed to remain on the premises was also generalised to a large extent, but both generalised and minimal. Linda Purcell, in oral evidence, simply said that underage persons often came in with their parents, who then had to take them out, so presumably those parents then complied with an instruction from or on behalf of the licensee. Cliff Lockwood, in his written complaint, refers to a young male of 14 years being allowed to remain on premises until he caused trouble, but this particular event did not come out in his evidence, either in his oral evidence or in his affidavit, which is exhibit 9.

In his oral evidence he referred to only one unspecific occasion on which the juvenile concerned had been quickly removed. In his affidavit he says that two of John Lowbeitch's three so called girlfriends were under 18. In his oral evidence, however, he concedes he did not know the age of these girls. And there was no other evidence relevant to a breach of section 106B. When questioned by Mr Loftus as to why he didn't record any other specific instances of underage persons being on the premises, Mr Lockwood said his major concerns were selling out of hours and serving intoxicated patrons.

Both complainants made a point of mentioning in evidence that the nominee - and they're normally quite vigilant - that's the complainants' word, "vigilant" - in removing underage persons from the premises. I agree with both counsel that there has been insufficient evidence to sustain any finding of a breach of section 106B. The complaint, in its reference to underage persons on the premises, cannot be upheld.

Linda Purcell further complained of the failure of the licensee's management to effectively deal with fighting and fights. In her oral evidence she detailed several incidents, including that of Brian, whose surname I actually forget, but is the Brian who hit his mother on the premises, for which he was barred for a time by the licensee. Mrs O'Brien gave evidence that barring is an effective punishment and she named several other patrons who have been barred in comparatively recent times, and testified that she has no aversion at all to excluding fighting patrons because, of course, she certainly doesn't want them fighting on her premises.

She testified that the incidence of violence has decreased since she took over the hotel. Linda Purcell testified that there were lots of fights while she was there, but Cliff Lockwood testified that there weren't as many fights as he had actually expected. The totality of the evidence on this aspect of the complaint is such that there can be no finding that the licensee has permitted riotous conduct, which is the wording of section 105 - permitting it, or failing to exclude persons for violent quarrelsome or disorderly behaviour as per section 121 of the Act. And I might say that it should be emphasised that no offence is committed by a licensee simply because a fight happens. The offence is permitting it or failing to act sufficiently in excluding the fighting patrons such as to breach section 121.

Now, so far I've not referred to the standard of proof to be adopted, which has been raised with me, because my findings so far - that is in relation to the nominee's intoxication, underage persons on premises, and permitting or failing to exclude fighting patrons - has been the result of my having no doubt whatsoever as to the insufficiency of the evidence in relation to those specific aspects of the complaint. From this point on though, the decisions on different segments of the complaints may not be free of all or any doubt, and reference should be made at this point to the standard of proof that the Commission adopts in matters of complaint having the potential for serious consequences for a licensee, as is undoubtedly the case here.

The Commission does decide these matters on a civil standard, which is to say on the balance of probabilities. In relation to that standard, both counsel have referred me to *Briggenshaw-v-Briggenshaw*, and I'm fully in agreement that the standard of proof must be more than an academic or structured weighing of the evidence, such that the perception of a tilt of the scales one way or the other would decide any contested issue of fact. It has to be more than that. Evidence in justification of a finding in matters such as this must be stronger than that.

The Commission, for some time now, has adopted the recommendation of the High Court in *Briggenshaw* that in matters such as this we should need to be positively persuaded on a given issue. Rather than it just being probable on balance, it needs to be a very strongly probable balance. Positive persuasion is what I've taken to be the appropriate standard of proof in relation to the determination of the remainder of the elements of these complaints.

Echoing Cliff Lockwood's expression of his major concerns - that is, serving intoxicated persons and takeaway out of hours, essentially service out of hours - in my view, these matters are the licensee's major concerns on the evidence in this matter. Counsel assisting has properly and helpfully separated out all the different elements involved in these allegations, but I'll deal with them in a perhaps more bundled up manner. For example, staff book-up will be dealt with as part of my consideration of after hours delivery of beer to the assistant security staff.

Before passing from book-up for the moment, however, there is some allegation of apparent book-up in relation to takeaway cartons of beer to non-staff. It was Mrs O'Brien's evidence that this is explainable in that house guests, which is to say bona fide lodgers, prefer everything to go on to their tab. She also explained that overt or blatant sales of take-away over the counter between 7 and 9 are something she tries to avoid, and so when beer is supplied to in-house guests it is somewhat discreet and it's all taken all of on a final account. This, of course, is a credible explanation of relevant evidence of the complainants and one which I accept. That being so, in my view that particular situation was not the evil intended to be addressed by the book-up condition in the licence.

What can now be described as the old book-up condition was simply not designed to affect the in-house lodger system whereby, naturally, you would normally expect to pay once at the end of your stay for all the services you had received.

The allegation relating to service of intoxicated persons is a little complex. I think it can be compartmented into three. Firstly, the statements and evidence as to general practice at the hotel; secondly, the subversion, in effect, by Errol, Terry and Tammy, of attempts by the complainants to cut patrons off, to put them off tap; and thirdly, the intoxication on premises of specific named persons, apart from the licensee herself. I might say, Mr Loftus, all the way through and continuing, when I refer to the licensee I will be referring to your client personally, the nominee, unless I indicate otherwise.

In any event, section 25 says that that's a matter of law. The nominee is the licensee for purposes of the Act.

As to the first of those categories that I mentioned, which is to say statements of general practice at the hotel, Linda Purcell says in evidence that all the time, day or night, there were always intoxicated people on the premises. Cliff Lockwood tells us that he regularly had to remove sleeping persons from the bars, although I note he says not all of these were drunk. Some woke up "bright as a button". So not every sleeping person he had to wake up - and I think he puts the number at half a dozen times while he was there - not all of those he considered to be drunk.

There are incidents of people vomiting on themselves, he says, and wetting themselves, although he does add the rider that this was not endemic. Mrs O'Brien, of course, refutes that situation as being the case. The relevant evidence from Linda Purcell does strike me as being somewhat over the top. She said:

*All the time, day or night, there were always intoxicated people on the premises.*

And it's relevant, I think, that there's nothing remotely like that in her affidavit. That sort of over the topness, if you will excuse the phraseology, only comes through, by surprise almost, in her oral testimony. And it does compare unfavourably with Cliff Lockwood's evidence of the incidents he describes as happening only from time to time. He didn't give any evidence as to any general level of intoxication in the bar all the time. Tammy Pearson and Mrs O'Brien have recollections between them of vomit in the outside toilet, which does happen, and some staff as well as some patrons throwing up at one stage, such that she thought there was something probably going around at that time.

Patrons vomiting and wetting themselves is certainly not an attractive picture, but it's not possible to be positive that all of it, or indeed any of it, can be ascribed without anything further to intoxication. It's a link, or indeed perhaps a leap, that cannot be made without significant further relevant observations as to symptoms and behaviour in any individual instances. I do not accept the evidence of Linda Purcell as to a level of non-stop continuous permanent intoxication at the hotel, and even if I believe that statement on its own terms, such evidence really isn't in any form that can be acted on by the Commission without anything further.

Both complainants admit being instructed by the licensee to be careful, and they both openly concede that they were told to look out for things which would jeopardise what's been referred to as Mrs O'Brien's probation. Cliff Lockwood, in particular, went into considerable detail as to her concerns as she communicated them to him. For me to accept the broad and colourful picture painted by the complainants would necessarily mean accepting that Mrs O'Brien has been treating this Commission and the suspension of licence hanging over her with contempt.

My observation of Mrs O'Brien's reaction in the witness box when she realised from something I said that she may be in just such jeopardy in relation to another aspect convinces me that she would not knowingly put herself in that position.

Moving on to the second category of "intox on premises", this relates to the complaints of Errol, Terry and Tammy subverting the complainants' attempts to put people off tap. In this respect, the remarks, or the finding, I just made in relation Mrs O'Brien also holds good in my consideration of these allegations. In effect, Mrs O'Brien would be a fool if she knowingly allowed that to happen overtly, and I don't believe that she did. Both complainants give Roy Rossi as the example of a patron seemingly in the privileged position of being allowed by Tammy and Errol to drink on after the complainants asked for him to be put off tap.

It is clear from all the evidence that Mr Rossi has a particular disability - and I'm recalling here, too, Sergeant Compton's evidence in that respect - and Mr Rossi's disability is such that he can just about always apparently look as if he's drunk. His mannerism and his walking is such that to an outsider who didn't know him he would always look drunk, and that seems pretty clear on all the evidence. Mr Rossi, therefore, is rather a bad example - or rather, an unhelpful example - for the complainants to focus on as a specific incident or personality to whom they are referring in their generalised complaint.

Also, I do accept the evidence of Tammy Pearson. She does credibly explain the impression the complainants say they had of being overridden in relation to the exclusion of intoxicated persons. Firstly, she tells us about the incident relating to a patron called Sonny who, on her evidence, which I accept, is somewhat in the same category as Mr Rossi. He does have a disability, and does look drunk. And when she tells us that when Cliff Lockwood wanted him to be put off tap she explained that he's all right, that she knows him and Mr Lockwood doesn't, I accept that evidence. I accept it as being the prime incident to which Mr Lockwood was referring in his evidence as an example of what he was complaining about in this context, and I accept the explanation of it.

Secondly, though, there is Tammy Pearson's response to a question by myself. The question was: "Did you see Errol allow back in anybody who had been put off tap or put out?" And she answered: "Yes, a couple of times, until I put a stop to it." And I must say that having observed her in the witness box, if she decided to put a stop to anything it would be done efficiently, even with some officiousness, I think. And there's no action the Commission can take in relation to Tammy saying that Errol did something like that a couple of times, no action we can take in the complete absence of any specifics as to exactly what did occur in relation to whom and when, and exactly what Errol's subsequent behaviour was, and generally in what circumstances. Mrs Pearson didn't volunteer such detail and my judgment call was not to pursue it myself.

Mrs O'Brien did admit that there are some people she, to use her terminology, "looks after", people that she settles down in front of the TV when she can rather than excluding them from premises for being intoxicated, albeit she carefully added the caveat that she catches them before they become intoxicated! The broad picture I now have on the whole of the relevant evidence is that there was some basis for the impression the complainants have, that their judgments of intoxication on the part of patrons were being overridden, but I do not think the evidence in that regard in its totality warrants any action on the part of the Commission.

Lastly, in terms of the complaint of serving intoxicated people, we come to the allegations in relation to specific people. I suppose in that respect the nominee was in a slightly separate category because her behaviour can go direct to a consideration of the issue of fit and proper person to be a licensee. Apart from her, there was Roy Rossi, whom I've already mentioned, and clearly Roy presents a problem of assessment. Sergeant Compton agrees with there being such a difficulty in relation to Roy Rossi, although he does narrate the occasion where, knowing Roy as he does, he did believe Roy was intoxicated and had just been served with some takeaway beer, and on that occasion he engineered a return of Roy's money and issued a caution to Errol.

Given that a police officer had indicated to the licensee through her husband, as was the case then, that in effect the caution was to be the end of that matter, I am prepared to allow that a form of estoppel should now prevail in that situation and that it would not be just to reactivate the matter for the purpose of recording any breach. It would be something in the way of an ambush of the licensee in all the circumstances. I'm also influenced by Sgt Compton's evidence acknowledging the difficulties of assessment for anybody serving Rossi who did not know him fairly well, and certainly for anybody who didn't know him as well as was necessary in this particular case.

There is a "JC" mentioned in evidence as always being intoxicated on the premises. I cannot remember if JC was ever identified. I don't think anybody pursued the issue of JC and his identity, but that's exactly my point: we just don't have enough detail of JC. There was a Brian mentioned as always intoxicated, Brian who Linda Purcell said fell asleep in his chair one Friday, woke up and was sick. This was the same Brian who is so well known to Terry and who was thereafter barred during Linda's term there for misbehaviour. I will return to the issue of sleeping patrons, but at this point suffice it to say I simply cannot, on that evidence, make a finding that Brian on a particular occasion, which isn't identified further, was intoxicated and that was the reason he was sick.

And there's Brendan Willis, (and not, I note, Brendan Anderson as named in Cliff Lockwood's notes - exhibit 11). Now, in relation to Brendan Willis, this is a sequence of events that has caused me much concern in my consideration of the complaints. There seems little doubt that either Linda or Cliff did count a number of bourbons in Brendan's book-up entry that particular day, or alternatively were told the number, because in fact they got it right when one looks at the book, which I think is

exhibit 16. However, of course, that book-up entry cannot be any automatic indicator of intoxication as Cliff initially would have had us believe.

Firstly, I accept that each of those entries covers or spans a week from Tuesday to close of business Monday. Secondly, it can hardly be proof of what Brendan actually drank. It's simply evidence of what he had agreed to pay for and could be made to pay for. And Brendan in evidence, said he only had five or six bourbon and cokes that day. I suppose one might allow a natural tendency to minimise, but even then you would have evidence from Brendan suggesting that he might have had six or seven or possibly even eight.

When one looks at exhibit 16, doing one's best in the absence of any expert evidence, some entries are in biro, some in pencil, and there's obviously been different pressures, different persons who put some of those strokes in. In my view, and informing myself the best I can from this exhibit, there's a bunch of 13 entries that would seem to have gone in just at about the same time by the look of it. It's certainly from the same bar person. That could well have been in relation to that Sunday, although we cannot be sure, and it probably accords with Brendan's evidence. He was happy he had a day off. He was shouting. If there was a bunch of 13, several of those drinks at least probably went to his friends, so that when he actually says he had five or six that can be seen to be in accordance with the evidence. Also, whatever his intake was, even up to all 13 drinks, it was over an extensive period of time.

So the question is, was he intoxicated? The observations the complainants say they made of Brendan is very detailed - in fact, strongly detailed - and indicating a rather large degree of intoxication. Brendan was said to be falling about, slurring his words, all over himself, and Cliff Lockwood in fact said he was so bad and he was so intoxicated that had he been a policeman he would have taken him to a doctor before he took him to the cells. Well, of course, he was taken to a doctor, in a way. He was taken to the Borroloola clinic where Sister Dean saw him and formed an opinion she calls moderately intoxicated, but then she does explain her observations: he could walk, he could talk, he was not slurring his words.

I recall that John Lowbeitch said he saw Brendan about 7 that night and would describe him as a "little bit drunk", a little bit intoxicated. So we have Terry O'Brien saying Brendan would have been lightly intoxicated, John Lowbeitch saying he was a little bit intoxicated, Sylvia Dean saying he was moderately intoxicated, but acknowledging that she was taking into account what she had been told of his drinking by staff at the hotel, and on the evidence such staff would appear to have been Linda Purcell, the complainant herself. The question is how to relate all of that to sections 102 or 121 of the Act. How do I resolve the nursing sister's observation of Brendan as not slurring his words at 11 to the complainant's observations that he was very much slurring his words?

I think the answer, or a large part of the answer, can be gleaned from Cliff Lockwood's notes of that particular day, which was 14 November:

*Brendan had a good old day. Pissed as 10 men. Drinking all day, smoking dope.*

Cliff obviously believed that Brendan had been smoking dope all day. He did say in evidence he didn't see it but he had been told things and believed it was so. If it was so, it does rather contaminate the evidence of intoxication, and in that circumstance I could not ascribe all or any of Brendan's indicators to alcohol alone. If Brendan had been smoking dope on that day, as the complainant Lockwood believed, it does inject such an element of confusion into the mix that in the end I cannot feel a positive persuasion that he must have been so affected by liquor as to require his removal from the hotel in order to avoid a breach of section 121.

I think that it is not improper to say at this point that I believe that the licensee has probably had a rather narrow squeak in relation to Brendan, but she is certainly entitled to the benefit of my indecision and my lack of conviction as to just what his state had really been, and just what part alcohol had played in that condition as distinct from dope.

There were also allegations in relation to Errol being intoxicated. Now, on the evidence, in my view, Errol is entitled to the same benefit of the same sort of evidence as was given in relation to Terry O'Brien. The evidence was that Errol was not showing any outward indicators of intoxication,

that you would not know he was intoxicated unless you knew him, and the reason they knew he was intoxicated was that he gets angry. And as an indicator of Errol's intoxication, that was all the evidence there was.

It might be said at this point too, that Errol's behaviour after hours is not of concern to the Commission, unless leading to other consequences which do become relevant to our functions and powers. For instance, a domestic on the premises after closing time without anything further does not excite our regulatory attention. The situation would need to be such as leading to a query of the licensee's fitness and properness, and that is certainly not the case in relation to the evidence we have heard as to what appears to have been a "domestic" only.

So from there, we move to the allegations as to service out of hours, and here, in my view, the licensee cannot avoid a finding of a breach of both a condition of the licence and a provision of the Act, but I do say to the licensee that she should not become too alarmed at that until I have finished. I might say I'm not concerned with the allegations of the bar remaining open for a couple of minutes after midnight. I do accept the evidence in that regard on behalf of the licensee. In particular, I accept the very forthright evidence of Tammy Pearson that the bar clock was set deliberately fast to avoid any such accusations. As I say, I'm not concerned with that aspect of the complaint and in that aspect the complaint is not upheld.

The Commission's concern is with the takeaway situation, and it is in this context that we must unavoidably deal with Cliff Lockwood's notes which are in evidence, although he tells us somewhat reluctantly they were not constructed for the purpose of being evidence but only because, as he says, he found himself in an uncertain situation, whatever that may mean. I'll come back to the notes in a minute.

Mrs O'Brien tells us that takeaway beer was sold at times between 7 and 9 and that's because she had voluntarily reduced the takeaway cut-off time, as a general rule to 7, and as far as the general public was concerned she was concerned that 7 should be seen to be the end of takeaways. But for all that, there were occasions between 7 o'clock and 9 o'clock when in-house guests would be served and, of course, as everybody has mentioned in evidence, 9 o'clock was in fact the lawful cut-off time.

There elapsed, on the evidence, some considerable time before Cliff Lockwood and Linda Purcell learned that the legal cut-off time for takeaway was in fact 9 pm, and they undoubtedly built up an initial impression of after hours sales based on such 7 o'clock to 9 o'clock activity as did take place. However, there are in Cliff's notes detailed allegations of takeaway sales after 9 pm. I'm going to go to the notes at this point and simply go through them. I look at 15 November:

*Booze over the back fence to John Lowbeitch. One carton VB cans 8 am. In night patrol ute.*

Although fairly specific, it does not say who delivered the alleged carton of VB to John Lowbeitch at 8 am. It became quite obvious that Mr Lockwood has no individual memory at all of this event, that this item does not trigger any memory, because he said in evidence that he just didn't who it was. "If it had been Terry or Errol", he said, "I would've said so, so therefore it must have been Brendan." Mr Lockwood's lack of memory is a worry, and I really could not use that item against the licensee. Again Mr Lockwood's notes:

*16th of November. Two cartons of beer over the back fence to an unknown person in a yellow Gemini.*

In evidence he amplified that and said "that was after we had knocked off". Now, I'll come back to that because, of course, Mrs O'Brien has admitted that she was in the habit from time to time of allowing in-house guests to take delivery of takeaway out of hours for their fishing trips. I have no idea of whether the somebody in a yellow Gemini might have been going off fishing, but it has to be a possibility, and the admission by Mrs O'Brien in evidence would certainly explain several if not all of these allegations of after-hours take-away, except those in relation to John Lowbeitch. Speaking of which, on 19 November, Mr Lockwood noted the delivery of a box of Stollies over the side fence to Mr Lowbeitch at 10.30 pm. Mr Lockwood was asked by Counsel:

*Why have you got 10.30 pm in there? Why note the time?*

The answer was:

*I made a note of the time because of what I saw.*

If what he saw was that important to him, one would have expected he could tell us who it was that delivered the box of Stollies over the side fence to John Lowbeitch. In his affidavit, he suggests without directly saying so that it was Errol most of the time, but it's a very generalised statement. So once again, there is really no connection of that item to the management of the hotel. I'm also faced with John Lowbeitch's own impressive evidence that he doesn't know what a Stolly is, and he doesn't drink and he's never taken delivery of any booze, neither for himself or for anybody else.

I had the vague thought that his three so-called girlfriends, his lady friends, may well like Stollies, but as I say, I am faced with his very forthright evidence that this did not happen, and I accept Mr Lowbeitch as a witness of truth. I find that he did not personally take delivery of any box of Stollies. At this point I should mention that the licensee knows that her licence does not cover takeaway Stollies. She may only sell takeaway beer, so what we're looking at if this is true is a double breach, something that puts her in double jeopardy, which I find hard to believe that she would knowingly permit.

If we had not heard from John Lowbeitch I would have perhaps thought that it was something Errol may have done without the licensee's knowledge, but I do accept Mr Lowbeitch as a witness of truth. Now, I'm not going to make any finding as to how and why that entry came about. I do not know if it was constructed. I do not know if Cliff made some sort of honest mistake or whether he saw the ute and assumed it was John Lowbeitch's. Whatever the true situation was, I do not accept that Mr Lowbeitch personally took delivery of a box of Stollies.

Next, we have something being passed to a Suzuki but which was not grog, which certainly indicates prima facie that Mr Lockwood is doing his best to be fair to the licensee, but we should remember, I think, that by this time, according to Linda Purcell's evidence, the two complainants had decided to make a complaint to the Liquor Commission. She said they had made that decision about halfway through their tenure at the hotel. That should have coloured the notes of Mr Lockwood, but prima facie, it did not. Nothing changes in time or style. It does colour the way I approach the later items. For instance, in relation to the next entry, which is as late as 21 November:

*Saw three slabs go outside gate, near the guest accommodation.*

Now there is no time mentioned there. He had made a decision to complain to the Liquor Commission and he continues to record these incidents, yet there is not only no indication of who did it, or any recorded connection with the hotel management, but there is no time noted. He says in oral evidence that he would not have made the entry unless it was out of hours. I think it is significant that it was near the guest accommodation, and I am minded of Mrs O'Brien's evidence that yes, there was out of hours service to house guests, if only from time to time. If that particular event was the supply by the hotel, then I am prepared to find that it was part of Mrs O'Brien's pattern of, from time to time, supplying lodgers with takeaway beer, and of course I'll come to that admission in due course. It does represent a problem for the licensee in these proceedings.

We have then got Mrs O'Brien being woken up by Emery. She remembers that. She has given evidence that she refused to give him liquor. I accept that evidence. Mr Lockwood says he saw Emery put two VB cans in his car. Not cartons; cans. So I am asked to accept that Mrs O'Brien got woken up at 7.30 am by Emery, said in effect yes, certainly Emery, I'll get you some liquor out of hours, got up, went up to the hotel, opened up, and then produced just two individual cans. It's something I cannot accept. Cliff may well have seen that but I certainly could not accept that the cans were supplied by Mrs O'Brien at that time, in that manner.

Lastly, we have Doug Pluto, and it is accepted by counsel assisting that Doug Pluto will be taken to have been a house guest in relation to the particular supply.

Now, Mrs O'Brien's licence does not permit her to serve takeaway to guests outside of takeaway hours. A combination of her licence conditions and the Act is such that the only manner in which bona fide lodgers may continue to drink outside of hours is to consume on the premises. I accept that she had ed - either misinterpreted her situation in that regard or otherwise was totally unaware that such was the case. I accept that in this respect she was not figuratively thumbing her nose at the Commission by deliberately risking the imposition of 10 days actual suspension.

I shall move on from the supply of house guests though, to supply of cartons to the local security assistants. This too is unlawful. Nobody may be supplied with takeaway after takeaway hours, staff notwithstanding. I'll re-phrase that. Nobody may be supplied after hours in circumstances which constitutes a sale. Section 104(3)(g) does not assist the licensee in this situation. It provides that nobody may be on licensed premises unless they're open for the sale of liquor. There are exceptions to that: it doesn't apply to members of the licensee's family, an invitee, basically a guest of the licensee. Now, that's fine, but it still does not permit a sale of liquor on the premises at such times as they're not open for the sale of liquor.

There would be nothing to stop Mrs O'Brien having a private party amongst her own family or invited guests after hours, and supplying them with complimentary alcohol, but as soon as she supplies liquor, as counsel assisting submits, in a commercial context, in exchange for some benefit to come or already rendered, then that is a sale within the meaning of the Act, and there is nothing in section 104 which permits a sale outside of hours. And I have to say that it does concern me that this has been happening. I do think to some extent it erodes the good work Mrs O'Brien has done in voluntarily cutting back generally to 7 pm, in that come 12 midnight or sometime after 12 midnight, several nights a week, there would be several fresh cold cartons taken away out into the community. I think it does reduce the brownie points she may well see on the credit side of her ledger.

In any event, in my view, it is unlawful. It has been in breach of the Act. It is in fact a breach of section 115, which insists that she may only sell in accordance with the conditions of her licence. By supplying two staff after hours for a benefit already obtained, she was in fact selling within the meaning of the Act. And that's notwithstanding it may have been previously previously ordered or, I might say, notwithstanding it may even have been previously paid for in any or some circumstances, and I reiterate the example I fleetingly made yesterday: it would make nonsense of the licensing system if the hotel could simply keep trading all night because everybody in the bar had pre-ordered and/or pre-paid all the drinks they thought they would need through till dawn. And, in fact, there is Supreme Court authority - which I can't give chapter and verse for at the moment - exactly on point which says it will not avail a licensee that supply out of hours have been ordered and paid for beforehand. Supply must not take place outside of licensing hours. I do find that there has been a breach of section 115. I do find that there's been a breach of the condition which restricts sales to bona fide lodgers and on-premises consumption.

Before I ask Mr Loftus for his submissions as to what should follow, there are a couple of things I need to say. On the previous occasion, the 10 days closure which was then suspended was an order of the hearing panel at that time, and I think it irrelevant that such hearing panel is not the present hearing panel. Under the Liquor Act a hearing panel at a hearing is the Commission. It does not just represent the Commission, it is the Commission for that particular purpose. I believe that the suspension and its consequences become a matter for the Commission as a corporate body.

Sitting here today, I am the Commission. I believe that I can be properly seized of that previous order here today in that I now have to consider the consequences of this present breach and, obviously, the consideration of the previous order must be one of my considerations in so doing. It cannot be avoided, and as the Commission here today, Mr Loftus, I do propose to deal with it. I do propose to stand seized of it.

Mr Loftus: I think that's the proper approach.

Mr Withnall: All right. Secondly, before I ask for your submissions, Mr Loftus, I think it fair to let you know my present thinking. I accept that Mrs O'Brien did not deliberately do or permit the actions which have produced my finding her in breach. Consequently, after much consideration, I am of

the view that this breach should not trigger the service of any part of the previously ordered suspension which is still hanging over her. That will remain an un-notified 10 day suspension and will remain hanging over her. I of course record the new breach. That can have consequences for the future.

It goes on to her licensee's management CV, in effect. It becomes part of a pattern which, if there is any future accusation relating to fitness and properness, can become very significant, but further than that, I think there should be something in the nature of some penalty because, of course, her main submission last time was inexperience and that she needed to focus more on her responsibilities. That would still seem to be the case. My current thinking is that while these breaches should not attract any actual suspension I should extend the current sword that's hanging over her in relation to the possible 10 days; I should extend that to 30 March of next year.

She could have expected that sword to be taken down mid-November this year. That's some five months away. Subject to hearing from you, I would propose to increase it by about another five months and leave it hanging over her until the end of March 2001. That's my current thinking. I invite your submissions.

Mr Loftus: From what I've heard I'm not sure if you have made a formal finding of a breach of the Act.

Mr Withnall: I do make that finding.

Mr Loftus: Sir, do you wish to extend those facts covered by your finding of a breach?

Mr Withnall: In relation to?

Mr Loftus: The incidents of staff drinks at knock off time.

Mr Withnall: Well, yes, let me touch upon knock-off drinks. I mean, to be consistent, knock-off drinks are also unlawful. I'm aware the practice is widespread. I really don't think it would be fair on this licensee for me to single her out. I think we should deal with the matter as a matter of broader principle and she would be dealt with simply as one of all the licensees that future guidelines in that respect may affect.

Mr Loftus: Sir, I hear what you've said. I have no further submissions...

Mr Withnall: All right. Mr O'Loughlin, anything to add? Anything arising?

Mr O'loughlin: I accept the Commission's attitude as to sentence.

Mr Withnall: I haven't actually done that yet. I've indicated my thinking.

Mr O'loughlin: Well, bearing in mind that I'm merely counsel assisting and not a prosecutor, I was of the view that this matter should trigger the suspended sentence. Ten days would be too long and I had in my mind perhaps half that time, depending on whether or not the finding of intoxicated persons on premises was made out, but given that the breach is found on more of a technical nature, then that five day actual suspension should be reduced, in my view, but at some stage an actual penalty or strong message needs to be given to this licensee.

I wasn't present at the previous hearing but presumably there were extensive submissions that we didn't mean to, we did our best, we didn't know and we promise not to do it again, and the facts in this case seem to have produced a similar submission by my friend, but much of the evidence here came from her own mouth and she said that she didn't know, she didn't mean to...

Mr Withnall: As I say, I accept that.

Mr O'loughlin: But it's a matter of how many times she can say that before it's no longer a sufficient excuse to escape an actual penalty. I admit it's marginal but, in my view, there should be some actual suspension to ensure that she takes positive steps to understand the Act, to read her licence about the takeaway provision ... bona fide guests, consumption on premises. That's quite clear in her own licence. It's pinned up in her office and it's not really one that needs legal advice

as to whether or not I can sell beer to take away fishing at 8 am. It's something she should have known and she - I accept that they were mistaken but she should have done more to understand her own licence and to understand its Act.

Perhaps a one or two day actual suspension will ensure that she does sit down and read the Act and reads her own licence or perhaps get some legal advice so a lawyer can come in and give advice on every action she does and for staff in dealing with house guests, and prepare a folder of provisions - relevant provisions and what to do in the running of her hotel. Another point I wish to make is that it is not just specific deterrence for this particular licensee, there should be consideration of general deterrence and, firstly, the message given to this licensee, and secondly, the message given to the industry as a whole.

And if the Commission is of the view that no trigger of a suspended sentence should be made, then the Commission should take care in relating those reasons and publishing them because it may cause the industry to relax and think that if I do get a suspended sentence, I've been let off. Normally, a suspended sentence would be triggered and the message go out to the industry; the Commission should take care to explain why it's not triggered in this sense, in this case. But other than that, I accept that there are a number of factors that do go on this - to the licensee's favour.

Mr Withnall: The message to the industry will be, will it not, that Terry O'Brien got 10 days suspension for an extra four months? She's got another 10 days hanging over her head in that additional time.

Mr O'loughlin: If they were never triggered ... there is High Court authority that says a suspended sentence is an actual penalty, but for the industry, if they get the impression that they aren't likely to be triggered, then they may get that complacency.

Mr Withnall: I would suspect that Mrs O'Brien sitting here this morning is feeling the weight of it. I think it would be felt as a very real consequence of this hearing. She's got to bear this 10 day wait for yet another four and a half-odd months. In that time, of course, she can expect many inspections by way of the Commission's monitoring of the situation. So she knows she's got an extra four and a half-odd months in which some sort of monitoring will be taking place and she remains at risk of ten days plus.

Mr O'loughlin: If I may mention a point of law, my understanding of section 66 in a suspension of licence - my reading is that that can only be triggered if a direction is given to the licensee.

Mr Withnall: No, if you look at (b), Mr O'Loughlin, that's in the alternative because just before (c) they use the word "or". So (a), (b) and (c) are alternatives.

Mr O'loughlin: ... yes ...

MR WITHNALL: Yes. Mr O'Loughlin, I don't think anybody in the industry would see her as getting off scot-free. Even recording the breach ... I mean, it is starting to add up now because, really, if there's any further finding of a breach of the Act in the future, Mrs O'Brien can expect the Office of the Director to file a complaint relating to her fitness to be a licensee. So this extra breach could be very significant at some time in the future, although hopefully, of course, it will never arise. Mr Loftus, apropos something you mentioned just then - Cliff Lockwood does include the practice of supplying cartons to security staff after hours in his complaint. He does complain of it. And formally, I propose to uphold the complaint in that aspect.

All right. Well, I'll make that order. The breaches that I have referred to will be formally recorded against the licensee. In relation to those breaches, I'm satisfied that the contravention is of sufficient gravity to justify the suspension of the licence. The licence will be suspended for 10 days, however that suspension will not be notified for a period that commences with the expiry of the current suspended suspension and concludes on 31 March 2001. If, within that time, there are no further breaches of the Act or of the licence, or if, at the end of that time, there's no allegation outstanding, then the notification of the commencement of actual suspension will not thereafter be made.

Now, Mr Loftus, you did ask me to make a finding on the record that Sergeant Compton is a witness of truth. This arose out of the allegation by Linda Purcell that whenever the police came they all knew it - that there was a tip-off situation. You eventually coaxed her after some considerable effort into having to acknowledge that it's an unavoidable implication from what she was really alleging. What I do find odd about Ms Purcell's evidence in that regard is that she's only aware, she tells us, of the police visiting three or four times. And even Cliff Lockwood talks about half a dozen times in the month he was there.

Mr Loftus: Yes.

Mr Withnall: Interestingly, when she says that everybody always knew, he says that wasn't the case; he never knew, which is somewhat odd given that they were socially a unit and employment-wise they were also a unit. I accept Sergeant Compton's evidence that what are called big days certainly are Thursdays and Saturdays, and that the normal practice was to visit the hotel five, even six times a night on those nights. I accept that that happened most Thursdays and Saturdays and any other big nights in the whole time that Purcell and Lockwood were working at the hotel. That being the case, I simply cannot accept Linda Purcell's evidence in that regard.

It would not make sense. If the police are going to be down there a dozen times a weekend, what's the point of any system of tip-off? Whoever it may have been in terms of her allegation would be working full-time just getting the word down to the hotel a dozen times a weekend. I accept that there's no system of police tip-off. I accept Sergeant Compton as a witness of truth and, in fact, having regard to the evidence he's given overall, I found him a witness of refreshing candour.

Just two other things I might mention in passing. The formal proceeding is closed at this point. But, Mr Loftus, can I suggest to you it would be a good thing if you would consult with your client as to her reference to allowing people to stay in because they're to be looked after. The Act is quite clear and good intentions won't be sufficient to get around it. If anybody has reached the stage of intoxication, they must be excluded, and that's the situation until the Act is changed. Now, I accepted Mrs O'Brien's evidence that this happened before they reached intoxication. I'm simply sounding a bit of a warning, I suppose. It could be important for her in the future.

Mr Loftus: I will be doing that

Mr Withnall: Also, there is a difference between intoxication and drunkenness. They're not interchangeable, they're not synonymous. Intoxication really means just showing signs of losing control of any faculties, whether physical or mental, and that became a problem for me when Mrs O'Brien described Brendan as, I think, lightly intoxicated. I've accepted that for the purposes of section 121 he was not to be found intoxicated within the meaning of the Act on that particular day, but it's an aspect she might consider for the future. "Lightly", "moderately", "little bit" - as long as a person is intoxicated, the Act must be complied with. She will have to address it.

All right. If there's nothing further, the matter will stand concluded.

***(Concluded at 12.05 p.m. on 8th June 2000)***

John Withnall  
Presiding Member