

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Licensee:</b>	Trojanmede Pty Ltd
<b>Licence Number:</b>	80315200
<b>Proceedings:</b>	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i>
<b>Heard Before:</b>	Mr Richard O'Sullivan (Chairman) Mr Philip Timney (Legal Member) Mrs Jane Large
<b>Appearances</b>	Ms Jodi Truman, Counsel for Licensee, instructed by Mr Richard Henschke of Halfpennys Mr Lex Silvester, Counsel for the Director, instructed by Mr Joshua Ingrams of Solicitor for the NT
<b>Dates of Hearing</b>	26 to 29 September 2011 and 7 October 2011

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### Background

- 1) By memorandum dated 2 February 2011 Licensing Inspector Pippa Pech lodged a complaint pursuant to Section 48(2) of the *Liquor Act* ("the Act") with the Director of Licensing against Trojanmede Pty Ltd, the Licensee of the Beachfront Hotel ("the Hotel"). The complaint was the result of a letter dated 28 September 2010 received by the Director from twenty two residents of the neighbourhood in which the Hotel is located in respect of allegations of a recent escalation of disturbances emanating from the Hotel.
- 2) The complaint from the residents concerned the following issues:
  - Violent incidents perpetrated by intoxicated patrons leaving the Hotel.
  - Loud and often aggressive conduct of patrons leaving the Hotel in all directions and the disturbance affecting residents living nearby.
  - Damage to property by intoxicated patrons leaving the Hotel.
  - Patrons leaving the Hotel inebriated to such an extent that they can't walk properly.
  - Patrons leaving the Hotel with stubbies or cans in hand, mostly at closing times but also in broad daylight.
  - Closing times are 12.00midnight Sunday to Monday, and 2.00am Thursday to Saturday, but patrons can remain in the Hotel until thirty minutes after closing time and then leave. This means patrons leaving around one hour after closing time, resulting in the following problems:
    - Noise of people leaving the Hotel on foot and in cars, this includes revving of engines, hooting, yelling, swearing and often wheelies.
    - Noise from amplified music late at night.
    - Increased noise from patrons using the Beer Garden at the rear of the Hotel, since the introduction of the new smoking legislation, affecting nearby residents including swearing, bottles breaking or being thrown in bins, bass music, cheering, screaming and general drunken yelling.

- Noise from cars doing burnout and hooning
  - Noise from industrial air conditioners / generator on the side of the Happy Garden are of the Hotel.
  - Broken bottles, glasses, empty bottles and rubbish in the vicinity of the Hotel and beyond.
  - Broken bottles, glasses and rubbish left on the public cycle way on the foreshore.
  - The lack of security presence around the Hotel.
  - Failure of the Licensee to respond appropriately to requests from residents to turn the music down.
  - Issues associated with special events such as State of Origin nights including:
    - Threats of violence and issues of safety after the game has finished
    - The build up of cars and lack of access to public walk ways.
    - Glass broken in nearby driveways.
    - Patrons of the Hotel parking cars across private drive ways.
    - Drunks spilling over onto the cycle path with no regard for their own or others' safety.
- 3) By decision dated 24 March 2011 the Commission determined to conduct a Hearing into the complaint. Following a Directions Hearing held on 5 August 2011, the Hearing in respect of the complaints was convened from 26 September to 29 September 2011 and concluded on 7 October 2011.

## The Hearing

- 4) In his opening address, Mr Silvester initially informed the Commission that the complaint was brought pursuant to Section 68 of the Act with Licensing Inspector Pippa Pech as the complainant. He referred the Commission to folio 164 of the Hearing Brief in that regard. Mr Silvester was informed by the Commission that as the complaint was lodged prior to the amendment to the Act in July 2011; the complaint was actually laid under Section 48 of the Act as it stood prior to the amendment. Mr Silvester noted that the complaint was initiated following receipt by the Director of Licensing of a letter dated 7 October 2010 signed by twenty two individual residents living in the vicinity of the Beachfront Hotel.
- 5) Mr Silvester stated that the grant of a liquor licence and the consequent authority to sell liquor was a privilege and a liquor licence may be revoked or varied as readily as it may be granted. He noted that the Hotel was recognised as a longstanding hotel and entertainment venue located in a residential area. As such, the Licensee is under an obligation to operate the premises in a manner whereby the venue can peacefully co-exist with other members of the neighbourhood. Mr Silvester stated that there has been a long history of tension between the Licensee and many residents in the neighbourhood, culminating in community meetings held in 2008, in an attempt to resolve those issues. He added that whilst there had been some improvement in the operation of the premises since 2008 those community meetings had effectively failed to achieve a permanent resolution to the issues raised by concerned residents. Mr Silvester stated that it was not appropriate to criticise the residents for failing to continually lodge complaints against the Hotel. Those involved in the 2008 community meetings were given assurances by the Licensee at the time and those assurances had not been met.
- 6) Mr Silvester submitted that the manner in which the Hotel was currently operating was not consistent with a neighbourhood hotel and would be better placed in an entertainment

district, such as Mitchell Street. He added that the Hotel's bottle shop was in part responsible for the illegal drinking by itinerants and others in the coastal reserve opposite the Hotel, an area that has been declared a General Restricted Area in which the consumption of alcohol is prohibited. He stated that this fact raises the question as to whether a bottle shop is appropriate in a residential neighbourhood of this nature.

- 7) On behalf of the complaint residents, Mr Silvester identified nine categories of complaint being:
  - a) Violent incidents;
  - b) Property damage;
  - c) Intoxicated patrons leaving the Hotel;
  - d) Patrons leaving the Hotel carrying glasses, stubbies, containers;
  - e) Noise;
  - f) Rubbish including dangerous items like broken glass;
  - g) Inadequate security;
  - h) Elevated problems on special nights;
  - i) Incompetent and unresponsive management.
- 8) Mr Silvester noted that the complaints were of a serious nature and had been on-going for a number of years, at least since the 2008 community consultations. Whilst this particular complaint may be confined to a specified period he submitted that it is important for the Commission to consider whether anything has changed over the years as an indication as to how management of the Hotel has dealt with the issues and responded to the complaints of residents. He submitted that this was an unusual type of complaint and that there are no precedents for a broad community complaint of this nature.
- 9) Mr Silvester stated that whilst the community meetings had resulted in little improvement in the management of the Hotel, there had been some improvement in the matters of concern to the residents since the complaint had been lodged in October 2010.

## **Evidence presented on behalf of the director of licensing**

### **Evidence of Licensing Inspector Pippa Pech:**

- 10) Licensing Inspector Pippa Pech referred to her Statutory Declaration sworn 6 June 2011 and confirmed that she was the Inspector charged with investigation of the residents' complaints. She informed the Commission that she had conducted interviews with the residents of the area who were signatories to the letter of complaint and had conducted further investigations in respect of the substance of their complaints.
- 11) Under cross examination Inspector Pech stated that her investigations did not include consultation with Mr Sallis or any attempt to mediate a solution to the issues between the parties. She also confirmed that she had not conducted interviews with residents in the area other than those who lodged the complaint. She stated that she did not consider it part of her role to make inquiries of people living in the vicinity of the Hotel who had not lodged complaints. Inspector Pech also confirmed that she made no inquiries or investigations to confirm that the rubbish being left on or near neighbouring properties had actually come from the Hotel.

### **Evidence of Acting Commander James O'Brien, Northern Territory Police:**

- 12) Commander O'Brien referred to his Statutory Declaration sworn 6 September 2011 and the annexed reports relating to Police interventions in and around the area in which the Hotel is situated. He stated that the Beachfront is a targeted "hot spot" for Police due to the number of incidents that occur in and around the Hotel. He informed the Commission that the statistical reports attached to his Statutory Declaration recorded a total number of 325 incidents reported to Police during the period 19 February 2011 to 30 August 2011.
- 13) Commander O'Brien noted that the statistical reports indicated the following incidents / events during the reporting period:
  - Police conducted 72 licensed premises patrols consisting of walking through the premises and checking for licence compliance and issues surrounding alcohol fuelled violence or anti-social behaviour;
  - Seventeen reported Police generated "Reassurance Patrols" plus four "Tactical Response Group" patrols;
  - Reporting of twenty one General Disturbances;
  - Reporting of eighteen Disturbance Licensed Premises;
  - Reporting of five or six noise complaints.
- 14) Commander O'Brien also stated that the Police reports indicated incident counts for Friday and Saturday are far greater than for other days of the week. He noted also that a number of incidents reported on Sunday related to incidents in the early hours of Sunday morning and related to the trading hours of the Hotel.
- 15) Under cross examination Commander O'Brien conceded that not all incidents reported to Police were alcohol related and some related to issues with itinerants congregating on the foreshore across the road from the Hotel. He conceded that only one of the noise complaints related to the Hotel and that concerned an issue with a generator or compressor. Also, of the twenty one incidents of "Disturbance General" many concerned incidents on the foreshore reserve, only 4 concerned the Hotel and three of those were instigated by staff of the Hotel contacting Police. He agreed that there were sixteen incidents of "Disturbance Licensed Premises", not eighteen, and of those fifteen involved incidents where staff of the Hotel had contacted Police. Commander O'Brien also conceded that the incidents of attendance by the Night Patrol had little if anything to do with the operation of the Hotel but were more concerned with itinerants and the like congregating on the foreshore reserve.

### **Evidence of Ms Susan Cox:**

- 16) Ms Cox is the partner of Mr Spazzapan (another witness) and has resided at 1/332 Casuarina Drive for the past five years and in the Nightcliff neighbourhood for over twenty years. She was not a signatory to the complaint lodged with the Director, however she has seen the letter and agrees with its content and has witnessed many of the types of incidents referred to in the complaint, with the exception of the noise from the air conditioners.
- 17) Ms Cox confirmed that the main issue for her was the disturbance caused by drunks leaving the Hotel around closing time and travelling past her residence. She stated that those people were often loud, arguing, behaving in a drunken manner and sometimes becoming aggressive. She noted that patrons leaving the Hotel and moving past her premises vary in number on different nights of the week and are often carrying alcohol containers as they walk down the street. She has been required to close up her residence and turn the air conditioner on to block out the noise and disturbances. Ms Cox recounted an incident at her home in 2006 when her partner was stabbed following an altercation with patrons leaving the Hotel.

- 18) Ms Cox also informed the Commission of an incident on a State of Origin night when someone entered her property and stole two hand bags. She also noted that on special event nights there was an excess of traffic in the area due to greater than normal patron numbers attending the Hotel and this created more disturbance than usually occurs. She stated that she has observed aggressive people in the streets on these nights, including people taking off their shirts and shaping up to fight in the street. She added that she would not leave her home on those nights due to the aggressive behaviour of patrons of the Hotel.
- 19) Ms Cox stated that she has eventually become used to the noise from the Hotel but it is not pleasant. She is regularly disturbed by revving engines and cars leaving the Hotel area at speed. She noted that noise levels fluctuate during the week however her sleep is disturbed at least once per week. Ms Cox noted that the laneway next to her home is used by people travelling home from the Hotel and she has witnessed incidents of arguments and fights in that area. She is also concerned at the level of intoxication of patrons leaving the Hotel and is concerned that management of the Hotel would allow them to become so intoxicated.
- 20) Ms Cox stated that rubbish is thrown into her front yard on occasion and is regularly left on the verge outside her home or on the fence. She informed the Commission of an incident during which the garden on her verge was demolished by a patron of the Hotel who parked there.
- 21) Under cross examination Ms Cox admitted that she had not actually seen drunks leaving the Hotel but assumed that is where the people passing her home had come from. She agreed that itinerants using the foreshore for drinking sessions were also a problem in the area but not as significant a problem as the patrons of the Hotel. She conceded that she had not communicated her concerns to Mr Sallis and that it was not her normal practice to complain to Police. Ms Cox stated that she would like to see the trading hours of the Hotel reduced as a means of reducing consumption of alcohol by patrons and alleviating the issues that arise in the neighbourhood.

#### **Evidence of Mrs Dee Sarev:**

- 22) Mrs Sarev has resided at 352 Casuarina Drive, located approximately 100 metres from the Hotel, for the past thirty one years. Mrs Sarev prepared a Witness Statement dated 7 September 2011 for the purposes of the Hearing. She has concerns regarding the state of intoxication of patrons leaving the Hotel and has witnessed them zigzagging down the road and footpath past her home, shouting and acting in an aggressive manner. Mrs Sarev stated that she witnesses this type of behaviour at least once a week, mainly on Fridays and Saturdays.
- 23) Mrs Sarev described the persons causing disturbances in the neighbourhood as predominantly Caucasians in their 20's and 30's who travel past her house singing and yelling at each other, often in an aggressive manner, with the disturbances escalating in accordance with their level of intoxication. She stated that she was awoken from sleep once or twice a week and this was not acceptable in a residential area. She said that the problems were not so bad early in the week but Thursday nights and the weekend were the worst.
- 24) Ms Sarev stated that the issues were worse on State of Origin nights with patrons of the Hotel parking on either side of her driveway and on her verge and damaging the sprinklers. She added that vehicles are regularly left parked in the street overnight. Ms Sarev also noted that patrons regularly drop cans and bottles in the gutter or on the verge outside her residence and that she regularly sees people walking past with open containers of alcohol.
- 25) Ms Sarev stated that itinerants congregating on the foreshore opposite the Hotel and her residence were also a problem with aggressive behaviour, fighting, fornicating and littering the area. She noted that these people are often quite aggressive.
- 26) Under cross examination Ms Sarev agreed that the Hotel management had paid for the replacement of her security lights that she suspected were damaged by patrons of the Hotel.

She also agreed that she had not complained directly to the Hotel management about noise issues, rubbish or the issues associated with the State of Origin nights, nor has she seen a copy of the Hotel's Environmental Management Plan ("EMP"). Ms Sarev stated that she had not contacted the Hotel after receiving a letter advising of the engagement of a community liaison employee and instead lodged a number of "Local Resident's Reports" with Inspector Pech. She has however contacted the Police on a number of occasions.

#### **Evidence of Mr Markus Spazzapan:**

- 27) Mr Spazzapan has resided at 1/332 Casuarina Drive for the past five years and his residence is approximately eighty metres from the Hotel. He is a signatory to the letter of complaint that gave rise to this Hearing. Mr Spazzapan stated that about four years ago he was assaulted in a home invasion perpetrated by patrons of the Hotel. He states that a further home invasion occurred about a year after the first event with the perpetrators being a group of men who had left the Beachfront. He noted that after the assault the assailants went back to a vehicle parked outside the Hotel.
- 28) Mr Spazzapan stated that he uses the Hotel on occasion and he believes it has a right to exist and do business. He added that he had complained to the Hotel management with no success and that Police are reluctant to deal with noise complaints.

#### **Evidence of Ms Heather Moorcroft:**

- 29) Ms Moorcroft has resided at 65 Sergison Circuit for twenty one years. Her residence is approximately twenty metres from the Hotel. She participated in the community meetings held in respect of the Hotel in 2008. Ms Moorcroft is a signatory to the letter of complaint lodged with the Director on 7 October 2010.
- 30) Ms Truman referred Ms Moorcroft to an annexure to her Statutory Declaration in which she referred to a conversation she had with Mr Sallis on 15 July 2010 during which Mr Sallis expressed his disappointment that the residents had not spoken to him directly prior to lodging the complaint with the Director. She said that she advised Mr Sallis that the issues had not been resolved by the 2008 community meetings and she doubted that further meetings would result in a reduction of the Hotel's operating hours, which was what she wanted.
- 31) Ms Moorcroft stated that there had been some improvement since the 2008 community meetings including implementation of some of the matters raised in the EMP, such as locking the rear gate, which had provided some relief to the residents of Sergison Circuit. She did not agree that all aspects of the EMP were being implemented by management of the Hotel. She added that the disposal of bottles was still occurring between 11.00pm and 2.00am regularly enough to convince her that the Hotel was not complying with that aspect of the EMP. She noted that she had complained about a beer delivery at 4.45 am but had been told by Mr Sallis that the disturbance must have been caused by a gas delivery to the Happy Gardens as he never had beer deliveries at the that time.
- 32) Ms Moorcroft stated that she had been subjected to disturbances from bad language that definitely came from patrons of the Hotel. She has witnessed numerous incidents of drunken patrons leaving the Hotel and moving along Sergison Circuit past her residence. She stated that she is woken at least once or twice a week following which she has difficulty getting back to sleep. The worst nights are the late trading nights when the noise sometimes continues to 2.45am and the problems are escalating on Thursday nights. On State of Origin nights the problems increase with noise continuing until 3.00am. She noted that when the rear gate at the Hotel was locked the problem moved to Casuarina Drive.
- 33) Ms Moorcroft has made videos of incidents near her premises involving the Hotel and these were viewed by the Commission.
- 34) Under cross examination Ms Moorcroft conceded that whilst there had been issues with noise emanating from rubbish disposal these had reduced since the 2008 community

meetings. She added that there were still issues around noise created by stock deliveries and these were not covered in the EMP. She agreed that Mr Sallis had done all he could be expected to do in locking the rear gate to prevent patrons exiting the Hotel via Sergison Circuit. Ms Moorcroft agreed that she had not taken up the offer to contact Mr Sallis directly in respect of her concerns with the Hotel.

#### **Evidence of Mr Robert Howard:**

- 35) Mr Howard has lived at 330 Casuarina Drive for the past four years and submitted a witness statement dated 21 September 2011. He stated that one of his major concerns was patrons leaving the Hotel in a drunken state, as he has witnessed over the past four years, including having glasses thrown at him and his dog. He has observed drunks on his property and broken bottles on the footpath. He noted that the Hotel was aware of this problem as a yardman cleans up the footpaths occasionally.
- 36) Mr Howard stated that he has also witnessed numerous incidents of hooning, including one incident where a person doing a burn out crashed into the barrier fence near his residence. He said he was regularly disturbed by roaring engines around 2.00 am and often patrons of the Hotel parked across his driveway. He noted that the laneway next to his premises is very busy on the weekends with patrons travelling to and from the Hotel.
- 37) Mr Howard stated that he was involved in the incident in which Mr Spazzapan was attacked as he went to assist and was assaulted himself. He described the incident as extremely dangerous and frightening. He stated that he had contacted Police to complain on occasion but by the time police arrive the troublemakers have often moved on.
- 38) Under cross examination Mr Howard stated that he had tried to phone the Hotel after he had been provided with a contact number but there was no answer and no opportunity to leave a message. He conceded that he had not see or read the Hotel's EMP.

#### **Evidence of Mr Robert Curry:**

- 39) Mr Curry has resided at 65 Sergison Circuit for twenty one years with his wife Heather Moorcroft, also a complainant. Their residence is approximately twenty metres from the Hotel. Mr Curry participated in the community meeting in 2008 and is a signatory to the complaint dated 7 October 2010. The substance of Mr Curry's complaint is contained in a Statutory Declaration sworn 30 May 2011.
- 40) Mr Curry stated that there had been numerous brawls and violent incidents in Sergison Circuit prior to the rear gate from the Hotel being locked. The situation has improved since the gate has been locked however he can now hear disturbances coming from Casuarina Drive. He said that he was often disturbed by angry and excited patrons leaving the Hotel as well as nasty swearing. He has often heard punches being thrown and whilst he cannot say for certain that these people are intoxicated he strongly suspects that is the case. His main issue is noise disturbances from patrons leaving the Hotel between 2.00am and 3.00am and waking him up, sometimes the patrons are just boisterous and sometimes violent and aggressive.
- 41) Mr Curry stated that noise from rubbish trucks and rubbish removal was less of an issue than it was in the past and the publican has responded to what was a major issue. He noted that he often sees patrons of the Hotel in Sergison Circuit with bottles and cans of alcohol and sometimes glasses. He added that he was disturbed by noise form the rear area of the premises since the revamp of the premises to accommodate the revised smoking laws and that burnouts were a regular occurrence in the carpark up to 2008.
- 42) Under cross examination Mr Curry agreed there had been improvements in the management of the Hotel and disturbances since the 2008 community meetings however his main issue was being awoken at night by noise from the premises and patrons leaving. He stated that he had not complained directly to Mr Sallis when invited to do so as he did not expect anything to be done about the trading hours due to the self interests of the Licensee.

**Evidence of Ms Patrice Gill:**

- 43) Ms Gill has resided at 63 Sergison Circuit for the past thirty years. Her residence is located on the block next door to the Hotel and her balcony overlooks the carpark. Ms Gill is a signatory to the letter of complaint lodged with the Director on 7 October 2010. She has taken recordings of noise disturbances and photographs of issues with the Hotel that are of concern to her. The photographs and recordings were tendered into evidence at the Hearing.
- 44) Ms Gill stated that the only components of the EMP that have been implemented were the erection of signage asking patrons to note they were in a residential area and the locking of the rear gate. In respect of disturbances from waste removal, she said bags of rubbish were being dragged out to the skip bin located near her boundary fence creating unreasonable noise. She added that bags are taken out of the premises up to 8.00pm and 9.00pm and thrown into the unlocked skip bin. She had also been disturbed recently by a beer delivery at 7.45am with pallets removed from a truck by a fork lift. She acknowledged that in recent times the rubbish truck did not come to the Hotel prior to 8.00am.
- 45) Ms Gill stated that hooning was also an issue and that her husband no longer wishes to stay in their home due to the noise disturbances. She noted that noise from patrons using the beer garden sometimes commences in the mid afternoon and continues until 2.00am and is worse on pay days. Ms Gill stated that she complained to the Hotel management about the "booze bus" that visits the premises and parks next to her boundary fence, creating disturbances including bad language and yelling from drunken patrons exiting the bus to enter the Hotel. She also noted that she is regularly disturbed by violent and aggressive patrons leaving the Hotel.
- 46) Ms Gill stated that she does not complain to the Hotel every time she is disturbed by noise as she did not expect anything positive to result. She noted also that staff of the Hotel sometimes clean up rubbish from Sergison Circuit, including the morning Ms Gill gave her evidence before the Commission.
- 47) Under cross examination Ms Gill confirmed that she had attended both community meetings in 2008. She stated that she was not satisfied with the responses from the Hotel management to the issues that were raised. She agreed that she had Mr Sallis's contact details after the meetings but did not call him directly. She added that she was also advised at one of the community meetings to make a note of any issues that arose with the Hotel and report that to the Police or Licensing, which was the course she adopted. She noted that she had contacted the Hotel twice to complain, on 3 December 2010 and 18 December 2010.
- 48) In response to a question from Ms Truman, Ms Gill agreed that she had contacted the Hotel on 30 July 2009 regarding a noise complaint and had left her details. She stated that Mr Russell Temple had contacted her in response to her complaint and she was satisfied with the way in which her complaint was dealt with. In response to further questions from Ms Truman, Ms Gill stated she could not recall making phone calls to the Hotel in December 2009 or asking to speak directly to Mr Temple.
- 49) Ms Gill conceded that she had returned to Darwin from holidays in mid-2011 and that she had contacted the Hotel on 15 July 2011 at 2.0 am to complain about noise resonating from the venue from 12.20am onwards. She confirmed that she did not ask to speak to the manager as she was only concerned with having the noise reduced so she could get back to bed. Folio 81 of the Witness Statements Brief is Ms Gill's "Local Resident's Report" in respect of that complaint.
- 50) Ms Gill agreed that the closure of the rear gate to the premises has been reasonably addressed except for people now jumping the rear fence. She confirmed that she did not contact the operators of the Party Bus to complain about noise generated by its patrons.

### **Evidence of Ms Megan Brown:**

- 51) Ms Brown has lived at 54 Sergison Circuit since 1992. Her residence is located 100 metres from the Hotel. She attended the first community meeting in 2008 and is a signatory to the complaint letter dated 7 October 2010 lodged with the Director. She stated that the majority of her issues with the Hotel arose on weekends however disturbances sometimes occurred on Thursdays and Mondays. She has a partially obscured view of the rear carpark of the Hotel from her balcony.
- 52) Ms Brown stated that she has been affected by vehicles doing “donuts” in the carpark, people leaving the premises revving their engines and she can also hear burnouts in Casuarina drive. She also noted that she was concerned about drunks leaving the premises with drinks in hand, inebriated to the point they were sometimes falling down. Ms Brown’s employment requires her to work outside normal hours and she often finds it difficult to sleep due to noise emanating from the Hotel. She noted that disturbances over the past six months had been less frequent than previously when she was disturbed two to three times per week.
- 53) Ms Brown stated that cans and bottles are regularly dumped in Sergison Circuit near her residence, up to two to three times per week and more often in the past. Ms Brown advised the Commission that she had tried to phone the Hotel management several times in 2009 after being provided with contact numbers. She stated that her calls and messages had been unanswered so she now contacts Police instead. She confirmed that she had a meeting at her home with the Community Relations Officer engaged by the Hotel that lasted for 1 ½ hours and was of a positive nature. Ms Brown stated that during the meeting she raised her main issues of concern being rubbish, incidents of violence and shouting in the carpark, loud music after midnight and hooning in the carpark and local streets.
- 54) Ms Brown stated that she had observed a number of violent incidents involving patrons in the carpark and had regularly seen patrons climbing over the rear fence. She also recalled an incident in May 2011 when she was near the Hotel bottle shop and observed patrons leaving the premises through the rear gate with open containers of alcohol.
- 55) Under cross examination Ms Brown agreed that there had been some improvement since her meeting with the Community Relations Officer. She noted that there was less rubbish left in her street, the carpark noise had reduced as had disturbances from fighting and aggressive behaviour by patrons. Similarly, the incidents of hooning had reduced by about half since the meeting in October 2010 as had the incidents of patrons leaving the premises with open containers of alcohol. Ms Brown also noted that disturbances from loud music had also reduced in recent months.

### **Conclusion of Evidence on behalf of the Director:**

- 56) At this point Mr Silvester informed the Commission that he did not intend to call any further evidence from residents however he did rely on the Statutory Declarations and witness statements of residents who were not called on to give oral evidence. Mr Truman stated that her client was not accepting of all the evidence contained in the Statutory Declarations of the residents and reserved her position in that regard.
- 57) Mr Silvester then tendered a Statutory Declaration sworn by Inspector Shane McCorkell on 21 September 2011 in respect of inspections conducted at the Hotel during the most recent State of Origin night. Mr Silvester then tendered a further affidavit sworn by Inspector McCorkell concerning the Hotel’s “Complaints & Actions Register”. Ms Truman did not oppose the tender of the affidavits so far as they relate to factual matters. She did however object to the acceptance of Inspector McCorkell’s commentary on the events to which he deposed.

## Evidence presented on behalf of the licensee

### Evidence of Mr Milos Kovic:

- 58) Mr Kovic was previously employed at the Beachfront Hotel as the Security Manager. He informed the Commission that has been engaged in the security industry for twenty six years, including nine years in the Northern Territory.
- 59) Mr Kovic was shown a copy of the 2008 EMP for the Hotel and confirmed that he had been employed to implement that EMP and, subsequently the 2010 version of the EMP. In respect of waste removal from the premises, he confirmed that procedures had been changed in accordance with the terms of the EMP. The skip bin is locked at 9.00pm each night by security personnel so that no rubbish can be placed in the bin after that time. Previously bags of rubbish were taken out and placed near the skip bin after 9.00pm but now no rubbish is taken from the premises to the skip bin between 9.00pm and 8.00am the next morning as a measure aimed at addressing the residents' concerns.
- 60) Mr Kovic stated that patrons are not permitted to leave the premises with open containers of alcohol as this would amount to a breach of the conditions of licence. He added that a possible cause of the alcohol related rubbish being dropped in the neighbourhood is that patrons often arrive at the Hotel with alcohol in hand and dispose of the container prior to entering the premises. He confirmed that crowd controllers at the Hotel are aware that patrons are not permitted to leave the premises with open containers of alcohol however some patrons do sneak alcohol past the security guards. He noted that crowd controllers do not have the power to search patrons they suspect are concealing alcohol.
- 61) Mr Kovic acknowledged that he has seen patrons climbing over the rear fence of the Hotel to gain entry. He stated that patrons caught doing that were banned from the premises for up to three months, or for shorter periods depending on the circumstances. Mr Kovic also stated that he had witnessed patrons hooning and doing burnouts in the carpark of the Hotel and that both he and the security staff had called Police when this occurred. Those incidents were also recorded in the security incident register. Mr Kovic recalled an incident where the driver of a Nissan Skyline had been reported to Police on three occasions for hooning. The patron was spoken to by security staff and subsequently banned from the premises for three months. He stated that another long term patron had been banned for three months for honking his horn repeatedly and abusing security staff.
- 62) Mr Kovic stated that security staff remained in the carpark area until 2.30am on late trading nights. He noted that most patrons were co-operative in keeping quiet when exiting and that two crowd controllers were stationed at the entrance to the Hotel until all patrons have left. Mr Kovic also noted that crowd controllers have no option other than to call Police to control the situation if patrons who have left the premises decide to make a nuisance of themselves once out on the streets.
- 63) Mr Kovic was shown a document entitled "Beachfront Hotel Management Checklist" (Exhibit 20) and agreed that document was used by security staff as a record of when various security tasks were carried out. He noted that the Beachfront was the only venue at which he has worked where security checks are done outside the boundary of the venue, including across the road where itinerants often congregate.
- 64) Under cross examination Mr Kovic stated that he was not provided with an operational manual when he commenced working at the Hotel however he was directed to the Management Checklist and the EMP. He stated that he went through those documents with the Nominee, Mr Guy Dunne, and instructed the Hotel's security guards on the requirements of both documents.
- 65) Mr Kovic confirmed that security staff remain on duty until the crowd of patrons disperses and that the "intoxication runs" identified on the Checklist cover the whole of the premises.

He stated that security staff are also called to the bottle shop when incidents, such as drunks trying to purchase alcohol, occur in that area.

- 66) At this point Mr Kovic was excused from further cross examination due to him needing to catch a flight interstate. Mr Silvester noted that he had not completed his cross examination of Mr Kovic and reserved his right to do so later in the Hearing if required.

### **Evidence of Mr Doug Sallis:**

- 67) Mr Sallis advised that he is the Managing Director of Trojanmede Pty Ltd, the corporate Licensee for the Beachfront Hotel and also for the Humpty Doo Tavern. He stated that he has worked in approximately fifteen hotels in both South Australia and the Northern Territory. He purchased the lease for the Beachfront Hotel in January 2001 at which time he described the place as a pretty shabby affair with a beer garden and a bottle shop catering mainly to an itinerant clientele. In his opinion the Hotel was not meeting community needs at the time he took over management of the premises.
- 68) Mr Sallis stated that after taking over the Hotel he had the premises cleaned throughout and organised improvements to the Beer Garden, the Trophy Room, the Cue Bar and the Gaming Room. New furniture was purchased and improvements were made to the landscaping. A commercial kitchen was installed and the premises now offered a full menu for patrons with dinner available each evening and lunch being offered from 10.00am to 3.00pm daily. A code of dress standards for patrons was also implemented and enforced.
- 69) Mr Sallis stated that he had also organised the construction of the drive through bottle shop and improved the range of wine and premium beers available for takeaway purchase. He stated that he had made the decision to remove fortified wines and many of the cask wine products from stock and raised the quality and increased the prices of remaining wine products. He noted that these measures had resulted in a massive change in sales patterns and the sale of cask wine and fortified products had subsequently fallen by 75%. He added that the bottle shop was now a successful component of the business of the Hotel and had won awards in the past.
- 70) Mr Sallis informed the Commission that bottle shop staff adhered to a policy of attempting to identify patrons who were likely to breach the two kilometre law if sold takeaway alcohol and those people were refused service. He stated that this policy had resulted in a number of altercations with some patrons, including abuse of staff and physical confrontation by patrons who were refused service. Mr Sallis noted it is difficult to refuse service to a person who is sober and over eighteen years of age even if staff suspect that takeaway alcohol will be consumed on the foreshore in breach of the restricted status of that area.
- 71) Mr Sallis stated that the renovations to the Hotel had cost between \$3.5 and \$4 million and were aimed at their preferred clientele, namely those who wished to attend an alternative venue to those available in Mitchell Street and patrons who did not wish to travel to the CBD for their entertainment.
- 72) In terms of the operating hours of the premises, Mr Sallis stated that trading hours were from 10.00am to midnight on Sundays and from 10.00am to 2.00pm from Thursday to Saturday nights and that there had been no changes to the trading hours under his management and that the Cue Room had been licensed to trade until 2.00am all along.
- 73) Mr Sallis was referred to the minutes of the community meeting held in 2008 and agreed the minutes were a fair reflection of the discussions that took place at the time. He stated that he had regularly discussed concerns with residents in the neighbourhood. He agreed that the community meetings had taken place as a result of a number of complaints by residents to local MLA Ms Jane Aagard. He noted that despite a mail out to 200 residents, only eleven had attended the community meeting in July 2008 and six attended the meeting on 18 September 2008. Mr Sallis confirmed that the EMP for the Hotel was prepared following the July 2008 meeting in an attempt to address the concerns expressed by local residents. He was referred to an email from Ms Aagard's electoral office (Exhibit 23) commending the EMP

and ensuring Mr Sallis that residents would receive a copy. Mr Sallis added that since the September 2008 meeting he had no further contact from Ms Aagard and no new date had ever been set for any follow up meetings.

- 74) Mr Sallis noted that the Hotel employed between 55 to 65 staff and issues between 240 and 250 group certificates for taxation purposes annually, due in part to high staff turnover. He noted that since the implementation of the EMP significant changes had been made to rubbish disposal procedures to minimise the noise affecting nearby residents and agreed that this was a legitimate concern to those living near the Hotel. He conceded that sometimes staff did not comply with the procedures and the systems in place and that they were regularly reviewed. Mr Sallis stated that noise from delivery vehicles was a relatively new issue and that he had requested that no deliveries be made prior to 8.00am, although this created problems for some of his suppliers who commenced deliveries at 7.00am. The Commission was referred to Exhibit 24, being confirmation from suppliers that deliveries would not occur prior to 7.00am.
- 75) Mr Sallis noted that the licence is subject to a noise condition requiring the Licensee to take reasonable measures necessary to ensure that noise from the Trophy Room and Beer Garden after midnight does not cause undue disturbance or discomfort to neighbourhood residents. He stated that staff had started taking noise level recordings approximately one year ago and these were recorded on the Beachfront Hotel Management Checklist at 8.00pm, 10.00pm and midnight.
- 76) Mr Sallis advised that hooning and burnouts were of concern to the management of the Hotel and were covered in the EMP with staff being required to report such incidents to Police and the patrons engaged in those activities being barred for a period of time. Mr Sallis conceded that it is extremely difficult for staff of the Hotel to control the behaviour of patrons once they leave the licensed premises. Mr Sallis stated that the carpark is not part of the licensed premises and that he does not hold a lease over that area. He noted that this arrangement was historical in nature and reflected the fact that the property was previously leased under three separate tenancies.
- 77) Ms Sallis stated that he had tried to address some of the residents' concerns by locking the rear gate to the premises however some patrons still climb over the fence and, on occasion, had removed the locks with bolt cutters or propped items against the fence to allow access. He added that security staff are required to report patrons climbing over the back fence and patrons caught in the act are banned.
- 78) Mr Sallis noted clause 2(c) of the current EMP which refers to the maintenance of the footpath along the rear of the Hotel in Sergison Circuit and confirmed that his staff carry out this duty. He stated that the Licensee is not responsible for this area and much of the rubbish dropped in the streets around the neighbourhood is not from the Hotel itself. He added that this requirement in the EMP indicates the responsible attitude of the Hotel management. Mr Sallis noted that management of the Hotel had also written to the Darwin City Council requesting that the street lighting in Sergison Circuit be improved due to the high level of foot traffic by patrons of the Hotel.
- 79) Mr Sallis stated that littering in the streets surrounding the Hotel is not really his problem but he realises the blame will be sheeted home to the Hotel even if the littering is not associated with the Hotel and its patrons. Mr Sallis was referred to a document (Exhibit 25) which is a list of the type of alcohol containers reported by residents as being left in the neighbourhood. He noted that many of the products identified in the list were not in fact sold by the Hotel for on premise consumption with the result they could not have been left in the street by patrons who had removed them from the Hotel.
- 80) Mr Sallis also noted that, as required by the EMP, he had arranged for the erection of signage requesting that patrons consider the residents in relation to noise when leaving the Hotel and that the signage had been approved by LR&AS. He advised that the staff training required by clause 4 of the EMP had also been conducted. Mr Sallis also referred to clause 5 of the EMP and the provisions that relate to itinerants utilising the foreshore for illegal

drinking. He confirmed that this is a particularly difficult issue for staff and involved the risk of complaints of discrimination. However all incidents observed of illegal activity were reported to Police. He confirmed that he has no intention to operate a venue that is dependent on the sale of alcohol to itinerants. Mr Sallis conceded that some of the alcohol consumed in the restricted foreshore area came from the Hotel bottle shop but noted that it was impossible for his staff to stop people breaking the law once they had made the purchase.

- 81) In respect of the security arrangements for the Hotel, Mr Sallis noted clause 6 of the EMP and advised that it includes specific and detailed instructions for security staff. He noted had always engaged private security firms to perform this function and the standard of service delivered was variable, depending on the individual staff engaged, and that he had been required to change security firms in the past due to poor performance. Mr Sallis stated that he treats the EMP seriously and that staff have lost their jobs for non-adherence to the requirements set out in the EMP.
- 82) Mr Sallis stated that following the 2008 community meetings he had provided his personal contact details, including his mobile number, to residents who had attended and asked that complaints be referred to him directly. In response to a question from Ms Truman, Mr Sallis stated that he did not recall receiving any phone calls from Ms Megan Brown and he cannot explain her assertion that she phoned his mobile number of four separate occasions and left messages but received no reply.
- 83) In respect of the State of Origin nights, Mr Sallis confirmed this event has been conducted for the past 6 years and was popular with patrons, including many residents of the neighbourhood. He referred the Commission to an email from the Deputy Director of Licensing dated 7 July 2005 (Exhibit 27) complimenting him on the conduct and control of the event. Mr Sallis also noted the Statutory Declaration of Inspector McCorkell (Exhibit 19) in respect of his observations of the 2011 State of Origin Event and noted there were no significant issues of concern noted and no complaints of breaches of licence conditions. He added that residents were notified in writing in advance of the event, including notification of the traffic management plan for the event and, for the last two to three years, residents have been offered free tickets to attend the event (Exhibit 17).
- 84) In respect of the allegations of numerous people leaving the Hotel with open containers of alcohol, Mr Sallis denied this is a regular occurrence but conceded that some patrons do hide alcohol from staff when exiting the premises. He added that other plausible explanations to the residents' observations of people walking the streets with alcohol were people leaving home on foot or in vehicles and bringing alcohol with them to the Hotel or people wandering up from drinking areas and parties on the foreshore.
- 85) Mr Sallis was shown a copy of an email containing the Duty Manager's report for 29 July 2009 which refers to a noise complaint from Ms Patrice Gill (Exhibit 28). Mr Sallis stated that Mr Temple contact Ms Gill the next day to discuss the complaint and achieved a satisfactory outcome. Mr Sallis was also referred to Exhibit 29, being an email from Mr Temple to various staff members of the Hotel advising that he had tried to contact Ms Gill twice by phone without success to follow up on her complaint. Mr Sallis was also referred to Exhibit 30, being documents prepared by Hotel staff in respect of a further noise complaint lodged by Ms Gill on 16 July 2011. Mr Sallis stated that those exhibits demonstrated that the management of the Hotel did treat residents' complaints seriously and took appropriate action when required.
- 86) Mr Sallis also noted that several of the complainants had referred to noise from a generator on the Hotel carpark area. He stated the Power and Water Corporation (PWC) had installed a back up generator in the carpark whilst they were carrying out general repairs in the neighbourhood and neighbours had incorrectly assumed that the noise was emanating from the Hotel's air conditioner. Mr Sallis noted that PWC confirmed their responsibility for the generator and the noise issues in a letter dated 28 May 2011 that was delivered to residents (Exhibit 31).

- 87) In respect of the residents' complaints generally, Mr Sallis stated that he was disappointed with the fact Inspectors appeared to have been inviting residents to join the cause and yet did not contact him directly about the concerns raised by the residents. He noted that he had appointed a Community Relations Officer, Ms Deb Sharpe, to deal specifically with residents' issues, and yet neither Inspector Pech nor LR&AS staff had not contacted her at any stage during the process of bringing the complaint. The Commission was referred to Exhibit 32, being a map showing the residents that Ms Sharpe had been in contact with and Exhibit 33, a list itemising issues raised by residents during Mr Sharpe's meetings as evidence that the Licensee was treating the residents' complaints seriously.
- 88) Mr Sallis stated that several amendments had been made to the EMP since the 2008 original version including amendments to the following clauses:
- Clause 1(c): rubbish was no longer transferred from the Hotel, to the skip bin after 9.00pm;
  - Clause 1(e): Sound levels are now taken at two hourly intervals and that new procedure is reflected in the Management Checklist;
  - Clause 2(e): improvement to the carpark lighting at the Licensee's expense;
  - Clause 3(d): signage installed in the carpark advising that the area is under CCTV surveillance;
  - Clause 6(c): A new measure requiring security presence in the carpark on Thursday through to Sunday nights until all patrons have left the premises;
  - Clause 6(h): New measure banning patrons who engage in anti-social or poor behaviour;
  - Clause 7(a) A new measure incorporating the nightly Management Checklist; and
  - Clause 7(b): The establishment and maintenance of a complaints register (Exhibit 34).
- 89) Mr Sallis was referred to Exhibit 36 being the results of a petition in support of the operations of the Hotel. Responses from some eighty three residents of the neighbourhood and sixty one non-locals were collected by the Licensee in support of the operation and management of the Hotel. Exhibits 37 and 38 comprise a map of the area around the Hotel and a list indicating the residence of the complainants and those in the neighbourhood who had notified their support for the Hotel via the Licensee's petition.
- 90) In respect of the complaint lodged by Mr Chris Austin, who resides next door to the Hotel, Mr Sallis stated that he has had many discussions with Mr Austin and has taken his comments into account in revising the EMP, including comments about rubbish and noise issues. Mr Sallis also advised that Nominee, Mr Guy Dunne, had written to the operators of the Party Bus and requested that certain measures be put in place to address issues raised by residents in respect of the noise and disruption generated by the arrival and departure of the bus from the Hotel (Exhibit 39).
- 91) Mr Sallis agreed that patrons can still "slip through" the locked gate at the rear of the premises and attempts to stop patrons accessing the premises that way have not been 100% effective but nevertheless effective for the majority of patrons. He confirmed that duty manager training is conducted on a one to-one basis and each new employee is provided with an Employee Handbook (Exhibit 42) and the EMP. Employees are required to acknowledge that they have read and understand both documents. He agreed that there was no operational manual for the premises as such but the Hotel is managed in accordance with the EMP, the Staff Manual and the Management Checklist. Mr Sallis stated that the EMP is pivotal to the operation of the business of the Hotel and that he regularly discusses implementation of the EMP with his senior staff.

- 92) Mr Sallis acknowledged that failure to comply with the requirements set out in the EMP was not specified in the Staff Handbook as a ground for dismissal. He stated however that this was included as part of the formal acknowledgment by staff of having sighted the EMP and agreed to enforce its terms and conditions. In respect of the Management Checklist, Mr Sallis confirmed that the "Intoxication runs" included a sweep of all areas of the premises, including the carpark and vehicles parked there, to ensure there were no intoxicated patrons present. He stated that the method employed to remove intoxicated person from the premises varied depending on the circumstances of each case. When patrons are identified as being intoxicated at or near closing time they are offered assistance to get home and a record is noted in the incident register.
- 93) Mr Sallis did not agree that the main issue raised by residents during the 2008 community consultation meetings was intoxicated patrons leaving the premises. He agreed that issue was raised however he stated it was not the dominant issue of concern to residents and at the time he undertook to do what he could to control people leaving the Hotel. He added that a fair degree of responsibility for behaviour off the premises rested with the individual person.
- 94) In terms of closing procedures, Mr Sallis stated that last drinks are called at around 1.45am on late closing nights and service of alcohol ceases at 2.00am with patrons permitted to finish their last drinks before leaving. He agreed that it is possible for patrons to become intoxicated in the last ½ hour or so before leaving the premises. He added that the Licensee has the same responsibility in terms of the level of intoxication of patrons between 2.00am and 2.30am as it does for any other time the Hotel is open for trade.
- 95) In response to questions regarding the carpark, Mr Sallis stated that the carpark had been excised from the licensed area of the premises and that the rubbish skip bins, located in the carpark, were not on the licensed area of the Hotel. He agreed that patrons leaving via the back doors of the Hotel entered the non-licensed area of the carpark however he acknowledged that the Licensee owes a duty of care to those patrons in any event. He stated that nothing prevents people accessing the carpark after hours and lockable gates for the carpark were not something he could consider without the consent of the owner of the land.
- 96) In response to questioning regarding the bottle shop operations, Mr Sallis stated that his staff were incapable of controlling illegal drinking in the restricted area across the road from the Hotel. He stated that his staff do more than most hotels to prevent this activity from occurring but there is a limit to what can be done without infringing discrimination laws. He added that the current Hotel policy of refusing service to persons who staff suspected would break the law by drinking in the restricted area was problematic and staff were often abused by patrons who are refused takeaway service. Mr Sallis also noted that the authorities responsible for enforcement of the restricted area provisions also appeared to be having limited success in curbing the public drinking and associated antisocial behaviour.
- 97) Mr Sallis did not agree that a reduction of the trading hours of the bottle shop would assist the situation. In his opinion this problem is not a late night issue and many of the incidents arising from drinking on the foreshore occurred in the afternoon or early evening. Mr Sallis refuted the suggestion that many intoxicated patrons left the premises at closing time and stated that his staff were fully aware that intoxicated patrons were required to be removed as soon as their level of intoxication was identified.
- 98) Mr Silvester suggested to Mr Sallis that many of the issues of concern raised by the residents would be resolved if the trading hours of the premises were reduced to midnight on weekends and 10.00pm on other nights. Mr Sallis stated that such a reduction would be catastrophic for his business and the Licensee company would struggle to break even operating as such reduced hours.
- 99) Ms Truman informed the Commission that she had originally intended to call Ms Debbie Sharpe and Mr Guy Dunne to give evidence on behalf of the Licensee however they will not now be called.

100) At this point Mr Silvester tendered into evidence a particularised summary of the complaint against the Licensee. The Commission expresses approbrium over the late notice of the actual complaint details for the Hearing. The complaint, including amendments made in concert with the Commission, is as follows:

- The Complaint is laid under Section 48(2) of the Act in that for a period from August 2010 until 4 February 2011 the Licensee conducted the business for which liquor licence number 80315200 is held in ways which fail to meet the public interest criteria in respect of a full licensed premises under Section 6(1) (a) and Section 6(2) (a) (b) (c) (e) (f) (g) (h) of the Act.
- Particulars are contained in a letter of complaint, Statutory Declaration and Witness Statements. The complainant is Inspector Pech and this complaint has been accepted by the Director.
  - a) Particulars of the complaint relate to:
  - b) Violent Incidents;
  - c) Property damage;
  - d) Intoxicated patrons leaving the hotel;
  - e) Patrons leaving hotel carrying glasses, stubbies, containers;
  - f) Noise;
  - g) Rubbish including dangerous items like broken glass;
  - h) Inadequate security;
  - i) Elevated problems on special event nights;
  - j) Incompetent and unresponsive management.

101) Ms Truman expressed her dismay that it had take until the fifth day of the Hearing, and the conclusion of the evidence on behalf of the parties, for the complaint against her client to be properly articulated and particularised. She submitted that her client had been severely prejudiced and hampered in the preparation of his defence by the lack of detail of the complaint provided prior to the commencement of the Hearing.

### **Submissions on behalf of the Director:**

102) Mr Silvester referred the Commission to folios 46 to 48 of the Hearing Brief, being the time line of events concerning the Hotel since early 2008 through to the community meeting held in July 2008. He submitted that in 2008 the complaints procedure did not directly involve the Commission and a consultation process between the Licensee and the residents was adopted instead. At the time the residents hoped this would lead to the resolution of issues that were of concern to them in respect of the operation of the Hotel. In effect the residents put their faith in Mr Sallis developing an EMP and enforcing it.

103) Mr Silvester submitted that no evidence had been lead on behalf of the Licensee alleging that any of the residents' complaints were not genuine or that they had fabricated or exaggerated any of their evidence. He alleged that the Hotel had a long history of intoxicated persons being permitted to remain on the premises and then emptying out into the neighbourhood. Since at least 2008 to October 2010 the residents have been consistent in their complaint about disturbances from patrons leaving the Hotel in a drunken state. Mr Silvester referred the Commission to the definition of "drunk" as defined in the recently amended *Liquor Act* and in Butterworths: "Words and Phrases Legally Defined".

- 104) He submitted that the witness statements of concerned residents tendered to the Commission were truthful and no contrary facts had been alleged on behalf of the Licensee. Mr Silvester stated that the fact that the residents did not contact Mr Sallis personally with their complaints is irrelevant in the context of the matters before the Commission. He submitted further that the EMP prepared for the Hotel was “smoke and mirrors” and there was no evidence presented confirming compliance with the EMP by staff apart from Mr Sallis’ assertions that this was the case. He noted that it was not until June 2011 that the Licensee implemented the procedure whereby staff members are required to formally acknowledge they have read and understand the terms of the EMP. Mr Silvester added that there was nothing in the current EMP that dealt with the identification and removal of intoxicated patrons.
- 105) In respect of the Staff Handbook, Mr Silvester noted that it did include information on how staff could identify patrons who were intoxicated but provided no guidance as to how to prevent them becoming intoxicated in the first place. He noted also that the Staff Handbook made no mention of the EMP and that it had not been updated since the recent changes to the *Liquor Act* in July 2011.
- 106) Mr Silvester submitted that the existing EMP for the premises was shallow in content and lacking in guidance to staff. For example, clause 1(a) prohibits the emptying of glass bins into the skip bin after 9.00pm each night but provides no guidance as to what is to happen to that rubbish once the skip bin is locked at 9.00pm. The outcome is that staff drag bags of bottles and cans out to the skip bin and deposit them there for later disposal. Clauses 1(d) and 1(e) require the taking of sound level recordings at specified intervals however no objective standard is included against which the recordings taken are to be assessed.
- 107) In respect of hooning and burnouts, Mr Silvester submitted that the current measure used by management in reporting these incidents to Police had been ineffective in reducing the problem. He stated that there was a requirement for a permanent security presence in the carpark area and some procedures put in place to stop such incidents occurring in the first place. Mr Silvester noted that clause 2(a) deals with the maintenance of the Hotel grounds but makes no mention of the what is to be done about rubbish deposited by patrons in the streets around the Hotel and on the verges and in the gardens of neighbouring residents. Whilst a “waste collection and removal” policy for areas beyond the perimeter of the Hotel is referred to in clause 2(d) there are no clear guidelines indicating to staff what is actually required or when the cleaning up is to be done.
- 108) Mr Silvester noted that the signage referred to in clause 3 of the EMP has been erected but has been of little, if any, effect. Whilst signs request that patrons consider the neighbouring residents the warnings are routinely ignored by people creating disturbances as they leave the Hotel. He noted also that none of the signage advises patrons of the consequences of non-adherence to the EMP, such as ejection from the premises, reporting to the Police and banning notices. Mr Silvester also noted that clause 4 dealing with staff training required only that staff members obtain RSA accreditation, which is actually a condition of licence, and nothing more.
- 109) In respect of clause 5 of the EMP, dealing with “Itinerants in the Reserve”, Mr Silvester noted that this clause gave staff no guidance on what they should do in respect of illegal drinking or in their dealings with the itinerants concerned. Mr Silvester referred also to clause 6 dealing with Hotel Security and noted that whilst the EMP required improved surveillance of patrons leaving the Hotel with unfinished drinks and better management of behaviour in the carpark there was no guidance as to how this was to be achieved. In respect of clause 6(c) Mr Silvester submitted that no evidence had been produced that confirmed security staff remained in the carpark until all patrons had departed, apart from the assertions made by Mr Sallis.
- 110) Mr Silvester noted that management staff are now required to complete the Beachfront Management Checklist on a regular basis and the checklist includes recording sound levels at the perimeter fence. However no evidence was presented by the Licensee as to what the

recordings were to be measured against and what remedial action would be taken if the records fell below a specified standard. Whilst the Hotel had engaged a Community Relations Officer there was no evidence presented as to what her duties are or what was the aim of the appointment.

- 111) In respect of the EMP generally, Mr Silvester submitted that there was no evidence that staff of the Hotel were complying with the operational requirements set out in that document. To the extent that the requirements of the EMP may have been implemented by Hotel management it did not fulfil the promises made by Mr Sallis to the residents during the 2008 community consultations and had achieved nothing. He submitted that the fact that the residents were complaining about the same issues in 2011 as they were in 2008 was a clear indication that the EMP was simply not effective in addressing the residents' concerns.
- 112) At this point Mr Silvester tendered into evidence an EMP that he has prepared in consultation with the Director. He submitted that the content of this EMP responds to the concerns raised in this hearing by the neighbouring residents.
- 113) Mr Silvester noted that the Commission had heard no evidence from Mr Guy Dunne, the Nominee and the person charged with the day to day management of the business conducted under the liquor licence. Similarly, whilst Mr Kovic provided some evidence he had been engaged as the security manager of the premises up to four weeks prior to the Hearing but had given no evidence in respect of the scope of his duties or what functions the other security guards perform.
- 114) Mr Silvester submitted that a number of the video recordings made by Ms Margot Bailey (Folio 108 of the Hearing Brief) were sufficient to satisfy the Commission of the general tendency of patrons leaving the Hotel intoxicated. Whilst there is no direct evidence of that occurring, such as a proven breach, the nearby residents have given evidence that is the case. Mr Silvester submitted that there is nothing in the Act that allows patrons to remain on licensed premises for up to a half hour after closing time and whilst this may be common practice it is not done under lawful authority.
- 115) Mr Silvester submitted that the Beachfront Hotel is trading as a late night entertainment venue and must be managed as such. Given its location in a residential area, the removal of drunk or troublesome patrons leads to further disturbance of the nearby residents. The failure of the Hotel management to properly manage patrons before they start showing signs of noticeable impairment further exacerbates the problems faced by the residents. He noted Mr Sallis' evidence that it is hard for the staff of the Hotel to properly manage patrons once they had left the premises. Mr Silvester submitted the reason for that is that many of the patrons leaving the premises are so intoxicated it is impossible for anyone to control their behaviour.
- 116) Mr Silvester noted that the majority of complaints referred to the behaviour of drunken patrons, both on the premises and after leaving. He submitted that the Licensee was doing nothing to address the problem or, alternatively, was incapable of resolving the problem. Mr Sallis has been aware of the problems confronting the neighbours in respect of drunken behaviour by patrons of the Hotel since at least 2008 but has done nothing about it. Mr Silvester noted Mr Sallis' evidence that a reduction of trading hours by two hours on late trading nights would impact negatively on his business. He submitted this was clear evidence of how much the profitability of the business relied on that late night / early morning trade. He submitted that Mr Sallis could not identify for the Commission his management prescription for dealing with intoxicated patrons when they leave the premises because he simply does not have any ideas on how to resolve that problem.
- 117) Mr Silvester noted that the Licensee has a legal responsibility to not serve patrons who are drunk and that this requires regular monitoring of every patron on the premises. He submitted that currently the staff could not be expected to perform this function satisfactorily as there are simply not enough bar staff or security staff to monitor the large number of patrons utilising the Hotel, given the Hotel's maximum capacity of 490 patrons plus those using the Beer Garden.

- 118) Mr Silvester submitted that the most appropriate and practical way for the Commission to address the concerns of the residents was to reduce trading hours to 10.00pm closing on weekdays and Sundays and to 12.00 midnight from Thursday through to Saturday. Mr Silvester also noted that the State of Origin events ran until midnight when the match finished well before that time. He submitted that the Hotel could readily show the match and still close at 10.00pm or, alternatively, 1 ½ hours after the finish of the match.
- 119) In respect of the actual management of the Hotel, Mr Silvester queried the relationship between Mr Sallis and Mr Russel Temple. He noted that Mr Temple was tasked with responding to a complaint from Ms Patrice Gill who had asked to speak to “the owner of the Hotel”. He noted that Mr Temple had dealt with Ms Gill’s complaint and there was no evidence lead that Mr Sallis was aware of this situation or that Ms Gill’s complaint had been brought to his attention by Mr Temple. Mr Silvester submitted that Mr Sallis and Mr Temple are “the operational minds behind the operation of the business” and that Mr Temple was a person not known to the Director in any capacity associated with the licence for the Beachfront Hotel.
- 120) In respect of the Hotel bottle shop, Mr Silvester submitted that this service is used by itinerants who consume the alcohol purchased illegally in public places which results in drunkenness and antisocial behaviour that impacts on the wider community. He submitted that bottle shop staff could legally refuse to serve patrons if they had reason to believe that the alcohol would be consumed illegally.
- 121) Mr Silvester submitted that the appropriate response from the Licensee to the concerns of the residents was to reduce the trading hours to times that are appropriate for a residential neighbourhood but even that will not prevent people bringing alcohol into the area from other places. He stated that the Hotel is clearly making a pitch for patrons of the Mitchell Street entertainment market and was actively seeking patronage from the “drink until you are drunk crowd”. He submitted that this type of venue is completely inappropriate in a residential area.
- 122) Mr Silvester submitted that the nearby residents were in the best position to hear what occurs at the Hotel at night and, in the course of the hearing, were able to describe persistent noise disturbances from patrons on the premises and in the neighbourhood after leaving, from violence among drunken patrons, from burnouts and hooning and from the Hotel’s industrial air conditioners. The neighbours are also the ones who have to put up with rubbish in the streets and on their premises. He concluded that a large proportion of the major issues raised by the residents relate to the level of intoxication of patrons when they leave the premises and spill into the neighbourhood.
- 123) Mr Ingrames referred the Commission to the evidence of A/Commander O’Brien and noted his statement that the Beachfront Hotel was a Police “hot spot”. He noted also that a number of calls to Police in respect of incidents at the Hotel were made by Hotel staff. However, a number of complaints were also made by residents and patrons of the Hotel who had been involved in some form of incident.
- 124) Mr Ingrames referred the Commission to Exhibit 35, an email from nearby resident Ms Reilly to Ms Debbie Sharpe, the Hotel’s Community Relations Officer. He referred to Ms Reilly’s comment that much of the littering the neighbourhood would be eliminated if staff did not allow patrons to leave the premises with open bottles and cans of alcohol.
- 125) In respect of the Hotel’s Complaints Register (Exhibit 34) Mr Ingrames noted that this system was implemented following the 2008 community hearings. The Register records complaints lodged by Ms Gill and Ms Moorcroft following them phoning the Hotel. He noted however that none of the other complaints claimed to have been made by the residents were recorded in the Register and in fact the Register had not been updated since August 2011.
- 126) In respect of the client surveys conducted by the Hotel management (Exhibit 36) Mr Ingrames noted that the questionnaire was only available to patrons of the Hotel and bottle shop. The questionnaire made no reference to drunkenness or antisocial behaviour and the respondents were not directed to the issue of late night closure of the premises or noise

issues. Of the 144 surveys collected thirty two respondents were “non-locals” who would be unable to give any feedback on the impact of the Hotel on the neighbourhood or the nearby residents, particularly where those disturbances occurred in the early hours of the morning. Of the eighty two “local residents” who responded to the questionnaire Mr Ingrames submitted that only sixteen actually reside at the address stated on the questionnaire with only a few residing in the immediate vicinity of the Hotel (Exhibit 37). He advised also that many of the respondents noted that other residents had no right to complain as “the pub was here first”. Mr Ingrames submitted that this was a clear indicator, even from those who were supporters of the Beachfront, that the Hotel was in fact causing issues in the neighbourhood even though some respondents defended the Hotel’s right to do so on the “here first” argument.

### **Submissions on behalf of the Licensee:**

- 127) Ms Truman tendered formal written submission to the Commission on behalf of the Licensee. She argued that the submission of the Director had “put the cart before the horse” in that the submissions were directed towards remedial action aimed at remedying the allegations the subject of the complaints without the Commission having determined that the complaints are actually made out. She also emphasised that the scope of the complaint was not unlimited and that the Commission must confine itself to complaints that fell within a defined complaint period.
- 128) Ms Truman highlighted the major points from her written submissions. In response to the submissions of the Director, Ms Truman submitted that the criticism of the Hotel’s existing EMP were unfair and inappropriate. She agreed that the original EMP had been produced after the 2008 community meetings and noted that the Ms Aagard MLA had corresponded with Mr Sallis and commended the EMP as a comprehensive document that deals well with the residents’ concerns. She submitted that it was completely inappropriate for counsel for the Director to now criticise a document that had community support at the time of its inception and had been significantly updated and amended since. She added that the submission that the EMP was “smoke and mirrors” was offensive to the Licensee. She submitted that Mr Sallis did treat the EMP seriously and had in fact dismissed staff who had failed to comply with its conditions.
- 129) Ms Truman noted that were the Licensee to adopt the EMP drafted by Mr Silvester and the Director he would be leaving himself open to prosecution for matters over which he had no control. The suggestion that the EMP should include a clause prohibiting the Licensee from allowing intoxicated patrons to leave the premises not only defied normal industry standards but would render the Licensee liable to a complaint for allowing intoxicated persons to remain on the premises. She submitted that the main question now before the Commission is: has the complaint as laid by the Director been made out on the basis of the evidence presented to the Hearing by the residents who lodged complaints? She submitted that there is no need for any critical analysis of the existing EMP unless and until the complaint is actually found by the Commission to have been made out.
- 130) Ms Truman noted that it was agreed during the course of the Hearing that some of the noise issues that concerned residents were generated from the Sands Apartment complex and surrounding residences and not from the Hotel.

### **Written Submissions on behalf of the Licensee:**

- 131) Ms Truman’s written submission may be conveniently summarised as follows:
- 132) The complaint of the Director was laid pursuant to Section 48(2) of the Act as it stood prior to the 1 July 2011 amendments and, as such can only be a complaint concerning “any matter arising out of the conduct of the business at the licensed premises”. The objects of the Act and the public interest criteria are not relevant to the Commission’s deliberations in determining whether or not a complaint has been made out. The objects and public interest criteria set out into the Act are only relevant to this matter should the Commission first

determine that a complaint is made out and then consider that a variation of the licence conditions is to be imposed as the appropriate penalty, but not otherwise in the context of a Section 48 complaint.

- 133) The standard of proof to be applied by the Commission is on the balance of probabilities<sup>1</sup> and the Commission is required to be “*positively persuaded on an issue as distinct from indulging in any artificial weighing or measuring exercise*”.<sup>2</sup> Whether the Commission needs to be positively persuaded by overwhelming evidence depends on the particular issues involved and the circumstances in which those issues arise<sup>3</sup>.
- 134) In respect of the complaints concerning noise and rubbish, and allowing that those factors could clearly have come from another source, the Commission should require overwhelming evidence that the source of the noise and rubbish is from the Hotel before it can find the complaint made out on the balance of probabilities. In this instance such overwhelming evidence does not exist on the evidence before the Commission.
- 135) The purported complaints contained in emails from Ms Janice Reilly and Mr Liam should be ignored by the Commission on the basis those persons did not lodge a complaint with the Director as required by the Act.
- 136) The complaints as lodged originate from eleven households in the area surrounding the Hotel. There are possibly up to 323 households in that area. The complaint was styled by counsel for the Director as a “community issue” or a “community concern” with the result the Commission must consider precisely what “community” is involved<sup>4</sup>, and in this instance the “community” is the Nightcliff area. The 16 persons who lodged complaints with the Director represent 0.4% of the total number of people who reside and work in the Nightcliff area or 0.5% of the adults in the area. On that basis the Commission should not be persuaded that the evidence of the complainants represents the view of the “community”.
- 137) Evidence submitted on behalf of the Licensee in a petition (Exhibit 36) demonstrates support for the Hotel from thirty three residents or eighteen households, representing 1.1% of the adults residing or working in the community, more than double that of the complainants. Whilst not determinative this is a matter that the Commission should take into account. The Inspectors investigating the complaints sought evidence only from the complainants and not people who supported the Hotel. Despite significant efforts by the Inspectors to obtain complaints only sixteen residents lodged formal complaints. The evidence does not support the proposition put on behalf of the Director that the complaints are the “community view”.
- 138) The complaint period is from “August 2010 to the present time”, as identified in the letter from the Director dated 4 February 2011 to the Licensee informing him of the complaint. As a result the Commission should only consider complaints for the period from August 2010 to 4 February 2011. Evidence relating to incidents pre and post those dates should only be considered in the context of identifying the efforts of the complainants in pursuing their complaints and to consider what had occurred since the complaint was laid.

### **Noise:**

- 139) The only licence condition concerning noise relates to the Trophy Room and Beer Garden, prohibiting amplified music in the Beer Garden after midnight and requiring the Licensee to take reasonable measures to ensure that noise from the Trophy Room and Beer Garden do not cause undue disturbance or discomfort to residents of the neighbourhood. As a consequence, consideration of whether the Licensee has breached the condition is narrowed to that of whether activities in only the Trophy Room or Beer Garden caused disturbance to

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<sup>1</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>2</sup> John Withnell, “Reasons for Decision”: *Epsom Pty Ltd* (7 February 2000)

<sup>3</sup> *Ibid* at page 6

<sup>4</sup> *Ibid* at page 7

the neighbourhood i.e. the noise must relate to those areas and not noise from people in the street or the carpark<sup>5</sup>.

- 140) There is no evidence before the Commission that there has been any amplified music played in the Beer garden that has caused particular concern to the residents. Whilst there is some evidence of noise from the Trophy Room and Beer Garden after midnight there is substantial evidence before the Commission that the Licensee has taken reasonable measures to ensure such noise does not disturb the residents in compliance with the licence condition. Due to the terms of the licence condition the Commission should not consider allegations of noise before midnight and none of the complainants were able to speak of noise that they could identify satisfactorily as coming from the Beer Garden or Trophy Room with the result that component of the complaint should be dismissed.
- 141) Whilst the location of the Hotel in a residential neighbourhood is a relevant consideration it is not determinative<sup>6</sup>. The fact that the Hotel was in existence prior to the residents purchasing their homes is a relevant consideration and the complaints need to be considered taking account of the reasonable standards for the enjoyment of the premises given the nature of the neighbourhood and its location and the reasonableness of all the parties' expectations becomes a factor<sup>7</sup>. The expectations of some of the complainants in this case are unreasonable in that the operation of the business of the Hotel necessarily entails some reasonable disturbance to neighbours despite their unreasonable expectations.
- 142) Whilst there is some reasonableness for the assumption that some of the noise disturbances from the surrounding street comes from patrons leaving the Hotel that is not sufficient to satisfy a claim that only people coming from the Hotel are making the noise. Other potential sources of noise are people leaving and returning to their own homes without visiting the Hotel, itinerants and other persons using the foreshore with the result the Commission cannot be positively persuaded that all the street noise is generated by patrons of the Hotel. In addition, noise from people on the street cannot be seen as noise from the Hotel so as to prove a breach of the noise condition attached to the licence.
- 143) It is unreasonable to expect Licensees to attempt to control behaviour that occurs outside the boundaries of their licence and to do so would impose an unacceptable burden on Licensees and an unacceptable shifting of responsibility for individual choice. The options available to a Licensee in dealing with patrons are limited to controlling their activities whilst on the licensed premises<sup>8</sup>. The Licensee cannot do anything in response to unruly behaviour of patrons once they exit the premises with the result he cannot be held responsible for the behaviour of those patrons who cause disturbances in the neighbourhood.
- 144) The Licensee has measures in place such as asking patrons not to swear and to keep the noise down, reporting incidents of hooning, stopping patrons from leaving the premises with drinks and asking patrons to leave when they become intoxicated. The Licensee is responsible for its response to such behaviour it cannot be held responsible for the behaviour itself or for the manner in which patrons conduct themselves, more so when those patrons leave the premises.
- 145) The evidence of A/Commander O'Brien and the statistics of incidents related to the area in which the Hotel is situated should be dismissed entirely as the Police "jobs" referred to do not fall within the complaint period. In the alternative, evidence should be viewed by the Commission as representational only of the types of complaints made to Police. The following commentary was submitted in respect of the Police statistics:

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<sup>5</sup> John Withnell, "Reasons for Decision": Top End Hotel (29 June 2001)

<sup>6</sup> Ibid and Richard O'Sullivan, "Reasons for Decision": Katherine Hotel (19 November 2008 at pgs 7 & 8)

<sup>7</sup> John Withnell, "Reasons for Decision": Top End Hotel (29 June 2001) at page 7

<sup>8</sup> *Cole v South Tweed Heads Rugby League Football Club & Anor* (2004) 217 CLR 469

- Of the five noise complaints reported to police only one concerned the Hotel and that concerned noise from PAWA activity. The rest were complaints by residents against other residents;
- Residents were advised during the 2008 Community meetings to lodge noise complaints with Police and this simply has not occurred;
- Of the twenty-one “General Disturbance” reports lodged with Police only four related to the Hotel, three or four of which were lodged by Hotel staff;
- In respect of the eighteen “Disturbance Licensed Premises” reports received by Police Commander O’Brien confirmed the actual number was sixteen and on fifteen of those occasions Hotel staff had contacted Police. Of the sixteen incidents seven make no reference to intoxication being a factor;
- Of the twenty-two complaints of “drunk persons” it was clear following cross examination that only one of those jobs bore any relationship to the Hotel, on 21 May 2011, and acting Commander O’Brien conceded it may have been staff of the Hotel that called Police;
- Of the nine Police jobs reported in respect of “assaults” only two appeared to have any connection with the Hotel and Acting Commander O’Brien acknowledged there was no reference to alcohol being involved and both incidents occurred during the day and long before closing time;
- Of the eighteen “stealing” jobs referred to Police only four related to the Hotel and three of those relating to theft of items such as phones and purses. Commander O’Brien accepted that some may have been misplacement of items rather than theft. For the remaining “job” the Hotel was the victim of a theft; and
- The three incidents reported to Police of hooning and/or burnouts were referred to Police by staff of the Hotel in accordance with the relevant clause in the EMP. None of the reports to Police in respect of burnouts or hooning were made by residents or the complainants themselves.

- 146) The evidence presented by the complainants in respect of noise deal mainly with noise from patrons on the street and not noise from the Hotel. Ms Gill referred to a continuing problem with noise from the music at the Hotel but she has been absent from her residence for a large proportion of the complaint period. Her only complaint during the complaint period relates to noise from music on 16 October 2010, although she has complained about noise on other occasions outside the complaint period and her main problem is noise from the carpark, not from the Beer Garden or the Trophy Room. The prompt response from staff of the Hotel indicates the seriousness with which the Licensee treats complaints from neighbours.
- 147) Casuarina Drive is a major thoroughfare in a suburban area with long term traffic problems which have led to many attempts to reduce and slow traffic. The Commission is referred its Decision in the matter of Hibiscus Tavern<sup>9</sup> where it was noted (in respect of Leanyer Drive) that the noise referred to by a complainant could be coming from anywhere and it was only the subjective impression of the complainant that the noise was emanating from the tavern.
- 148) No evidence was lead in respect of the complaint concerning noise from the Hotel’s air conditioning equipment. This issue was not pursued by counsel for the Director and should be dismissed by the Commission.
- 149) In respect of the complaints concerning noise from the Party Bus, the Licensee notes again this is not noise generated from the Beer Garden nor the Trophy Room and is not even noise

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<sup>9</sup> John Withnell, “Reasons for Decision”: Hibiscus Tavern (Dolly O’Reilly’s) (28 May 2001)

from the licensed premises. In any event the Licensee has done what he can in terms of contacting the operator of the Party Bus and asking that the neighbours concerns be taken into account.

### **Intoxicated patrons on the streets, patrons leaving the Hotel with alcohol and inadequate security:**

- 150) Both Inspector Pech and A/Commander O'Brien stated that they had not found any evidence that the Licensee was in breach of Sections 102 or 121 of the Act and for that reason alone this element of the complaint should be dismissed. If that submission is not accepted the Commission needs to consider whether the evidence relating to complaints of this category falls within the complaint period. The majority of the evidence presented by the complainants in regard to intoxicated people on the street and leaving the premises with alcohol are vague and general.
- 151) People who are intoxicated on the streets near the Hotel may not have actually been to the Hotel but may have been attending a private party in a residence or on the foreshore. The Commission should disregard much of the video evidence gathered by the complainants on the basis most of the events depicted fall outside the complaints period. In addition, the Commission should disregard the commentary that accompanies the video footage on the grounds the commentary is highly prejudicial and merely opinion that is of no probative value. Whilst much of the evidence of the complainants regarding incidents in the street infers that the people involved were coming from the Hotel that is mere assumption in the majority of cases. There is no evidence before the Commission, apart from the bold assertions of some of the complainants, that glasses are removed from the Hotel by patrons leaving the premises.
- 152) It is not a matter for the Commission to attempt to determine whether events referred to by the complainants as having occurred on an unspecified date actually occurred during the complaint period. That obligation falls to counsel for the Director and he has failed to meet the obligation with the result those allegations should be dismissed.

### **Security:**

- 153) None of the witnesses gave evidence that they had actually seen security staff be in adequate in the performance of their duties. No evidence was lead to support the allegation that security at the Hotel is inadequate with the result this aspect of the complaint should be dismissed.

### **Responsible Service of Alcohol:**

- 154) Not a single witness gave evidence that they had seen a failure to comply with the RSA conditions, there is therefore no evidence to support this element of the complaint and it should be dismissed.

### **Violence:**

- 155) Section 105 of the Act creates an offence for permitting riotous conduct on or at licensed premises. Both Inspector Pech and A/Commander O'Brien gave evidence that the Licensee had not been found to have committed any breaches of the Act. The Licensee is not responsible for violence that occurs on the street, for the same reasons as set out earlier in the submissions relating to the noise complaints. It is clear from the licence and the relevant legislation that the Licensee and security staff cannot exercise power beyond the borders of the licensed premises. That position was supported by the evidence of Mr Milos Kovic. As a result this element of the complaint should be dismissed.
- 156) In the alternative, the Commission should only consider evidence relating to incidents alleged to have occurred within the complaint period.

- 157) Many of the allegations of the complainants refer to incidents of “violence” however a closer examination of their evidence reveals the complaints do not refer to acts of physical violence but rather noise. No direct evidence was lead linking the persons involved in the alleged violence with the Hotel. Some of the alleged incidents of violence captured on video involve very young persons who may not be old enough to attend licensed premises at night. Further, it is not clear from much of the evidence presented by the complainants that the persons involved in the alleged violence are intoxicated. Anti-social behaviour can occur on any street at any time, without alcohol being involved. Allegations of incidents on unspecified dates should not be taken into account by the Commission. Counsel for the Director is required to determine the dates on which alleged incidents are said to have occurred and in this instance that obligation has not been fulfilled.

### **Property Damage:**

- 158) Neither the Act nor the licence place any obligation on the Licensee in relation to behaviour beyond the licensed premises. For this reason the complaints regarding property damage to neighbouring properties should be dismissed.<sup>10</sup>
- 159) In the alternative, it is absurd to suggest that property damage can be solely attributable to the business of the Hotel. The neighbourhood is of high population density which brings with it the increased risk of crime and anti-social behaviour. Behaviour of this nature occurs in all neighbourhood, regardless of whether there are licensed premises within that neighbourhood.
- 160) The evidence of damage to Ms Sarev’s property indicates that this occurred outside the complaint period. Regardless the Licensee addressed matters quickly and placed Ms Sarev’s interests above its own. The evidence of other complainants in respect of property damage do not suggest any connection between the property damage alleged and the Hotel or, alternatively, relate to incidents that occurred outside the complaint period.

### **Hooning / Burnouts:**

- 161) Neither the Act nor the licence place any obligation on the Licensee in relation to behaviour beyond the licensed premises. For this reason the complaints regarding property damage to neighbouring properties should be dismissed.
- 162) Ms Truman submitted that until 23 September 2011 the carpark at the rear of the Hotel was in the licensed area (See below for further discussion on the legal status of the car par vis a vis the liquor licence for the Hotel) and, as such, the Licensee accepts that hooning and burnouts in the carpark were on licensed premises and that Section 105 of the former Act applies. However, many of the incidents of hooning and burnouts reported by the complainants were vague as to the dates the incidents occurred. In the majority of instances no evidence was presented linking the hooning to the Hotel or patrons of the Hotel. The evidence of the Licensee, which was not refuted in evidence presented on behalf of the complainants, is that incidents of hooning are reported to Police if the responsible person can be identified with that person subsequently banned from entering the Hotel. Whilst the Licensee cannot control the behaviour of persons outside the licensed premises he can respond to such behaviour and is actively doing so in an appropriate way. The Commission is also asked to keep in mind that the Licensee does not own or lease the carpark at the rear of the Hotel and, as a result, any changes to the carpark are subject to the consent of the landlord.

### **Car Parking in the Street and State of Origin:**

- 163) The majority of complaints regarding car parking relate to the State of Origin events. The State of Origin events this year were held on 25 May, 15 June and 6 July 2011 with the result

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<sup>10</sup> Ibid *Cole v South Tweed Heads Rugby League Football Club*

that any complaints regarding these events fall outside the complaint period and should be dismissed.

### **Trading Hours too late:**

164) The category of complaint is realistically a submission and not a complaint as it relies on other categories of complaint to be made out. As a category of complaint it does not exist on its own without the other categories first being satisfied. The premise has had the existing trading hours since 1994 with the exception of a 2003 extension for the hours for the Trophy Room and Beer garden.

### **Unresponsive management:**

165) There is no evidence before the Commission that management staff have been unresponsive to any complaint where the Licensee has actually been made aware of the complaint. The evidence before the Commission is of attempts by the Licensee to respond to the concerns of residents promptly. The Licensee or its staff have actually made contact with Police to complain. The Licensee has made numerous attempts to engage with residents on becoming aware of their complaints.

166) Evidence was presented of various incidents where residents' complaints have been addressed immediately.

### **Rubbish:**

167) The Licensee is not responsible for behaviour beyond the boundaries of the licensed premises and reliance is placed on the earlier submissions in that regard. Allegations concerning rubbish that is not on or at the licensed premises should be dismissed.

168) In the alternative, the Commission should only consider complaints in this category that fall within the complaint period. Staff of the Licensee in fact conduct "rubbish runs" around the neighbourhood, as stated by most of the witnesses, some of whom complaint that rubbish collection by staff of the Hotel is not consistent enough. The Licensee is not responsible for rubbish outside the licensed premises but has been involved in its collection in an endeavour to be part of the community and responsive to the needs of the neighbours and should be given credit for doing so.

169) The Licensee has changed its own rubbish disposal regime in response to the neighbours' concerns regarding associated noise. The skip bin is locked at 9.00pm and rubbish is now kept inside the premises after 9.00pm for disposal in the morning.

170) Exhibit 25 demonstrates that not all of the alcohol related rubbish observed in the streets could have come from the Hotel as some of those products are not sold on-premises and the bottle shop closes at 10.00pm. Littering occurs regardless of whether there are licensed premises in a neighbourhood. The Licensee is doing all that it reasonably can to prevent patrons from leaving the premises with open containers of alcohol.

### **Not Appropriate Crowd:**

171) This head of complaint is not made out and there is no evidence before the Commission that there is anything inappropriate with the "crowd", whatever is meant by that category of complaint.

### **Bottle Shop:**

172) This head of complaint is not made out and there is no evidence before the Commission to suggest any breach of the licence conditions or the Act associated with the operation of the bottle shop. This category of complaint should be dismissed.

## Matters Generally:

- 173) The submission by counsel for the Director that “if there is less than 100% compliance with the Act or the licence then the Commission should vary the licence” cannot be correct as 100% compliance is an impossibility in a business context and such a submission is not in accordance with the Act which requires that a Licensee take the reasonable measures necessary for the conduct of the business.
- 174) Both Inspector Pech and A/Commander O’Brien gave evidence that they had found no breaches of the licence or the law, despite regular inspections by the Inspectors and the attention given to the Hotel by Police. In respect of A/Commander O’Brien’s evidence that the Beachfront Hotel was a “hot spot” and “specific target” the Licensee submits that evidence was in relation to the possibility of alcohol being consumed along the foreshore by itinerants. There is no lawful basis to refuse service to a person who is sober, over eighteen years of age, meets the dress standards and has money to pay for the alcohol, unless they are on the Banned Drinker Register. The Hotel is only a “hot spot” because it is the only licensed premises in the area. According to the Police evidence, Nightcliff, Rapid Creek and the Aralia Street shops are also “hot spots”. Despite being labelled a “hot spot” A/Commander O’Brien stated there was no evidence that the Hotel was committing breaches of its licence or the law.
- 175) The Beachfront Hotel is not, as stated by counsel for the Director, the only hotel in a residential area not enclosed by walls. The Parap Hotel has a beer garden as do the Hibiscus Tavern and the Airport Hotel, both of which are close to residential homes.
- 176) If, as Counsel for the Director submitted, no criticism should be levelled at the residents for not complaining then likewise no criticism should be levelled at the Licensee for not addressing the complaints.

## Consideration of the issues

### The Complaint Period:

- 177) It was agreed by counsel for both parties that for the purpose of this complaint against the Licensee of the Beachfront Hotel the complaint period was limited to August 2010 to 4 February 2011, the date on which the complaint was referred by the Director to the Licensee. The Director’s letter, dated 4 February 2011, clearly states that undue noise and disturbance from the Hotel *“has disrupted the living comfort of surrounding residents from August 2010.”*
- 178) The Commission accepts that complaints period is limited as specified immediately above. The Commission received a significant amount of evidence from witnesses in respect of incidents alleged to have occurred outside this period, including as far back as 2006 and prior to the 2008 Community Meetings. Evidence in respect of incidents that occurred outside the complaint period can only have any probative value if and when the Commission determines that a complaint within the complaint period has been made out.

### Categories of complaint:

- 179) Mr Silvester identified 9 categories of complaints (Exhibit 1) as follows:
- Violent Incidents;
  - Property damage;
  - Intoxicated patrons leaving the Hotel;
  - Patrons leaving carrying glasses, stubbies, containers;
  - Noise (including patron noise, hooning and noise from rubbish removal);

- Rubbish including dangerous items like broken glass;
- Inadequate security;
- Elevated problems on special event nights (State of Origin);
- Incompetent and unresponsive management.

180) A number of other categories of complaint were raised during the course of the Hearing including:

- Issues with the operation and trading hours of the bottle shop;
- Lack of security in the rear carpark;
- Late trading hours for the Hotel; and
- The Hotel attracting an inappropriate crowd.

### **Incidents alleged to have occurred off the licensed premises:**

181) A number of categories of complaint identified above relate to incidents alleged to have occurred as a result of the behaviour of patrons once they had left the Hotel and were no longer on the licensed premises. These categories of complaint include allegations of patrons leaving stubbies, cans and the like in the streets surrounding the Hotel, hooning and burnout in Casuarina Drive and surrounding streets, patron behaviour including shouting, swearing and fighting in the streets and intoxicated patrons causing disturbances in the neighbourhood generally.

182) Ms Truman submitted that whilst Licensees can be held responsible for their response to the behaviour of patrons once they leave the licensed premises they should not and cannot be responsible for actual behaviour beyond the boundaries of the licensed area. The Commission was referred to a number of its previous decisions in that regard as well as to legal authority for that proposition.

183) The Commission is persuaded by those submissions and in particular the pronouncements of the High Court in the matter of *Cole v South Tweed Heads Rugby League Football Club & Anor*<sup>11</sup> in which one of the issues before the Court was where a Licensee's responsibility begins and ends. The High Court decided that Rosellie Cole could not sue the South Tweed Heads Rugby League Football Club for negligence after she drank spumante for eight hours, was ejected, declined offers of transport and was hit by a car outside. In that case His Honour Justice Callanan stated:

*Let me assume, contrary to what I would hold to be the case, that the respondent owed a duty of care of the kind suggested, to the appellant before and at about the time that she left its premises. There was no breach of such a duty. The notion that the appellant, as far gone and as offensively abusive as she was, would have been amenable to counselling, or simple restraint, or indeed to any measures intended to restore her composure, is fanciful. Forceful restraint was out of the question. No sensible person would ever remotely contemplate such a course, capable, as it would be, of leading to a physical altercation, an assault, and the possibility of criminal and civil proceedings in relation to it. The same consequences could equally flow from any attempt to induce the appellant to regain her sobriety in a room or other quiet place at the respondent's premises. As for the suggestion made in oral argument, that a police officer could and should have been called, these responses should be made. .... There is another complete answer to this ground of appeal. It is that the appellant when she left did so voluntarily and apparently with*

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<sup>11</sup> (2004) 217 CLR 469 @ 56.

*a group of men. The men said that they would look after her. In those circumstances there was nothing that the respondent could do. There is no obligation upon anyone to engage in a futility.*

- 184) Whilst not as persuasive as High Court authority, the Commission has previously addressed the issue of complaints relating to noise from patrons after they have left licensed premises. In a 2001 decision relating to the Top End Hotel the Presiding Member stated:
- “Our consideration of whether the Licensee has breached the noise condition therefore narrows down to the evidence only as to late night disturbances from noise from the Hippy Bar (the sound of patrons in the street and the carparks, however unruly, not being noise from the premises).”*
- 185) The evidence of Mr Kovic and Mr Sallis was consistent with the authorities cited immediately above. They can and do have systems in place to ban patrons who cause problems and disturbances in the neighbourhood. The evidence before the Commission, including the Hotel’s complaints register and the evidence of A/Commander O’Brien is that management of the Hotel does report incidents such as hooning and burnouts to the Police and, if the offender is able to be identified, that person is banned from the Hotel for a specified period.
- 186) The Commission as currently constituted sees no compelling reason to depart from the principle that Licensees are not responsible for the behaviour of patrons once they leave the licensed premises. The Licensee is subject to an obligation to control and manage the behaviour of patrons whilst they are on licensed premises. They are also subject, in a necessarily more limited way, to obligations as to how they respond to the unruly or troublesome behaviour of patrons when they depart the premises.
- 187) For these reasons the Commission considers that the categories of complaint concerning violent incidents in the streets, disturbances caused by unruly patrons leaving the premises and persons causing property damage to the premises of nearby residents cannot be maintained against the Licensee of the Beachfront Hotel for the simple reason the Licensee has no duty, and in fact no power or authority, to deal with those issues.
- 188) The Commission notes the evidence of Mr Sallis that he has directed his staff to conduct periodic rubbish runs in the area surrounding the Hotel. The Commission has also heard evidence that he has arranged for repairs to neighbouring properties following complaints of patrons causing property damage. It is to the credit of Mr Sallis that these things occur however, on the basis of the authorities set out above, he is under no legal obligation to involve himself in issues that occur off the licensed premises of the Hotel.
- 189) On the same basis, the complaints regarding patrons leaving bottles and cans in the surrounding streets cannot be sustained. A number of the complainants alleged that the litter was being left by patrons who regularly leave the Hotel with open containers of alcohol. The Licensee, through the evidence of Mr Kovic, denied this was the case. He conceded that some patrons try, and sometimes succeed, in concealing alcohol when they leave the Hotel and that whilst Crowd Controllers do their best to prevent this occurring they are not permitted to physically search patrons.
- 190) In addition, evidence was presented by the Licensee that various liquor products depicted in the photographs taken by the complainants of litter in the neighbourhood were products that were not sold by the Hotel at all or, in some cases, only sold from the bottle shop. This evidence was not challenged by the Director with the result the Commission is entitled to deduce that not all of the litter complained of by the neighbours could have come from patrons leaving the Hotel. The alternative explanations that the litter was left by people who had not been to the Hotel, by people who had attended private parties in the neighbourhood or people who brought alcohol with them on the trip to the Hotel are equally as plausible.
- 191) The Commission is satisfied that the complaints against the Licensee alleging that it was responsible for the littering in the neighbourhood cannot be sustained and have not been made out.

### **The Carpark at the Rear of the Hotel:**

- 192) The status of the carpark at the rear of the Beachfront Hotel has been the subject of significant debate, including a review of the current situation by a special panel of Commissioners, independent from those presiding over this Hearing. Submissions from various parties, including Mr Sallis and the Inspectorate have been confusing and contradictory.
- 193) In her written submissions Ms Truman, at paragraph 126, states “It is accepted that until very recently (i.e. 23 September 2011 – see Exhibit 41) the carpark at the rear of the licensed premises was included in the licence”. No doubt that submission was made on the instructions of Mr Sallis who lodged an application earlier in 2011 to have the carpark excised from the licensed area of the Hotel.
- 194) At paragraph 131 of her written submissions Ms Truman submits “The Commission is also asked to keep in mind the evidence of the Licensee that he does not lease, nor own, the carpark at the rear of the licensed premises”. Again the Commission is entitled to assume that submission was made on the instructions of Mr Sallis which begs the question as to why Mr Sallis:
- having a lease for the Beachfront which did not include the carpark since at least 2007;
  - having heard reference at the community meeting in September 2008 that the carpark was within the Beachfront licensed area,
- only made an application early 2011 to have the carpark removed from the licensed premises but did not mention that he neither owned nor leased the carpark. In the material available to the Commission the first mention of this was at this Hearing. It is relevant and instructive that the special panel of Commissioners determined that “The licensed area for the Beachfront Hotel does not include the carpark” and has not done so since at least 2007 and perhaps earlier.
- 195) As agreed by Ms. Truman for the Licensee, during the period of time relative to these complaints, the carpark was perhaps erroneously included in the licensed area on the licence issued. Evidence given by Mr. Sallis, at the Hearing, and subsequent investigations by the Commission have shown that the Licensee holds no lease over the carpark. A title search of the property on which then Hotel is situated reveals the following:
- Trojanmede Pty Ltd has two leases over the property at 340 Casuarina Drive
  - The current lease for the Hotel premises commenced on 30 June 2007 for a period of 10 years. This lease does not include the carpark.
  - The current lease for the Happy Gardens area commenced on 7 September 2010 and expires on the same date as the Hotel lease. This lease also does not include the carpark.
- 196) There is clear evidence contained in the lease documents held by the Titles Office that from at least 30 June 2007 the carpark should not have been included in the licensed area for the Beachfront Hotel as Licensee has not held a lease over the carpark since that date. Perhaps the carpark was previously leased to Trojanmede Pty Ltd but that is now irrelevant as there is no lease today. The carpark is in fact owned by Sallis Investments Pty Ltd and both leases were executed by a Director of the company Mr Richard Sallis, who has no connection with the licence for the Beachfront Hotel or the operation of the business under the licence other than in the capacity of landlord.
- 197) In addition, the Commission has no evidence before it that there is any legally executed agreement or arrangement entered into by the Licensee involving the carpark and, therefore, the Commission concludes that the carpark should not have been included in the licensed premises. This defect has since been remedied and the site plan now reflects accurately that the carpark is not included in the licensed premises of the Hotel.

198) As the carpark, should not have been and now is not part of the licensed premises it is not an area over which the Licensee has any control. As such, and for the same reasons as set out above in respect of alleged incidents occurring outside the licensed premises, the Licensee cannot be held responsible for incidents that occur in the carpark that may otherwise present as a breach of licence conditions or the Act. That may not be an entirely satisfactory situation in terms of management of the Hotel or the business conducted under the licence. It is however a matter of fact on the information before the Commission.

### **Intoxicated Patrons leaving the Hotel:**

- 199) It is an offence for a Licensee to allow intoxicated persons to remain on licensed premises. At no time has the current Licensee of the Beachfront Hotel been charged with or found guilty of committing such a breach. Clearly that is not categorical proof that the Licensee has not committed such a breach however it does indicate no such breaches have been detected by Police or Licensing Inspectors.
- 200) A/Commander O'Brien informed the Commission during the Hearing that the Beachfront Hotel was a Police "hot spot" and the Hotel and surrounding areas were a regular target for Police patrols and surveillance. In his Statutory Declaration dated 6 September 2011, A/Commander O'Brien deposes that between 19 February 2011 and 30 August 2011 ("the reporting period") Police conducted 72 licensed premises patrols, generally consisting of walking through the premises checking for licence compliance and any surrounding alcohol fuelled violence or anti-social behaviour. Those patrols covered the carpark and surrounding areas of the Beachfront Hotel.
- 201) The Commission notes that Police conducted seventy two licensed premises checks over a period of 193 days, although all were conducted outside the period covered by the official complaint under consideration, and they did not file any complaints concerning intoxicated patrons being served alcohol or being permitted to remain on the premises whilst intoxicated.
- 202) Folios 126 to 132 of the Hearing Brief comprise reports prepared by Inspectors who conducted compliance checks on the Beachfront Hotel on various dates between 15 September 2010 and 1 January 2011. In respect of intoxicated patrons on the Hotel Premises or other detected breaches those reports may be summarised as follows:
- Sunday 15 September 2010 00.45am to 0.15am: No clear breaches detected.
  - Saturday 11 September 2010 1.10am: Noise emanating from the venue quite loud. A number of patrons showing signs of being borderline intoxicated. Duty manager advised and some of those patrons removed. No complaints laid.
  - Sunday 12 September 2010 0.30am: Police officers removing people with open containers of alcohol from the front of the Happy Gardens. Officers did not believe they had come from the Beachfront. Inspectors thought some patrons were under the influence and should be removed. Observed one patron being escorted to the deck area by security and then returning to the main bar. Inspectors asked that the music be turned down and this was done. No complaints laid.
  - Saturday 27 November 2010 2.20am to 2.53am. Observed rubbish being dumped in and near the skip bin and an argument in the carpark and lack of security present in the carpark. Observed a male and female arguing and the male urinating in the road. The male was spoken to by crowd controllers. Observed two persons climb the fence. Observed an intoxicated female in a vehicle in the carpark. Instructed security to remove the female from "licensed premises". No complaints laid.
  - Saturday 27 November 2010 11.35pm: Observed "no intox or minors on premises and no unruly behaviour sighted in and around the premises".
  - Sunday 19 December 1.10am: Observed a heavily intoxicated male outside the Hotel who then vacated the area. Duty Manager and Crowd Controller confirmed male had

not been in the Hotel. Male refused entry by security due to intoxication. Inspectors advised that earlier in the evening minors who had been refused entry began to antagonise another group of patrons. Noise at an acceptable level. Inspectors to follow up on male on front lawns. No complaints laid.

- Saturday 1 January 2011 1.10am: Observed Police placing males into Police van. Inspectors believed several patrons were demonstrating early signs of intoxication. Crowd Controllers roving beer garden checking ID. Observed Crowd Controllers on the lawn outside the front of the Hotel restraining one male with the assistance of Police and another male on the ground who appeared to be intoxicated. No complaints laid by Inspectors or Police.

- 203) It is difficult for the Commission to reconcile the complaints of the neighbours in respect of regular disturbances by intoxicated patrons of the Hotel with the compelling evidence that no complaints have been laid by Inspectors or Police for intoxicated patrons, despite the relatively intense scrutiny of the Hotel through inspections, both during and outside the complaint period.
- 204) The Commission does not doubt the veracity of the evidence given by the complainants during the course of the Hearing that they are regularly disturbed by what they perceive to be intoxicated people in the streets and the general neighbourhood. The complaints of the residents have been referred to the Director and, as a consequence, are within the knowledge of the Inspectors. However, none of those complaints has resulted in the Hotel being charged with a breach of Section 102 (supply of alcohol to an intoxicated person) or 121 (failure to remove intoxicated persons) of the Act.
- 205) The Commission is entitled to assume that none of the residents' complaints of intoxicated people on and leaving the premises included sufficient particulars or specific allegations to warrant a formal complaint by Police or the Inspectors. In those circumstances the Licensee must be given the benefit of any doubt and the Commission finds that this component of the complaint is not made out due to the lack of specifics or particulars contained in the complaints by the neighbours.

## **Noise complaints**

### **Rubbish Disposal:**

- 206) Dealing first with the issue of noise disturbance as a result of the removal of rubbish from the Hotel. Several of the nearby residents complained of being disturbed by bags of bottles and cans being dumped into the skip bin located in the carpark late at night. For those neighbours whose properties abut the fence next to the site where the skip bin is located the commission has no doubt that noise of that nature would be particularly disturbing and likely to disrupt sleep.
- 207) The Commission heard that in response to this category of complaint Mr Sallis directed that no rubbish was to be transferred to the skip bin between the hours of 9.00pm and 8.00am the following morning. Unfortunately this did not resolve the problem as staff of the Hotel continued to deposit garbage bags of bottles and cans next to the skip bin throughout the evenings, again disturbing the nearby neighbours.
- 208) The Licensee's response, as stated by Mr Sallis during the viewing of the premises, was to further change the rubbish disposal arrangements so that no rubbish is removed from the premises after 9.00pm but remains within the Hotel building until the following morning. A number of the complainants noted that the changed rubbish removal arrangements had resulted in a lessening of the noise issues associated with disposal of bottles and cans.
- 209) The Licensee is operating a hotel business and an enterprise of that nature must be expected to result in a significant amount of can and bottle rubbish which needs to be removed. The Commission is of the view that the Licensee has addressed this aspect of the

complaint to the best of his ability and there is little more that can be done to further address that issue.

- 210) The Commission finds that the complaints concerning noise disturbance arising from the disposal of rubbish, whilst validly made, have been addressed by the Licensee with the disposal procedures incorporated into the Hotel's EMP. The Commission intends to take no further action in respect of this element of the complaint.

#### **Delivery Vehicles:**

- 211) Some residents complained about disturbances caused by delivery vehicles delivering products to the Hotel and or disturbances that occur when the Hotel's rubbish is collected for transfer to the dump.
- 212) Mr Sallis evidence, which was supported by documentary evidence (see for example Exhibit 24), was that he has contacted the garbage collection company and requested that they do not attend the Hotel till after 8.00am. He has made similar requests to other suppliers, such as his alcohol suppliers. It appears to the Commission that here is little more that Mr Sallis can do other than to seek the co-operation of his suppliers which he has done. The Commission is of the view that the Licensee has limited control over the timing of deliveries by his suppliers and that he done all that is possible to address the neighbours' concerns in that regard.
- 213) The Commission does not intend to take any action against the Licensee in respect of the complaints concerning the rubbish removal and delivery of goods to the Hotel.

#### **Noise from music and entertainment at the Hotel:**

- 214) The Licence of the Beachfront Hotel is subject to the following noise conditions:

*(c) There will be no live or amplified music in the Beer Garden after midnight.*

*(e) The **Licensee will take all reasonable measures** necessary to ensure that **noise from the Trophy Room and Beer Garden after midnight** does not cause undue disturbance or discomfort to residents of the neighbourhood. (Emphasis added).*

- 215) Taking account of the specific and narrow wording of the licence condition any complaint in this category must relate to noise emanating from the Trophy Room and/or the Beer Garden. As correctly submitted by Ms Truman, the complaints concerning noise from the Beer Garden relate to patron noise and not noise from amplified music. As a result that Commission has no evidence before it such as to enliven licence condition (c) set out above.
- 216) A number of the complainants from the residents concerned noise issues well prior to the complaint period, including as far back as prior to the 2008 Community meetings. Having said that, the Commission is satisfied that there have been instances where noise, whether it be from music or from patrons in the beer garden, has disturbed neighbours after midnight and particularly those neighbours who reside close to the Hotel.
- 217) However, the manner in which the noise condition is drafted requires the Commission to take a three staged assessment in considering any complaint that the condition has been breached. Firstly, has the noise from the Trophy Room or the Beer Garden caused disturbance or discomfort to the residents of the neighbourhood? If the answer to that question is "yes" then the Commission is required to consider whether the disturbance or discomfort is "undue". Thirdly, if the Commission is satisfied that noise from the Hotel is causing undue discomfort to the residents it must then consider whether the Licensee has "taken all reasonable measures" to prevent the disturbance.
- 218) In her written submissions Ms Truman points out that some of the noise complaints from the residents fall outside the complaint period whilst others relate to noise prior to midnight and still other relate to noise apparently emanating from locations within the premises other than the Beer Garden and the Trophy Room (for example noise from the Cue Room). The

Commission accepts that submission however, it is also accepted that noise from the Beer Garden and/or the Trophy Room has on at least some occasions within the complaints period disturbed or discomforted some residents.

- 219) Turning to the third consideration, the Commission notes that the licence condition requires the Licensee “to take all reasonable measures” to ensure that noise from the Beer garden and Trophy room does not disturb the residents. The Commission has heard evidence of the specific measures the Licensee has taken to address the concerns of residents. On various occasions residents have contacted the Hotel and asked for the music, or often the bass, to be turned down and the management of the Hotel has responded positively. A complaints register has been established and the Hotel has appointed a Community Relations Officer. In addition the EMP for the Hotel includes clauses relating to noise and the requirement for sound recordings to be taken at various intervals during the evening. Exhibit 20 is a sample of the “Beachfront Hotel Management Checklist” and demonstrates that sound recordings are taken at two hourly intervals from 8.00pm in the evening and three separate locations on the licensed premises.
- 220) The Commission acknowledges that the existing noise condition for the Hotel is inadequate. It does not currently cover the control of noise from the entirety of the licensed premises. Whilst it is reasonable for the Licensee to comply with and rely on the precise terms of the existing licence condition in response to noise complaints it is not satisfactory for the Licensee to use the defence that the noise came from an area not covered by the licence condition and therefore does not constitute a breach of the condition.
- 221) The Commission intends to amend the noise condition to include a condition that restricts noise disturbances from the Hotel, from music or otherwise, for all areas of the Hotel after midnight.
- 222) Despite the submissions made on behalf of some of the complainants, the Commission does not agree that the management of the Hotel has been unresponsive or uncaring in respect of noise complaints from residents where those complaints have actually been brought to their attention. The adequacy and effectiveness of the Licensee’s response to the complaints is legitimately questioned, however on the basis of the evidence presented at the hearing the Commission is satisfied that the Licensee of the Beachfront Hotel has taken reasonable measures, albeit not 100% successful, to ensure that noise from the Hotel does not disturb the neighbourhood.
- 223) The final consideration for the Commission under this head of complaint is whether the noise complained of by the neighbours is “undue”, allowing that the operation of any Hotel is likely to bring with it some noise on the basis that hotels are places where people congregate for the purpose of social activities including entertainment.
- 224) The Commission is guided in this respect by previous decisions in respect of noise complaints from residents living close by licensed premises and the consideration of the common law relating to nuisance. In particular the Commission notes the decision in the matter of the Top End Hotel<sup>12</sup> in which the Presiding Member stated:

*Authorities were cited to us for the proposition that in the common law relating to nuisance it was no defence to show that it was the complainant who had “come to the nuisance” as the expression is. It has never been any answer to a claim in nuisance for the defendant to show that the complaining person brought the trouble on his or her own head by electing to come to reside so close to the defendant’s existing activities.*

*However, the Commission is of the view that the common law in this area is not necessarily to be seen as being of assistance to the Commission in discharging its purely statutory function of regulating liquor and licensed premises. Even so, there*

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<sup>12</sup> John Withnell, “Reasons for Decision”: Top End Hotel (29 June 2001)

*are statements in some of the Australian authorities on the common law of nuisance which are not inconsistent with the direction of the Commission's thinking in relation to its present task.*

- 225) The Presiding Member in that decision went on to say that the reasonable standards for the enjoyment of premises in a mixed use neighbourhood would surely see a pre-existing hotel as a relevant consideration, not determinative but relevant in terms of the comfort of neighbours who moved into the area knowing of the Hotel's existence and the likelihood to noise being generated from a business of that nature.
- 226) The Commission does however note the evidence of Ms Moorcroft in respect of the change in the operations of the Hotel. She stated that there was no problem with the Hotel when it was Lim's when the "Cage" was operating as activities finished at 8.30pm. She added that the problems arose from 2003 onwards when the operation of the Hotel changed and when the trading hours for the Trophy Room and the Beer Gardens were extended.
- 227) The Commission also notes the pronouncement of Justice Hodgson of the Supreme Court of NSW in the matter of *Seidler and Ors v Luna Park Reserve Trust*<sup>13</sup> which concerned complaints from residents of properties located near Sydney's Luna Park about noise generated by the roller coaster, both from mechanical noise and screaming patrons, constituted a nuisance. Luna Park opened in 1935 and the residences of the plaintiffs were constructed from 1988 onwards. Hodgson J, in considering competing interests in a mixed use neighbourhood stated:

*In assessing this one must have regard to the character of the neighbourhood which a person in that locality might reasonably expect, making due allowance for reasonable give and take between neighbours. Putting the same matter a different way, the question is whether or not there is, in relation to the plaintiffs' properties, such interference with the amenity of the plaintiffs resulting from the defendants uses of the land that such use must be considered unreasonable".*

*"It is not contended that the circumstances of the plaintiffs "coming to the nuisance" of itself gave a defence; but this was an important factor to be taken into account in relation to the extent of interference with the plaintiffs' amenity, as well as the reasonableness of the defendants' conduct".*

- 228) The Police evidence and statistics, as presented by A/Commander O'Brien in his affidavit, was unconvincing and misleading in terms of the frequency and purposes of Police attendances in the neighbourhood surrounding the Hotel. Under cross examination A/Commander O'Brien conceded that many of the incidents included in the statistical report as incidents occurring at the Hotel had no connection with the Beachfront whatsoever. In addition, several of the calls to Police reporting incidents at the Hotel were actually made by staff of the Hotel. Complaints from the general public concerning the Hotel were, under cross examination, narrowed down to a handful of incidents over a 6 ½ month period, reported by persons other than staff of the Hotel, which directly related to the operation of the Hotel.
- 229) The low number of complaints to Police regarding the operation of the Hotel is more compelling taking account of the fact the neighbouring residents were advised during the course of the Community meeting held on 23 July 2008 that Police did not have a substantial body of complaint from residents about the issues raised at the meeting. The residents stated that they did not want to burden the Police following which Sergeant Gordon explained that due to the low level of complaint an expanded Police presence in the area could not be justified. He requested that residents call and complain about incidents at the Hotel.
- 230) Clearly, from the evidence of A/Commander O'Brien the number of complaints to Police by residents has not risen significantly since 2008. In addition, in the lead up to the Hearing

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<sup>13</sup> Unreported. BC9505507 No 1166 of 1995

counsel for the Director made concerted efforts to drum up further complaints, including mail outs to nearby residents. Those efforts did not result in any additional complaints being included in the Hearing Brief.

- 231) The Commission treats the survey or petition organised by management of the Hotel with some scepticism given that those who participated by completing the questionnaire were predominantly patrons of the Hotel, both from the neighbourhood and further afield. The Commission does note however that the Licensee managed to obtain a positive response regarding the Hotel from in excess of 140 people.
- 232) The Commission regards the complaints lodged by neighbouring residents to be legitimately made and addressing the genuine concerns of those residents. However, the low number of incidents reported to Police, the Inspectors and the Licensee himself the Commission is not persuaded that that the complaints as presented require the reduction of current trading hours.
- 233) For the reasons set out above the Commission is not satisfied that the complaints as laid out and presented at the Hearing are made out to the degree required so as to warrant punitive action against the Licensee.

**Special Event Nights (State of Origin):**

- 234) Having determined that the complaints as laid have not been made out against the Licensee the Commission is not required to further consider the complaints of residents that relate to the State of Origin events held at the Hotel. Those events in 2011 were held outside the complaint period that is the subject of this decision.
- 235) Notwithstanding this, the Commission notes that many of the complaints, for example illegal parking, littering and disturbances from patrons departing the Hotel after the event, are not within the control or responsibility of the Licensee for the reasons set out above. The Commission notes also that a significant number of licensed venues hold special events for the State of Origin series and those events are well patronised by patrons who attend such functions. Were it required to consider the complaints regarding the State of Origin nights at this time the Commission would have been more likely to lean towards the view that, if properly managed, there is nothing inherently wrong with such events. Given the mixed use nature of the neighbourhood the Commission sees this as a situation that should be measured against the usual give and take between neighbours who have competing interests in their respective expectations as to what constitutes reasonable enjoyment and amenity of their premises.

**Additional considerations:**

- 236) The Commission is mindful of the fact that the Beachfront Hotel is located within a residential neighbourhood and the operation of the business under the licence must take account of that factor and the reasonable enjoyment by the neighbours of their respective premises. In support of the submission that Hotel management was mindful of the concerns of residents, Mr Sallis placed great emphasis on the development of the Hotel's EMP and its implementation and refinement since 2008. Mr Sallis gave evidence that the requirements of the EMP were explained to all staff members and that concerted efforts were made to ensure compliance, including in matters not directly related to the operation of the premises. For example, the measures included in the EMP aimed at reducing the prevalence of illegal drinking by itinerants on the foreshore across the road from the Hotel, an issue that is clearly not the responsibility of the Licensee.
- 237) The Commission is mindful of the valid and long running nature of the resident's concerns. Some of those concerns, such as the late night disposal of rubbish into the skip bin, have been addressed and resolved via implementation of the EMP. Similarly, the EMP deals with the issue of hooning and the like and sets out the requirement for staff to report such incidents to Police and includes a banning procedure for persons responsible. Other areas

of concern are capable of being addressed by the Licensee complying with the terms of its own EMP.

- 238) The Commission intends to include a condition in the licence for the Beachfront Hotel requiring the Licensee, in conjunction with the Director, to develop an EMP and for this development and implementation of the EMP to be a condition of the licence for the Hotel. The Commission regards the EMP prepared by the Licensee and dated June 2010 to be suitable for that purpose. This component of the decision has been included as a consequence of the evidence given by Mr Sallis during the course of the Hearing that he and his management team are serious about enforcing the EMP as a procedural manual for the operation of the business under the licence.

## Decision

- 239) The Commission finds, for the reasons set out above, that the complaints against the Licence contained in the letter from residents in the neighbourhood of the Beachfront Hotel have not been proven on the evidence presented to the Commission during the course of a long Hearing.
- 240) The Commission expresses its concerns in respect of the current wording of the noise condition attached to the licence. Due to the anomalies noted above and to ensure that the noise conditions attached to the licence are consistent and more readily enforceable the Commission determines that the existing noise conditions attached to the liquor licence for the Beachfront Hotel be removed and replaced with the following licence condition:

*The Licensee shall take all measures necessary to ensure that noise from the premises does not cause undue disturbance or discomfort to residents of the neighbourhood.*

- 241) In addition, the Commission directs that the following condition be included in the Liquor Licence for the Beachfront Hotel:

*The Licensee shall develop an Environmental Management Plan for the management of the licensed premises in consultation with the Director of Licensing. The Licensee shall ensure that the matters set out in the Environmental Management Plan are implemented in the operation of the business conducted under the liquor licence.*

- 242) The Commission notes with some significant concern the manner in which this complaint was presented at Hearing and queries whether the prescribed complaint process is the appropriate mechanism to deal with community complaints in respect of noise and other disturbance from licensed premises.
- 243) The Commission notes that the recent amendments to the Act have provided the Director, and the Inspectors, with a far wider range of options in respect of the manner in which complaints are dealt with, including without the intervention of the Commission. The Commission trusts that those avenues will be fully explored should complaints of a similar nature be raised in the future. In the Commission's recent experience the attempted resolution of neighbourhood noise and disturbance disputes via the formal complaint process is not only extremely costly to the parties but has also proven unsatisfactory in achieving agreed outcomes and on-going solutions to the satisfaction of the parties in dispute.

Richard O'Sullivan  
Chairman

12 January 2012