

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Tiwi Supermarket
Licence Number:	80903294
Complainant:	Director of Licensing
Hearing:	Complaint pursuant to Section 48 of the <i>Liquor Act</i> -Breach of Licence conditions (bookup of liquor) contrary to section 110 of the <i>Liquor Act</i> and breach of section 33E(1) of the <i>Liquor Act</i> (retention of a persons debt card as security payment for liquor)
Heard Before:	Mr John Flynn Mrs Veronica McClintic Ms Brenda Monaghan
Date of Hearing:	6 July 2006
Appearances:	Complainant-Mr Phil Timney Licensee-Self Represented

Background

- 1) This complaint has been laid by the Director of Licensing against the licensee of Tiwi Supermarket, Mrs Jannie Grau Mathers. The complaint alleges that on 7 December 2005, the licensee breached the credit provision of her liquor licence by selling liquor to a person on book up. The Director alleges a further breach by the Licensee of Section 33E(1) of the *Liquor Act* by retaining a person's debit card as security for payment of the sale of liquor. Both breaches are denied.
- 2) The evidence put forward by the complainant in support of the complaint is as follows. Aboriginal Community Police Officer (ACPO) Ben Pascoe from Maningrida assisted the Director of Licensing by attempting to obtain liquor by book up (aka book down) at two separate outlets. One of those outlets was Tiwi Supermarket. The fact that the attempt at bookup was a "set up" was freely admitted.
- 3) Mr Pascoe gave evidence that he meet with Licensing Inspectors at 10am on 7 December 2005 and went with them to one premise to attempt to obtain liquor by bookup. The attempt was unsuccessful and he was further asked by Licensing Inspectors to attend at the Tiwi Store to see if he could obtain liquor by bookup there. Mr Pascoe, travelling in an unmarked Police car, left the inspectors and first stopped at an ATM to check his debit card balance to ensure it was in debit. His own evidence and his bank statement supports a view that this check took place at 1051am in Darwin. Mr Pascoe then decided to call in on his cousin Sandra Cooper to ask her to accompany him to the Tiwi Store. He knew she was a regular customer and that the staff there knew her.
- 4) It appears that the decision by Mr Pascoe to involve his cousin was made after he left the Licensing Inspectors and that he made a detour to check his bank balance and to collect her. This caused some confusion with the Licensing Inspectors, who were waiting near the Tiwi Store (out of view) on the understanding that they would meet up with Mr Pascoe after his visit to the store. This did not happen.
- 5) Mr Pascoe's evidence is that around 12 noon, he and his cousin Miss Sandra Cooper entered the Tiwi Store. Miss Cooper asked the manager, Mr Mathers if her cousin could

“book down” and he agreed. Miss Cooper and Mr Pascoe obtained a number of food items and took them to the front counter where they were they were served by an assistant known to Ms Cooper as Rachael. Mr Pascoe asked Rachael if he could book up some grog and indicated he wanted a carton of beer. Rachel advised him that he could have a 4lt cask of Buronga wine which was cheaper. Miss Cooper then walked over to the store fridge, retrieved a cask and brought it back to the counter.

- 6) Mr Pascoe’s evidence was that Rachel added up his purchases and told him that the final cost was \$101.30. He gave her his debit card and she placed it in the EFTPOS machine (“the little black machine”). He told her when his payday was and he gave her his pin number. His evidence was that Rachel did not give him a receipt but that she placed a piece of paper from the machine and his credit card beside the cash register. Mr Pascoe then left the store with the bags of groceries including the cask in a yellow bag. He was recognised by a passer-by outside the store as an ACPO. When he and Miss Cooper could not find the Licensing Inspectors, they drove directly to the office of Racing Gaming and Licensing and waited for Licensing Inspector MacKenzie to arrive. At around 1pm, Mr Pascoe handed the cask over to Mr MacKenzie and told him his story.
- 7) Sometime later, Mr Pascoe rang Tiwi Store from Maningrida and asked for his card back. He recalls speaking to a woman and his evidence was as follows:

“Later, a couple weeks later, when I was back at Maningrida I rang Tiwi shop, and someone in the shop um, spoke to me, I spoke to her, ‘my name is Ben Pascoe, I believe you have my card, my ANZ access card. That belongs to me, can I have it back.’ And the person said, the person could be, it was a female. She reckons, ‘I don’t care if you’re George Clinton, I don’t care if you’re Michael Jackson, or I don’t care if you’re John Howard. I don’t know who you are.’ What? See ya. I didn’t answer any questions. I just hung up. I knew that um, I knew she probably knew who I was.”

- 8) The evidence of Miss Sandra Cooper corroborated that of her cousin Mr Pascoe to some degree. She admitted she was picked up by him in a vehicle and that she went with him to the Tiwi Store at around 12 noon. She asked the manager if Mr Pascoe could “book down”. When they had made their grocery purchases, she went to the fridge and retrieved a cask of wine. The chain on the fridge was off at the time. She returned to the counter where Rachel (the person she knew) was serving and placed the cask with the other purchases. She then left the store to wait for Mr Pascoe outside. She admits to carrying the purchases to the car after the book up was completed. Miss Copper was a very reluctant and hesitant witness. She advised she still shops at the Tiwi Store and currently has a book up debt to the store.
- 9) Licensing Inspector Marc MacKenzie also gave evidence. He confirmed that he had met with Mr Ben Pascoe at about 10am that day and he had again seen Mr Pascoe after an unsuccessful attempt at book up at another store in Nightcliff. He admitted that there was an agreement that Mr Pascoe would visit the Tiwi Store to attempt book up of liquor but there was some confusion regarding arrangements and Mr Pascoe never arrived at the rendezvous point in the park behind the Tiwi Store.
- 10) Mr MacKenzie confirms that he received a phone call from Racing Gaming and Licensing (RGL) Office at about 12:45pm advising him that Mr Pascoe was waiting for him there. He returned to the office and attended on Mr Pascoe at about 1pm, heard his story about Mr Pascoe’s visit to the Tiwi Store and retrieved the wine cask from him in the yellow plastic bag. Mr MacKenzie further gave evidence that at approximately 1:45pm that same day, he and two police officers attended the Tiwi Store. Mr Mathers, store manager, denied providing any liquor on book up to Mr Pascoe. A search of the premises failed to locate Mr Pascoe’s card or any transaction record relating to a book up involving Mr Pascoe.
- 11) Mrs Mathers as licensee emphatically denies the breach. She was not in the store at the time but her husband and one of her employees Rachel Hewitt gave evidence. Both Mr Mathers and Ms Hewitt are the people that Mr Pascoe and Miss Cooper state attended on

them at the Tiwi Store on 7 December 2005. Both Mr Mathers and Miss Hewitt deny that they served or spoke to Mr Pascoe on that day or that they allowed him to book up at the store.

- 12) Mr Mathers remembers 7 December 2005 as a normal day until Mr MacKenzie and the Police Officers arrived at the store unannounced and conducted a search. Mr Mathers objected strongly to a suggestion that he and other staff were allowing book up of liquor. He was concerned that the evidence of the Director was fabricated and that Miss Cooper's evidence could not be relied upon as it had been obtained under duress. Mr Mathers admitted that sometime after 7 December, ACPO Ben Pascoe rang and spoke to him and asked for his card to be returned. He agreed that he responded as follows:

"The next contact I had, was someone rang up saying he was Ben Pascoe, he reckons in his evidence he spoke with a woman, and if he mistook my voice for a woman's, you're going extremely well.

He said, 'I am a community based police from Maningrida, my name is Ben Pascoe, I'd like my card back.'

I said, 'I couldn't care less if you're Michael Jackson; we don't have your card.'

[He said] 'I am a policeman; I'll be coming there to turn your shop upside down.'

[I said] 'I'll be waiting near the front door, you can't miss me, I'm fat, haven't got a lot of hair.' [He] obviously didn't take that up."

- 13) Miss Hewitt confirmed that Sandra Cooper was a regular customer and acknowledged that she may have been in the store on the 7 December but Miss Hewitt has no memory of the incident. Miss Hewitt gave her account of her normal procedure for attending to a person wanting to "book up" groceries. Such customers are told to see Ian (Mathers) the manager and if Ian agrees, then they return to the checkout where they complete a book up form. The store assistant then checks the debit or credit card with the bank to confirm that the PIN is correct and the card is accepted. This procedure involves the card being swiped, a bank account and a monetary amount entered together with the PIN. The transaction is however cancelled before completion once the assistant is satisfied the card is a current card and is accepted by the bank. The shop assistant then prepares an invoice in the invoice book itemising individual grocery items. The total is added up on the calculator on the cash register. The calculator on the cash register does not include a print out and calculations made in this fashion do not show on the till tape. The customer signs the invoice and is provided with the top copy - the carbon copy being retained by the licensee. The detail of the book up is then retained in the ledger book including the balance owed and PIN details. The card of the customer is also kept.
- 14) Other documents, ANZ Bank Statement in the name of Ben Pascoe and a faxed letter from Bev Wilson, ANZ Investigator, dated 13 February 2006, were also tendered to the Commission which supported two conclusions:
- a) Ben Pascoe's card was not used by him after 7 December (NB there were some transactions made from the account of Mr Pascoe but these were either automatic payment transactions or ones that did not require the use of a card.)
 - b) Details of a cancelled transaction on an ANZ EFTPOS machine (such as the one at the Tiwi Store) are not retained by the ANZ bank on its customer records. The evidence of Miss Hewitt and Mr Mathers was that this was the normal procedure they followed to confirm for themselves that a customer's card was still current. If it was not current, then the printout from the EFTPOS machine would tell them that and book up would no doubt be refused. Thus, if the licensee swiped the card, entered an amount to be deducted and the PIN but then cancelled the transaction, no transaction record would be kept by the bank of this attempt. The only documentary record is the printout received by the person using the EFTPOS machine. If we find that the book up did

occur, then this would explain why a record of the card enquiry did not show up on the bank's customer records.

- 15) We have considered carefully all the evidence in this matter and are satisfied on the balance of probabilities that the incidents complained of did in fact occur. We make the following comments.
- a) We prefer the evidence of Mr Pascoe and Miss Cooper to that of Mr Mathers and Miss Hewitt. Mr Pascoe is an "outsider" with no connections to the Tiwi Store (although he knows people including his cousin who shop there).
 - b) Mr Pascoe gave convincing evidence of the events as they unfolded on the 7th of December. Whilst some timelines are not perfect, the main times are corroborated by the evidence of Miss Cooper or Mr MacKenzie. These include the time he first met with the Licensing Inspectors on 7 December, the time he collected Miss Cooper from her home, the time he and Miss Cooper entered Tiwi Store and the time he attended RGL's office to deliver the wine cask.
 - c) It was quite clear to the Commission that Sandra Cooper was a reluctant witness. We concluded from her demeanour that her reluctance was likely to be caused from the unenviable position she was placed in having to give evidence against her own shop keeper – especially in the circumstances where she currently has a book up debt to them. There was no reasonable evidence before us to support a conclusion that Miss Cooper gave evidence under duress and we do not make that finding.
 - d) Despite her reluctance, Miss Cooper confirmed Mr Pascoe's evidence regarding the identity of the shop and its occupants ("Rachael" and Mr Mathers), her involvement in the bookup arrangements made for the purchase of the wine cask and groceries by her cousin and the part she played in removing the cask from the liquor fridge and again later in carrying it to the car. Neither Mr Mathers nor Ms Hewitt suggested that Ms Cooper was untrustworthy and in fact thought the opposite about her.
 - e) The licensee would have us believe that Mr Pascoe lied by purchasing the goods elsewhere and then blaming the book up on the Tiwi Store. This does not to our minds seem to be feasible. There is no motive for Mr Pascoe to take such steps. Further, we found Mr Pascoe's evidence believable in that apart from the form filling, the process he described going through to get bookup was the same as that described by Ms Hewitt and Mr Mathers (see paragraph 13 above). It is unlikely that Mr Pascoe would have known the process unless he had been in the store and seen it for himself.
 - f) It also seems logical to us that the transaction process described by Mr Pascoe when he sought bookup of liquor would be a sensible method for a licensee to use. The calculator on the till is used to show the customer the total. This calculator leaves no paper record. The debit card is then swiped, the total for the purchases is entered together with the PIN number and the transaction is then cancelled. This procedure enables the licensee to check that the card is accepted by the bank. It also provides a transaction slip for the licensee recording the total amount booked up. Because it is cancelled before it is completed however, it does not appear on the bank's records as an enquiry.
 - g) We also place some weight on the conversation Mr Pascoe had with Mr Mathers at a later date when he attempted to retrieve his card. There seems no logical reason why he would ring for his card unless he thought it was there.
 - h) There has been some confusion as regards the colour of the plastic bags used by the store. The exhibited wine cask is held in a yellow plastic bag and Mr Mathers' evidence was that the store has never had yellow plastic bags although they had had other colours. Miss Cooper spoke of white plastic bags always being used. We have not disregarded this evidence but have preferred the evidence of Mr Pascoe to that of the other witnesses. Mr Pascoe advises that he purchased the wine cask in a yellow bag

from the Tiwi Store– the very same bag the wine cask is in as it is exhibited today. We accept this evidence.

- 16) In summary we find the complaint that the licensee breached the *Liquor Act* by allowing the book up of liquor on 7 December 2005. We also uphold the complaint that the licensee in breach of section 33E(1) of the *Liquor Act* retained the debt card of Mr Pascoe as security for the purchase of liquor. A time and date has been set for 0930hrs on 3 August 2006 for the parties to provide submissions for penalty.

John Flynn
Chairman

17 July 2006