

# Northern Territory Licensing Commission

## Penalty Decision

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<b>Premises:</b>	Mataranka Hotel Stuart Highway Mataranka
<b>Licensee:</b>	Westbrick Pty Ltd
<b>Licence Number:</b>	80117506
<b>Complaints:</b>	Complaint pursuant to Section 48(2) of the <i>Liquor Act</i> – Conduct contrary to Section 102 Sale or Supply to an intoxicated person
<b>Heard Before:</b>	Mr Philip Timney (Presiding Member) Mrs Jane Large Mr David Brooker
<b>Date of Hearing:</b>	21 & 22 March 2011
<b>Appearances:</b>	Mr Antony Downs for the Licensee Inspector Mark Wood for the Director of Licensing

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## Background

- 1) By decision dated 19 April 2011 the Commission found that the Licensee of the Mataranka Hotel had contravened Section 102 of the *Liquor Act* ("the Act"). The Commission found that on 11 March 2010 an employee of the Licensee supplied and intoxicated person, Mr Ross Billy, with alcohol being a carton of VB beer. At the conclusion of the Hearing the parties were advised that, should the Commission find the complaint made out, it would seek written submissions on penalty. Submissions were to be forwarded to the Commission on or before close of business on Friday 6 May 2011.

## Submissions on behalf of the Licensee

- 2) Written submissions on behalf of the Licensee were received under cover of a letter from Mr Antony Downs dated 9 May 2011. Those submissions may be summarised as follows:
- 3) No evidence was presented at the Hearing in respect of any harm suffered or caused by Mr Billy and the Police officers involved at the time did not see reason to place him into protective custody.
- 4) The breach is at the less serious end of the scale and not of sufficient gravity to warrant a suspension of licence for the following reasons:
  - a) The Licensee has managed the Mataranka Homestead since 2005 prior to purchasing the Mataranka Hotel and has not been the subject of a complaint arising from either premises. This was a first offence with no aggravating circumstances.
  - b) The Licensee has, on various occasions, voluntarily restricted the type of alcohol sold at the premises, reduced trading hours and complied with Police and community requests in respect of the sale of alcohol;
  - c) The Licensee is an integral part of the Mataranka community and maintains a good relationship with the local Police and the community generally;
  - d) The Licensee has taken a proactive stance in respect of the responsible drinking;

- e) The breach was not deliberate, careless or demonstrating reckless disregard by the Licensee;
  - f) Mr Billy displayed no obvious signs of intoxication at the time of the supply of the carton of VB and this was not a situation where the Licensee served a patron beyond the point of intoxication;
  - g) Mr Billy was not displaying any indicia of intoxication at the time of the supply and no findings were made in respect of any such indicia compared with the decision in respect of the Gove Yacht Club (27 April 2009); and
  - h) The supply to Mr Billy was a one-off event and not one to a patron who had been previously drinking at the premises.
- 5) Mr Downs suggested that the Commission should follow the decision in Crossways Motor Hotel (23 January 2006) in which no penalty was imposed due to the Commission taking account of the following matters that are also relevant in this complaint:
- a) The passage of time since the incidents occurred, through no fault of the Licensee;
  - b) The Licensee's demonstrated keenness to participate in the case to its conclusion;
  - c) The costs borne by the Licensee in defending the complaint;
  - d) The positive report from the Director of Licensing regarding the Licensee's performance; and
  - e) The Licensee of the Mataranka Hotel also had the prospects of criminal proceedings to contend with.
- 6) Mr Downs submitted that the appropriate penalty in the circumstances is the issuing of a breach with no further penalty. If the Commission is not persuaded by that submission then the penalty should be no more than the issuing of a formal caution or reprimand to the Licensee. In the alternative, if a suspension is to be imposed it should be immediately suspended and/or limited to take away sales only.

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

- 7) Inspector Wood forwarded written submissions to the Commission in a letter dated 19 April 2011. Those submission may be summarised as follows:
- 8) The identification of the staff member of the Mataranka Hotel who actually supplied Mr Billy with the carton of beer when he was intoxicated is immaterial. The actions of a member of staff in breaching Section 102 of the Act are subsequently those of the Licensee.
- 9) The offence must be viewed in the following context:
  - a) The Mataranka Hotel is the only "pub" in Mataranka;
  - b) Mataranka is the hub for and the closest liquor outlet for a number of outlying Aboriginal communities. Mr Billy is a resident of Minyerri community;
  - c) As most Aboriginal communities are "dry" many people from the communities who visit Mataranka remain in the township either drinking in public or staying at the town camps resulting in an increase in alcohol related issues in Mataranka; and
  - d) The majority of the workload of the Police in Mataranka is dealing with alcohol related issues and incidents, which is why Officer Dingle and his Minyerri based colleagues were in Mataranka.

- 10) Mr Billy made a considered effort to obtain further liquor from the Hotel and, considering the time of the evening it is widely accepted that extra vigilance is required to prevent already intoxicated persons from topping up prior to the end of take away hours.
- 11) On the evidence of the witnesses for the Licensee, Mr Billy would not have been served had the Licensee complied with its own policy of breath-testing patrons. The Licensee submitted that the reason for non-compliance was that the presence of the Police intimidated the staff to abandon the policy rather than admit that an error of judgement had occurred.
- 12) Inspector Wood submitted that the Commission has long held that the sale of take away alcohol to an intoxicated person is far more serious than on premise sales and referred to decisions in the matters of The Vic Hotel (24 July 2008) and Kitty O'Sheas Irish Bar (19 December 2008). He submitted further that Mr Billy was not a resident of Mataranka and the Commission should accept that Mr Billy, were he not apprehended by Police, may well have committed further offences by consuming the alcohol in a public restricted or prescribed area.
- 13) Inspector Wood submitted that the Licensee's reluctance to accept culpability for the offending was of significant concern. He added that whilst the Licensee should be given credit for an unblemished record the following aggravating factors should be taken into account. Namely the total denial by the Licensee of any wrongdoing and the defences submitted by the Licensee that the offence was ordered or condoned by the Police and that Mr Billy was an agent provocateur acting on instructions from the Police.
- 14) In respect of the appropriate penalty, Inspector Wood submitted that the intentional attempt by the Licensee to shift the blame onto Police demonstrates contemptuous behaviour with the result that the need for specific deterrence in this matter is greater than the requirement for general deterrence. He submitted that the appropriate penalty would be a suspension of licence for a period of 3 days with 2 of those days to be actually served on Thursday pay days, the day on which the offence occurred.

## **Consideration of the Issues**

- 15) The Commission has previously expressed its views in respect of the sale of take away alcohol to intoxicated persons and regards breaches of this nature as being at the serious end of offending under the Act. The anti-social behaviour, violence and self-harm resulting from the sale of take away alcohol to persons who are already intoxicated impacts significantly on the wellbeing of the person themselves and on the community at large, more so in a remote or isolated locations such as Mataranka. The Commission has regularly informed Licensees, through the conduct of its Hearings and in its published decisions, that offences involving the sale of take away alcohol to intoxicated persons will not be tolerated and that significant penalties will apply, including suspension of the liquor licence.
- 16) In this instance there were a number of aggravating factors which persuade the Commission to impose a penalty at the higher end of the scale. The sale was to an Aboriginal man who was not a resident and who was significantly intoxicated at the time he was sold a carton of VB by staff at the Mataranka Hotel. The purchaser, Mr Billy, is a resident of the Minyerri Community who had informed Officer Dingle that he intended to purchase the beer and drink it in the drinking paddock. The harm that could have arisen to Mr Billy or those he may have come in contact with in those circumstances, and given his level of intoxication at the time of the purchase, are significant. The potential for harm was averted due to the intervention and proactive response by the Police and the Licensee is not entitled to any credit in that regard.
- 17) The Commission notes and agrees with the submission of Mr Wood that the Licensee, through the evidence and submissions presented at the Hearing, showed absolutely no acceptance of the possibility that an error of judgement may have occurred, despite the

cogent and compelling evidence presented by Officer Dingle both in his statutory declaration and when under cross-examination during the Hearing.

- 18) To the contrary, the Licensee submitted defences including that Officer Dingle contrived with Mr Billy to cause the Licensee to commit an offence and, in the alternative, that Mr Billy was somehow an agent provocateur acting at the behest of Officer Dingle.
- 19) Except for acknowledging that patrons can mask some of the indicators of intoxication, Ms Moore remained adamant, when giving evidence at the Hearing, that no breach occurred and that Officer Dingle's Statutory Declaration and sworn evidence did not reflect what occurred on the night in question. Of significant concern to the Commission is Ms Moore's evidence that given the same factual matrix she would not do anything different.
- 20) Ms Moore's position, coupled with the chronology of events on the evening when Mr Billy was sold a carton of VB, leaves the Commission with little flexibility in terms of determining the appropriate penalty.
- 21) The initial and reasonable apprehension of Officer Dingle was that Mr Billy was intoxicated prior to the supply. That assessment was supported by Officer Dingle's refusal to transport him back to the community, his observations in regard to Mr Billy's speech and demeanour, Mr Billy's own assessment of his level of intoxication and the subsequent BAC analysis. Officer Dingle's evidence was challenged whilst he was under cross examination; however his evidence remained unequivocal that he did not believe Mr Billy would not be sold or supplied with alcohol due to his level of intoxication.
- 22) Officer Dingle observed the supply to Mr Billy from outside the Hotel. His observations in respect of Mr Billy's level of intoxication, gleaned from his observation of physical indicia, were subsequently confirmed by the breath analysis conducted at the Police Station. This evidence was effectively unchallenged by the witnesses called on behalf of the Licensee.
- 23) The Licensee presented no cogent evidence to persuade the Commission that Mr Billy was not intoxicated at the time of the supply, as is required once the allegation was raised by Officer Dingle. Ms Vernon was able to say she does not serve intoxicated persons but she had no recollection of the supply to Mr Billy. Ms Moore denied that she was the person who supplied the beer to Mr Billy.
- 24) The sometimes confused evidence of Ms Moore indicated that perhaps an error of judgement may have occurred on the night Mr Billy was supplied with a carton of VB. However, due to her apparent preoccupation with apportioning blame elsewhere, the Commission is not able to give any weight to this possible explanation as Ms Moore strenuously denied in her evidence at the Hearing that an error of judgement may possibly have occurred.
- 25) In addition, the Commission is entitled to assume that Mr Downs' submissions were made on instructions from his client and indicate that at no time did the Licensee contemplate the prospect of fault on its behalf. Under oath, the evidence of Officer Dingle was unequivocal with regard to his belief that Mr Billy was intoxicated to the point where he would not be served. This is entirely inconsistent with any notion or assertion that Mr Billy had been coached or enlisted to act as an agent provocateur. That submission, on behalf of the Licensee, was supported by no factual foundation apart from a bold assertion that somehow Officer Dingle colluded with Mr Billy to deceive the Licensee into committing a breach. The Commission considers that submission to be spurious and, at best, a poor attempt to sheet the blame for the breach home to another party.
- 26) The Commission is more persuaded to take the point raised by Mr Wood that, based on indicators of intoxication displayed by Mr Billy and observed by Officer Dingle, the supply to Mr Billy was an error of judgement or a lapse of diligence on the part of the employee who made the supply. The Commission accepts Mr Wood's submission that the supply to Mr Billy was not a deliberate act but rather an error of judgement on the part of the person who supplied the carton to Mr Billy.

- 27) Whilst the Commission regards the sale or supply of take away alcohol to intoxicated persons as constituting a breach at the higher end of the scale it is also cognisant of the fact it is often difficult for Licensees and staff to detect the level of intoxication of patrons. For first time offenders the Commission is generally prepared to allow some latitude and impose penalties in the range of a formal reprimand to a short period of suspension of licence, suspended for a period of time in circumstances where some leniency is warranted.
- 28) It is the view of the Commission that a suspended penalty is often warranted where the following circumstances exist:
- No prior breaches or convictions on the part of the Licensee over a significant period of time;
  - An early plea to the substance of the alleged offence;
  - Admissions submitted in evidence during the course of a Hearing;
  - The co-operation of the Licensees in investigations conducted by Licensing Inspectors;
  - Genuine remorse or contrition demonstrated by the Licensee; and
  - Remedial action taken or proposed by the Licensee intended to prevent or minimise the occurrence of further breaches of a similar nature.
- 29) In setting out those matters that may go to mitigation, the Commission is also mindful that a Licensee is entitled to protect his or her own interests and rely on any viable and appropriate defences available to it. However, when none of the circumstances set out in the preceding paragraph exist the Commission must, in determining the appropriate penalty, turn its mind to the general and specific deterrence aspects of the penalty in reaching its conclusions.
- 30) In this instance the Commission notes that, apart from the fact this is the first breach by this Licensee that has been brought to the attention of the Commission, none of the other mitigating factors set out above exist in this case. The Licensee unsuccessfully contested the breach, including attacking the evidence and credibility of the complainant's key witness, Officer Dingle. As noted above, the Commission gives little if any credence to a number of the defences raised by the Licensee, including that Mr Billy was somehow an agent provocateur of Police or engaged in some form of entrapment in concert with Officer Dingle.
- 31) The Commission expresses its concern in respect of a number of the assertions made in the Licensee's submissions on penalty. One of the assertions was that the Licensee should receive credit as no actual harm occurred to Mr Billy and no evidence was presented as to any potential harm. That submission overlooks completely the reality that the supply of a carton of full strength beer in the evening to a person who is already significantly intoxicated and who has nowhere to stay for the night brings with it an inherent and obvious potential for harm. The fact that no actual harm came to Mr Billy was due to the intervention of Police and not through any steps taken by the Licensee.
- 32) With regards to the submission that Mr Billy could not have been significantly intoxicated as he was not placed into protective custody by Police, it must be borne in mind that mere intoxication is not the threshold point that determines such action. Protective custody action is taken where there exists a reasonable belief that the intoxicated individual is affected by his intoxication to the point there is a potential for him to cause harm to himself or other members of the community. As such the decision of the Police Officers not to place Mr Billy into protective custody cannot be the catalyst to raise a presumption that Mr Billy was not intoxicated.

- 33) Of significant concern to the Commission in the case of the Mataranka Hotel is the Licensee's continued assertions that its employees had done nothing wrong in this instance, there was no error of judgement on the night in question and there is no necessity to change the existing practices in respect of the detection of intoxicated patrons.
- 34) Remarkably, the Licensee continued those assertions, in the written submissions of Mr Downs, even after the Commission had found the breach proven and published its reasons for decision in that regard. A number of the assertions made in the written submissions would be more appropriately included in a notice of appeal, rather than a submission on penalty, and highlight the Commission's view that the Licensee cannot accept the fact that an error was made and a breach was committed when Mr Billy was supplied with a carton of beer and that remedial action is required to prevent further occurrences of this type of breach. The Commission's reasons in finding that the breach was made out are set out clearly in the decision. The Licensee's continued assertions that the breach was not made out are of significant concern in respect of the on-going manner in which this Licensee will operate the premises.

## Decision

- 35) Taking account of the circumstances of this particular breach, the Commission has determined that the appropriate penalty is a one day suspension of the take away component of the licence. The Commission notes that this is the first offence by this Licensee since taking over the operation of the Mataranka Hotel in 2009. The Commission is not satisfied that any of the other mitigating factors set out in paragraph 30 above, apart from this being a first breach, exist in this case so as militate in favour of a suspension of the penalty for a period of time.
- 36) That penalty is to be served on Thursday 21 July 2011, being a like day to that on which the offence occurred. The Licensee is also warned that any penalty imposed for subsequent breaches may not be limited to the take away component of the Licence and may apply to the liquor licence generally.

Philip Timney  
Presiding Member

30 June 2011