

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Crossways Motor Hotel
Licensee:	Liquid Management Pty Ltd
Licence Number:	80100963
Nominee:	Mr John Jeffery
Proceeding:	Complaints pursuant to Section 48(2) of the <i>Liquor Act</i>
Complainant:	Darrell Kerr, Acting Senior Sergeant, NT Police
Heard Before:	Dr Alan Clough
Dates of Hearing:	31 st of August, 1 st of September and 23 rd of November 2004, 27 th and 29 th September and 28 th of November 2005
Appearances:	Ms Cassandra Tys for the Complainant and Mr John Lawrence for the Licensee
Date of Decision:	23 rd of January 2006

Summary of Decision:

Complaint 1: Regarding an incident at Rio's Night Club on the 2nd of August 2003

- The complaint is upheld. A breach is recorded but with no penalty.

Complaint 2: Regarding an incident at Crossways Bottle Shop on the 4th of August 2003

- The complaint is dismissed.

Complaint 3: Regarding an incident at Crossways Bottle Shop on the 28th of August 2003

- The complaint is dismissed.

Recommendation Arising from this Decision:

It is recommended to the full Commission that it requests the Director of Licensing to assist and encourage Licensees and their staff to seek appropriate education about the prospect of their patrons masking visible signs of intoxication. It is also recommended that Licensees throughout the Northern Territory should ensure that appropriate strategies to address the prospect of masking visible signs of intoxication are incorporated into their codes of conduct and/or training for their staff.

Signed by the Commission member constituting the hearing panel:

Alan Clough
Commission Member Presiding

The Commission for the purposes of this decision

The *Liquor Act*¹ at Section 51(2A) provides that at a Hearing under the Act, the Commission may be constituted by one Member or three Members.

At the time the complaints were lodged with the Director of Licensing (the Director) and at the resultant Hearing in August, September and November 2004, the Commission was constituted by three Members, the others being Mr John Withnall (Presiding Member and Chairman of the Commission) and Ms Annette Smith.

The sad death of the Presiding Member and Chairman has since varied the constitution of the Commission from three Members to less than three, effectively reducing it to one Member for the completion of the Hearing; a fact that brings into effect the provisions of Section 51 contained at sub-sections 10A, 10B and 10C.

The relevant sub-sections of Section 51 are as follows:

- (10A) *Where the Commission is constituted by one member, a party who is not satisfied with the decision of the Commission may apply, within 14 days after the decision, in writing to the Chairperson for a new hearing.*
- (10B) *Where a party applies, under subsection (10A), for a new hearing the Chairperson may, if he thinks fit, cause a new hearing to be held.*
- (10C) *Where a new hearing is held, under subsection (10B), the Commission –*
 - (a) shall be constituted by not less than 3 members; and*
 - (b) may make any decision that it could have made if a hearing had not previously been held.*

Preamble

1. Three complaints pursuant to Section 48 regarding the conduct of the business at licensed premises known as Crossways Motor Hotel were lodged with the Director on the 22nd and 23rd of September 2003 by Acting Senior Sergeant Darrell Kerr, Officer In Charge, Katherine Police Station. The substance of the complaints are that
 - 1) at about 2.30am on Saturday the 2nd of August 2003, an intoxicated male person walked into Rio's Nightclub and purchased three cans of UDL liquor from the bar,
 - 2) on Monday the 4th of August 2003, an intoxicated male person attended the Crossways Bottle Shop and purchased a bottle of McWilliams Port, and
 - 3) on Saturday the 28th of August 2003, two intoxicated males attended the Crossways Bottle Shop and purchased two three-liter casks of Nikov Vodka.
2. Liquor Licence number 80100963 allows for trading on Friday and Saturday until 04:00 hours the following day in a part of the Crossways Motor Hotel known as 'Rio Bar Restaurant & Nightclub' with its entrance off Katherine Terrace (referred to as Rio's in this decision) and for liquor to be sold for consumption away from the premises until 21:00 seven (7) days a week, a service provided from the drive-in bottle shop off Warburton Street.
3. Two of the complaints (numbers 2 and 3) advised the Director that a summons file was submitted for Mr Steven Reed and for Mr Patrick Troughton to appear in the Katherine Court of Summary Jurisdictions in relation to the offence of selling liquor to an intoxicated person contrary to Section 102 of the *Liquor Act*. Complaint number 1 advised that a

¹ As in force at the 23rd of January 2003

summons file was submitted for Ms Stevie Morrison to appear in the Katherine Court of Summary Jurisdictions in relation to the offence of selling liquor to an intoxicated person.

Section 102 of the *Act* demands that a *“licensee or a person employed by a licensee shall not sell or supply liquor to a person unless the person to whom it is sold or supplied is not intoxicated at the time (the onus of proof of which lies with the defendant).”*

4. As stated in a previous decision,²

“1. The Commission’s role in complaints against licensees by police was considered by the Supreme Court of the Northern Territory in O’Neill Hotel Management Services P/L v NT Liquor Commission [1999] NTSC 124 in which Thomas J confirmed that

The Commission does not make a finding of criminal guilt. However, the Commission can find a section of the Act has been breached in order to consider regulatory action under the Act or in relation to (a condition of the licence)”

5. The Commission’s approach to complaints of breach of Section 102 of the *Act* was also set out in a previous decision.³

“Once there is a case to answer in relation to a breach of Section 102, which is to say, once a sale or supply is demonstrated, together... with any reasonable ground to suspect that the recipient may have been other than not intoxicated, an onus of proof shifts to the licensee, who must prove that (the patron) was not intoxicated, or alternatively must sufficiently undermine the evidence of the sale or supply having occurred.”

6. In the same decision, it is reported that the Commission had reflected upon the so-called ‘reverse onus’, emphasising that

“... as a matter of law the reverse onus is able to be discharged on the balance of probabilities.”

7. The legal authority of *Briginshaw-v-Briginshaw* in making out an evidentiary case before a tribunal such as the Commission allows the burden of proof in matters involving an assessment of the balance of probabilities to vary according to the nature, importance or context of a particular issue.
8. The Commission’s usual standard of proof in relation to complaints is that of positive persuasion. The Commission must, while giving consideration to the nature, importance or context of the issue, be positively persuaded that the patron was not intoxicated.
9. The Commission has historically equated intoxication to the showing of visible indicators of impairment of bodily faculties as a probable consequence of, or in conjunction with, the consumption of liquor.

Legislation

10. Ms Tys for the Complainant drew the Commission’s attention to a bill to amend Section 102 of the *Liquor Act* which was read a second time in the NT Parliament on the 28th of February 1996⁴ with the following introduction.

“The purpose of this bill is to amend the Liquor Act: by repealing and replacing section 102 with a more straightforward approach that makes it an absolute offence

² Northern Territory Licensing Commission, Reasons for Decision, Milner Road Foodtown, December 2003

³ Northern Territory Licensing Commission, Reasons for Decision, Scotty’s Place, February 2000.

⁴ Liquor Amendment Bill (Serial 139), Seventh Assembly First Session 27/02/96 Parliamentary Record No:20

to serve intoxicated persons and places the onus of proving that the person served was not intoxicated on the defendant; making an offence against section 102 a regulatory offence by amendment of section 124AA of the Liquor Act; ...”

11. The Legislature had perceived a problem in that since Section 102 was not a regulatory offence, Section 31(1) of the Criminal Code applied, viz.

“A person is excused from criminal responsibility for an act, an omission or an event unless it was intended or foreseen by him as a possible consequence of his conduct.”

The second reading speech cited a particular finding of the Court of Summary Jurisdiction which provides insight into the Legislature’s intent for the amendment. In hearing an alleged breach of Section 102, the magistrate accepted that, at the time when the customer was apprehended by police, there were reasonable grounds to believe that he was intoxicated. However, the prosecution was unable to prove beyond reasonable doubt that the defendant had knowledge that the customer being served was intoxicated at the time of making the sale.

“The magistrate went on to say that there was nothing in the Liquor Act to require bar staff to establish the sobriety of customers who were being served with intoxicating liquor. Were the onus placed on bar staff that they did carry out sufficient inquiries to satisfy themselves of the sobriety of the customers, this would prevent the easily manufactured defence that exists under the present legislation, whereby they can say they did not observe or notice anything.”

Expert evidence: Dr David Lawrence Wells, Head of Forensic Medicine, Victorian Institute of Forensic Medicine

12. Mr Lawrence for the Licensee called Dr Wells to provide expert evidence. Dr Wells has almost 20 years experience in clinical practice assessing people who appear to be under the influence of alcohol or other drugs and in research into the effects of alcohol on human motor skills and behaviour.
13. Dr Wells stated that there is an increasing recognition in his field that there is a poor correlation between a person’s blood alcohol level and their behavioural responses. In regular, heavy drinkers the condition known as ‘tolerance’ develops where higher levels of alcohol are required to produce the same effects as would be apparent at lower levels of alcohol consumed by naïve drinkers.
14. Dr Wells described a second phenomenon, only lately becoming better understood in his field. Regular, heavy drinkers can mask symptoms of intoxication to a degree and for periods of time, particularly if they are under some scrutiny. However, the more complex tasks reveal the symptoms of intoxication with masking becoming more difficult as the period of observation increases.
15. Masking of symptoms of intoxication in the patrons served was raised in defence of complaint 2 and was alluded to in complaint 3 while the issue of tolerance to the effects of alcohol in regular, heavy drinkers was raised in defence of complaint 1.
16. Irrespective of the level of tolerance to the acute effects of alcohol in a patron, since the Commission has equated ‘intoxication’ to the showing of visible indicators of impairment of bodily faculties, it is the evidence pertaining to observations by a licensee’s staff of the visible indicators of intoxication evinced by the patron and the actions taken based on these observations which will go to a finding of whether a patron was served liquor, or was allowed to enter and remain on the licensed premises, while intoxicated, or not.
17. The prospect of masking these visible indicators, as described by Dr Wells, holds the potential to sharpen the contrast between the evidence of visible indicators of impairment of bodily faculties provided by different observers of the same patron and could thereby

intensify the contest between a complainant and a licensee. The clear intent of the Legislature in amending Section 102 of the *Act* to place greater responsibility on bar staff to carry out sufficient observations to establish the sobriety of their customers underscores the need for close attention to the issue of masking. The Commission appears not to have dealt specifically with this issue previously, at least not furnished with the formal and convincing evidence from the expert witness, Dr Wells. Moreover, I could find no legal authority to assist.

18. The matter before the Commission is essentially a competition between different assessments, two different judgment calls, to paraphrase the late Mr Withnall.⁵ The judgment calls made in this case were considered in light of *Briginshaw-v-Briginshaw* and in line with the onus of proof and the standard of proof. This seemed the only reasonable, practical and lawful approach to deal with the issue of masking since the 'nature, importance or context of the issue' would reasonably subsume the full range of evidence for a patron's behaviour when purchasing liquor or entering licensed premises.

Complaint 1: Regarding an incident at Rio's Night Club on the 2nd of August 2003

19. There is sworn evidence and also audiotape evidence from both Mr Alfred King (Exhibit 5) and Ms Stevie Morrison (Exhibit 6) that Ms Morrison sold Mr King liquor, namely three UDL cans, in Rio's Night Club for which he paid \$5 each using a \$50 note for the transaction although Mr King stated he used a \$20 note in his audiotape evidence at the Katherine Police Station (Exhibit 5). The complainant reported the time of the sale as approximately 2.30am on Saturday the 2nd of August 2003 and this accords with the evidence of Mr King and Ms Morrison.
20. Mr King's evidence provides reasonable ground to suspect that he was other than not intoxicated when he was served the liquor. In his sworn evidence he stated that on Friday the 1st of August, he attended the Katherine RSL. He commenced drinking at about 3.00pm; about five UDL cans. In the evening he started off for his cousin's house visiting a bottle shop on the way where he purchased two cartons of UDL cans. Then at his cousin's house he stated he had *"about eight cans there"*. At about 8.30pm-9.00pm he went to the Katherine Hotel where he had three large glasses, 'schooners' of 'illusions', (a cocktail) and 'a couple more rum cans' which Mr King conceded amounted to four more UDL cans. He left the Katherine Hotel sometime between 12.30am and 1.00am Saturday the 2nd of August and proceeded to Rio's. This amount of liquor consumed over approximately 10 hours, would constitute a drinking rate of from two to three standard drinks per hour for Mr King's evening. It was also Mr King's evidence that he had not had anything to eat all day and that he was dancing at the Katherine Hotel. Mr King describes himself as a heavy drinker who has been a drinker for over 20 years and who usually drinks once or twice a week, suggesting that he may have a high tolerance to the acute effects of alcohol. He also conceded that the alcohol he consumed had *"affected me a little"* and that it made him *"a bit merry"* and that *"in some ways it might have"* altered his memory of the night.
21. The sworn evidence of Constables Brendon Molloy and Evan Kelly, who were on plain clothes liquor patrol and stationed at a vantage point directly across Katherine Terrace from Rio's, is that they first observed Mr King shortly after 2.00am moving along Katherine Terrace towards the night club and noticed his 'drunken demeanour' and formed the view that he was affected by alcohol. Constable Molloy stated he observed Mr King for 10-15 minutes and described Mr King this way. *"He wasn't walking neatly... On a number of occasions he sort of stumbled forward walking down Katherine Terrace, and then outside the entrance to the nightclub, when he stood up to tuck his shirt in, he couldn't even do that."* Constable Kelly also stated that he saw Mr King attempt to tuck his shirt in but failed, a failure Constable Molloy attributed to his intoxicated state. Constable Kelly stated he first saw Mr King about 100-150 meters away from where he was standing and that he

⁵ Transcript of this hearing on the 31st of August 2004, p.12

observed Mr King to be staggering, stumbling and putting his hand on the buildings to steady him as he walked. Constable Molloy also described Mr King as staggering and unsteady on his feet and that he was stumbling forward as he walked.

22. Neither Constable saw Mr King enter Rio's. Their attention was distracted by a group of people at the entrance to the night club, one of whom, Constable Kelly stated, was raising a disturbance. When they had dealt with this group, Constables Molloy and Kelly then entered Rio's and proceeded to conduct surveillance of the night club crowd. Constable Molloy next noticed Mr King to be stumbling through the crowd taking care not to spill three drinks in his hands. Constable Molloy alerted Constable Kelly of this. Constable Molloy then intercepted Mr King and confirmed in a brief interview that he had purchased the drinks from the bar served by an attendant who, when later approached, identified herself as Stevie Morrison. Constable Molloy stated that the time lapsed from when he first observed Mr King up to this point was 20-30 minutes.
23. The surveillance footage of the entrance to Rio's (Exhibit 8) shows the two security personnel on duty, Mr Ronald Jackway and Mr Adrian Mullan, and Mr King entering. Mr Jackway and Mr Mullan are both experienced security guards. The video footage runs for 2 minutes and 19 secs.⁶ At 43 seconds Mr Jackway is standing on the bottom step looking along the street. At 46 seconds Mr Jackway and Mr Mullan are both on the bottom step and both appear to be observing along the street. At 54 seconds Mr Jackway moves back up the stairs to the entrance door. One patron has entered Rio's and one has exited up to this time. At 55 seconds Mr King appears, his shirt out of his trousers, and goes up the steps and immediately engages in, what appears to be, a lively but amiable conversation with Mr Jackway and Mr Mullan. At 1 minute 11 seconds Mr King is seen to come quite close to Mr Jackway conversing with him. At 1 minute 19 seconds Mr King turned towards the doorway and at 1 minute 20 seconds appears to stumble and fall with his back against the right side of the doorway with Mr Jackway appearing from the video to be looking straight at him. Mr Mullan's face is obscured by a beam. Mr King quickly realigns himself at 1 minute 21 seconds but then appears to stumble on the step as he enters the door to Rio's. Mr Mullan's view of this was probably blocked by Mr Jackway who was closer to Mr King but with his back to him as he entered the door. At 1 minute 22 seconds Mr King passed through the door, his shirt still out of his trousers, and moved towards the entry fee counter watched by Mr Jackway as he did so. It is noteworthy that Mr King appeared not to conceal his demeanour and freely engaged Mr Jackway and Mr Mullan in conversation. Mr King did not appear to stagger during the conversation (nor did he attempt to tuck in his shirt). Rather, he appears to be moving his weight fluidly from one foot to the other as he conversed with the security personnel.
24. It was Mr Mullan's sworn evidence that a view along the street outside Rio's can only be had from the bottom step. He did not see Mr King approach. Mr Jackway, who knew Mr King as a regular patron of Rio's, stated that he first saw Mr King about 50 meters away, walking "*quite steady*", and that he watched him approach for the final 10-15 meters. This cannot be confirmed from the video evidence but it is not inconsistent with Mr Jackway standing on the bottom step and appearing to look in the direction from which Mr King arrived for perhaps 12 seconds.
25. Mr Jackway stated he spoke to Mr King for a couple of minutes and that he was aware that he had been drinking but that he did not slur his speech or sway or stagger and that he was in a jovial mood. Mr Jackway first stated he asked Mr King how much he had to drink and further stated that he decided to give him access to Rio's when Mr King answered that he had just a few. In cross-examination, he conceded that he didn't ask Mr King how many drinks he had consumed. Mr King's account of the conversation varied over time, perhaps not surprisingly given that over two years had passed since the incident. On the 1st of September 2004, Mr King's evidence was that the security personnel asked him about his mate sitting down near the entrance to Rio's, "*..they asked me how I was and that was it.*"

⁶ Using Windows Media Player

In his audiotape conversation (Exhibit 5, 2nd of August 2003) Mr King stated to police that the security personnel asked him *"Nothing whatsoever... wished me a happy night... take it easy."* On the 28th of November 2005, Mr King stated to the hearing that the security guards asked him to tuck in his shirt and that he did so before entering Rio's although he claimed some difficulty because of his tight jeans. Neither the video evidence, nor that of Mssrs Jackway and Mullan, accords precisely with Mr King's account. In cross-examination, Mr Jackway denied seeing Mr King trip and fall into the doorway or realigning himself as he entered Rio's but conceded that if he had seen a person do this he would have considered it to be an indication that the person was affected by alcohol. Mr Jackway had asked Mr King to leave Rio's on a previous occasion because of his level of intoxication and Mr King had complied promptly with that request.

26. Mr Mullan stated that he did not see Mr King, whom he knew as a regular patron, approach along Katherine Terrace. He did, however, see Mr King *"come springing up the steps"* which are challenging to negotiate because of their unevenness and a good indicator to gauge a person's level of intoxication. In what he described as *"normal chit-chat"* with Mr King, he surmised *".. it looked like he had had a few drinks, but not enough to refuse him entry."* Mr Mullan had assessed Mr King on several occasions and had previously asked him to leave the premises because he believed he was intoxicated. On this occasion, however, he believed Mr King to be *"in fine shape"* and *"on the night in question I had no doubts he was fine."* He cannot recall the details of the conversation with Mr King. He did not see him trip or stumble and did not see him trying to tuck in his shirt. He had refused entry to around 20-25 other patrons that evening before Mr King arrived.
27. Ms Stevie Morrison, an experienced bar attendant, stated in her sworn evidence that she knew Mr King as a regular patron of Rio's and considered him to be *"a bit of a binge drinker."* She has served Mr King in Rio's on a number of occasions over a two year period but has not seen Mr King refused service in the night club stating *".. they only ever let him through the door if he was sober enough to be let in."* She was working with two or three other bar attendants supported by the Duty Manager Mr Trent Young.
28. Ms Morrison described the transaction with Mr King in this way. She did not see him approach the bar since the line-up of patrons at the bar was being served one-by-one along the bar providing little opportunity for her and the other two or three bar staff to observe individuals approaching. It was shortly after 2.00am which she described as the *"rush period"* when up to 200 extra patrons may arrive at Rio's. She exchanged greetings with Mr King and asked him what he wanted. She provided three UDL cans open on the bar. Mr King gave her \$50 and she placed his change in his hand. She saw Mr King had no difficulties accepting his change and putting it in his pocket. She saw Mr King grab the cans, two in one hand and one in the other, and take a couple of steps as he left the bar. Then she moved promptly to serve the next customer.
29. When questioned shortly afterwards by Constable Molloy, consistent with the Constables' evidence, she did not at first realize that it was Mr King Constable Molloy described to her by reference to his clothing. Ms Morrison stated she was very upset and humiliated by the incident, terminated her employment at Crossways shortly afterwards and moved interstate where she tried, unsuccessfully, to make a career change.
30. In cross-examination Ms Morrison conceded that the time available to assess Mr King was very limited and that bar staff get very limited time to assess patrons during the rush period. The Duty Manager usually assists bar staff by stocking the fridges during the peak 15 minutes or so of the rush period. However, she could not recall Mr Young's location or activities at the time she served Mr King. Mr King's movements at the bar were consistent with him dancing to the music. She said he was *".. overly happy, ... in a really good mood.."* and this led her to believe that he had a few drinks. However, she was not able to smell alcohol on him at the bar. Although she believed Mr King to be *"tipsy,"* she did not feel it necessary to intensify her scrutiny of him to further assess physical indicators of intoxication.

31. Both Constables Molloy and Kelly had further opportunity to observe Mr King's demeanour. Observing him in conversation with Constable Molloy inside the night club, Constable Kelly described Mr King as smelling of liquor, slurring and appearing intoxicated. They left Rio's with Mr King. Constable Molloy stated that he explained to Mr King that they wanted him to "...*participate voluntarily and come back to the police station to conduct a breath analysis to work out what his blood alcohol concentration was.*" Mr King's account of this was as follows. "*Two plain clothes police officers came up to me and asked me if I could, you know, go for a walk with them and go back to the police station with them and I thought I was in trouble and they explained to me that I was in no trouble, and they just wanted to breathalyse me and that was it.*" Constables Molloy and Kelly stated that Mr King smelled of alcohol, his eyes were bloodshot, he was perspiring and his speech was slurred and he was swaying and unsteady on his feet. Mr King's audiotape evidence (Exhibit 5) indicates that his speech was slurred to some degree. Constable Molloy stated he conducted a breath analysis on Mr King with a result of 0.244% and he advised Mr King of this. This level accords with Mr King's memory of the reading.
32. Ms Tys sought to show Mr King and the Commission the video recorded at the Katherine Police Station showing the conduct of the breath analysis. Mr Lawrence objected arguing that the evidence in this video was gathered without the fully informed consent of Mr King whose evidence it was that he had no idea he was being filmed at the time. This triggered an *on voir dire* interlude for Mr Lawrence to inquire into Mr King's interest in the nature of the consent he may have given to provide a breath analysis at the Katherine Police Station. In the course of Constable Molloy's evidence, Ms Tys had earlier sought to tender the certificate of performance of the breath analysis provided by Mr King and performed by Constable Molloy. Mr Lawrence also objected to this course. After some debate and consideration, the Presiding Member (Mr Withnall) advised that these matters could not be immediately determined and that Constable Molloy's evidence of the breath analysis could go in on a preliminary basis subject to judicial consideration of the legal issues raised by Mr Lawrence and the contentions of Ms Tys. Mr King was, therefore, stood down for later recall. Mr Withnall's judicial considerations of the matter were handed down at the reconvened hearing on the 23rd of November 2004 and are contained in the annexure to this decision.
33. In handing down his ruling Mr Withnall indicated that the Commission had received a letter from Ms Tys in the interim indicating that she would no longer be seeking to tender the video taken of Mr King undergoing a breath analysis at the Katherine Police Station. However, since Mr Lawrence had included the blood alcohol reading and the circumstances of the taking of the reading in his concern, the Commission proceeded to make a ruling in relation to its reception of the blood alcohol reading. In essence, the ruling says that the Commission will continue not to accept a certificate of a breath analysis standing alone, because as a piece of paper it only has any meaning under the *Traffic Act* and proceedings in relation to the *Traffic Act*. But the Commission will accept evidence from the operator as to what he did and whether he obtained the reading, so that if he is the author of the certificate the Commission would accept the certificate. The Commission will, therefore, accept a reading as evidence of the probable percentage of alcohol in the person's blood leaving open the question of what use it is; what links the reading might have with the visible indicators of intoxication and what weight the reading should be given.
34. Ms Morrison in her evidence spoke highly of the new management strategy at Crossways instituted by the new owners. The Manager and Nominee of Crossways, Mr John Jeffery, who has seven years experience in the hospitality industry, was the nominee at Crossways Motor Hotel in August 2003 and had been in that position from February 2003 when he was recruited by the new owners. An important stimulus for the new management strategy was a serious incident leading to the death of a night club patron. Mr Jeffery said the incident occurred on the steps of the night club not long before the change of ownership and that it involved an off-duty security guard who had worked on the premises. Rio's then had a very poor reputation and was known as "*the fight club,*" according to Ms Morrison, who also spoke of how she came to feel much safer as a bar attendant at Rio's as a consequence of the management strategy implemented by Mr Jeffery on behalf of the new owners. The

new management strategy featured enhanced awareness training for staff responsibilities under the *Act* and what Mr Jeffery described as “*hounding*” his bar staff with the instruction: “*If in doubt, don’t serve*” and with a similar instruction to security personnel and junior managers.

35. Mr John Little is one of the owners of the Crossways Motor Hotel, his first such venture in the Northern Territory. The Commission noted that Mr Little traveled from his home in southern Queensland to attend all segments of the hearing. The other owner is Mr Richard Hack who attended the August and September 2004 segments of the hearing. Mr Little has significant (18 years) experience in the liquor and hospitality industry in Papua New Guinea. Mr Little stated that he set about changing “*the bad culture*” in the night club shortly after taking up ownership of the business in March 2003 by introducing a code of conduct for staff with: “*If in doubt, don’t serve*” a central principle of the code and by altering the security arrangements. The night club is not the biggest component of the business. If the night club hours were to be decreased, the nightclub would no longer be viable. Mr Little candidly conceded that breaches of the *Act* occur from time to time but did not concede that this breach occurred since he believed Ms Morrison had performed her job adequately in observing Mr King. Neither he nor Mr Jeffery found the need to discipline Ms Morrison or the other staff involved in the incident.

Complaint 1: Consideration of the evidence and determination

36. I am not positively persuaded that Mr Alfred King was not intoxicated when he was served liquor by Ms Stevie Morrison after having been admitted to ‘Rio Bar Restaurant & Nightclub’ (Rio’s) at the Crossways Motor Hotel on Saturday the 2nd of August 2003.
37. By his own admission and by the evidence for the quantity of liquor he had consumed and the circumstances of its consumption that day, Mr King was affected by alcohol despite his possibly having a high tolerance to its acute effects.
38. The sworn evidence of two police officers conducting surveillance for possible breaches of the *Liquor Act* is consistent in the content of their accounts. Both observed Mr King over some distance to be staggering, unsteady on his feet and stumbling as he moved towards Rio’s. This stands against the direct evidence primarily of Mr Jackway who stated that Mr King was walking “*quite steady*” as he observed him approach Rio’s. Mr Mullan did not see Mr King approaching along the street.
39. Evidence in the video surveillance footage that Mr King stumbled as he entered the door of Rio’s is consistent with the Constables’ observations of his gait as he walked along Katherine Terrace before entering the surveillance camera’s view. Mr Jackway and Mr Mullan both had ample opportunity to observe Mr King as he sought to enter Rio’s, but they failed to observe this unsteadiness and this at a known rush period when numbers of patrons are seeking to enter Rio’s after having already consumed liquor at other licensed premises and elsewhere. That Mr King was permitted entry by security staff when they had ample opportunity to closely scrutinize his level of intoxication, and at the busiest period of the evening, exposed Ms Morrison and other bar staff, to additional risk that Mr King would seek to be served liquor along with the many other patrons seeking to be served at the same time and in a situation at the bar where, according to Ms Morrison, staff have fewer opportunities to closely observe patrons.
40. The two police officers had further opportunity to observe Mr King’s demeanour at closer quarters inside Rio’s. Evidence that Mr King was stumbling through the crowd when next seen by Constable Molloy carrying drinks purchased from the bar is consistent with the evidence of his gait when observed outside Rio’s and with the video evidence. The Constables concurred in their evidence of Mr King’s slurred speech, slowed speech, bloodshot eyes and unsteadiness both at Rio’s and at Katherine Police Station. Audiotape evidence suggesting Mr King’s slurred speech supports this. This stands against the more limited scrutiny of Mr King’s demeanour by Mssrs Jackway and Mullan at the entrance to Rio’s and by Ms Morrison at the bar. There was inconclusive evidence regarding the

content of the conversation between Mr Jackway and Mr King with Mr Mullan participating peripherally. Again, it would be expected that closer scrutiny would be conducted by security of someone who, as it was acknowledged, had already consumed liquor elsewhere even though Mr King was known as a regular patron and as a cooperative and amiable person even when intoxicated and when new management's instructions for security staff were to refuse entry if there was any doubt as to a person's level of intoxication.

41. Ms Morrison, whose trust in the security personnel in allowing only those who are not intoxicated to enter the premises may have been misplaced, conceded that the time taken to observe Mr King was limited and that he appeared "*tipsy*". The evidence that the bar was busy and that bar staff do not have sufficient opportunity to observe patrons at the rush period does not outweigh the Legislature's will, embodied in Section 102 of the *Act*, that bar staff should carry out sufficient inquiries to satisfy themselves of the sobriety of their customers. Although serving Mr King, a known regular patron who was in a jovial mood at the time, may have represented little risk to himself or other patrons, the Legislature's expectation that bar staff will serve only those patrons who are not intoxicated at the time remains.
42. In making this finding of fact, the possible serious consequences for Ms Morrison and the Licensee, who have already suffered personally, professionally and commercially to a significant degree, as a consequence of this complaint, and the laudable determination of the owners and management to implement improved management strategies at Crossways Motor Hotel do not outweigh the obligations for the Licensee and his staff to ensure that only people who are not intoxicated are served on their premises or are allowed to enter and remain there. Nor does it outweigh the need to avoid, at all costs, any prospect of another serious incident like the death that occurred on the steps of the night club (the same steps patrolled by Mssrs Jackway and Mullan) and which inspired the positive and responsible management changes commendably implemented by Mr Little and Mr Hack with the diligent support of their Manager, Mr Jeffery.
43. As to penalty, had this finding been made closer to the time of the incident and the ensuing complaint, the Commission may have been minded to impose an actual penalty up to and including varying licence conditions to reduce the hours of trading in 'Rio Bar Restaurant & Nightclub'. It is determined that a breach is recorded. However, no penalty is imposed for the following reasons. The passage of time since the incidents occurred were largely due to unfortunate circumstances that were beyond the control of the Licensee. The Licensee demonstrated very commendable keenness to participate in all aspects of this case to its conclusion. The costs borne to do this and the positive report from the Director of Licensing regarding the Licensee's performance since August 2003 also mitigate the need for further penalty.

Complaint 2: Regarding an incident at Crossways Bottle Shop on the 4th of August 2003

44. There is videotape evidence showing Mr Brian Jimberry purchasing liquor at the Crossways bottle shop (Exhibit 4). There is sworn evidence by Mr Steven Reed that, in the evening of the 4th of August 2003, he was working in the bottle shop and he sold Mr Jimberry a 750ml bottle of port and that he admitted doing so when questioned by Constable Wilcox of the Katherine Police Station.
45. There is sworn evidence from Mr Lambert-Hey and Ms Rhonda Morgan who work with the Kalano Community Patrol that shortly before Mr Jimberry purchased the bottle of port, he was observed by them at the corner of First and Warburton Streets and appeared to be intoxicated. Mr Lambert-Hey, an experienced and skilled community worker with training in identifying and managing intoxicated people, stated that he has known Mr Jimberry for around four and a half years, deals with him about three times a week and is familiar with his behaviour. Mr Lambert-Hey observed Mr Jimberry enter the bottle shop and saw him come out with a bottle under his arm but did not see him at the counter. Ms Morgan stated that she too is familiar with Mr Jimberry, "*we pick him up a lot of times because he is drunk*"

and that when she first saw him *"he looked half shot."* She did not see him at the counter. Mr Lambert-Hey, Ms Morgan and Ms Shirley Lambert-Hey, another Community Patrol worker, all observed Mr Jimberrry to be staggering shortly before he entered the bottle shop. Mr Lambert-Hey stated that he *"staggered across the road"* and before entering, controlled himself to look sober as he did so. But when he left the bottle shop, *"he started wobbling again."* Their evidence provides reasonable ground to suspect that Mr Jimberrry may have been other than not intoxicated when he was served the liquor.

46. Sergeant Darrell Kerr was Acting Senior Sergeant and Officer in Charge of Katherine Police Station in August 2003 and he had worked in Katherine since April 2003. As a result of a call from Kalano Community Patrol he came to see Mr Jimberrry walking along First Street in the direction of an abandoned house at the corner of First and Giles Streets where people were known to congregate and drink. He observed Mr Jimberrry to be staggering on his feet and to be having difficulty walking. He called another Police vehicle to attend.
47. Constable Jolene McKeown has performed general duties at Katherine for two years. She was on duty with Constable Rhett Wilcox and Police Auxiliary Daniel Grungo when at approximately 6.20pm they were informed by communications that a breach of the *Liquor Act* may have occurred in that an apparently intoxicated Aboriginal male had purchased liquor at the Crossways Hotel. It was Constable Wilcox who identified Mr Jimberrry under the abandoned house from the description provided by communications of an Aboriginal man carrying blankets under his arm and a bottle. The time from receiving the communication to when Mr Jimberrry was observed was no more than approximately 15 minutes. While Constable Wilcox conversed with Mr Jimberrry and also seized the liquor which, according to Mr Grungo was still sealed, Constable Mackeown observed *"he appeared very intoxicated. I recall he had trouble keeping his balance when he walked. His words were very slurred and he also had blood shot eyes and I noticed as we placed him in the back of the vehicle, I could smell liquor on him."* Police Auxiliary Daniel Grungo worked at the Katherine Police Station for two and a half years and has had dealings with Mr Jimberrry previously. His evidence corroborates that of Constable Mackeown: *"His slurred speech, he smelled strongly of alcohol. His look on his - his eyes were red and bloodshot. A couple of times during the conversation with Constable Wilcox, he leaned on the police vehicle for support and we had to help him into the back of the police cage. He couldn't manage it by himself."* He regards Mr Jimberrry as an alcoholic.
48. There is videotape evidence showing Mr Jimberrry at the charge counter of the Katherine Police Station (Exhibit 7). At the mark 18:46:37 on the video, he was asked by one of the officers present to *"walk this way"* and he proceeded to walk with no clear indication of unsteadiness. At 18:48:02 Sergeant Kerr asked Mr Jimberrry how much he had to drink that day. Mr Jimberrry replied that he and his wife had shared half a carton but that they had consumed no wine. There was no clear indication that his speech was slurred. When Mr Jimberrry placed his new thongs on the counter he appeared to be quite steady. At 18:51:20 Mr Jimberrry provided a breath analysis. It seemed that Sergeant Kerr then commented *"not too bad."*
49. In his evidence regarding his observations of Mr Jimberrry at the station the Sergeant confirmed that it was he who made this comment. Sergeant Kerr also advised that the breath analysis device used was a hand-held testing machine which gives an indication, not an accurate reading of blood alcohol level. The indication was that Mr Jimberrry's blood alcohol concentration was between 0.1% to 0.15%. Sergeant Kerr's observations of Mr Jimberrry at the station were that he was unsteady, smelled of alcohol and almost fell over when standing next to him, *"he was very drunk."* There was no evidence from other observers to corroborate this.
50. Mr Steven Reed began working in the Crossways bottle shop on a part-time basis in June 2003, a couple of months before the incident the subject of the complaint. He was recently promoted to the position of Assistant Manager of Crossways. Mr John Jeffery had briefed Mr Reed regarding his responsibilities under the *Liquor Act* and about the visible signs of intoxication at the commencement of his employment. Mr Reed readily related several

visible indicators of intoxication in his evidence and was aware of the confounding effects of language and communication styles on indicators that a person's speech could be affected by alcohol. Mr Reed was briefed on a weekly basis by senior management to *"make sure you're not serving intoxicated people."* While conceding he was not as experienced as the other staff, and was perhaps less strict than he now is in his application of the instructions of his manager, he had refused service to a number of patrons at the bottle shop on the grounds that they were intoxicated. Some of these were even refused service after the transaction had been completed with Mr Reed alerted by indications of intoxication observed by him as the patron walked away. In these situations Mr Reed had retrieved the liquor and refunded the patron's money.

51. Mr Reed described the transaction with Mr Jimberry in terms which were corroborated by the security video footage (Exhibit 4). The video does not show Mr Jimberry dropping his jacket and retrieving it. This was the first thing Mr Reed noticed about Mr Jimberry as he approached from about 15 meters away; he picked up his jacket with no indication that he was affected by alcohol. Mr Reed stated that he observed Mr Jimberry throughout the transaction concluding *"he had definitely been drinking. I didn't think he was intoxicated to a point to refuse service but he had definitely had alcohol that day, yes."* The video footage (Exhibit 4) shows no clear evidence that Mr Jimberry was unsteady on his feet or staggering, and this is consistent with the video of Mr Jimberry taken approximately an hour later at the Katherine Police Station. At a point 16 seconds into the second segment of Exhibit 4, which shows Mr Jimberry walking away from the counter in the bottle shop, Mr Reed can be seen closely observing Mr Jimberry as he walks away, up to the 33 seconds point by which time, according to Mr Reed, Mr Jimberry was out of sight.
52. According to Mr Reed it was about 20 to 30 minutes later that Constable Wilcox and his assistants arrived at the bottle shop in the police wagon with Mr Jimberry in the back. Questioned by Constable Wilcox Mr Reed admitted serving Mr Jimberry. In his evidence, he also explained his observations of Mr Jimberry during the transaction. *"I said that he came in and I had seen him drop and pick up his jacket in a smoother movement, that I had seen him walk in and out and he seemed to be - he had been drinking - I said he had definitely been drinking and that he might have, sort of, been approaching of them at some stage, he would have to be cut off but I didn't feel he had reached that level."* This explanation is consistent with what can be gleaned from the video evidence. In cross-examination Mr Reed conceded that Mr Jimberry had been drinking and that he smelled of alcohol and his eyes were *"a bit red."* However, he asserted *"his gait was fairly good. I'd seen him pick up the item of clothing in a smooth movement, and it led me to a conclusion that he was still okay for a drink."* He had conceded to Constable Wilcox, however, that *"it might be getting towards his last drink."* Mr Reed also conceded that the conversation he had with Mr Jimberry was brief and with few words exchanged.

Complaint 2: Consideration of the evidence and determination

53. On video, Mr Jimberry was heard to report that he had consumed perhaps six cans of beer that day over an unknown period, a quantity of alcohol which may or may not have taken him beyond 0.05% blood alcohol concentration. Sergeant Kerr, the complainant, himself concluded that the indicated concentration of alcohol in Mr Jimberry's blood was surprisingly low. The Complainant provided little to explain why Mr Jimberry could not appear as a witness to the hearing. Without Mr Jimberry as a witness, the Commission is entitled to apply the principle established in *Jones -v- Dunkell* (1959) 101 CLR 298 being that the failure to call a specific witness to give evidence leads to the inference that their evidence would not have assisted the Complainant's case.
54. There is sound evidence from three police officers and three very reliable civilian witnesses of visible indications of intoxication in Mr Jimberry before and after the transaction. This stands against the inconclusive evidence of the video footage (Exhibits 4 and 7) coupled with Sergeant Kerr's surprise at the low level of blood alcohol concentration seeming to contradict the visible indications of intoxication observed in Mr Jimberry. It also stands against the evidence provided by Mr Reed that, while Mr Jimberry had been drinking, he

was not at a level where Mr Reed felt he should be refused service. This assessment was based on Mr Reed's observations made in accordance with the instructions of his manager. It was argued by the Complainant that the period of observation should have been longer, that Mr Reed should have engaged Mr Jimberry for longer in conversation and should have sought to expose physical indications of intoxication in Mr Jimberry by engaging him in more complex tasks. However, from the careful observation Mr Reed made of Mr Jimberry as he walked away from the counter, I am convinced that Mr Reed genuinely attempted to increase his scrutiny of Mr Jimberry to ensure that the transaction was valid in terms of Section 102. Again, without Mr Jimberry as a witness to the hearing, the Commission is entitled to apply the principle in *Jones –v- Dunkell* and conclude that his evidence would not have supported the Complainant's case.

55. I am therefore not positively persuaded that Mr Brian Jimberry was intoxicated when he was served liquor by Mr Steven Reed at the Crossways Motor Hotel bottle shop on Monday the 4th of August 2003.
56. Mr Lambert-Hey provided sound evidence that Mr Jimberry may have been masking the visible indicators of his level of intoxication, thereby directing us towards an example of the evidence provided by Dr Wells that such practices are common among regular, heavy drinkers. While the prospect of masking supports Mr Reed's evidence, it is not for me to make a finding that someone masking the visible indicators of intoxication can be considered to be not intoxicated at the time of the sale, i.e. that they lose their intoxication. The converse argument may be equally compelling that if someone was showing visible signs of intoxication both before and after they purchased liquor, then they must have been intoxicated at the time of the transaction. One argument implies that masking negates other evidence of visible indicators of intoxication while the other implies that intoxication at the time of a transaction can be inferred indirectly from other evidence of such indicators. It seems to me that both arguments fail for the same logical reason that they are seeking to reach their different conclusions based on inference and not on direct evidence. In any event, for the moment, to prove to this Commission that a person was not intoxicated when served liquor, it is not sufficient to say that the person serving did not see any signs of intoxication since this would be counter to the Legislature's intent in amending Section 102, as already discussed. This said, however, the useful and informative example this case has provided alerts the Commission to recommend to the Director that licensees and their staff should have appropriate education about the prospect of their patrons masking visible signs of intoxication thereby increasing the risks of breaches of the *Act* perhaps leading to complaints similar to two of those heard here. Management of licensed premises throughout the Northern Territory, on the basis of the Crossways experience, should ensure that appropriate strategies to address the prospect of masking visible signs of intoxication are incorporated into their codes of conduct for their staff.
57. In these considerations I have taken into account the laudable determination of owners and management to implement improved management strategies at Crossways Motor Hotel and the positive and responsible management changes commendably implemented by Mr Little and Mr Hack with the diligent support of their Manager, Mr Jeffery. The positive report from the Director of Licensing regarding the Licensee's performance since August 2003 was also a factor.
58. For these reasons, the complaint is dismissed.

Complaint 3: Regarding an incident at Crossways Bottle Shop on the 28th of August 2003

59. There is sworn evidence from Mr Patrick Troughton that, in the evening of the 28th of August 2003, he was working in the bottle shop and that he sold two three-liter casks of Nikov Vodka to two Aboriginal men. Later, when asked by Sergeant Brett Wenn (in the presence of Constable Luke Kingsbury) whether he had served the two men in the back of their police wagon, he admitted that he had. The two Aboriginal men in the police wagon were Mr Kenny Katherine and another man named by Mr Katherine in his sworn evidence

as Kenny Allison. In Sergeant Wenn's evidence he states the two Aboriginal men later indicated that they had purchased the liquor from the Crossways bottle shop and that Mr Troughton was the attendant who served them the liquor. Constable Kingsbury, in his sworn evidence, named a Mr David Allison as the man with Mr Katherine and as the man who provided a breath analysis at the Katherine Police Station. Mr Katherine, in his evidence, went on to relate that police paid a subsequent visit to Kalano and attempted to pick up David Allison along with Mr Katherine for an interview about the incident. Mr Katherine stated: *"They got the wrong fellow. I told them the fellow you're lookin' for is Kenny."* Given this uncertainty about who the second Aboriginal man was accompanying Mr Katherine and since there was little other evidence referring to this second Aboriginal man, I considered this component of the complaint no further.

60. Mr Katherine's evidence provides reasonable ground to suspect that he was other than not intoxicated when he was served the liquor. In his sworn evidence he stated that on the 28th of August, he was at home drinking with an unspecified number of other people. He stated that this group had consumed one carton and one Nikov during the day but *"it went just like that because there were too many drinking."* He then went alone to the Crossways bottle shop and there purchased one carton of Nikov Vodka. Mr Katherine admitted *"Yes, you can say I'm a big drinker."* Sergeant Wenn's evidence is that the two Aboriginal men, one of whom was Mr Katherine, indicated that *"they had a few beers that day."*
61. Sergeant Brett Wenn, who has had seven years experience working as a policeman and dealing with Aboriginal communities, was on patrol with Constable Luke Kingsbury on the 28th of August 2003, when he noticed Mr Katherine and the other Aboriginal man walking away from the bottle shop, crossing the street each holding a plastic bag; *"the guys were swaying, very unsteady on their feet."* Concerned for their safety on the road, the officers stopped them.
62. Sergeant Wenn and Constable Kingsbury believed they were intoxicated because of their unsteady walking and their movements, bloodshot eyes and slurred speech and that they smelled of alcohol. At the Katherine Police Station both Sergeant Wenn and Constable Kingsbury administered a breath analysis on the two men. It was Constable Kingsbury's evidence that Mr Katherine's reading was reported to him by Sergeant Wenn as 0.259% while Sergeant Wenn recalled a reading of 0.259% in one of the men but did not identify which it was.
63. Mr Patrick Troughton had worked at Crossways for approximately six months before the incident the subject of this complaint occurred. He worked at Crossways for a further 12 months. *"It's the only time it's ever happened to me that they tried to charge me for intoxicated - serving an intoxicated person and it kind of blew me away actually because I didn't expect it. To me, there was no signs of intoxication."* Video footage of this incident was not provided as evidence. Mr Troughton is aware that video footage of the incident probably exists but has never seen it. Mr Troughton's account is that he watched the two Aboriginal male patrons approach over a distance of perhaps 10 meters. He was not serving other customers at the time. They didn't stagger or sway, *"so I didn't gather they were intoxicated to start off with. Then as they got closer, they didn't really look intoxicated in any way. They were dressed neat and tidy."* He served one of the men and then two or three cars came in and he asked the men to wait while he cleared the driveway of the building traffic. As he did this he took the opportunity to observe the second person, a strategy which he has used in the past to ensure that the patron is not intoxicated. Mr Troughton stated that he observed that the man did not lean against the counter for support and showed no other signs of intoxication. Mr Troughton conceded that the conversation he had with the men was brief consisting of little more than a brief greeting and the specifics of the transaction. From a distance of about a meter he could smell no alcohol on either of the men. Mr Troughton knew one of the men as a regular patron whom he had refused service in the past, but he could not name him. He asserted that they may have been drinking but *"they didn't have any signs whatsoever to lead me on to think that they had been drinking"*. He saw neither of the men staggering and neither slurred their words. He conceded their eyes may have been bloodshot. However, he does not regard

bloodshot eyes as a reliable sign of intoxication in Aboriginal people. Later when asked by Sergeant Wenn why he had served the two men he replied "*Because I didn't see them to be intoxicated.*"

Complaint 3: Consideration of the evidence and determination

64. I am not positively persuaded that Mr Kenny Katherine was intoxicated when he was served liquor by Mr Patrick Troughton at the Crossways Motor Hotel bottle shop on Thursday the 28th of August 2003.
65. While Mr Katherine gave evidence that he had been drinking that day, there was no clear indication from any source of how much he had been drinking. The breath analysis result of 0.259% for Mr Katherine, recorded in his notebook by Constable Kingsbury reported by Sergeant Wenn, is the only evidence available to be considered that is independent of the competing assessments of visible signs of intoxication.
66. While this primary fact to be considered inclusive of other facts on which I am obliged to make a decision is not found, there is evidence from two police officers of visible indications of intoxication in Mr Katherine. There is no video evidence to be considered, so the evidence of the police officers stands against the evidence of Mr Troughton that, while Mr Katherine may have been drinking, he observed no other signs to suggest to him that he should refuse Mr Katherine service. This assessment was made in accordance with the instructions of his manager. It is not clear whether Mr Katherine was the patron who was asked to wait while Mr Troughton served customers in their cars, a strategy used by Mr Troughton to intensify scrutiny of patrons for signs of intoxication. Whoever it may have been, this evidence indicates that Mr Troughton was seeking to ensure he met his responsibilities under Section 102 of the *Liquor Act*, rather than ignoring them. It was argued by the Complainant that the period of observation should have been longer and that Mr Troughton should have engaged Mr Katherine for longer in conversation. There was no direct evidence provided that Mr Katherine was masking visible signs of intoxication, although the possibility of masking was raised. Mr Troughton provided convincing evidence that he observed no signs of intoxication and had no reason to refuse Mr Katherine service. Despite that observations of signs of intoxication were provided by two police officers, the evidence that Mr Katherine was intoxicated when Mr Troughton served him liquor is not sufficient for me to find that a breach of Section 102 occurred.
67. In these considerations I have taken into account the laudable determination of owners and management to implement improved management strategies at Crossways Motor Hotel and the positive and responsible management changes commendably implemented by Mr Little and Mr Hack with the diligent support of their Manager, Mr Jeffery. The positive report from the Director of Licensing regarding the Licensee's performance since August 2003 was also a factor.
68. For these reasons the complaint is dismissed.

Annexure

Northern Territory Licensing Commission

Police Complaints against Crossways Hotel Katherine:

Ruling as to Reception of Blood Alcohol Reading

1. This part-heard matter is standing for a ruling by the Commission prior to resumption of the hearing. Witness Mr Alfred King has been stood down pending the ruling.
2. Mr King was the patron whose purchase of three cans of pre-mixed spirits from the Bar in Rio's Nightclub at about 2.30am in the early hours of Saturday 2 August 2003 is the subject of the police complaint of the Licensee's breach of Section 102 of the *Liquor Act* in relation to that transaction. The police evidence has been that Mr King voluntarily accompanied the police to the Katherine Police Station for the taking of a breath sample, after it being explained to him that he was not personally in any trouble but that police were seeking evidence in relation a possible charge against the Licensee.
3. The officer who conducted the breath analysis has given evidence of obtaining a reading of .244% concentration of alcohol in the blood.
4. Mr King was also called by the police to give evidence, and it was during his evidence that counsel Mr Lawrence on behalf of the Licensee took issue with the voluntariness both of the breath analysis and the video taken of Mr King during that procedure, the police having presaged seeking to also tender the video in evidence. Mr King himself testified on the *voir dire* that he thought the showing of such a video was an invasion of his privacy, in that he did not know that a video recording would be made of his undergoing a breath analysis, and had not consented to it.
5. Mr Lawrence submitted that we should have a general curial concern as to such evidence being gathered in an environment that could not or should not be realistically seen as being voluntary on the part of persons in the position of Mr King. Mr Lawrence submitted that the Commission should surely be feeling the same level of disquiet as he was. Mr King was then stood down to await our ruling on these aspects of the police case.
6. Counsel for the complainant police subsequently advised that the complainant will no longer seek to rely on the video evidence taken of Mr King, and that consequently there is no further need for the ruling.
7. However, Mr Lawrence had included the taking of the sample of Mr King's breath in his request for a ruling as to the propriety of such evidence in complaints of this nature before the Commission, and we will proceed to rule on this aspect of Mr Lawrence's concern.
8. The immediate "catch 22" for the police is that if Mr King was intoxicated for the purposes of Section 102, as the police are attempting to demonstrate, then it stands to reason that he cannot be assumed to have been sufficiently aware to have freely given a fully informed consent to any evidentiary process that led to the finding of intoxication. That is, if the breath analysis evidence assists towards a finding of intoxication, the voluntary basis of the breath analysis is undermined by its very success.
9. Constable Kelly tells us that he informed Mr King that the breath analysis would form evidence of his intoxication in possible proceedings against the Licensee, and that Mr King consented on that basis. For the purposes of this ruling we accept that evidence.
10. However, Constable Kelly also told us he observed Mr King to have had slurred speech and bloodshot eyes, and was unable to stand in a balanced way, adding that on Mr King's approach to the nightclub Constable Kelly had observed him stumbling and shuffling and putting his hands out to the sides of the building to steady himself. Without making any finding as to whether Mr King was intoxicated (which is of course the very issue that Mr Lawrence is contesting), nevertheless we accept that such evidence militates against Mr

King having had the capacity to have freely volunteered a fully informed consent to the police request that he volunteer to give a sample of his breath for analysis.

11. In any event, it can be stated as a general proposition that if the reception of blood alcohol evidence assists the Commission in coming to a finding on the substantive issue that the donor of the sample was intoxicated, then it must follow that the donor's consent to the provision of such evidence cannot be taken to have been voluntarily and freely given. Success in demonstrating intoxication must surely render any alleged consent to the breath analysis process at least doubtful.
12. We therefore continue with this consideration of the issue of the Commission's reception of such evidence on the basis that the blood alcohol analysis in all probability could not have had Mr King's fully aware consent. However, the proceeding in which such evidence is sought to be used is not a proceeding against Mr King, so that the rules as to voluntary admissions and self-incrimination do not in themselves resolve the issue of the proper acceptance of such evidence.
13. While the Commission is not bound by the rules of evidence, it nevertheless must act fairly, and does not lightly receive challenged evidence which is not compatible with a recognised rule of evidence. We try to strike a balance between not sliding into too "judicial" a model while recognising that the release from being bound by the rules of evidence is not a fiat to ignore them. We accept that the Commission is not excused from an obligation to ensure that our findings and conclusions rest upon material having "rational probative force" (*Pochi v. Minister for Immigration and Ethnic Affairs*, (1979) 36 FLR 482 at 492-3).
14. The Commission has historically always declined to accept evidence of a blood alcohol reading by way of only an operator's certificate. We accept that a certificate standing alone can only have meaning in proceedings in relation to breaches of the *Traffic Act*. The Commission has always insisted that evidence of a reading of a percentage of alcohol in a person's blood can only be received from the officer who personally operated the breath analysis machine that produced the reading, and can give first hand evidence as to the nature and working of the machine in relation to the reading being tendered.
15. Mr Lawrence queries even this approach, on the basis that evidence of the calibration of the machine and the various steps that culminate in such a reading can also have no meaning outside the *Traffic Act*. It is our view however that while the *Traffic Act* imposes a mandatory regimen and precision in relation to such evidence in order to succeed in obtaining a conviction in a Court of Summary Jurisdiction, this Commission is able to exercise its discretion under Section 51(3)(d) of the *Liquor Act* and accept in an appropriate case that a reading taken by a witness before us is likely *on the balance of probability* to represent the percentage of alcohol in a particular person's blood.
16. However, we certainly agree that with nothing further such a reading prime facie can mean no more than that the person from whom the reading was obtained would have come within certain sentencing parameters if apprehended while driving a vehicle. The reading can be of no real assistance in a Commission proceeding such as the present one without expert evidence, or at least evidence from a persuasively experienced operator, as to what the reading may actually indicate in terms of "intoxication".
17. Historically then, the Commission has tended to receive the actual reading into evidence but then to await and require additional evidence to indicate what weight it may be given in the matter before it.
18. We do not see that our foregoing approach is affected by an appreciation that the person from whom the reading was obtained may not have been in a sufficiently sober condition to meaningfully consent to the procedure. The police have the power to enter licensed premises and check for and take enforcement action on breaches of the *Liquor Act*. They can surely seek the assistance of third party witnesses on evidentiary issues in a situation in which there are no issues of self-incrimination involved. In our view they could have asked Mr King if he would attempt to walk a straight line or pick up coins from the floor

without attracting the opprobrium being levelled at their request to provide a breath sample, but we see all such requests in aid of evidence as to intoxication as being on the same plane. We do not see such evidence gathering as being in any way unlawful or unconscionable because of the possible intoxication to some degree of the person at the focus of police attention, such intoxication being the very condition which triggers the police duties and powers under the *Liquor Act* in relation to which the evidence is being gathered.

19. In any event, if we are wrong as to the lawfulness of such evidence, the general discretion of courts and tribunals such as the Licensing Commission in this hearing to exclude evidence unlawfully obtained or evidence which would operate unfairly implies a discretion to accept such evidence. The discretion to exclude assumes a power to include.
20. In the absence of evidence of actual resistance to the provision of a sample of breath for analysis, and subject to discrete evidentiary issues arising in individual cases, we propose to continue to accept blood alcohol readings on the foregoing basis, and do so in this case. The issue of the weight to be given to the reading remains a matter for final submissions.

John Withnall
Chairman

23 November 2004