

Northern Territory Licensing Commission

Decision

Premises:	Malandari Store Robinson Road Borroloola
Licensee:	Malandari Partnership
Licence Number:	80903761
Complaints:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> – Breach of Section 102 – Sale or Supply to an intoxicated Person Breach or Section 110 Failure of Licensee to Comply with a Condition of Liquor Licence
Heard Before:	Mr Richard O’Sullivan (Chairman) Mr Philip Timney (Legal Member) Mr Wally Grimshaw
Date of Hearing:	5 April 2011
Attendees:	Mr Brian Kimmings for the Licensee Sergeant Gert Johnson Inspector Mark Wood for the Director of Licensing Inspector Sondra Barry

Background

- 1) A full Commission meeting on 27 October 2011 determined to conduct a Hearing in respect of complaints lodged by the Director of Licensing pursuant to Section 48(2) of the *Liquor Act* (“the Act”) against the Licensee of the Malandari Store (“the Store”). The complaints allege that on 14 August 2010 the Licensee or an employee of the Licensee did sell or supply liquor to a person who was intoxicated at the time. Further, it is also alleged that three staff members had not enrolled or obtained Responsible Serving of Alcohol Certificates (“RSA”), contrary to Section 110 of the Act.
- 2) At approximately 16:50 hours on Saturday 14 August 2010 Sergeant Gert Johnson and Constable First Class Melissa Sanderson, were conducting patrols of the general Borroloola community and attended the Store. This was for the purpose of observing takeaway sales of liquor to patrons as they were aware of large quantities of alcohol in the community.
- 3) Police observed a man known to them as Mr Craig Norman exit the store with a carton of XXXX Gold. At the time he appeared dishevelled, his pants were undone and were falling down, he was staggering and appeared to be intoxicated. On closer inspection Police observed his eyes were bloodshot and his speech was very slurred and incoherent. He was also swaying backwards and forwards.
- 4) At this point Police requested Mr Norman to undertake a breath test to which he readily consented and after several attempts subsequently provided a reading of .310% Blood Alcohol Content (“BAC”). Mr Norman was then conveyed to the Borroloola Police Station where he voluntarily underwent a breath analysis test at which he provided a reading of .277% BAC.

- 5) On 23 August 2010 Inspectors visited the Store and requested information regarding the RSA Register and the status of employees as to the currency of the RSA Certificates as required in the liquor licence conditions.
- 6) During this process it was revealed Mrs Jacqueline Keighran, Mrs Jullianne McCloskey and Mr John McCloskey, all of whom had started employment in June / July 2010, had not obtained or enrolled for an RSA Certificate. Mrs Keighran is employed in the capacity as shop assistant and is directly involved in the sale of liquor. Mr and Mrs McCloskey are the managers of the store, and as such, are also involved in the sale of liquor. It is a condition of the Liquor Licence Number 80903761 that all staff are required to hold an RSA Certificate within one month of commencing employment.
- 7) It was confirmed through employment records that Mr and Mrs McCloskey's employment commenced on 15 June 2010 and as of 22 August 2010 they had not obtained RSA accreditation or undertaken an RSA course. Mrs Keighran's employment records stated that she had started work on 12 July 2010 and she also had not obtained accreditation or undertaken the course.

Hearing

- 8) At the outset of the Hearing, Inspector Mark Wood, representing the Director, outlined the basis of the complaint alleging a breach of section 102 of the Act with Ms Bonny Stuttard named as a person involved in the sale of alcohol to Craig Norman. He also indicated that the alleged breach relating to the sale of alcohol to the intoxicated person would be contested and in regard to the second complaint regarding failures to meet the RSA requirements, a plea of guilty would be forthcoming. Mr Kimmings, representing the Licensee confirmed that was the case.
- 9) Inspector Wood further pointed out to the Hearing that the actual sale of the alcohol to Mr Norman was not in question and the issue was whether at the time of Mr Norman's purchase, he was intoxicated.
- 10) Inspector Wood emphasised the fact that the BAC readings were only an indicator of Mr Norman's intoxication and do not represent a definitive or conclusive fact as to Mr Norman's intoxication and needed to be taken into account with other displayed indicators.
- 11) He introduced Constable Sanderson's Statutory Declaration into evidence and explained her unavailability to appear due to leave and submitted that full weight ought to be given to her Declaration.
- 12) Inspector Wood then took the Commission step by step through Constable Sanderson's Statutory Declaration. Paragraph 9 deals with a conversation she has with Mr Norman during which she asked him where he purchased his carton of XXXX and in paragraph 10 Mr Norman replies "*from here BDD*" (Borroloola Bulk Discount Store). "*Do you want to carry it for me?*" he asked Constable Sanderson to which she replied "*No*".
- 13) Constable Sanderson then asked Mr Norman if had been drinking today, to which he replied "*only a bit*". Constable Sanderson then asked him, in paragraph 12, "*who purchased the beer he was carrying*" and he answered "*I did*".
- 14) Inspector Wood introduced folio 13 of the Hearing Brief which is a full transcript of an interview carried out between Constable Sanderson and Mr Norman in which Inspector Wood submits he appears to be rambling and incoherent.
- 15) Mr Kimmings expressed disagreement and stated he did not consider the transcript indicates that Mr Norman was rambling, suggesting he is coherent.
- 16) Evidence of Sergeant Gert Johnsson was that he had served as a Police Officer for thirty three years with three years experience in traffic and numerous years experience relating to drink driving offences. He performed duties in Alice Springs on Todd River patrols and

stated he had extensive experience in dealings with persons of varying states of intoxication. Sergeant Johnsson told the Hearing that on 14 August 2010, whilst patrolling in company with Constable Sanderson, they visited the Store at approximately 4.50pm. He entered the Store and observed proceedings for two or three minutes. At the time he estimated there would have been thirty to forty people in the store and it appeared to be quite busy.

- 17) He noticed there were three people in the region of the counter involved in the sale of alcohol. One person was bringing the cartons out to the serving area, one person was handing the cartons to the customers and one person was taking the money. Each sale transaction took approximately one to one and half minutes and seemed quite effective. This differs as to normal bottleshop practice where usually one person handles the whole procedure with each customer.
- 18) Sergeant Johnsson, in conjunction with Constable Sanderson, observed Mr Norman at this time and saw him to be swaying about, with his clothes untidy and dishevelled. He told the Hearing that he had numerous dealings with Mr Norman over a period of time and had observed him at different levels of sobriety. Mr Norman was then delivered to the Borroloola Police Station.
- 19) During the ensuing interview Sergeant Johnsson was in no doubt Mr Norman was heavily intoxicated as he was swaying, had bloodshot eyes and slurred speech. Sergeant Johnsson then went back to the Store and told them not to sell alcohol to any more people that were intoxicated and at this point that the Store voluntarily ceased the sale of alcohol for the day.
- 20) Mr Kimmings stated that the Store only sold beer and the staff knew what its customers wanted and that staff had conversations with customers when requesting signatures on the purchasing register maintained by the store to ensure people did not double up on the maximum daily limit of twenty four cans of mid or light strength beer at the time of the alleged offence (currently set at 30 cans of light or mid strength beer per person per day). He further suggested Mr Norman was not a big man and the weight of the carton would make him sway. To this Sergeant Johnsson agreed that it was possible but highly improbable.
- 21) Mr Kimmings questioned whether bloodshot eyes would indicate intoxication. Sergeant Johnsson replied that it was one factor. When all the factors were put together he had no trouble concluding Mr Norman was heavily intoxicated. Sergeant Johnsson further pointed out it took six attempts to get Mr Norman to successfully blow into the breathalyser which is most unusual.
- 22) Sergeant Johnsson stated that Mr Norman was subsequently transported to a friend's residence as he could not be taken home because he was in possession of alcohol, and at this stage he was still intoxicated.
- 23) Mr Kimmings suggested that concluding Mr Norman was intoxicated was based on a subjective assessment only.
- 24) Inspector Sondra Barry gave evidence in relation to her Statutory Declaration of 1 March 2011 following an interview with Ms Stuttard in which she stated she was aware of the RSA requirements and procedures. Ms Stuttard further said it was very hard to tell the level of intoxication of some people and also if you were to bar people who were to some level intoxicated, you would have to bar everybody in town. Ms Stuttard recalled serving Mr Norman and did not think he was that drunk. Had she thought so, she would not have served him. It was a very busy time of the day and the line waiting to be served was quite long.
- 25) Mr Kimmings introduced his Statutory Declaration following an interview with Ms Stuttard taken over the phone by himself on 3 April 2011 The Declaration outlines answers to some questions put by Mr Kimmings to the effect that Mr Norman was not displaying signs of

intoxication when served. As a result of question from Inspector Wood and the Chairman, it was ascertained from Mr Kimmings that the questions that formed the Statutory Declaration had been put together by Mr Kimmings and discussed with Ms Stuttard at length prior to the Statutory Declaration being taken.

Submissions

- 26) Inspector Wood submitted the case of intoxication was proven basically on the evidence of two Police Officers with vast experience and prior knowledge of the person in question and did not need to rely on the 0.277% BAC breath analysis reading alone. Both Police had prior knowledge of and dealings with Mr Norman over a long period of time and therefore were in a very good position to form an opinion as to his state of intoxication.
- 27) Inspector Wood further referred to the statement of Mr Norman himself where he admitted that he had been drinking. Inspector Wood then pointed out that on the day in question, two and half hours of alcohol sales had taken place which equates to one hundred and fifty minutes and during that time one hundred and fifty cartons had been sold which points to the fact that all personnel involved were busy and perhaps the level of diligence was not at its optimum at the time of the sale.
- 28) Mr Kimmings submitted that Police did not witness the sale. He further pointed out that all the characteristics displayed by Mr Norman were observed after the event, including what may be construed as signs of intoxication. Mr Kimmings suggested that to determine intoxication requires a subjective assessment by the person selling the product. Mr Kimmings further submitted that because of the three hours sales time for alcohol, this necessitates one lane of the servery area for the sale of alcohol only and thus raises the importance of awareness of level of intoxication by persons serving this lane.
- 29) Mr Kimmings also mentioned the fact that Ms Stuttard watched the line of customers, and on that day had previously refused service to two customers. This showed evidence that Ms Stuttard takes her position very seriously and is not just standing there taking peoples' money. Her assessment of Mr Norman was that he may have been drinking but was not intoxicated and he was therefore served.
- 30) Mr Kimmings submitted that regarding the RSA breaches, the management agreement with the Arnhemland Progress Association ("ALPA") commenced mid 2010 under which ALPA manage the store and train the staff. He acknowledged problems with proper briefing between management and staff and that in his view ALPA had let them down.
- 31) He advised that since these events the Store Committee has implemented changes in procedure for banning customers for issues relating to RSA, criminal activity and even general humbugging. The Store has taken it on itself to install an encrypted photo ID system at a cost of \$30,000. This machine incorporates technology that not only scans ID, but records all purchases and dates. A new counter system has been implemented that will avail staff of more time to assess patrons. The new technology also enables checks of customers through driver's licences to be linked to beer cards that are issued by the Store and are only valid for the date of issue. There is also provision within this technology for casual cards to be issued for temporary residents and tourists.

Submissions on Penalty

- 32) Inspector Wood submitted that on the issue of the RSA offence there has been a full and frank admission made regarding this matter. Taking into account the fact that the Licensee had taken quick remedial action to rectify the situation, he suggested that it be treated as an administrative offence. Inspector Wood submitted that while there may be deficiencies with ALPA's management, the Licensee cannot abrogate responsibilities of alcohol sales issues and it is totally their responsibility to ensure processes are in place to handle these requirements.

- 33) In relation to the sale to an intoxicated person contrary to Section 102 of the Act, Inspector Wood submitted that takeaway offences are far more serious than those committed on licensed premises. Takeaway is usually of larger quantities, involves unsupervised drinking, has potential for further offences, and often generates greater harm to the individual and causes general community disharmony.
- 34) Inspector Wood submitted that as the Store had been subject to no prior breaches the appropriate penalty for serving an intoxicated person in the circumstances was a one day suspension of licence, fully served. In respect of the breach of the RSA licence condition, he submitted that the appropriate penalty would be a formal reprimand.
- 35) Mr Kimmings, in response, submitted that the early plea in respect of the RSA breach should be taken into account. Remedial systems had been implemented and the Licensee has shown a genuine desire to improve the implementation of proper outcomes and as such Mr Kimmings suggested a reprimand would be an appropriate penalty.
- 36) Mr Kimmings stated in relation to the alleged breach pertaining to Section 102, he recognised the difference between the on premises sale and the takeaway. Whilst the sale of alcohol is not the core business of the Store, it is an integral part of their turnover and as such, even a one day suspension would be too harsh a penalty. He added that the Store is a not for profit organisation and such a penalty would effectively equate to a fine of approximately \$3,000 per day if the licence was to be suspended. He added that Borroloola residents would simply drive to Heartbreak Hotel and therefore the potential for harm would be further increased.

Consideration of the Issues

- 37) In relation to the breach under Section 102, serving an intoxicated person, the Commission takes into account the testimony of two experienced Police Officers and their prior knowledge of Mr Norman. The Commission is fully aware of the fact that individual indicators of sobriety, i.e. bloodshot eyes, dishevelled appearance, slurred speech, level of coherency and breath analysis readings, do not in themselves create a definitive conclusion as to one's state of sobriety. But if all those indicators are in existence, it can be reasonably assumed that they form a conclusive outcome that Mr Norman was intoxicated at the time of the sale. This, coupled with Mr Norman's own admission that he was half drunk at the time, persuades the Commission on the balance of probabilities that Mr Norman was intoxicated at the time he purchased the carton of beer.
- 38) Mr Kimmings' argument that Police evidence was gathered after Mr Norman was served is not persuasive. The Police officers observed Mr Norman only minutes after he was sold the carton of beer, not enough time for there to be perceptible changes to Mr Norman's state of intoxication.
- 39) In considering the evidence before it, the Commission has grave concerns as to the merit and circumstances surrounding the Statutory Declaration of Mr Kimmings that was based on answers to questions he posed to Ms Stuttard, via telephone. It was also revealed during the Hearing that preceding telephone conversations had taken place between both parties and Mr Kimmings had in some instances suggested the wording of the answers attributed to Ms Stuttard. Therefore the weight that can be placed on the evidence submitted in that Statutory Declaration must be regarded as not significant.
- 40) The submissions made by Inspector Wood for the Director and by Mr Kimmings, especially the proactive measures that have been implemented at the Store and the cost involved in these measures, have been taken into account.
- 41) In deliberating on this matter the Commission is also very cognisant of the circumstances involving any isolated township, such as Borroloola. The liquor licences in these areas are serving a vast area in total and as the Malandari Store is the only outlet to service the takeaway liquor requirements of the Borroloola general public, they have to be monitored, managed and controlled in a very diligent manner. The Store must realise the great

responsibility it holds as to the overall social structure of the town and the influence it has on the residents, the harm that can be created and the overloading of services that can be pressured by the adverse effects of too much alcohol.

- 42) In assessing the severity of this particular breach the Commission raises particular concerns in respect of the evidence of Sergeant Johnsson. Following his interview and breath testing at the Police Station, Mr Norman was transported to a friend's residence because he was intoxicated and he had alcohol in his possession. Sergeant Johnsson decided not to return Mr Norman to his own residence as he was significantly intoxicated and his residence is within a prescribed area. Were it not for the intervention of Police it is highly likely that Mr Norman would have consumed the carton of beer in an uncontrolled and unsupervised environment at a time when he was already significantly intoxicated.
- 43) Clearly, the potential for harm to Mr Norman, or for a disturbance to occur at his residence when he finally arrived home, are significantly heightened in the particular circumstances of this complaint. For those reasons the Commission finds this offence to be at the higher end of the scale of severity. This, in conjunction with the Mr Kimming's failure at the Hearing to concede on behalf of the Licensee that an error of judgement may have occurred, counters any leniency the Commission may have otherwise applied in determining the appropriate penalty for a first time offender. Allowing for the cogent and persuasive evidence presented at the Hearing as to Mr Norman's level of intoxication, the stance adopted by the Licensee gives the Commission little comfort in terms of the likelihood of a recurrence of a breach of this nature.
- 44) In respect of breach of the Section 110 RSA requirements, the Commission accepts the guilty plea of the Licensee and is also mindful of the situation that was in place regarding the management contract between the store and ALPA and that the employees were in fact employed by ALPA. It further notes the steps that the Licensee has taken to rectify the issues and gives credit to the genuine proactive measures by the Store managers and the Licensee with regard to these matters.

Decision

- 45) In relation to the failure to comply with the RSA requirements, which constitute breaches of the licence condition under Section 110 of the Act, the Commission finds the breach proven and requests the Director to issue a written reprimand which will be placed on the file of this licence and in the event of any further proven breaches of this nature, this decision will be taken into consideration in the matter of penalty.
- 46) In relation to the breach of Section 102, sale or supply to an intoxicated person, the Commission finds this breach proven and, taking account of the aggravating factors set above, directs that a penalty of one day suspension of licence (fully served) be imposed. The day the suspension will be served will be the same day as the breach was committed. In this case the breach occurred on a Saturday and as such it is determined the suspension will take place on Saturday 18 June 2011.

Richard O'Sullivan
Chairman

9 June 2011