

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Katherine 5 Star Supermarket
Licensee:	Cesdilla Pty Ltd
Licence Number:	80900703
Nominee:	Mr Trevor Wayne Ford
Proceeding:	Complaint Pursuant to Section 48(2) of the Liquor Act - Breach of Section 102 of the Liquor Act – Sale of Liquor to Intoxicated Person
Heard Before:	Mr Richard O’Sullivan (Chairman) Ms Cynthia-Lee Bravos Mr Walter Grimshaw
Date of Hearing:	1 March 2011
Date of Decision:	14 March 2011
Appearances:	Mr Neil Croft, Director, Cesdilla Pty Ltd Inspector Mark Wood for the Director of Licensing

Background

- 1) By report dated 2 December 2010, the Director of Licensing recommended that the Northern Territory Licensing Commission (“the Commission”) conduct a Hearing in respect of an alleged breach of Section 102 of the *Liquor Act* (“the Act”) by the Licensee of the 5 Star Supermarket Katherine (“the Licensee”).
- 2) The Commission was advised that on 2 November 2010, a complaint was lodged with the Director of Licensing pursuant to Section 48(2) of the Act. The complaint alleged that the Licensee breached Section 102 of the Act in that a person employed by the Licensee had sold liquor to an intoxicated person.
- 3) The substance of the complaint was that:
 - At about 5.35pm on 7 October 2010, Constable Jeshua Kelly observed a person known to him as Mr Brian Woodroffe purchase liquor from the Licensee’s premises being the 5 Star Supermarket Katherine (“the premises”);
 - Constable Kelly observed Mr Woodroffe exit the premises carrying a 2 litre cask of Yalumba wine;
 - Constable Kelly stopped and spoke with Mr Woodroffe and noted that Mr Woodroffe stank of intoxicating liquor, was unsteady on his feet and appeared to have soiled himself;
 - At the request of Constable Kelly, Mr Woodroffe participated in a breath test which gave a positive indication for having consumed liquor;
 - Mr Woodroffe was later placed in protective custody at which time he participated in a breath analysis that gave a reading of 0.237% BAC;

- Subsequently, Mr Woodroffe made a statement that on the day in question he had been drinking at the Katherine Hotel from 12.00pm. He then consumed a cask of wine, purchased from Mac's Liquor, with his wife at about 2.00pm. Mr Woodroffe then purchased a cask of wine from Katherine 5 Star Supermarket at approximately 5.30pm and subsequently stated that he felt about "half shot".
- 4) The Director of Licensing informed the Licensee and the Nominee of the substance of the complaint by way of written correspondence dated 2 November 2010.
 - 5) On 18 November 2010, the Nominee responded to the complaint. The Nominee did not dispute the sale of liquor to Mr Woodroffe, however, the Nominee disputed that Mr Woodroffe was intoxicated at the time of the sale.

Hearing

- 6) On 1 March 2011, the Commission conducted a hearing into this matter at the Katherine Magistrates Court. Licensing Inspector Mr Mark Wood appeared on behalf of the Director of Licensing and Mr Neil Croft, a Director of the Licensee appeared on behalf of the Licensee.
- 7) Mr Wood submitted that about 5.35pm on 7 October 2010, the Licensee breached Section 102 of the Act in that Ms Allison Rodda, an employee of the Licensee had sold liquor to an intoxicated person, namely Mr Brian Woodroffe.
- 8) Mr Wood called Constable Jeshua Kelly who gave evidence that he had been employed as a police officer with the Northern Territory Police for approximately three (3) years and was currently stationed at Katherine Police Station as a General Duties Officer.
- 9) Constable Kelly gave evidence that on 7 October 2011, he was on duty with Senior Aboriginal Community Police Officer (S/ACPO) Trudy Tilley. About 5.35pm, he saw a person known to him as Brian Woodroffe exit the premises through the side door carrying a 2 litre cask of wine. Mr Woodroffe was with two other persons known to Constable Kelly as Alfonso Rickson and Francilla McDonald.
- 10) Constable Kelly stopped Mr Woodroffe and formed the opinion that Mr Woodroffe was intoxicated. Earlier in the day he had encountered Mr Kelly and had tipped alcohol out belonging to Mr Kelly who was drinking with others in the Katherine Public Restricted Area. Constable Kelly observed that Mr Woodroffe had very blood-shot eyes, was swaying on his feet and appeared to have soiled himself in that he smelt of faeces and had faeces on the back of his pants.
- 11) Mr Woodroffe admitted to Constable Kelly that he had purchased the wine. Constable Kelly conducted a breath test on Mr Woodroffe which gave a positive result. Constable Kelly offered to take Mr Woodroffe to a family member's residence, however, upon arrival, the persons at the residence did not wish for Mr Woodroffe to stay there. This residence had previously been declared Private Restricted which does not allow the possession or consumption of alcohol. Mr Woodroffe was then placed into protective custody.
- 12) Mr Wood then called S/ACPO Trudy Tilley who gave evidence that she had been employed as an ACPO for approximately five years and at the time of the incident was working within the public place unit, undertaking patrols of Katherine.
- 13) S/ACPO Tilley gave evidence that supported the events as detailed in the evidence of Constable Kelly. In addition S/ACPO Tilley advised the Commission that Mr Woodroffe was well known to her as she had dealt with Mr Woodroffe on many occasions including occasions when he was sober. S/ACPO Tilley gave evidence that at the time of the incident and based on her experience, she formed the view that Mr Woodroffe was highly intoxicated as he smelt strongly of intoxicating liquor, was unsteady on his feet and his eyes were half closed. S/ACPO Tilley stated that she had dealt with Mr Woodroffe earlier in the day (when wine in his possession was tipped out) and that at that time his alcohol condition

was not too bad and that there was a huge difference between Mr Woodroffe's state of intoxication earlier in the day and at the time of the incident.

- 14) S/ACPO Tilley also gave evidence that on the following day she obtained a statement from Mr Woodroffe regarding the events on 7 October 2011.
- 15) Mr Wood introduced camera surveillance footage of Mr Woodroffe entering the premises, stopping just inside and looking around and then walking towards the liquor sale area. A female employee follows Mr Woodroffe into the liquor sale area. Mr Woodroffe is then seen viewing the liquor offered for sale in the refrigerated cabinets. The female employee is seen cleaning the glass door of the refrigerated cabinet next to where Mr Woodroffe is located. Mr Woodroffe is then seen exiting the premises and a short time later re-entering the premises. Mr Woodroffe is then seen selecting a 2 litre cask of wine from the refrigerated cabinets, taking the wine to the sales counter where he remains for a short time and he is then seen exiting the premises with the wine cask.
- 16) Mr Wood introduced the statements of Ms Allison Rodda and Ms Judith Schmidt, both employees of the Licensee who were in the premises at the time of the incident. Mr Wood informed the Commission that he did not contest any of the evidence contained within the statements which appear at folios 32-35 of the Hearing Brief.
- 17) Mr Croft did not call any witnesses.
- 18) Mr Croft informed the Commission that the Licensee did not dispute that Mr Woodroffe had purchased liquor from the premises on the day in question.
- 19) Mr Croft submitted that the employees on duty that day had made a judgement call that Mr Woodroffe was not intoxicated. He submitted that the employees had interacted with Mr Woodroffe for a short period of time whilst he was in the premises on the two occasions and unlike the Police members involved, they did not have the benefit of earlier interactions with Mr Woodroffe during that day to assist them in forming their opinion.
- 20) Mr Croft submitted that Mr Woodroffe did not come up on the ID system as having purchased liquor earlier in the day and also submitted that soiling oneself, if indeed that had occurred on the day, was not indicative of intoxication. Mr Croft submitted that customers of the premise are regularly refused service due to intoxication. At the request of the Commission, Mr Croft agreed to provide the Commission with recent records pertaining to the refusal of service at the premise due to intoxication.
- 21) Mr Croft submitted that people know that they have to be on their best behaviour when purchasing liquor and many people can purport to be sober at that time and are practised at masking intoxication.

Consideration of the issues

- 22) The Commission notes that the Licensee does not dispute that on 7 October 2011, a person employed by the Licensee sold liquor to Mr Woodroffe. The issue that is contested is whether Mr Woodroffe was intoxicated at the time.
- 23) With respect to intoxication, the Commission notes that Section 102 of the Act states:

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).

- 24) The Commission therefore notes that once the complainant has adduced evidence in support of the allegation that Mr Woodroffe was intoxicated at the time he purchased the liquor, it is the Licensee who must establish the existence of certain facts that would enable the Commission to come to the finding that Mr Woodroffe was not intoxicated at the time.

- 25) The evidence before the Commission is that both Constable Kelly and S/ACPO Tilley formed the view that Mr Woodroffe was intoxicated when they spoke with him directly after he purchased liquor at the Licensee's premises. The noticeable signs of intoxication as identified by Constable Kelly were that Mr Woodroffe had very blood-shot eyes, was swaying on his feet and appeared to have soiled himself. S/ACPO Tilley formed the view that Mr Woodroffe was intoxicated as he smelt strongly of intoxicating liquor, was unsteady on his feet and his eyes were half closed. Mr Woodroffe then underwent a breath test which returned a positive reading. After an unsuccessful attempt by police to place Mr Woodroffe in the care of a family member, Mr Woodroffe was placed in protective custody and released the following morning.
- 26) The Commission also notes that documentation within the Hearing Brief indicates that Mr Woodroffe underwent a breath analysis at 5.54pm on the day in question which resulted in a reading of 0.237% BAC. Whilst a reading at this level is regarded by the Commission, adopting a common sense approach, as an indicator of intoxication at a relatively high level, the Commission also acknowledges that a BAC reading alone cannot support a finding that a person was intoxicated. The Commission is of the view that there must be other observable indicators that the person was intoxicated at the time of service.
- 27) 5 Star shop assistant Ms Rodda, stated in her sworn Statutory Declaration dated 18 November 2010, that on the day in question she had observed Mr Woodroffe enter the premises and "...walk into the bottle shop. He walked straight to the fridge and opened the door without any trouble." Mr Woodroffe then went to the sales counter area where Ms Rodda states that:
- He put the cask on the counter. I said hello and asked him how he was today. He said: "Fine". I asked him if he had been drinking and he said "No".*
- 28) Ms Rodda stated that she then conducted a check that identified that Mr Woodroffe was not banned from buying alcohol. Ms Rodda further stated that:
- I did not think he was intoxicated. He did not exhibit any typical behaviour of a drunk person. He walked freely and steadily and his eyes were not blood shot nor glazed. He did not smell of alcohol.*
- 29) 5 Star shop employee Ms Schmidt stated in her sworn Statutory Declaration dated 18 November 2010 that she did not form the view that Mr Woodroffe was intoxicated. Ms Schmidt states that, "He did not smell or look as though he had soiled himself. He did not stink of liquor. He was not unsteady on his feet."
- 30) The Commission also takes note that Mr Woodroffe himself, by way of sworn statutory declaration dated 7 October 2010, some six hours after being taken into protective custody states that shortly after leaving the premises he had a conversation with a "...police man there. He asked me if I was drunk and I told him I only had 5 cans and a box of moselle...I felt about half shot."
- 31) The Commission notes that it has now been provided with a list of customers refused service at the premises due to intoxication between 13 May 2010 and 3 November 2010. The Commission notes that this documentation lists that some 150 persons have been refused service during that period of time. The Commission also notes that on the day in question, no persons are recorded as being refused service up until the time Mr Woodroffe was served. The Commission notes that 2 people were then refused service at 5.50pm and 6.15pm. It appears to the Commission that the attendance of the police members in relation to this incident directly outside the Licensee's premise may have heightened the awareness of the Licensee's employees' responsibilities not to serve intoxicated persons.
- 32) The Commission has also reviewed the camera surveillance recording that shows Mr Woodroffe entering the premises, purchasing the liquor and exiting the premises. Due to the lack of a camera over the sales counter, a clear view of Mr Woodroffe during the sales transaction is unavailable. The Commission considers this to be unfortunate given that

good quality footage of an incident provides invaluable assistance to the viewer when considering such a matter. The Commission does concede that the footage does not show Mr Woodroffe unsteady on his feet but rather a steadily purposeful approach to the refrigerated area and sales counter.

- 33) Had footage been available of Mr Woodroffe purchasing the liquor at the sales counter, the Licensee may have been able to rely upon it to assist it in providing to the Commission, evidence of the fact that Mr Woodroffe was not intoxicated. It is the experience of the Commission that intoxicated persons often display amongst other physical signs, a lack of coordination which can include such things as difficulty counting money or dropping change.
- 34) In support of a finding that Mr Woodroffe was not intoxicated, Mr Croft put to the Commission that:
- the Licensee's employees had time to interact with Mr Woodroffe and determined he was not intoxicated;
 - checks showed the Mr Woodroffe had not purchased cask liquor earlier in the day;
 - soiling oneself (if it had occurred on the day) was not indicative of intoxication; and
 - that the Licensee was able to demonstrate a history of non-service of intoxicated customers.
- 35) The Commission has considered the evidence before it and notes the conflict between the observations of the members of police and that of Ms Rodda and Ms Schmidt in relation to Mr Woodroffe.
- 36) Ms Rodda and Ms Schmidt state that they did not form the view that Mr Woodroffe was intoxicated. They both state that Mr Woodroffe did not smell of liquor and that he was steady on his feet. Ms Rodda further stated his eyes were not blood shot or glazed. Ms Schmidt states that Mr Woodroffe did not smell or look as though he had soiled himself.
- 37) The Commission notes that both Police members based on their observations of Mr Woodroffe, made an assessment that Mr Woodroffe was intoxicated at the time he exited the premises. This view is supported by a positive breath test conducted at that time and further supported by the results of a breath analysis undertaken a short time later. The police members acted upon their assessment of intoxication and placed Mr Woodroffe into protective custody.
- 38) The Commission notes that pursuant to the *Police Administration Act*, Police Officers are able to take members of the public into protective custody if they are seriously intoxicated in a public place. Whilst the placing of persons into protective custody is an all too common event in the Northern Territory, the Commission notes that deprivation of liberty is a serious matter and considers that the decision to place Mr Woodroffe in protective custody would not have been one taken lightly by Constable Kelly and S/ACPO Tilley.
- 39) The Commission also notes that in support of Constable Kelly and S/ACPO Tilley's assessment that Mr Woodroffe was intoxicated, Mr Woodroffe by his own admission some six hours later states that he was "half shot" at the time.
- 40) Based on the evidence before it, it is the view of the Commission that the Licensee has not established the existence of facts that would enable the Commission to come to a finding that Mr Woodroffe was not intoxicated at the time when he was served liquor at the premises.

Submissions on penalty

- 41) Mr Wood submitted that in his view, the staff on duty at the premises on the day made a 'bad call' and that it is sometimes difficult to determine the level of intoxication of a person especially if that person is a functioning alcoholic.
- 42) Mr Wood confirmed that the Licensee had operated the premises for approximately eighteen years without significant incident until 2008 when the Licensee came before the Commission as a result of a conviction of a breach of Section 102 of the Act which resulted in the Court imposing a \$500 fine and a \$40 victim's levy. At that time, the Commission, pursuant to Section 124AAA of the Act determined that a formal letter of reprimand be placed on the Licensee's file and should be considered by the Commission if there are any further breaches of the Act by the Licensee.
- 43) Mr Wood referred the Commission to Section 124AAA(2)(b) of the Act for guidance on penalty. This Section states that suspension of a Licensee's licence in relation to a second offence upon a finding of guilt for an offence against Section 102 of the Act may be for up to a period of seven days. Mr Wood submitted that should the Commission consider the complaint proven, that the penalty does need to reflect the serious nature of the offence and a 1 day suspension of the Licensee's license would be appropriate.
- 44) Mr Croft submitted to the Commission that Ms Rodda and Ms Schmidt did their best on the day in question and may have simply made a bad call. Mr Croft further submitted that the Licensee's employees receive training and are instructed not to serve liquor to intoxicated persons. Mr Croft made no submission as to an appropriate penalty should the Commission find the complaint proven.

Decision

- 45) On the information before it, the Commission finds that the Licensee has contravened Section 102 of the Act.
- 46) The Commission notes that serving alcohol to intoxicated persons is contrary to the objects of the Act and as such, is a breach of the Act that should not be tolerated. Whilst not applicable to matters that are referred directly to the Commission, as opposed to those referred to the Courts, the Commission notes that pursuant to Section 124AAA(2)(b) of the Act the penalty prescribed for a second breach of Section 102 of the Act is a suspension of licence for a period of up to seven days.
- 47) The Commission is satisfied that the contravention by the Licensee is of sufficient gravity to justify the suspension of the licence for a period of one day, with that penalty to be imposed on a Thursday, being the day of the offence. The suspension is to take place on Thursday 31 March 2011.
- 48) In respect to the adequacy of Camera Surveillance, the Commission is of the view that surveillance camera coverage of the sales counter area would have greatly assisted in its assessment of patron intoxication. Accordingly, the Commission directs that in addition to the current camera placements in the premises, a minimum of one camera be placed over the sales counter area and that a Camera Surveillance Plan be developed inclusive of this coverage.

Richard O'Sullivan
Chairman

14 March 2011