

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	EVERLEY PARAP
LICENSEE:	Fong Continental Foods Pty Ltd
LICENCE NUMBER:	80900486
NOMINEE:	Mr Raymond Fong
PROCEEDING:	Complaint pursuant to section 48 of the <i>Liquor Act</i>
COMPLAINANT:	Mr Neville Pantazis
HEARD BEFORE:	Ms Jill Huck (Presiding) Mr Paul Costigan Mr Craig Spencer
DATE OF HEARING:	29 July 2005
APPEARANCES:	Mr Kevin Fong for the Licensee Mr Greg Lye for the Director of Racing Gaming and Licensing

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1. This hearing arose from a complaint lodged by Mr Pantazis on 19 May 2005. Mr Pantazis alleged that shortly after 5.15pm on 18 May 2005 an intoxicated person was sold takeaway liquor at the Everley Parap premises, specifically half a carton of Victoria Bitter (VB) cans. If proved, the sale of liquor in these circumstances would be a breach of section 102 of the *Liquor Act* (the Act).
 2. The circumstances were that this person had been refused service by Mrs Pantazis at Parap Fine Foods on the grounds of intoxication shortly before the alleged sale of liquor to the same person at Everley Parap. Mr Pantazis and his mother, Mrs Pantazis, both gave evidence about how they had decided the person was intoxicated when he came into Parap Fine Foods that afternoon. Mr Pantazis said that he recognised the person as having purchased one dozen VB cans earlier in the day. When this customer returned to the shop to purchase more beer, Mr Pantazis observed changes in the customer's appearance and demeanour that led him to form the view that the customer was intoxicated. Among other things, the customer was walking more slowly (shuffling) and his eyes were droopy and glassy. Although she

did not know that he had bought alcohol earlier that day, Mrs Pantazis after observing him, also formed the view that he was intoxicated. Mrs Pantazis said that she recognised him as a regular customer and was familiar with his usual presentation. She said that on this occasion he walked differently -“he was not carrying his body the way he should”, his face looked different and his eyes had a different glow. He was neatly and cleanly dressed and she did not remember smelling alcohol on him but she said it would have been obvious to anyone that he was affected by alcohol. Mrs Pantazis said that this was the first time she had seen this customer showing signs of intoxication.

3. The Commission was told that it is normal practice in Parap Fine Foods for one of the female staff members, where possible, to take on the task of advising intoxicated persons that they will not be served. This approach is considered less confrontational than using the male staff to undertake this task. The store regularly refuses service to customers and there are rarely any bad reactions. Mrs Pantazis dealt with this particular customer, telling him that he'd had too much to drink and suggesting that he go home and sleep it off. She said that, although he was surprised to be refused service, he reacted politely and left the shop without any fuss.
4. Mr Pantazis said that he was curious to see whether the customer would be served elsewhere and alerted his sister, Mrs Dinoris, to keep an eye out for him (giving her a description of the customer's physical appearance including his clothing). Mr Pantazis' evidence was that he then went out the back of the store and saw the customer go into the Everley Parap store and emerge a minute or so later with half a VB carton. When questioned at the hearing, Mr Pantazis had trouble recalling whether he could specifically see the VB cans in the carton but thought he had. Mr Pantazis said that he had called his sister, Mrs Dinoris, and they had both watched the customer walk towards, and then past, them. Mrs Dinoris said that she gained the impression that the customer was intoxicated because of the way he walked (she demonstrated this to the Commission) and said that she could see the VB cans in the carton as he walked past. She confirmed that she had not actually seen him enter or leave Everley Parap; however she did see him walking from that direction.
5. Mr Pantazis lodged his written complaint the next day, and a witness statement from Mrs Dinoris was lodged some 5 days later. He said that his intention in lodging the complaint had only been to remind the Fongs of their responsibilities as licensees and he had been shocked when the matter resulted in a public hearing.
6. On cross examination, both Mr Pantazis and his mother, Mrs Pantazis, conceded that the customer may have been able to hold himself together enough when he entered Everley Parap to give the impression he was less intoxicated than he was. Mr and Mrs Pantazis said that the customer was not so drunk that he was muddling his words, he was

not dishevelled in appearance and, although his walk was affected, he was not swaying from side to side. Mrs Pantazis described the customer as “strongly under the influence but able to hold his appearances”. She said that she suspected that the customer would have been “staggering drunk” with a couple more drinks, but he wasn’t quite at that stage. Mr Pantazis said that it was a “borderline situation”. He also acknowledged that, because of the high shelves and the small space in the Everley Parap shop, it might be hard for staff to observe how a person walked and utilise these observations to help form a view as to whether the person was intoxicated. He said that on the day in question he and his mother had made a judgement call that the customer was intoxicated, using the rule of thumb that they would have expected a licensing inspector to pull them up if they had served him. Mrs Pantazis said she was disappointed that the customer had been served elsewhere, given that she had been trying to do the right thing by the community.

7. The Fongs were notified by a licensing inspector of the complaint some six days after the alleged incident. In his written response to the complaint dated 7 June 2005 (3 weeks after the alleged incident), Mr Fong wrote, in part:

At the time that the alleged incident occurred, the staff in our store were my wife, Lisa Fong, and me. I do not recall serving any person at the time the alleged breach occurred. My wife denies she sold liquor to any person who appeared to be intoxicated.

8. At the hearing both Mr and Mrs Fong, relying on their memories, were adamant that the customer described in detail by the complainant and his witnesses in their oral evidence, had not come into the Everley Parap store in the period 4.15pm to 6.30pm on the day in question. Further, they asserted that they had not sold any beer or any other alcohol to anyone in that time period. Mrs Fong said that she had been at the counter in the shop by herself for those two hours. She said that Mr Fong had been fully occupied unloading and storing goods out the back of the shop. The Fongs insisted that they had a very clear recollection of that day as there had been more deliveries than normal and the shop had been very quiet.
9. The Fongs said that they would have remembered if someone had bought a half carton of beer because cartons of beer and wine casks are kept in a cool room out the back of the premises. Only single cans and bottles are kept in the fridge in the shop. Mrs Fong would have had to buzz Mr Fong on the intercom to get him to bring out a half carton for the customer. Mr Fong said that, at no time during the period 4.15 to 6.30pm, did Mrs Fong use the intercom to ask him to bring any beer or other alcohol into the shop for a customer. Mrs Fong’s evidence was that it was very quiet in the shop that afternoon and she had filled in her time by reading a magazine. She said that the

only goods she sold were cigarettes and smallgoods such as two minute noodles, milk, margarine, bread and soft drinks. She said that there had been no adult male customer of any sort during the period 4.15pm to 6.30pm on that day, only some teenagers and some adult women. Both Mr and Mrs Fong said that they had excellent memories.

10. When questioned about written records of sales on that afternoon, Mr Fong's evidence about his record keeping was somewhat vague. He was adamant that he had not retained any "till tapes" for sales on that day and indicated that there were no other records of liquor sales which would provide information about the times, dates and types of liquor sold. Mr Fong said he used a cash book to record information from the cash register at the end of each day. He said that his accountant had never told him to retain till tapes.
11. The Commission asked Mrs Fong whether empty beer cartons were given to customers to carry other purchases, for example vegetables or small goods, and whether this might be what the complainant saw. While stating that she kept some empty cartons near the cash register, Mrs Fong repeated her that there had been no adult male customer – "just teenagers and a lady".
12. Both Mr and Mrs Fong were asked how they would decide that a person was intoxicated and what they would do if they came to the conclusion that a person was intoxicated. Mr Fong said that he had worked in Darwin pubs for many years and was used to dealing with people who were affected by alcohol. He described an intoxicated person as someone who was drunk, screaming, and unable to control him or herself. He said that people can have bloodshot eyes and/or red faces and not be drunk. Upon further questioning, he said that there was a difference between someone who was "drunk" and someone who was "intoxicated". He said that someone who was drunk was "u/s" as opposed to someone who was intoxicated who might "still know what they are doing". Mrs Fong said that an intoxicated person was someone who had been "over drinking" a bit – "not like heavy drunk where [the person would] start talking but not make sense". She said if a person is drunk they "can't get up – can't talk". She said that, since being notified of the complaint, they were being very careful and avoiding sales if the person was "a little bit over."
13. Mr and Mrs Fong made the point many times during the hearing that they tried not to directly refuse to sell people alcohol – they would tell customers that they had "run out. Come back tomorrow". Mrs Fong said she was concerned about being accused of being racist if she directly refused a sale, saying that this had happened on occasions. Mr Fong said he would use his "I've run out. Come back tomorrow" strategy about once a week to avoid a sale to an intoxicated person.

14. The problems of anti-social behaviour in the Parap area were discussed during the hearing, with Mr Pantazis expressing concern about Mr Fong's apparent reluctance to join in initiatives in the area. Among other things Mr Pantazis said that Parap Fine Foods and some other licensed premises in the area had made a deliberate decision not to stock certain products which are popular with itinerants, such as the cheaper casks of wine. Everley Parap had not limited these products at all.
15. Mr Fong told the Commission he sells about 16 Barunga Ridge wine casks each day and about 25 to 30 of cartons of beer per week. Although he acknowledged that these wine casks are the liquor of choice for many itinerants, he argued that the sales did not necessarily add to anti-social behaviour in the local community because often people came in mini-buses to purchase the wine casks and took them away from the area.
16. Mr Fong said that Everley Parap is now a marginal business, with cigarettes, phone cards and alcohol (particularly wine casks) being an important part of its income. He said that most customers only buy one or two items when they attend the store and that the business simply could not compete with the "big boys". Mr Fong said that he intended to sell the business.
17. There were two character witnesses for the Fongs, Max Cross and Richard Whyte, as well as a written reference from James Meller, the proprietor of Prickles Restaurant and Takeaway. The two witnesses stated that they had known Mr and Mrs Fong for many years and attested to their good character and honesty. Both said that they had spent many hours in the store speaking with Mr Fong and had never seen him sell liquor to an intoxicated person. They also stated that they had seen him refuse service to intoxicated people.

Discussion of the evidence and application of the law

18. It was clear from the evidence that the Pantazis family took a much more cautious approach than the Fongs to deciding when a person might be considered intoxicated and should be refused service.
19. The two businesses also had different ways of managing people they considered intoxicated, although they shared a common desire to avoid unpleasant confrontations with intoxicated people. At Parap Fine Foods the female staff members took on the task of advising people that they would not be served liquor because they were intoxicated; at Everley Parap the Fongs used the much more indirect approach of advising intoxicated customers that the store had run out of the particular product and telling them to come back the following day.

20. The Commission noted that the Fongs' approach undoubtedly reflected a genuine concern to avoid complaints of discrimination as well as to stop their customers losing face; however, the weakness of the Fongs' approach was that their customers did not get told the real reason they were not being served, perhaps leading them to develop false expectations about being able to purchase liquor when already under the influence of alcohol.
21. Against this background, the issues which needed to be established in this case were twofold: Did the Fongs sell alcohol to the person previously refused service by Parap Fine Foods? And if they did, was this person intoxicated at the time the alcohol was sold to him?
22. To answer these questions, the Commission had to weigh up the available evidence; evidence which, in this case, includes some very different accounts of what did or did not happen on the relevant day. Our assessment of this evidence is not assisted by the apparent lack of records of sales on that day. Written records, such as till tapes, could have provided some objective evidence about whether a sale occurred but these were not available. The Commission notes that such till tapes could have been used to help establish innocence as well as guilt in this matter. The fact that the customer was not called as a witness, the fact that the complainant did not observe the actual sale and the lack of corroborative evidence regarding the customer's consumption of alcohol, such as a blood alcohol concentration reading, also made this task more difficult.

Did the Fongs sell alcohol to the person previously refused service by Parap Fine Foods?

23. The Fongs claimed to have very clear memories of the events, customers and sales for that day and gave evidence that they did not sell alcohol to the person described at the hearing nor to anyone else within a two hour period on the relevant day. Further, Mrs Fong gave evidence that there were no adult male customers in that same two hour period. Mr and Mrs Fong's confidence regarding the accuracy of their evidence was surprising given the apparent absence of written records, the fact that they were not notified of the complaint until 6 days after the alleged event and did not have a detailed description of the customer until the date of the hearing.
24. The complainant gave clear evidence that he saw the customer enter the Fongs' store empty handed and leave the store carrying half a VB carton. Mrs Dinoris also gave evidence of seeing the customer walking from the direction of the Fongs' store with a half carton of VB cans. The complainant wrote his account of the alleged incident the next day and Mrs Dinoris recorded her account five (5) days after that. While there were some minor inconsistencies in the accounts of these witnesses at the hearing, these inconsistencies were not significant.

25. The Commission was left with the unpleasant task of potentially having to determine on the basis of credibility the factual issue of whether the customer had been sold alcohol by Everley Parap. Inevitably this would have involved some assessment of whether various witnesses were telling the truth about the factual events of that day. For reasons to be explained, the Commission decided that it was not strictly necessary to proceed down this path.

If the Fongs sold alcohol to this person, was he intoxicated at the time?

26. If the customer had been sold alcohol by the Fongs, the relevant issue would then become whether he was intoxicated at the time of sale or, more accurately, whether someone serving him could have been satisfied that he was not intoxicated? Section 102 of the *Liquor Act* reads as follows:

102. *Liquor not to be sold to intoxicated person*

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).

27. This Commission has considered the application of section 102 many times in the past. It is clear that once it has been established that an actual sale has occurred and that there were grounds to suspect that the customer was intoxicated, it is up to the licensee to establish that the customer was not intoxicated. In *Milne Foodtown* (19 December 2003), the Commission discussed the concept of intoxication as follows:

The three main alternative concepts of intoxication would seem to be, in simplified summary:

- a) materially affected by liquor;*
- b) inability to act in an unaffected normal fashion; or*
- c) visible impairment of faculties*

The need with the first two approaches to still have to determine a contextual meaning for “affected” or “unaffected” would seem to lead inexorably to the third approach as being more immediately practical, and more susceptible to the usual evidentiary case. 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.”

28. Mr and Mrs Pantazis were both clearly satisfied that they had made the right judgment call at their own store; they both thought that the customer was intoxicated, as did Mrs Dinoris when she later saw him walking up the street. Mr and Mrs Pantazis therefore made an appropriate decision to refuse this man service given that the law requires the licensee to be satisfied that a person is not intoxicated before selling or supplying liquor to that person. It was clear from the evidence that the Pantazis family are very conscientious licensees and that they do not take any risks in respect to their responsibilities under the *Liquor Act*.
29. Significantly both Mr and Mrs Pantazis conceded that, once the particular customer had been alerted to their concerns, he may have been able to pull himself together enough to present as less intoxicated than he was for the short time required to go into the Everley Parap store to purchase the alcohol. They both described the situation as “borderline”. Mrs Pantazis also conceded that someone unfamiliar with this customer may not have realised the extent to which he was affected by alcohol. Both Mr and Mrs Pantazis had seen this customer when he had not been drinking and therefore were able to compare his normal presentation with his presentation after he had been drinking - that is, they had the advantage of contextual information which enabled them to decide that he was “materially affected by alcohol” and not acting in an “unaffected normal fashion”. This evidence from the Pantazis family regarding the customer’s presentation is sufficient to raise some doubts about whether the Fongs, if they served this customer and were not familiar with him, would have been able to come to these same conclusions. It also raises doubts about whether the Fongs would have observed the “visible impairment of faculties” in this customer considered by the Commission as the preferred test for the application of section 102.
30. That said, the Commission notes that the onus of proof under section 102 is a reverse onus on the licensee to show that the person was not intoxicated at the time of sale or supply. In this particular case, we did not hear any arguments on this issue because the Fongs had denied that the customer came into the shop at all.
31. Given the doubts about the facts in this case described in paragraph 30 above, the Commission decided that it could not confidently find that the licensee had breached section 102 of the *Liquor Act*, even if it made findings that this customer had gone into the Everley Parap store and been sold beer by the Fongs. There will therefore be no finding that the licensee has contravened or failed to comply with the licence in respect of the facts constituting the ground of this complaint.
32. Regardless of any conclusions about whether there had been a breach of section 102 on this occasion, the Commission was left with some concerns about whether the Fongs were sufficiently cautious in their interpretation of their legal obligations under section 102, especially

given the reverse onus of proof. The Commission also had concerns about the apparent standard of the Fongs' record keeping, which in this case made the investigation and hearing of this complaint more difficult than it should have been.

33. The *Liquor Act* allows the Commission a wide discretion with regards to the outcome of a hearing into a complaint. These outcomes include dismissing a complaint or deciding to take no further action on a complaint. Some outcomes, such as the issuing of directions and the suspension or cancellation of a licence, require there to be findings that the licensee has contravened or failed to comply with their licence. Other outcomes such as amending licence conditions or varying the type of licence do not directly depend on a finding of contravention or failure.
34. In this case, there was no contravention or failure to comply with the licence so the issuing of a direction or the suspension or cancellation of the licence are not available options. The Commission however had sufficient concerns about the issues raised by this complaint not to be comfortable with dismissing the complaint or taking no further action. The Commission, after some consideration, decided instead to vary the conditions of the licence of the Everley Parap premises to insert the following special licence condition, with the date of effect being the date of notification of this decision:

The nominee and all other persons engaged in the sale or supply of liquor must successfully undertake, within a period of time acceptable to the Director, a suitable responsible service of alcohol course.

And

The licensee will ensure that written records are made of the nature, time and date of all liquor purchases made at the store, that these records are retained for at least four (4) weeks from the date of the transaction and that they are made available for inspection as required.

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Jill Huck
Presiding Member
28 September 2005