

# NORTHERN TERRITORY LICENSING COMMISSION

## DECISION

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<b>PREMISES:</b>	<b>MATARANKA HOTEL</b> Stuart Highway Mataranka
<b>LICENSEE:</b>	Westbrick Pty Ltd
<b>LICENCE NUMBER:</b>	80117506
<b>COMPLAINTS:</b>	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> – Conduct contrary to Section 102 Sale or supply to an intoxicated person
<b>HEARD BEFORE:</b>	Mr Philip Timney (Presiding Member) Mrs Jane Large Mr David Brooker
<b>DATE OF HEARING:</b>	21 & 22 March 2011
<b>APPEARANCES:</b>	Mr Antony Downs for the Licensee Inspector Mark Wood for the Director of Licensing

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## BACKGROUND

- 1) By decision dated 29 September 2010, the Commission determined to conduct a Hearing in respect of a complaint lodged by the Director of Licensing pursuant to Section 48(2) of the *Liquor Act* (the Act), against Licensee of the Mataranka Hotel. The complaint alleges that on 11 March 2010 the Licensee sold or supplied liquor to a person who was intoxicated at the time.
- 2) The complaint alleges the following facts. At approximately 7.55 pm Police Officers, including then A/Sergeant Jason Dingle and Senior Constable David Coulton, were patrolling the Mataranka Township and were positioned near the Hotel. The Officers observed 2 males they knew as Ross Billy and Peter Lansen enter the Hotel and depart with a 30 pack carton of VB beer. The Officers had spoken with Messrs Billy and Lansen earlier in the evening and had formed the opinion they were intoxicated.
- 3) The Officers approached Mr Ross when he exited from the Hotel who informed them he had purchased the carton for about \$60.

## THE HEARING

- 4) At the commencement of the Hearing Inspector Wood informed the Commission that the complaint was contested by the Licensee and that he intended to call Senior Constable Dingle to give evidence on behalf of the Director. He advised that Senior Constable Coulton, who along with Senior Constable Dingle has prepared a statutory declaration in respect of the complaint, was not available to give evidence having been posted overseas.
- 5) Mr Downs confirmed that the allegation of breach of section 102 of the Act was contested and that he intended to call the co-Nominees and Ms Julie Vernon as witnesses on behalf of the Licensee.

### Evidence of Senior Constable Dingle:

- 6) Senior Constable Dingle entered the witness box and advised that he was currently stationed in Katherine but at the time of the incident the subject of the complaint he was stationed at Minyerri Police Station at the rank of A/Sergeant. He stated that on 11 March 2010 he was carrying out patrol duties in Mataranka as often occurred for Officers stationed at Minyerri, particularly on pay days when extra money lead to extra drinking in the township.
- 7) Senior Constable Dingle stated that at around 7.30 pm on 11 March 2011, he was patrolling the carpark opposite the Hotel when he recognised Mr Billy and Mr Lansen, who he knew from his numerous dealings with them at Minyerri and nearby Hodgson Downs. He added that Mr Billy was humbugging him for a lift back to Hodgson Downs which was refused as he formed the opinion that Mr Billy was intoxicated. Senior Constable Dingle formed that opinion from observing that Mr Billy was unsteady on his feet, had bloodshot eyes and was slurring his words.
- 8) Senior Constable Dingle stated that when told Mr Billy he would not drive him back to Hodgson Downs he replied with words to the effect that is he did not give him a lift he would buy another carton of VB and go to the drinking paddock. Senior Constable Dingle told Mr Billy he would not get served as he was too drunk to which Mr Billy responded "I be right, you just watch".
- 9) Senior Constable Dingle watched Mr Billy and Mr Lansen cross the road heading towards the Mataranka Hotel and drove the Police vehicle to the front of the Hotel where he observed that 2 females were working in the bar. Senior Constable Dingle got out of the vehicle and stood on the footpath. He stated that he observed Mr Billy approach the bar of the Hotel and receive a carton of VB beer from a female in the Hotel. Senior Constable Dingle asked Mr Billy if he purchased the beer to which he responded that he had paid about \$60 for it and had give the female in the aqua shirt his licence.
- 10) Mr Billy agreed to participate in a breath analysis test and, in response to a question from Senior Constable Dingle as to how drunk he was, he stated that he was "Starting to get there, not quite full, maybe 3/4's". Senior Constable Dingle stated he took that to mean that Mr Billy was almost "full drunk". He added that he had seen Mr Billy in various states of intoxication and in his opinion he was almost completely drunk on the night in question when he spoke to him. He noted that Mr Billy does not normally slur his words when he is sober.

- 11) Senior Constable Dingle stated that after speaking to Mr Billy he entered the Hotel and spoke to the co-Nominee, Ms Debra Moore, and informed her she would be summonsed for serving alcohol to an intoxicated person.
- 12) Senior Constable Dingle stated that Mr Billy was voluntarily conveyed to the Mataranka Police Station where he returned a BAC recording of 0.175%. Mr Billy was later conveyed to a place of his choice, being the Mulggan Town Camp. Senior Constable Dingle added that he believes Mr Billy to be an educated person who speaks English well.
- 13) Senior Constable Dingle stated that he would not drive Mr Billy back to Hodgson Downs because he thought he was drunk and drunks were not well received in the community. He added that it was a 150 km trip from Mataranka to Hodgson Downs including 40 km of unsealed road and there were liability concerns in using Police vehicles as taxis for drunks. The trip takes approximately three hours when there are passengers in the caged rear area of the vehicle.
- 14) Under cross examination by Mr Downs, Senior Constable Dingle stated that he did not think Mr Billy was so intoxicated as to require being placed in protective custody, he did not consider him a threat to himself or others and he had no concerns regarding him crossing the Stuart Highway prior to entering the Hotel. Although Mr Billy and Mr Larsen were staggering when they were crossing the road they were not in any danger.
- 15) Senior Constable Dingle confirmed that he did not alert the Licensee that Mr Billy was intoxicated prior to him entering the Hotel as he did not expect him to be served. He stated that he did not hear any conversation between Mr Billy and the person who supplied him with the carton, nor did he see any money change hands.
- 16) Senior Constable Dingle stated that he did not have any specific recollection of his discussion with Ms Moore after the incident although he recalled that he told her she would be summonsed. In response to a question from Mr Downs, Mr Dingle stated that he did not approach Ms Moore for a statement nor did he request CCTV footage of the incident. He confirmed that originally the matter was to be prosecuted in Court and when those proceedings were withdrawn he handed carriage of the complaint to Licensing Inspector Wood who conducted the investigations from there on.
- 17) Senior Constable Dingle stated that he was not aware that the Licensee had a system of voluntary breath testing to check intoxication levels of patrons.
- 18) Under re-examination by Mr Wood, Senior Constable Dingle confirmed that when he was based at Minyerri he would travel to Mataranka on duty every second Thursday for 4 to 5 months. He stated that he may have intervened to prevent Mr Billy and Mr Larsen crossing the road if there had been any significant traffic or other hazard but this was not the case. He stated that he did not stop Mr Billy from entering the Hotel as he did not expect him to be served alcohol and he expected the Licensee to do the right thing. Senior Constable Dingle denied that he had made any arrangement with Mr Billy regarding him obtaining the beer from the Hotel. He reiterated that he did not expect Mr Billy to be served due to the level of his intoxication.

**Evidence of Ms Julie Vernon:**

- 19) Mr Downs informed the Commission that he intended to have Ms Julie Vernon, a former employee of the Hotel, give evidence from Western Australia via telephone. Ms Vernon advised that she had worked in Mataranka for 6 months at the Homestead and the Hotel. She was at work on the night of the incident involving Mr Billy and was selling take away alcohol that night.
- 20) Ms Vernon advised that she held RSA accreditation and she was aware of the indicators of intoxication. She stated that when she worked at the Mataranka Hotel there was a policy of not serving people who were intoxicated including breath testing patrons and removing those over a certain limit.
- 21) Ms Vernon recalled there were few patrons in the bar on 11 March 2010 and she was serving take away between 2 pm and 8 pm. She recalled seeing the Police outside the premises that night but they did not speak to her. She thought it was odd that they did not enter the premises. Ms Vernon stated that she would not have served an intoxicated person even if the Police were not watching and she did not observe anyone to be intoxicated that evening.
- 22) In response to a question from Mr Wood, Ms Vernon could not recall whether anyone had been refused service on the night in question. She did not recall the blood alcohol level imposed by the Licensee after which patrons were refused service.

**Evidence of Mr Stephen Garner:**

- 23) Mr Garner is a Director of the Licensee Company and co-Nominee of the Mataranka Hotel with Ms Debra Moore. He informed the Commission that he had managed the Mataranka Homestead for the past 5 ½ years and had purchased the Mataranka Hotel in 2009. He has RSA accreditation and is fully aware of the law in relation to intoxicated persons as he is engaged in all facets of the businesses as required.
- 24) Mr Garner stated that he is aware of the conditions attached to the Licence for the Hotel and that the Licensee has self imposed restrictions such as light beer sales only till 12 noon, no sales of take away wine and no sale of spirits when trouble is anticipated or when requested by Police. Mr Garner stated that he has a good relationship with the local Police and had closed the premises on a number of occasions at their request.
- 25) Mr Garner stated that take away sales from the Hotel were low and the majority of Mataranka residents bought their alcohol from the supermarket. He stated the staff take their obligations with intoxicated people seriously and he personally is aware of the risk should there be a breach. He confirmed that the Hotel had introduced a practice of breath testing patrons. Initially they used a reading of 0.18% BAC as the cut off but this was reduced to 0.12% BAC after discussions with local Police officers. Mr Garner stated he was not certain about the legality of breath testing patrons but he had discussed the issue with local Police and they had informally agreed on the appropriate cut off reading. He noted that the breath tester was a good tool for diffusing arguments with patrons.

- 26) Mr Garner stated that he regarded Ms Vernon as an excellent employee who was strict on not serving intoxicated patrons and treated the Hotel as her own bar. He could not understand how Mr Billy got past her guard. He suggested that perhaps Mr Billy must have put on a good show to fool Ms Vernon and Ms Moore as they would have been even more vigilant with Police outside.
- 27) Under cross examination by Mr Wood, Mr Garner confirmed he was not present at the Hotel on the night in question nor was he called to attend the premises that night. Mr Garner agreed that the indicators of intoxication were more important than a breath reading. He stated that he had nothing to do with the recent newspaper article referring to the Mataranka Hotel breath testing its patrons.
- 28) Mr Garner confirmed there was no saved CCTV footage of the incident nor had he ever watched it. By the time the complaint came to his attention fourteen days had elapsed and the footage had been erased.

**Evidence of Ms Debra Moore:**

- 29) Ms Moore is the co-Nominee of the Mataranka Hotel and a Director of the Licensee Company. She stated that she holds RSA accreditation, is aware of the indicia of intoxication and that she works at the Hotel approximately five days per week. She stated that her practice with intoxicated patrons is "when in doubt refuse service" and she regularly reinforced this position at staff meetings. Both premises owned by the corporate Licensee enforce the same policy and they maintain a banned persons list.
- 30) Ms Moore stated that the indicators of intoxication are not fool proof and some people are good at masking the signs, one of the reasons they had introduced breath testing. Ms Moore stated that she had spoken to local Police about the practice of breath testing patrons and had agreed that patrons could not be forced to undergo the test. They agreed on a cut off figure of 0.12% BAC.
- 31) Ms Moore confirmed that she was working with Ms Vernon on the night of the incident involving Mr Billy. She stated that the reason Mr Billy was not breath tested before being supplied with the VB was that out of town Police were outside the Hotel and she was not sure if that breath testing patrons was legal. Ms Moore stated that she was intimidated by the Police presence and that none of the officers had any real conversation with her prior to Mr Billy leaving the premises. Ms Moore thought Ms Vernon was also feeling intimidated by the Police presence.
- 32) Ms Moore stated that she considered Ms Vernon to be very thorough in her duties and if Mr Billy showed signs of intoxication she would not have served him. She recalled Mr Billy and Mr Lanson entering the premises on 11 March 2010. She was removing patrons at the time and was not serving behind the bar that night.
- 33) Ms Moore stated that she was evicting a patron when Senior Constable Dingle entered the Hotel and asked: "Do you serve drunks? Do you check ID? You just served this bloke and he's drunk". Ms Moore said that Senior Constable Dingle would not show her Mr Billy's ID and she denied that she refused to speak to him. Ms Moore stated that the CCTV footage was not retained as Senior Constable Dingle did not mention a summons at the time

and the first she heard of that was some three to four weeks later when the footage of the incident had been deleted.

- 34) Mr Moore stated that, with hindsight, she would not have done anything differently and in similar circumstances the same thing could happen again. The only change she would make would be to have Mr Billy undertake a breath test. In response to a question from Mr Wood, Mr Moore stated that she did not think they made a bad call in respect of Mr Billy's level of intoxication and that he presented well whilst on the premises. Ms Moore confirmed that she was wearing a turquoise top on the night of the incident.

**Submissions on behalf of the Director:**

- 35) Mr Wood noted that the Licensee had been co-operative with Police and Licensing Inspectors in voluntarily ceasing take away sales when requested to do so. He stated that whilst the Mataranka Hotel had a chequered past there had been no previous breaches by the current Licensee.

- 36) Mr Wood confirmed that none of the Police Officers present on the night had seen the sale to Mr Billy or witnessed any money changing hands. The complaint alleged supply to an intoxicated person, not a sale as such. He noted that Mr Billy was known to Senior Constable Dingle and he had previously dealt with him when he was sober and drunk. Senior Constable Dingle also had an opportunity to assess Mr Dingle's sobriety before and after he entered the Hotel. He noted Senior Constable Dingle's evidence that he did not instruct or direct Mr Billy to purchase the carton of beer rather he thought that he would be refused service because he was intoxicated.

- 37) In respect of the submission that Mr Billy was agent provocateur for Senior Constable Dingle, Mr Wood submitted that no evidence was presented in support of that assertion and Senior Constable Dingle had denied that was the case. In respect of the line of questioning inferring that Senior Constable Dingle was obliged to prevent breaches of the Act and should have prevented Mr Billy from entering the Hotel, Mr Wood noted that the Act provides that a Police Officer may but a licensee must remove intoxicated persons from the premises. Mr Wood also noted that Mr Billy committed no offence in entering the Hotel when he was intoxicated so as to enliven and power of Senior Constable Dingle to arrest him. He added that any lack of co-operation by Police in removing Mr Billy from the premises does not relieve the Licensee of the burden of ensuring that liquor is not supplied to intoxicated persons.

- 38) In respect of Ms Vernon's evidence, Mr Wood acknowledged that she held RSA accreditation at the time and that she was aware of the indicators of intoxication. Otherwise her recollection of the incident was vague and lacking in detail, not surprising given the passage of time since 11 March 2010. He noted that whilst experience in hotel work is of benefit it is not a guarantee that mistakes or errors of judgement will not be made. Mr Wood submitted that Ms Vernon's evidence was of a general nature and not sufficient to rebut the presumption that Mr Billy was intoxicated at the time he obtained the carton of VB.

- 39) Mr Wood noted that Mr Garner's evidence concerned only the general practices and management of the Hotel and he could add nothing in respect of this particular alleged breach as he was not at the Hotel on the night in question. Mr Wood acknowledged that whilst the current Licensees generally operated their premises at an acceptable standard the supply of alcohol to

Mr Billy was a bad call. He conceded there was no inference that the supply to an intoxicated person was deliberate but rather a mistake on the part of the person who supplied the carton.

- 40) Mr Wood noted there was some confusion as to whether it was Mr Vernon or Ms Moore who served Mr Dingle. He noted that Senior Constable Dingle stated that the person who handed the carton to Mr Billy was wearing a turquoise coloured top and Ms Moore stated that she was wearing a turquoise top on 11 March 2010. Mr Wood submitted that issue of who actually supplied the carton of VB is irrelevant as the Licensee has been charged with the breach.
- 41) Mr Wood submitted that the Commission should accept the evidence of Senior Constable Dingle that Mr Billy was intoxicated prior to and after entering the Hotel based on his prior knowledge of Mr Billy and the indicators of intoxication he observed when speaking to Mr Billy in the carpark opposite the Hotel and later when he conveyed him back to the Police Station. Mr Wood submitted that Senior Constable Dingle's opinion that Mr Billy was intoxicated was supported by the voluntary breath test undergone by Mr Billy which returned a BAC of 0.175%, significantly higher than the self imposed limit applied by the Licensee of 0.12%. He reiterated that the onus was with the Licensee to rebut the presumption that Mr Billy was intoxicated, that only Ms Vernon or Ms Moore could provide evidence that Mr Billy was not intoxicated at the time of the incident and they had not done so.

#### **Submissions on behalf of the Licensee:**

- 42) Mr Downs submitted the fact of the supply of the alcohol to Mr Billy was a given and not in dispute, the issue for the Commission to determine is whether Mr Billy was intoxicated in the mind of the Licensee, through the agency of its employees, when the supply took place. He noted the Act does not define "intoxication" and that assessment by a licensee needs to be guided by the indicia of intoxication as set out in the RSA guidelines, the experience of a particular licensee and knowledge of the patrons using the licensed premises.
- 43) Mr Downs submitted that Senior Constable Dingle's observations in respect of Mr Billy's state of intoxication some twenty minutes before he entered the Hotel are irrelevant. What is critical is whether Mr Billy was displaying any of the signs of intoxication that were noticeable to staff when he entered the Hotel and was supplied with the carton of VB. He noted that Senior Constable Dingle did not alert either Ms Vernon or Ms Moore that he thought Mr Billy was intoxicated and that the staff of the Licensee are not telepathic.
- 44) Mr Downs submitted that the observations of Senior Constable Dingle in respect of Mr Billy's level of intoxication need to have been concurrent with the supply. At the time the supply occurred Senior Constable Dingle could not see what signs of intoxication Mr Billy was displaying or whether they were consistent with the indicators observed earlier in the carpark. He noted that none of the evidence contained in Senior Constable Dingle's Statutory Declaration referred to any sign of intoxication of Mr Billy whilst he was in the Hotel.
- 45) Mr Downs referred the Commission to Section 5 of the *Police Administration Act* and submitted that Section, when read in conjunction with Section 121 of the *Liquor Act*, required Senior Constable Dingle to intervene and prevent Mr

Billy from entering the premises or at least alert the staff of the Hotel that he thought Mr Billy was intoxicated. He noted also that Section 76 of the *Police Administration Act* provided that the procuring of an offence by a Police Officer is a disciplinary offence.

- 46) Mr Downs submitted that, in the circumstances, the Licensee was entitled to rely on the defence contained in Section 124AA(b) of the Act in that the staff member of the Licensee was obeying the order of a competent authority, namely Senior Constable Dingle, when the carton of VB was supplied to Mr Billy. In that regard Mr Downs referred the Commission to his letter of 9 September 2010 addressed to the Director in response to the complaint and reiterated that the Police had condoned and authorised Mr Billy's purported acts and in doing so have availed his clients of the statutory defence.
- 47) Mr Downs submitted that Mr Billy was not a Mataranka resident and was unknown to Ms Vernon or Ms Moore and that he displayed no indication to them of being intoxicated when he was supplied with the alcohol. He noted that Mr Billy did not display a level of intoxication to warrant him being placed in protective custody by Police.
- 48) Mr Downs submitted that it was possible that Mr Billy masked any signs he was intoxicated when dealing with the staff of the Hotel and referred to Senior Constable Dingle's evidence that Mr Billy spoke English quite well. He noted also that Senior Constable Dingle did not formally caution Ms Moore prior to speaking to her and submitted that any response provided by Ms Moore should be excluded and not relied upon by the Commission.
- 49) Mr Downs submitted that no weight should be given to the Statutory declaration of Constable David Coulton as he had not been available to give evidence or for cross examination at the Hearing. He also noted there were inconsistencies between the statutory declarations of Senior Constable Dingle and Constable Coulton in respect of who left the Hotel with the carton of VB and where the breath test was conducted on Mr Billy.
- 50) Mr Downs submitted that the test as to whether Mr Billy was intoxicated at the time he received the carton of VB is to be determined on the balance of probabilities. The question for the Commission to determine is whether Mr Billy was intoxicated at the time of the sale and that there are no objective facts to support that finding. Ms Vernon was a thorough and strict member of staff at the Hotel, as corroborated by Mr Garner and Ms Moore.
- 51) Mr Downs stressed that all staff engaged in the sale of alcohol at the Hotel were RSA accredited. The Licensee had voluntarily purchased and used a hand held breathalyser to assess the sobriety of patrons. The breathalyser was not used on the night in question to test Mr Billy as Ms Moore was intimidated by the Police presence outside the Hotel. She was unsure whether the use of the breathalyser was legal but, were it not for the fact Police were watching the premises, she would have closed the front door of the Hotel to ensure that each patron entering was individually breath tested, including Mr Billy.
- 52) Mr Downs noted that this Licensee has committed no prior breaches of the Act and that the Nominees were community minded residents of Mataranka who enjoyed a good reputation in the community. He submitted that the assessment of the level of intoxication of patrons was a difficult task and one in which some latitude should be granted to Licensees.

- 53) Mr Downs also made submission in respect of the *Police Administration Act* and the requirement for Police Officers to be actively engaged in the prevention of offences. He stated that Senior Constable Dingle was under a duty to prevent Mr Billy from committing an offence or, in the alternative, he was duty bound to alert the Licensee to the state of Mr Billy's intoxication so as to prevent the Licensee from committing an offence by supplying alcohol to him.
- 54) Mr Downs concluded by submitting that the Commission should prefer the evidence of Ms Moore over that of Senior Constable Dingle as she had a clear recollection of the night on which Mr Billy was supplied with the carton of VB.

### **CONSIDERATION OF THE ISSUES**

- 55) The Commission is satisfied, from the statutory declaration of Senior Constable Dingle and from his testimony at the Hearing, that Mr Billy was intoxicated prior to him entering the Hotel. Mr Billy was known to Senior Constable Dingle who had previously dealt with him when he was sober and when he was intoxicated. When he spoke with Mr Billy on 11 March 2010 in the carpark opposite the Hotel, Senior Constable Dingle observed that Mr Billy was unsteady on his feet, had bloodshot eyes and was slurring his speech.
- 56) The Commission notes Mr Down's submissions in respect of anomalies and the weight that should be given to the statutory declaration of Constable Coulton due to the fact he was not available to give evidence at the Hearing. The Commission notes that Constable Coulton's statement was of a corroborative nature and the lead evidence was provided by Senior Constable Dingle. So far as the apparent inconsistencies in the two statements are concerned the Commission is of the view these are of very minor consequence in respect of the determination as to whether the alleged breach has been proven.
- 57) The Commission is also satisfied that Mr Billy was supplied with a carton of VB by a person employed by the Licensee of the Mataranka Hotel shortly after he had the conversation with Senior Constable Dingle. No evidence was lead by the Licensee to the effect that the supply did not occur in fact the supply by the Licensee was conceded by Mr Downs.
- 58) Soon after being supplied with the carton of VB Mr Billy was conveyed to the Mataranka Police Station where he voluntarily provide a breath sample indicating a blood alcohol concentration of 0.175%. Section 124B of the Act provides that the result of a breath analysis test is prima facie evidence of the concentration of alcohol in the person's blood.
- 59) Taking account of the indications of Mr Billy's level of intoxication identified by Senior Constable Dingle before he entered the Hotel, coupled with the relatively high breath analysis recording after he left the premises, the Commission is satisfied that Mr Billy was intoxicated to the point where he should not have been supplied with alcohol.
- 60) Section 102 of the Act provides:
- 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).*

- 61) Following the presentation of cogent and persuasive evidence that Mr Billy was intoxicated at the time he was supplied with the alcohol the onus rests with the Licensee to prove that he was not intoxicated.
- 62) The Commission notes that Ms Vernon is RSA accredited and provided the Commission with evidence regarding the general practices of the Hotel in dealing with intoxicated patrons. However, she did not provide any evidence in respect of her assessment of the level of intoxication of Mr Billy, presumably as she no longer recalled specific details of the incident the subject of the Hearing given the significant passage of time.
- 63) Similarly, the evidence of Ms Moore predominantly related to the general practices of the Licensee in respect of the responsible service of alcohol and the measures designed to prevent sales of alcohol to intoxicated persons, including the use of a breathalyser. Ms Moore did not present evidence in respect of her observations of Mr Billy's sobriety on the night of 11 March 2010, other than to state that Ms Vernon would not serve an intoxicated person. She stated that she was not selling alcohol that night but carrying out other duties, including monitoring and removing intoxicated patrons.
- 64) Mr Garner could not make any comment on Mr Billy's state of intoxication as he was not present at the Hotel on the night in question. In fact, the Commission heard no evidence on behalf of the Licensee challenging the level of Mr Billy's intoxication. Mr Downs submitted that some individuals are able to mask the indicia of intoxication in order to deceive others. Brief mention was made of the possibility of an intervening act between the initial discussion between Senior Constable Dingle and Mr Billy and the subsequent purchase of the alcohol.
- 65) However, this was not explored in detail and the Commission fails to see how a heavily intoxicated individual (at least  $\frac{3}{4}$  drunk on the basis of Mr Billy's own self assessment) could reach a level of sobriety to enable the purchase of liquor within 20 minutes. To the contrary, the evidence shows that Mr Billy was assessed as being intoxicated prior to entering the Hotel and was assessed with a BAC of 0.175% when breath tested at the Police Station shortly afterwards.
- 66) For the above reasons the Commission determines that the Licensee has not discharged the onus of proving that Mr Billy was not intoxicated when he was supplied with a carton of VB on 11 March 2010.
- 67) The Commission is not persuaded by the submission on behalf of the Licensee that Senior Constable Dingle had some positive obligation to alert the staff of the Hotel of the level of Mr Dingle's intoxication or to prevent him from entering the premises. The positive requirement to ensure that intoxicated persons do not enter or remain on licensed premises rests with the Licensee. Up to and after the supply of the carton of VB Mr Billy had committed no identified offence that would have warranted his apprehension or detention by Police. Attempting to enter licensed premises whilst intoxicated is not an offence recognised by the Act.
- 68) The Commission now turns to consider the defences raised by Mr Downs on behalf of the Licensee, namely:

- the defence set out in Section 124AA(b) of the Act that the supply of alcohol to Mr Billy was in obedience to an order from a competent authority;
- intimidation of Ms Moore by the Police presence on the night; and
- a defence based on the premise that Mr Billy was an agent provocateur acting at the behest of Senior Constable Dingle.

69) Section 124AA(2)(b) sets out a defence to specified regulatory offences, including an alleged breach of Section 102 of the Act:

**124AA Regulatory offences**

(2) *It is a defence to a prosecution for an offence referred to in subsection (1) if the defendant proves on the balance of probabilities that:*

- (b) *any contravention or failure to comply constituting the offence was authorised by being in obedience to the order of a competent authority whom the defendant is bound by law to obey unless the order is manifestly unlawful (the determination of which is a matter of law); (emphasis added)*

70) The Commission is not persuaded by this submission which suggests that somehow Senior Constable Dingle authorised the supply of the VB to Mr Billy and the employee was only acting in obedience of an implied or express order. No cogent evidence of any authorisation or order by Senior Constable Dingle was presented to the Commission through any of the witnesses called on behalf of the Licensee.

71) To the contrary, Senior Constable Dingle was cross examined on this aspect of his evidence on several occasions whilst he was giving evidence. He maintained that he did not direct or authorise Mr Billy to purchase the alcohol but rather he had assessed that he was so intoxicated that he would not be sold any alcohol at all. He stated that he honestly believed that no offence would be committed as Mr Billy would not be served. Ms Moore was unable to provide any evidence of any order directed to her by Senior Constable Dingle. To the contrary, she stated that she tried unsuccessfully to engage in conversation with Senior Constable Dingle and she was surprised at his non-responsive reaction.

72) The authority of *The Queen v Whittington* [2006] NTCCA 04 is of some assistance in respect of the defence of authorisation. At paragraph [56] of that decision His Honour Justice Southwood noted:

*“The Crown is not required to give particulars of how it proposes to meet the accused’s assertions that his conduct was authorised, justified or excused. The Crown is not required to, in effect, plead a reply traversing or avoiding the assertions of the accused”.*

73) No evidence was lead on behalf of the Licensee sufficient to satisfy the Commission that Senior Constable Dingle authorised Ms Vernon or Ms Moore, either directly or by implication, to supply the alcohol to Mr Billy. In this instance the Commission prefers the evidence of Senior Constable Dingle that he gave no such authorisation and finds that the Licensee is unable to rely on the statutory defence prescribed by Section 124AA(2)(b).

- 74) In respect of the defence based on intimidation by Police, Ms Moore gave evidence that the attendance of Police at the premises on 11 March 2010 was intimidating and confusing. It is unclear to the Commission whether Ms Moore's apprehensions were in response to any actual behaviour on the part of Police. More likely it may be attributed to the fact that she was used to a more cordial and cooperative relationship with the local Police Officers and was unsure how to deal with the unfamiliar posture taken by Officers that she did not know.
- 75) Ms Moore was adamant that her conduct on the night in question was different to normal due to the presence of Police whom she did not know. In response to questioning from the Commission, Ms Moore agreed that her discomfort and confusion could have been responsible for lapses in judgement in relation to the operation of the licensed premises.
- 76) For example, Ms Moore gave evidence that she was using the hand held breathalyser to test patrons up until the Police arrived at the Hotel. On the evidence of Ms Moore and Mr Garner it is clear to the Commission that the breathalyser was a useful tool that assisted in the management of intoxicated or near intoxicated patrons. When Ms Moore chose to not use the breathalyser it is reasonable to assume that her usual ability to detect intoxicated persons entering the premises was somewhat impaired or compromised.
- 77) In relation to the preceding paragraph, it must be noted that the inability of Ms Moore or Mr Garner to outline a consistent use of the breathalyser somewhat lessens the impact of claims in respect of the importance of being able to use the device. It was apparent from the evidence that, in fact, there is no consistent threshold BAC reading agreed to or enforced. However, the merit of using the device as a diversionary or arbitrary tool to assist with management of intoxicated or nearly intoxicated persons is not lost on the Commission. Given the almost unfettered discretion of Licensees to refuse entry to any patron, with the exception of discriminatory practices, the Commission is not aware of any prohibition on the use of breathalyser devices by Licensees as an aid to determining whether a potential patron is intoxicated to the point of being denied entry to licensed premises.
- 78) Regardless of the merits or benefits associated the use of the breathalyser, the Commission is not satisfied that Ms Moore was intimidated by the Police presence to make the sale to Mr Billy. There is some confusion as to who actually supplied the carton of VB to Mr Billy. Senior Constable Dingle recalled that person who handed over the carton was wearing a turquoise top and Ms Moore gave evidence she was wearing a turquoise top in 11 March 2010.
- 79) However, Ms Moore also gave evidence that she was not serving take away alcohol when Mr Billy entered the premises with the obvious inference the alcohol was supplied by Ms Vernon. Ms Vernon was called to give evidence and the issue of intimidation was not raised with her, nor did Ms Moore give evidence that she was intimidated to the point of instructing Ms Vernon to sell the alcohol to Mr Billy. For the reasons set out immediately above, the defence relying on intimidation by Police must fail.

80)The argument raised in relation to possible breaches of the *Police Administration Act* must fail in the view of the Commission. For the reasons set out above, the Commission is persuaded by the evidence of Senior Constable Dingle in that regard. He did not believe an offence was about to be committed as he was of the honest and reasonable belief that due to his level of intoxication Mr Billy would not be served. As stated earlier, it is not an offence under the Act for an intoxicated person to seek to obtain alcohol. In the context of this complaint, an offence only occurs when a licensee allows an intoxicated person to remain on licensed premises or when the intoxicated person is actually supplied with alcohol.

## **DECISION**

81)For the reasons set out above, the Commission finds, on the basis of the materials contained in the hearing brief and the evidence presented at the hearing, that the Licensee of the Mataranka Hotel contravened Section 102 of the Act on 11 March 2010 when an employee of the Licensee supplied Mr Billy with alcohol when he was intoxicated.

## **SUBMISSIONS ON PENALTY**

82)At the conclusion of the Hearing the parties were advised that, should the Commission find the complaint made out, it would seek written submissions on penalty. Having found that the Licensee has breached Section 102 of the Act the Commission now requests submissions from both parties in respect of penalties. The submissions are to be forwarded to the Commission on or before close of business on Friday 6 May 2011.



Philip Timney  
PRESIDING MEMBER

19 April 2011