

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
Heard Before:	Mr Richard O’Sullivan (Chairman) Mr Philip Timney (Legal Member) Mr Wally Grimshaw
Date of Hearing:	5 October 2011
Appearances:	Mr John Stewart for the Licensee Inspector Mark Wood for the Director of Licensing

Background

- 1) By a decision dated 22 June 2011 the Licensing Commission determined to conduct a Hearing into a complaint lodged by the Director of Licensing against the Licensee of the Malandari Store (“the Store”). The Hearing was conducted in Katherine on 5 October 2011. The complaint alleges that on 29 January 2011 the Licensee, through the agency of an employee, sold or supplied liquor to a person who was intoxicated at the time.

Hearing

- 2) At the commencement of the Hearing Inspector Wood outlined the facts leading to the complaint as follows. At approximately 3:40pm Saturday, 29 January 2011 Constable David D’Antoine and Senior Aboriginal Community Police Officer Noel Dixon attended the Malandari Store in response to a report of fighting at the premises. Upon arrival Constable D’Antoine observed Ms Jody Evans arguing over fuel payment with another female, Ms Selina Shadforth who were both known to the officer. Constable D’Antoine spoke to Ms Evans in relation to the argument and noted that she smelt heavily of liquor, she had blood shot eyes, her speech was slurred and she was unsteady on her feet.
- 3) After Ms Shadforth had left the area Constable D’Antoine entered the store and observed Ms Evans, in the company of Ms Lynette Simon. Constable D’Antoine observed Ms Evans, in the company of Ms Lynette Simon, present a Malandari Store beer card as identification to purchase liquor. Constable D’Antoine walked to the front of the store and noted Ms Shadforth had returned to the area and requested her to leave. At that time he observed Ms Evans walk out of the premises carrying a thirty pack of XXXX Gold beer cans.
- 4) Ms Evans got into the driver’s seat of the vehicle at which time Constable D’Antoine, having assessed she was intoxicated, conducted a roadside breath test which returned a reading of 0.343% BAC. He advised Ms Evans she was not to drive the vehicle at which time an appropriate driver was engaged and Ms Evans left the area in the vehicle. Constable D’Antoine re-entered the premises and asked an employee, Mr Michael Scragg, who sold Ms Evans the beer to which he replied ‘I did’. He then asked Mr Scragg if he knew she was intoxicated to which Mr Scragg replied ‘She looked emotional not intoxicated’. Constable

D'Antoine then asked for Mr Scragg's details and began collection of evidence in relation to this matter.

- 5) Mr Stewart informed the Commission that the Licensee was contesting the complaint. He stated that the supply of the alcohol to Ms Jody Evans was admitted given the expanded definition of "sold" as set out in the *Liquor Act* ("the Act") albeit that another person, Ms Simon, who was with Ms Evans, actually purchased the alcohol. Mr Stewart confirmed that the issue in dispute is whether Ms Jody Evans exhibited any noticeable indicators of intoxication at the time she was supplied with a carton of XXXX Gold. He advised the Commission that he intended to call Mr Michael Scragg, the employee of the Store who supplied the carton to Ms Evans, who would give evidence that he did not observe any signs of intoxication whilst Ms Evans was in the store on the day in question. Mr Stewart advised that he would also ask the Commission to view CCTV footage of the incident which he submitted shows that Ms Evans was showing no visible signs of intoxication at the relevant time.

Evidence of Senior Aboriginal Community Police Officer Noel Dixon:

- 6) Inspector Wood then called Senior Aboriginal Community Police Officer Noel Dixon to give evidence. Mr Dixon informed the Commission that he had served in the Police force for twenty-three years and that he was rostered on duty on 29 January 2011 and working in company with Constable David D'Antoine. At approximately 3.30pm on that date he attended the Malandari Store with Constable D'Antoine following a report of fighting and arguing at the Store. When he arrived at the front of the Store he saw two women that he knew as Jody Evans and Selina Shadforth engaged in an argument. He knows Ms Evans to be the daughter of Mr Sammy Evans and Ms Shadforth is his partner. Senior ACPO Dixon ascertained that the women were arguing over the payment for fuel for the vehicle in which they had driven to the Store.
- 7) Senior ACPO Dixon confirmed the evidence contained in his Statutory Declaration sworn on 16 January 2011, that he formed the view that both Ms Evans and Ms Shadforth were drunk as both had blood shot eyes and smelt of alcohol. He added during his oral evidence that both women were also staggering whilst they were arguing near the Store. Senior ACPO Dixon stated that he had known both Ms Evans and Ms Shadforth for a long time and had dealings with them when they were drunk and sober. In his opinion Ms Evans was drunk on the day in question.
- 8) Under cross examination, Senior ACPO Dixon agreed that he did not enter the Store at any stage during the incident involving Ms Evans and that he did not see Ms Evans obtain the carton or beer nor did he observe what happened when Constable D'Antoine entered the Store. He agreed with Mr Stewart that he did not mention Ms Evans staggering in his Statutory Declaration and upon reflection it was that Ms Shadforth was staggering, not Ms Evans who was "just standing". He confirmed that both women had blood shot eyes and smelt of alcohol. Senior ACPO Dixon confirmed that Jody and Emily Evans were sisters he had known since they were children and that both are similar in appearance. He stated that he was unsure whether Ms Jody Evans had a carton of beer when she left the area in the vehicle.
- 9) In response to a question from Inspector Wood, Senior ACPO Dixon stated that although Jody Evans was quiet during his dealings with her he could tell that she had been drinking and he assessed that she was drunk.

Evidence of Constable David D'Antoine:

- 10) Constable D'Antoine then entered the witness box and informed the Commission that he had five years experience as a Police Officer, including two years as an ACPO, working mainly on communities. He stated that he had significant experience in dealing with intoxicated people and did so on an almost daily basis in the course of investigating incidents of assault and domestic violence. He confirmed that on 29 January 2011 he was

working with Senior ACPO Dixon when he received a call at approximately 3.40pm advising of a disturbance outside the Malandari Store. On arrival at the Store he observed Ms Jody Evans and Ms Selina Shadforth, who he knew from previous dealings, arguing near the petrol bowsers. He later ascertained that the women were arguing over payment for fuel for the vehicle in which they had arrived at the Store.

- 11) Constable D'Antoine stated that he formed the view that Ms Evans and Ms Shadforth were highly intoxicated as they both had bloodshot eyes and were engaged in a loud and vocal argument. He spoke with both women for a couple of minutes as he was trying to defuse the argument and move them on. Constable D'Antoine confirmed the evidence contained in his Statutory Declaration, sworn on 30 January 2011, that Ms Evans smelt heavily of liquor, was slurring her speech, had bloodshot eyes and was unsteady on her feet.
- 12) Constable D'Antoine stated that after speaking with the women he entered the store and then observed Ms Evans walk into the store and line up at the liquor counter with a person he knew as Lynette Simon. He noticed that Ms Simon appeared to be trying to help out by paying for the fuel. He also observed Ms Evans hand over a Malandari store identification card, being the card required for the purchase of alcohol. He continued observing Ms Evans from about two metres away for a minute to a minute and a half and noticed that she appeared upset and looked to have been crying and had bloodshot eyes.
- 13) Constable D'Antoine stated that he observed Ms Evans leave the store with a carton of XXXX Gold which she placed in the vehicle before getting into the driver's seat and attempting to drive off. He was concerned about her level of intoxication and asked how much she had to drink to which she replied "not much". Constable D'Antoine conducted a road side breath test on Ms Evans which returned a reading of 0.343% BAC. He confirmed that the testing device was the standard hand held device.
- 14) Constable D'Antoine gave evidence that he returned to the Store and spoke with Mr Scragg about Ms Evans level of intoxication and the fact she had been sold a carton of beer. He stated that Mr Scragg's response was that he thought Ms Evans was emotional not intoxicated.
- 15) Under cross examination by Mr Stewart, Constable D'Antoine stated that he was pretty sure that it was Lynette Simon who agreed to pay for the fuel but he was not sure who had paid for the carton of beer. He had observed Ms Evans handing over an identification card but conceded that it was possible that someone else had actually paid for the beer. He agreed that when he spoke to Mr Scragg he could not be certain that Ms Jodi Evans was the purchaser and that subsequent inquiries had revealed that the identification card of Emily Evans, a sister of Jody Evans, was used for the purchase.
- 16) Constable D'Antoine stated that he formed the opinion that Ms Evans was intoxicated when she was trying to explain what had lead to the dispute with Ms Shadforth when he noticed that she had bloodshot eyes, she was unsteady on her feet, she smelt strongly of alcohol and her speech was slurred. He agreed that Ms Shadforth displayed the same signs of intoxication as Ms Evans.
- 17) In respect of his observations when Ms Evans was inside the Store, Constable D'Antoine stated that he observed Ms Evans at the centre counter in the Store and watched her move to the liquor counter. He noticed that Ms Evans was unsteady on her feet, as she was before entering the Store. He also noted that Ms Evans was still slurring her speech as she was before entering the Store and, in his opinion, Mr Scragg should have noticed those signs when Ms Evans was supplied with the carton of beer.
- 18) In response to a question from Mr Stewart, Constable D'Antoine agreed that alcohol in a person's mouth can affect a breath test and may result in an unusually high reading. He also agreed that bloodshot eyes can be the result of factors other than intoxication. Constable D'Antoine stated that were it not for the fact Ms Evans had indicated that she intended to drive the vehicle he would not have asked her to undergo a breath test. He

added that he would still have asked the Licensee for an explanation as, even without the breath analysis, he had formed the opinion that Ms Evans was significantly intoxicated.

- 19) Constable D'Antoine stated that he was surprised that Ms Evans had been able to obtain alcohol due to her state of intoxication. He had watched her hand over an identification card but expected that she would be refused service, albeit that he did not wait to see the conclusion of the sale.
- 20) Constable D'Antoine informed the Commission that he was surprised at the high level BAC reading returned by Ms Evans and that she was not displaying all the signs that he would expect of a person with such a high reading. He did not take Ms Evans into protective custody after the breath test as there were sober people in the group who could look after her. He stated that he believed the vehicle owner was Mr Sammy Evans but he was not aware who had driven the vehicle to the Store.
- 21) Constable D'Antoine stated that he did not warn the staff of the Store regarding his observations of Ms Evans state of intoxication as he expected that they had been trained in the responsible service of alcohol and would refuse to serve intoxicated persons. He agreed that in hindsight that warning the employees of the Store may have been a good idea.
- 22) Under re-examination, Constable D'Antoine stated that Ms Evans and Ms Shadforth continued to argue after Ms Evans left the store with the carton of beer and that they were both displaying the same indicators of intoxication as he had observed earlier. He confirmed that as far as he was aware there was nothing preventing a person using their identification card to purchase alcohol and for another person to make the payment.
- 23) The Commission then viewed the CCTV footage of the incident provided by the Licensee of the Store. The footage included that from one camera outside the Store directed towards the petrol bowsers and two inside, one of which was directed to the liquor sales counter.

Evidence of Mr Michael Scragg:

- 24) Following the viewing of the CCTV footage, Mr Stewart called Mr Michael Scragg to give evidence on behalf of the Licensee. Mr Scragg informed the Commission that he was employed by the Arnhem Land Progress Association as a relief store manager and he was working at the Malandari Store in that capacity at the time of the incident the subject of the Hearing. He completed his RSA accreditation on 20 January 2011.
- 25) Mr Scragg stated that at 3.40pm on 29 January 2011 when he was called to the service area due to an altercation taking place outside the Store and the requirement for a male staff member to be at the counter area. He took up a position at the beer counter but could not see the altercation from there. He confirmed that he did not go outside the Store to see what was happening out the front.
- 26) Mr Scragg stated that shortly afterwards a woman he now knows as Ms Jody Evans entered the Store with her father, Sammy Evans. Another woman, Salina Shadforth, entered the Store twice and abused Ms Evans and Mr Evans. Mr Scragg noticed that Ms Shadforth was very aggressive and was stomping and flailing her arms about. He assessed her as being unsteady on her feet and he formed the opinion she was intoxicated. He also noted that Ms Evans appeared to be upset about the abuse being hurled at her father by Ms Shadforth and he noticed she was crying.
- 27) Mr Scragg confirmed that Ms Evans handed him a store identification card for the purpose of purchasing a carton of beer. He recalled that Ms Lynette Simon actually paid for the carton. He stated that he took the identification card from Ms Evans, checked the image that came up on the computer terminal against Ms Evans and thought they were a match. Mr Scragg stated that Ms Evans and her sister, whose identification card was used for the purchase of the beer, were similar in appearance but there are differences when their respective photos are compared. He added that he became aware that Ms Evans had used

her sister's card on the following Monday. Mr Scragg confirmed that he had prepared an incident report concerning the incident involving Ms Evans on Tuesday 2 February 2011.

- 28) Mr Scragg stated that he did not believe Ms Evans was intoxicated at the time he supplied her with the carton of beer. He could not smell alcohol on her breath, she was steady on her feet whilst he was dealing with her and her language was coherent. Mr Scragg did notice that Ms Evans eyes were red and puffy but he put that down to the fact she had been crying and had been "shamed" in public by the abuse directed towards her and her father by Ms Shadforth. Mr Scragg added that Ms Evans had no difficulty in locating the identification card and handing it to him, nor did he observe any signs of intoxication as she carried the carton of beer out of the Store. Mr Scragg stated that Ms Shadforth was noticeably drunk and he had been advised she was refused service earlier in the day prior to the incident involving Ms Evans.
- 29) Mr Scragg stated that Constable D'Antoine returned to the Store a few minutes after Ms Evans departed and, when asked, he confirmed that he had sold the beer to Ms Evans. Constable D'Antoine informed Mr Scragg that he had just performed a breath test on Ms Evans and she was quite drunk. Mr Scragg responded to the effect he did not think she was drunk but rather was emotional after the altercations with Ms Shadforth. Mr Scragg confirmed that his viewing of the CCTV footage had not changed his mind in respect of the state of Ms Evans' intoxication and that none of the footage showed Ms Evans to be staggering or swaying. Mr Scragg stated that it usually takes 1 ½ to 3 minutes to complete a beer sale transaction, depending on whether cash or EFTPOS are used for payment, and this provided him with sufficient time to make the assessment as to whether a person was intoxicated.
- 30) Mr Scragg gave evidence that some days after the incident Sergeant Gert Johnson visited the Store and advised him that Ms Evans breath reading was 0.343% BAC. Mr Scragg stated that he was surprised by the high reading, given his observations of Ms Evans on the day, and that Sergeant Johnson responded that was normal for some people who were able to mask the signs of being drunk.
- 31) Mr Scragg informed the Commission of some of the remedial actions that had been implemented by the Store to limit the chance of supplying alcohol to people who are intoxicated including the introduction of the ID card system, mandatory breath testing for patrons wishing to purchase beer and a limit on the sale of alcohol to Borrooloola residents of 18 cans per person per day. He also noted that the Licensee regularly agreed to temporary closure of alcohol sales when requested to do so by Police during funerals and cultural and sporting events. He added that the Store now maintains an incident register following a suggestion from Sergeant Johnson that this would be a good idea.
- 32) Under cross examination by Inspector Wood, Mr Scragg confirmed that he had completed his RSA accreditation on-line. He stated that whilst he could not see the altercation between Ms Evans and Ms Shadforth from where he was positioned in the Store, he could hear some of the arguing. He stated that he was not aware at the time that Ms Evans was involved in the argument and he assessed that it was appropriate to sell her the carton of beer. He added that, in hindsight and having been later informed of more detail of the dispute, he may have placed too much emphasis on the fact Ms Evans appeared to have been embarrassed and "shamed" by the abuse she and her father received from Ms Shadforth, in assessing Ms Evans' condition.
- 33) Inspector Wood referred Mr Scragg to RSA Handbook and the topic dealing with customers in an emotionally charged situation. Mr Scragg agreed that greater vigilance is required in circumstances of that nature. He conceded that he was not as experienced in detecting signs of intoxication as someone with Constable D'Antoine's experience however he did not detect that Ms Evans was displaying any obvious signs of intoxication and that, in his opinion, she was not staggering whilst in the Store as has been alleged.
- 34) Mr Scragg conceded that he had made an error in not detecting that the card used by Ms Evans as identification for the purchase of the beer was not hers. He conceded that his

decision to make the sale to Ms Evans may have been an error of judgement given the high breath reading she returned. He added that at the time of the sale he considered that he was focussed enough to form the view that Ms Evans was not intoxicated.

Submissions on behalf of the Director:

- 35) Inspector Wood reiterated that this complaint concerned the “supply of alcohol to Ms Evans and referred the Commission to the expanded definition of “sell” as set out in the Act. He conceded there was some conjecture as to who paid for the carton of beer however, this issue was irrelevant in the context of this complaint which concerned the supply of alcohol.
- 36) Inspector Wood submitted that the breath test recording returned by Ms Evans of 0.343% BAC was extremely high and confirmed the observations of Constable D’Antoine and Senior ACPO Dixon that Ms Evans appeared to be intoxicated. He noted that both officers had considerable experience in dealing with intoxicated persons in their respective roles in community based positions. He noted that both Constable D’Antoine and senior ACPO Dixon have significant practical experience in community policing, the nature of the Borrooloola Township and its residents and in dealings with liquor related incidents. Senior ACPO Dixon had dealt with Ms Evans when she was sober and intoxicated and his evidence, both in his Statutory Declaration and in his oral evidence, was that he assessed that she was intoxicated before she entered the Store and purchased the carton of beer. Inspector Wood submitted that both officers were more experienced and better placed than Mr Scragg to assess Ms Evans state of sobriety, but that the indicators that they observed should have been equally obvious to Mr Scragg when Ms Evans entered the Store to make the purchase. He noted that Mr Scragg, with the benefit of hindsight, had conceded in his evidence that he may have made a judgement error in serving Ms Evans.
- 37) Inspector Wood noted that different people react differently following alcohol consumption and some drinkers have a greater capacity to mask the indicators of intoxication than others. He noted, from the CCTV footage, that Ms Evans did not appear to be “falling down drunk” and she was clearly able to maintain most normal functions, including filling the car with fuel and carrying the carton of beer directly to the vehicle after the purchase. However, he submitted that the best evidence available to the Commission was that of the Police officers who noticed the signs of intoxication displayed by Ms Evans and concluded she was intoxicated prior to the breath testing taking place. The breath analysis reading obtained confirmed their view that Ms Evans was intoxicated to the point she should not have been sold alcohol.
- 38) Inspector Wood referred the Commission to Section 102 of the Act, as it stood prior to the 1 July 2011 amendments, and noted that once reasonable grounds are established that Ms Evans was intoxicated at the time of the supply, the onus of demonstrating that Ms Evans was not intoxicated rests with the Licensee. He submitted that in the face of the consistent evidence of both Police officers concerned the Licensee had failed to rebut the presumption, raised by the observations of the officers involved, that Ms Evans was intoxicated at the time of the sale.
- 39) Inspector Wood concluded by submitting that Mr Scragg had simply made an honest mistake in his assessment of the state of intoxication of Ms Evans at the time of the supply and that, on the basis of the evidence presented at the Hearing, he should not have supplied Ms Evans with the carton of beer.

Submissions on behalf of the Licensee:

- 40) Mr Stewart confirmed to the Commission that the Licensee was not contesting that Ms Evans had been supplied with alcohol on the day in question and that the supply came within the expanded definition of “sale” set out in the Act. He acknowledged that Ms Evans had presented an identification card to Mr Scragg and then took delivery of a carton of beer and that constituted a “sale” of alcohol to her.

- 41) Mr Stewart referred the Commission to its decision in the matter of Crossways Motor Hotel¹ where the Commission noted that it has historically equated intoxication as the showing of visual indicators of impairment as a probable consequence of the consumption of liquor. Mr Stewart submitted that what is relevant in terms of the Commission's deliberations is the visible indicators of intoxication, demonstrated by the patron, and the observation by bar staff of those indicators and the manner in which they deal with the patron that determines whether the patron was served whilst intoxicated, as discussed at page 8 of the Crossways decision.
- 42) Mr Stewart noted that Constable D'Antoine's observations were that Ms Evans behaviour was consistent when she was in the car park and when she entered the Store to purchase the carton. Mr Scragg also had ample opportunity to assess Ms Evans while she was in the Store and his evidence was that she was not staggering or slurring her words and he could not smell alcohol on her. He conceded that Ms Evans had red eyes but provided an explanation for that, namely that she was emotional and had been crying as a result of the altercation with Ms Shadforth. Mr Stewart submitted that the Commission has a good opportunity to assess whether Ms Evans was displaying signs of intoxication from the CCTV footage from within the Store prior to and at the time of the purchase.
- 43) Mr Stewart submitted that it was open to the Commission to find in favour of the Licensee without discounting the evidence of Constable D'Antoine. He is an experienced officer who knew Ms Evans and some of her family members. He noted that when Constable D'Antoine first arrived at the Store Ms Evans was in an agitated state and engaged in a verbal argument with Ms Shadforth and submitted that it was entirely probable that Ms Evans had probably "put her best foot forward" when she entered the Store. Mr Stewart noted that she had been involved with Ms Simon in paying for the fuel and had assisted her father in purchasing a packet of cigarettes where she was observed to engage in conversation, use her bankcard, walk backwards for assistance in retying a tie on the back of her blouse, pick up the carton and walk straight out of the store without displaying any overt indications that she was intoxicated.
- 44) Mr Stewart noted that the CCTV footage was not of the best quality and whilst the footage was jerky to view it did not show any extravagant movement of staggering by Ms Evans. He referred the Commission to its decision in the matter of Milner Road Foodtown² in which the Police evidence of the indicators of intoxication was not borne out by the CCTV footage. Mr Stewart also submitted that, given the high BAC reading, it was plausible that Ms Evans had masked the signs of intoxication for the purpose of purchasing the carton of beer.
- 45) Mr Stewart noted that the Police enquiries of Ms Evans did not go far enough in that she was simply asked by Constable D'Antoine how much she had to drink to which she responded "not much". He noted there were not follow up questions in respect of the actual quantity of alcohol she had consumed, what type of alcohol she had been drinking and how long prior to driving to the Store she had ceased drinking.
- 46) In terms of the BAC reading, Mr Stewart stressed that the Commission should not be overly influenced by the high reading obtained from Ms Evans in determining whether a breach of Section 102 of the Act has occurred. He submitted that the question to be resolved objectively by the Commission is not whether Ms Evans was intoxicated but rather was she displaying any noticeable signs of intoxication at the time she was supplied with the carton of beer. He added that it would not be reasonable to expect staff of the Store to notice subtle signs of intoxication to the same extent as Constable D'Antoine could. He is an experienced officer who has spent much of his policing career in remote communities and a person who had dealt with Ms Evans when she was sober and intoxicated. Mr Stewart submitted that the Licensee should be expected to enforce a reasonable objective standard in assessing the level of intoxication of its customers and that assessment must be

¹ 23 January 2006 at page 6

² 19 December 2003

measured against the outward signs of intoxication displayed by the customer to the staff member who is serving them.

- 47) Mr Stewart also raised the issue of the Director's report to the Commission and noted that it failed to include any reference to the response to the complaint forwarded by the Licensee through its lawyers. The report was flawed in that regard with the result, in the absence of any reference to Licensee's response, the matter was referred to Hearing which may not have been the case had both sides of the story been set out in the Director's report. He also noted that the report from the Director inferred that Police had obtained the CCTV footage from the Store when in fact the Licensee had voluntarily produced the CCTV footage in support of its defence.
- 48) In respect of the evidence provided by the witnesses during the course of the Hearing, Mr Stewart submitted that all witnesses had been candid and honest in attempting to provide an accurate recall of the events on the day of the alleged breach. He noted that Senior ACPO Dixon assessed Ms Shadforth as being more intoxicated than Ms Evans and that Mr Scragg regarded Ms Shadforth as the aggressor in her argument with Ms Evans.
- 49) In conclusion Mr Stewart noted that Mr Scragg had made a generous concession, under cross examination, when he acknowledged that he may have made a bad judgement call in deciding to sell the carton of beer to Ms Evans. He submitted, however, that the Commission should give considerably more weight to Mr Scragg's consistent evidence that he held a genuine and reasonable belief, based on an objective test, that Ms Evans was not intoxicated at the time he supplied her with the beer.

Consideration of the Issues

- 50) The alleged offence the subject of this Hearing occurred on 29 January 2011, being prior to the amendments to the Act that came into force on 1 July 2011. Section 102 of the Act, which deals with the offence of the sale of alcohol to a person who is intoxicated, was significantly amended at that time including the removal of the reverse onus of proof previously imposed on a licensee. In this instance the Commission is tasked with applying Section 102 as it stood prior to the amendment which then read as follows:

Section 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).

- 51) The fact that the Licensee supplied alcohol to Ms Evans on 29 January 2011 is not in dispute. The question to be resolved by the Commission, as properly put by Mr Stewart, is whether she was displaying outward indicators of intoxication so as to alert an employee of the licensee that she was intoxicated to the point she should not have been supplied with the alcohol.
- 52) The Commission's approach to complaints of breach of Section 102 of the Act has been documented in numerous previous decisions, including the following pronouncement included in the written decision in the matter of Milner Road Foodtown³:

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

³ 19 December 2003

The Commission concedes, however, that as a matter of law the reverse onus is able to be discharged on the balance of probabilities.”

- 53) In relation to this alleged breach under Section 102 the Commission has before it the testimony of two experienced Police Officers and their prior knowledge of Ms Evans, both when she was intoxicated and sober. Constable D’Antoine’s observations of Ms Evans, as disclosed in his Statutory Declaration was that she smelt heavily of alcohol, her eyes were bloodshot, she was slurring her speech and she was unsteady on her feet. Similarly, Senior ACPO Dixon stated that he assessed Ms Evans as being intoxicated and he noted that she had bloodshot eyes and she smelt of alcohol. Those observations were made just prior to Ms Evans being supplied with a carton of beer by Mr Scragg.
- 54) In his oral evidence Senior ACPO Dixon initially stated that Ms Evans was also unsteady on her feet, an observation not mentioned in his Statutory Declaration. Under cross examination Senior ACPO Dixon stated that he considered Ms Shadforth to be more intoxicated than Ms Evans and that it was probably Ms Shadforth that he observed to be unsteady on her feet and that Ms Evans was “just standing”. In his oral evidence at the Hearing, Constable D’Antoine maintained that Ms Evans was displaying the indicators of intoxication as set out in his Statutory Declaration both before she entered the Store and whilst purchasing the carton on beer.
- 55) After she had been supplied with the carton of beer, Constable D’Antoine observed Ms Evans attempting to drive away in the vehicle she had driven to the Store. Constable D’Antoine, having observed the indicators of intoxication displayed by Ms Evans, clearly formed the view she was too intoxicated to drive and conducted a breath test with a hand held device. The reading returned was 0.343% BAC which confirmed Constable D’Antoine’s assessment that Ms Evans was not only intoxicated but, on anyone’s assessment, significantly intoxicated. Constable D’Antoine stated during the Hearing that he was surprised that Ms Evans was not displaying more pronounced signs of intoxication given the extremely high BAC reading.
- 56) Leaving aside the issue of whether Ms Evans was staggering, both officers formed the opinion that she was intoxicated on the basis of their observations that she had red eyes, she smelt of alcohol and, in Constable D’Antoine’s evidence, she was slurring her words and unsteady on her feet. As noted above, the issue of supply of alcohol to Ms Evans is not in dispute. The assessment of the officers, that Ms Evans was intoxicated, was supported by the reading from the breathalyser in which Ms Evans returned a reading of 0.343% BAC. As a result, the complainant has established that the Licensee has a case to answer with the result the onus shifts to the Licensee to demonstrate to the Commission that Ms Evans was not intoxicated at the time of the supply.
- 57) The use of blood alcohol readings as evidence of the level of a person’s intoxication has been considered on numerous occasions by the Commission⁴. Section 124 B of the Act specifically refers to the results of breath analysis testing and provides:

124B Results of breath analysis as evidence

In proceedings for an offence against this Act in which the question of whether a person was or was not intoxicated is in issue, the result of a breath analysis, by the use of a breath analysis instrument prescribed for the purposes of the Traffic Act, is admissible and is prima facie evidence of the person having, at the time the sample of breath to be analysed was taken, a concentration of alcohol in his or her blood not less than the concentration assessed by the analysis.

- 58) There is no doubt that the Commission is entitled, in the limited manner prescribed by Section 124B, to take account of a person’s recorded BAC in a proceeding of this nature.

⁴ For example: Crossways, Motor Hotel (23 January 2006), Timber Creek Hotel (19 October 2010)

The manner in which that evidence is to be considered is set out in the Commission's decision in the matter of Crossways Motor Hotel⁵ in which it was stated:

"Historically then, the Commission has tended to receive the actual reading into evidence but then to await and require additional evidence to indicate what weight it may be given in the matter before it."

- 59) The Commission is therefore not entitled to consider a BAC reading in isolation and some further indicia of intoxication need to be demonstrated. In this instance the evidence in respect of the further indicia of intoxication displayed by Ms Evans was provided by the Police Officers. As a result, the onus of eliciting persuasive evidence that Ms Evans was not intoxicated at the time of the supply then shifts to the Licensee who, in this instance, relied on the evidence of Mr Scragg to meet that evidentiary burden.
- 60) Mr Scragg gave evidence that he did not observe Ms Evans to be staggering at any time when she was in the Store or when he supplied her with the carton of beer. That evidence was supported to a significant degree by the CCTV footage in which the Commission was unable to detect any degree of impairment in Ms Evans gait. Unfortunately the CCTV footage is not of a particularly high standard both in terms of resolution or frames per second and did not definitively determine whether Ms Evans was staggering or unsteady on her feet. It certainly did not confirm that she was staggering. On balance, the Commission accepts Mr Scragg's evidence in this regards that Ms Evans was not staggering whilst he was dealing with her.
- 61) Mr Scragg agreed that Ms Evans had bloodshot eyes when he served her but added that he thought that was a result of her being emotional and crying following the altercation with Ms Shadforth. In respect of the other indicia of intoxication identified by Constable D'Antoine, Mr Scragg denied that Ms Evans speech was slurred or that she smelt of alcohol. In the Commission's view, a simple denial is not sufficient to satisfy the evidentiary burden as prescribed by Section 102 and to rebut the evidence of the Police officers.
- 62) In this instance the Commission accepts that Ms Evans was not displaying all the indicia of intoxication that would be expected to be shown by a person with a BAC of 0.343%. There were however indicia of intoxication that should have been observed by Mr Scragg at the time Ms Evans was served. The Commission is fully aware that individual indicators of sobriety, for example, bloodshot eyes, slurred speech, strong smell of alcohol on the person and breath analysis readings, do not in themselves create a definitive conclusion as to the person's state of sobriety. However, if all those indicators are in existence, it can be reasonably assumed that they form a conclusive outcome that Ms Evans was intoxicated at the time of the sale and Mr Scragg should have refused to supply her with alcohol.
- 63) The Commission is aware that regular heavy drinkers are capable of masking the symptoms of intoxication to a degree and for periods of time, particularly if they are aware they are under scrutiny. Ms Evans appears to fall into that category. Despite the fact she recorded a BAC of 0.343% she managed to drive a vehicle to the Store, fill it with fuel, assist her father in purchasing a packet of cigarettes, take delivery of a carton of beer and walk back to the vehicle with it. If not for the intervention of Constable D'Antoine she would most likely have driven away from the Store in the vehicle. On any assessment, it would not be expected in the normal course that a person intoxicated to that level could have competently undertaken those actions.
- 64) In reaching the conclusion that the Licensee has breached Section 102 of the Act, the Commission is particularly mindful in this instance of the significant difficulty faced by Mr Scragg in assessing Ms Evans level of intoxication. The Commission assessed Mr Scragg as a thoughtful and credible witness who gave an honest account of his actions on the day in question. However, his evidence was not sufficient to rebut that of the police officers in all aspects with the result the Licensee has not satisfied the onus the Act applies.

⁵ 23 January 2006

- 65) Constable D'Antoine gave evidence that he knew Ms Evans to be a drinker. Given the very high BAC reading and her actions and demeanour the day she obtained the carton of beer, she is obviously a person capable of masking some of the indicia of intoxication. Given the limited indicia that she was displaying at the time she was supplied with the carton on beer the Commission considers this particular offending to be at the lower end of the scale. The Commission agrees with the submission made by Inspector Wood that Mr Scragg simply made a bad judgement call in deciding to supply the alcohol to Ms Evans.
- 66) Having said that, the Commission reiterates its statement in a previous decision relating to a similar breach by the Licensee of the Malandari Store⁶.

“The Commission is very cognisant of the circumstances involving isolated townships, such as Borroloola. Liquor licensees 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.”

- 67) Given the hard drinking reputation of the township it is not surprising that some patrons of the Store are capable of masking the indicia of intoxication and the Licensee and consequently employees of the Store must be sufficiently trained and particularly vigilant in detecting intoxicated customers.
- 68) At the conclusion of the Hearing the parties were advised that, should the Commission find that the complaint was proven, written submissions on penalty would be sought. Having made that finding the Commission invites the respective parties to submit submissions on penalty within fourteen days of receipt of this decision. The Commission adds that, given the particular circumstances of this breach, coupled with the commendable changes to practices implemented by the Store in recent times, it is not minded, subject to consideration of the submissions on penalty from the parties, to impose a penalty greater than a formal caution.

Decision

- 69) In relation to the breach of Section 102, sale or supply to an intoxicated person, the Commission finds this breach proven. The Commission directs that the parties lodge submissions on penalty within fourteen days of receipt of this decision.

Richard O'Sullivan
Chairman

7 November 2011

⁶ Malandari Store (9 June 2011)