

# SUPREME COURT OF QUEENSLAND

CITATION: *Executive Director of the Office of Liquor and Gaming Regulation & Anor v Cayneston Pty Ltd trading as The Mad Cow Tavern* [2011] QCA 193

PARTIES: **EXECUTIVE DIRECTOR OF THE OFFICE OF LIQUOR AND GAMING REGULATION**  
(first appellant)  
**CHIEF EXECUTIVE OF THE DEPARTMENT OF EMPLOYMENT, ECONOMIC DEVELOPMENT AND INNOVATION**  
(second appellant)  
v  
**CAYNESTON PTY LTD trading as THE MAD COW TAVERN**  
(respondent)

FILE NO/S: Appeal No 12036 of 2010  
SC No 3341 of 2010

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 12 August 2011

DELIVERED AT: Brisbane

HEARING DATE: 25 March 2011

JUDGES: Margaret McMurdo P, Fraser and White JJA  
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – GENERALLY – where the respondent applied for a statutory order of review of the decision of the first appellant, as the delegate of the second appellant, to classify the respondent's premises as "high risk" under Pt 4 Div 9 of the *Liquor Act* 1992 (Qld) – where the classification meant that the respondent could no longer serve liquid to patrons in regular glass containers, or leave or place regular glass containers in areas to which a patron has access during trading hours – where the first appellant took into consideration a document containing material adverse to the respondent – where the respondent was not given an opportunity to make

representations on that document – where the primary judge held that the first appellant's decision was tainted by a denial of natural justice to the respondent and should be set aside – whether the primary judge erred in concluding that the appellants did not afford the respondent natural justice

LIQUOR LAW – GENERAL – where certain incidents taken into consideration for the purposes of classifying the premises as high risk occurred in the course of the respondent discharging the obligations under s 148A and s 165 of the *Liquor Act* 1992 (Qld) – where evidence indicated that the incidents were not necessarily the result of alcohol abuse and misuse – whether the first appellant should have taken into consideration incidents where the respondent was acting to provide a safe environment in its premises or lawfully removing persons from its premises – whether incidents for the purposes of classifying the premises high risk can only be taken into consideration if shown to result from or be connected with alcohol abuse and misuse

*Liquor Act* 1992 (Qld), s 3, s 4, s 42A, s 96, s 97, s 98, s 99, s 99B, s 99C, s 99D, s 99E, s 99G, s 148A, s 165, s 165A

*Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88; [2005] HCA 72, applied

*Cayneston Pty Ltd t/a The Mad Cow Tavern v Chief Executive of the Dept of Employment, Economic Development & Innovation & Anor* [2010] QSC 394, approved

*Kioa v West* (1985) 159 CLR 550; [1985] HCA 81, considered

*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6, considered

COUNSEL: M Hinson SC for the appellants  
A A Horneman-Wren SC, with C O Watters, for the respondent

SOLICITORS: Crown Law for the appellants  
Creevey Russell Lawyers for the respondent

- [1] **MARGARET McMURDO P:** The respondent, the licensee of the Mad Cow Tavern in Townsville, applied for a statutory order of review of the decision of the first appellant, the delegate of the second appellant, to classify the respondent's premises from 29 April 2010 as "high risk" under Pt 4 Div 9 *Liquor Act* 1992 (Qld). The consequences of that classification are that the respondent cannot during trading hours serve liquid to patrons in regular glass containers, or leave or place regular glass containers in areas to which a patron has access.<sup>1</sup> The primary judge granted

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<sup>1</sup> *Liquor Act*, s 99C.

the respondent's application, set aside the classification; remitted the decision to the second appellant for further consideration according to law; and ordered that the appellants pay the respondent's costs. The appellants have appealed from those orders contending that the primary judge erred in concluding that they did not afford the respondent natural justice.

- [2] The respondent has filed a notice of contention in which it submits that the primary judge's decision was right on two other bases. It contended that the first appellant failed to take into account the obligations and powers referred to in s 148A and s 165 *Liquor Act*. As a result, he failed to properly exercise the power conferred by s 97(1)(b) *Liquor Act*. It also argued that the first appellant wrongly took into account irrelevant considerations, namely, incidents which may not have included alcohol abuse and misuse.
- [3] Before returning to discuss these competing arguments, it is necessary to refer in some detail to the relevant legislative scheme; the complex factual matrix; the first appellant's decision; the approach taken by the primary judge; and the parties' contentions in this appeal.

#### **Relevant provisions of the *Liquor Act 1992 (Qld)***

- [4] It is common ground that the relevant reprint of the *Liquor Act* is Reprint No 9D which came into force on 18 December 2009.
- [5] The relevant objects of the *Liquor Act* are to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse;<sup>2</sup> to facilitate and regulate the optimum development of the tourist, liquor and hospitality industries of the State having regard to the welfare, needs and interests of the community and the economic implications of change;<sup>3</sup> and to provide for a flexible, practical system for regulation of the liquor industry with minimal formality, technicality or intervention consistent with the proper and efficient administration of the *Liquor Act*.<sup>4</sup>
- [6] Part 3 of the *Liquor Act* deals with "Administration" and includes:
- "42A Chief executive may issue guidelines**
- (1) The chief executive may issue guidelines to inform persons about—
- (a) the attitude the chief executive is likely to adopt on a particular matter; or
- (b) how the chief executive administers this Act.
- ...
- (3) The chief executive must keep copies of the guidelines available for inspection, free of charge, by members of the public at—
- (a) the department's head office and regional offices; and
- (b) other places the chief executive considers appropriate.

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<sup>2</sup> *Liquor Act*, s 3(a).

<sup>3</sup> *Liquor Act*, s 3(b).

<sup>4</sup> *Liquor Act*, s 3(d).

- (4) Also, the chief executive must, if asked by a person, give the person a copy of a guideline, or an extract from a guideline, free of charge."

[7] Part 4 of the *Liquor Act* deals with "Licences" and Pt 4 Div 9 with "Banning use of regular glass in certain licensed premises". Division 9 relevantly provides:

**"97 When all or part of licensed premises must be classified as high risk**

- (1) The chief executive may classify all or part of licensed premises as high risk if the chief executive is satisfied—

...

- (b) there has been a level of violence at the premises during the relevant period that is unacceptable having regard to this Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse.
- (2) However, before classifying the premises or part of the premises as high risk the chief executive must—
- (a) give the licensee of the premises a written notice under section 98; and
- (b) have regard to the licensee's response, if any, to the notice.

*Note—*

A guideline may be made by the chief executive under section 42A informing persons about the attitude the chief executive is to adopt on a particular matter or how the chief executive administers this Act.

**98 Notice to licensee of licensed premises considered high risk**

- (1) If the chief executive considers that all or part of licensed premises are high risk, the chief executive must give the licensee of the premises a notice under this section.
- (2) The notice must state the following—
- (a) that the chief executive considers all or a stated part of the premises to be high risk;
- (b) the reasons the chief executive considers the premises or part to be high risk;
- (c) an invitation to the licensee to show within a stated period, not less than 14 days after the notice is given to the licensee, why the premises or part should not be classified as high risk.

**99 Representations about notice**

- (1) The licensee may make written representations about the notice to the chief executive within the 14 day period.

- (2) The licensee may request that all or part of the licensed premises not be classified as high risk.
- (3) The chief executive must consider all written representations made under subsection (1)."

- [8] If, after considering any representations from the licensee under s 99, the chief executive still considers all or part of licensed premises should be classified as high risk, he or she must give the licensee a written notice classifying all or a stated part of the premises as high risk and stating the day on which the classification starts.<sup>5</sup> A licensee who receives such a notice must not serve liquid to a patron in a regular glass container<sup>6</sup> during trading hours or leave or place a regular glass container in an area to which a patron has access. The maximum penalty for doing so is 100 penalty units.<sup>7</sup> After one year has elapsed since the classification as high risk, the licensee may make written representations to the chief executive to revoke the classification.<sup>8</sup> The chief executive may revoke the classification only if satisfied that the licensee has put measures in place that sufficiently minimise the risk of harm caused by alcohol abuse and misuse.<sup>9</sup>
- [9] Subject to the *Judicial Review Act* 1991 (Qld), the chief executive's decision under Pt 4 Div 9 is final and conclusive.<sup>10</sup> The chief executive may ask the Commissioner of the police service<sup>11</sup> to give the second appellant information needed to decide whether to classify licensed premises as high risk.<sup>12</sup>
- [10] Part 6 of the *Liquor Act* deals with "Obligatory provisions and offences" and contains s 148A which is relevantly in these terms:

**148A Obligations of licensees and permittees relating to the service, supply and promotion of liquor**

- (1) This section imposes obligations on licensees and permittees in the conduct of business on licensed premises or premises to which a permit relates for—
  - (a) maintaining a safe environment for patrons and staff of the premises; and
  - (b) ensuring liquor is served, supplied and promoted in a way that is compatible with minimising harm from the use of liquor and preserving the peace and good order of the neighbourhood of the premises.
- (2) The licensee or permittee must not engage in a practice or promotion that may encourage rapid or excessive consumption of liquor.  
Maximum penalty—100 penalty units.

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<sup>5</sup> *Liquor Act*, s 99B.

<sup>6</sup> That is, a container made entirely or partly of regular glass capable of holding a liquid, for example, a drinking glass, bottle or jug (see s 96 *Liquor Act* which contains definitions for Pt 4 Div 9 of the Act).

<sup>7</sup> *Liquor Act*, s 99C.

<sup>8</sup> *Liquor Act*, s 99D(2).

<sup>9</sup> *Liquor Act*, s 99D(3).

<sup>10</sup> *Liquor Act*, s 99E.

<sup>11</sup> See definition of "commissioner" in s 4 *Liquor Act*.

<sup>12</sup> *Liquor Act*, s 99G.

- (3) The licensee or permittee must engage in practices and promotions that encourage the responsible consumption of liquor.  
Maximum penalty—100 penalty units.
- (4) The licensee or permittee must provide and maintain a safe environment in and around the premises.  
Maximum penalty—100 penalty units.

... ."

[11] Division 2 of Pt 6 is headed "Provisions binding all persons" and includes s 165 which is in these terms:

**"165 Removal of persons from premises**

- (1) An authorised person for premises to which a licence or permit relates may require a person to leave the premises if—
  - (a) the person is unduly intoxicated; or
  - (b) the person is disorderly; or
  - (c) the person is creating a disturbance; or
  - (d) the person is a minor, other than an exempt minor; or
  - (e) the person has entered the premises despite being refused entry under section 165A;<sup>13</sup> or
  - (f) the person refuses to state particulars, or to produce evidence, as to age when required to do so under section 167.
- (2) A person must immediately leave premises when required to do so under subsection (1).  
Maximum penalty—25 penalty units.
- (3) If a person fails to leave when required under subsection (1), the authorised person may use necessary and reasonable force to remove the person.
- (4) A person must not resist an authorised person who is removing the person under subsection (3).  
Maximum penalty—25 penalty units.
- (5) In this section—  
***authorised person***, for premises to which a licence or permit relates, means—
  - (a) the licensee or permittee; or
  - (b) an employee or agent of the licensee or permittee."

**The background**

[12] Unfortunately, none of the parties, who were all legally represented placed the relevant facts before this Court, or, it seems, the primary court, in a clear, concise, or even, in some instances, legible way. I have attempted to unravel the relevant aspects of the material in the appeal record book and to present it in a comprehensible and legible manner. This should have been done by the parties'

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<sup>13</sup> *Liquor Act*, s 165A authorises the refusal of entry to licensed premises for those who are unduly intoxicated, disorderly or a minor (other than an exempt minor).

legal representatives. It is not the task of busy courts, either at primary or appellate level.

- [13] On 9 October 2009, the second appellant's Acting Director-General wrote to the Commissioner of the Queensland Police Service about the then recent amendments to the *Liquor Act* adding Pt 4 Div 9 in terms which included:

"Criteria for classifying premises as high risk, outlined in section 97 of the Liquor Act, are:

- (a) one or more glassings have happened at the premises during the relevant period, or
- (b) there has been a level of violence at the premises during the relevant period that is unacceptable having regard to the Liquor Act's object to regulate the liquor industry in a way compatible with minimizing harm caused by alcohol abuse and misuse.

...

In relation to criteria (b) OLGR<sup>14</sup> has compiled a list of premises that are considered to fall within the scope of the provision, and is enclosed for your reference. ... When compiling the list of premises that fall within criteria (b), I would request the following details be included:

- the name and location of the licensed venue
- the date of the relevant incident/s (which must be post 16 October 2008)
- a description of sufficient detail that justifies the classification and that can be included in notices provided to licensees.

...

[I]t will be necessary that the information is made available to OLGR by no later than 23 October 2009.

..."

- [14] The second appellant issued the following guideline under s 42A<sup>15</sup> which was noted as "approved" and dated 30 October 2009:

**"BANNING USE OF REGULAR GLASS Sections 96 TO 99G**

**LIQUOR ACT 1992**

This guideline outlines the criteria used by chief executive in deciding whether to impose a restriction on the use of regular glass in licensed premises.

#### **BACKGROUND**

Section 148A(4) of the *Liquor Act 1992* imposes obligations and responsibilities on licensees in conducting business on licensed premises to provide and maintain a safe environment for patrons and staff in and around the licensed premises.

<sup>14</sup> Office of Liquor and Gaming Regulation.

<sup>15</sup> Set out at [6] of these reasons.

In addition to this general obligation for licensees, sections 96 to 99G have been enacted to minimise harm associated with incidents involving the use of regular glass as a weapon.

...

When all or part of premises may be classified as high risk

The process for the chief executive to classify premises or part of the premises as high risk may be triggered if:

- 1) a glassing has occurred at the premises (a glassing means an act of violence by a person that involves the use of regular glass and causes injury to any person);  
or
- 2) there has been a level of violence at the premises during the last 12 months that is unacceptable having regard to the objective of the Liquor Act to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse.

In considering whether unacceptable levels of violence are present, the chief executive will have regard to:

- a) the frequency of violent incidents at a premises;
- b) the seriousness of the violent incident/s including the number of persons involved, and the extent of any injuries or damage caused by the incident/s;
- c) whether the violent incidents were caused by alcohol abuse or misuse.

...

Representations from the licensee

In considering representations from the licensee in relation to glassings or the level of violence the chief executive will have regard to:

- a) the level of intoxication of any person involved;
- b) the management practices in place at the time of any incident for the prevention of these incidents, including the level of supervision;
- c) whether the current licensee was the licensee at the time of the incident.

..."

- [15] The first appellant's briefing note dated 3 November 2009 and signed by him as approved on 4 November 2009 does not appear to have been obtained by the respondent until after 3 March 2010 when the first appellant classified the respondent's premises as high risk. It included the following:

"Executive Directors briefing note  Action  Information

Office of Liquor and Gaming Regulation **Date:** 3 November 2009

**Title: Section 98 of the Liquor Act 1992**

**1. Purpose**

To provide advice on the potential issue of notices under section 98 of the Liquor Act 1992.

**2. Recommendation**

That the Executive Director decide which, if any, of the premises identified in **Attachment 3**, has had an unacceptable level of violence in the past 12 months and should therefore have all or part of the premises classified as high risk for the purposes of Division 9 of the *Liquor Act 1992*

...

#### 4. Issues

On 30 October and 2 November 2009 a Committee of experienced compliance and licensing officers met to consider the information supplied by the police. The committee used four distinct criteria, consistent with the approved guideline, in determining a list of licensed venues that should be put to you, as the chief executive's delegate, as potentially having had an unacceptable level of violence, and therefore appropriate for your consideration as to whether you wish to classify all or part of each licensed premises as high risk, and accordingly issue a notice pursuant to section 98 of the Liquor Act. This list is enclosed (**Attachment 3**).

The four criteria used by the committee were:

- (a) Where a brawl or melee has occurred at the premises resulting in substantial injuries or arrests
- (b) Where there have been at least 2 violent incidents, and in each case a charge of GBH (or worse) has been laid against a defendant and serious injuries suffered by a victim
- (c) Where there have been 10 or more violent incidents at a premises resulting in charges of (at least) assault occasioning bodily harm
- (d) Where a violent death has occurred on premises

The list (**Attachment 3**) contains the name of the licensed premises, the dates and a summary of the relevant incidents and the criteria under which the committee felt it warranted inclusion.

It is important to point out that as the decision maker in this process you must consider each of the venue's individual circumstances (listed in attachment 3) along with the data provided by the QPS (**attachment 4**) on their merits and you must satisfy yourself that, taking into account the approved guideline and the circumstances outlined, there has been a level of violence at the premises during the past 12 months that is unacceptable having regard to the Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse, and accordingly that all or part of the premises are high risk.

...

You should note that attachment 3 contains the names of 12 premises that the committee felt warranted inclusion. Of these 12, all but one has been previously issued with a notice pursuant to section 97(1)(a) of the Liquor Act.

..."

[16] The respondent's premises were included in that list of 12. The primary judge referred to Attachment 3 to the briefing note as "the document in contention" and it is convenient to adopt that term. It contained the following relevant information concerning the respondent's premises:

| PREMISES IDENTIFIED AS "HIGH RISK"<br>UNACCEPTABLE LEVELS (SIC) OF VIOLENCE S 97(1)(b) |  |   |  |                    |               |   |                           |  |
|--|--|---|--|--------------------|---------------|---|---------------------------|--|
| Premises   | Address  | Date / Time                             | Charge                                     | 2 x GBH (or worse) | Melee / Brawl | 10 or more Assaults (serious)                             | Violent death on Premises | Action   |
| MAD COW TAVERN TOWNSVILLE  | 129 FLINDERS ST, TOWNSVILLE CITY, QLD<br><br>Australia<br>4810 | 21/07/2009<br>5:05:00 PM                | Assault occasioning<br>bodily harm [0214]  | N                  | N             | Y<br><br>9 x AOBH<br>1 x Sexual<br>assault<br>2 x Assault |                           | <p style="text-align: right;"><i>M Sarquis</i></p> <p>[signed M Sarquis]<br/>APPROVED / NOT APPROVED</p> <p style="text-align: right;">_____<br/>Michael Sarquis Executive Director Office of Liquor and Gaming Regulation<br/>4/11/09 [handwritten]</p> |
|  |  | 22/07/2009 <sup>F1</sup><br>9:10:00 AM  | Assault occasioning<br>bodily harm [0214]  |                    |               |   |                           |  |
|  |  | 18/09/2009 <sup>F2</sup><br>8:00:00 PM  | Assault, Common [0218]                     |                    |               |   |                           |  |
|  |  | 11/01/2009 <sup>F3</sup><br>2:45:00 AM  | Assault occasioning<br>bodily harm [0214]  |                    |               |   |                           |  |
|  |  | 14/02/2009 <sup>F4</sup><br>3:00:00 AM  | Assault, occasioning<br>bodily harm [0214] |                    |               |   |                           |  |
|  |  | 27/02/2009 <sup>F5</sup><br>11:30:00 PM | Assault occasioning<br>bodily harm [0214]  |                    |               |   |                           |  |
|  |  | 28/02/2009 <sup>F6</sup><br>2:00:00 AM  | Assault occasioning<br>bodily harm [0214]  |                    |               |   |                           |  |
|  |  | 14/03/2009 <sup>F7</sup><br>1:15:00 AM  | Assault occasioning<br>bodily harm [0214]  |                    |               |   |                           |  |
|  |  | 26/04/2009 <sup>F8</sup><br>2:10:00 AM  | Assault occasioning<br>bodily harm [0214]  |                    |               |   |                           |  |
|  |  | 31/05/2009 <sup>F9</sup><br>2:53:00 AM  | 0215 - Assault, Serious (Other)            |                    |               |   |                           |  |
|  |  | 31/05/2009 <sup>F10</sup><br>3:00:00 AM | Assault occasioning<br>bodily harm [0214]  |                    |               |   |                           |  |
| 21/06/2009 <sup>F11</sup><br>2:00:00 AM  | 0316 - Sexual assault (other)                                  |   |  |                    |               |   |                           |  |

F1 This incident is QP0900559116  
 F2 This incident is QP0900729609  
 F3 This incident is QP0900027751  
 F4 This incident is QP0900131571  
 F5 This incident is QP0900165148  
 F6 This incident is QP0900162423  
 F7 This incident is QP0900205290  
 F8 This incident is QP0900316134  
 F9 This incident is QP0900411368  
 F10 This incident is QP0900411246  
 F11 This incident is QP0900473203

(my footnotes)

- [17] On 20 November 2009, the first appellant sent the respondent a letter of notice of intention to classify its premises as high risk under s 98<sup>16</sup> which included the following:

"... I consider all of that part of your licensed premises where liquor is consumed are high risk for the purposes of sections 97 and 98.

I have formed this view after reviewing a range of material from the Queensland Police Service and internal compliance records from the

<sup>16</sup>

An earlier notice sent on 16 October 2009 has no relevance in this appeal.

Office of Liquor and Gambling Regulation. Copies of this material are enclosed (see Attachment A).

This material shows there have been a series of violent incidents at your premises during the past year which have caused, or had the potential to cause, serious personal injury, pain and suffering to those involved and other patrons of your premises, as outlined in Attachment A.

I consider that the level of violence at your premises evidenced by these incidents is unacceptable and that your premises are therefore high risk for the purposes of section 97 and 98 of the Liquor Act.

In reaching this view, I have had regard to the frequency and seriousness of the incidents, the number of persons involved, the extent of the injuries caused and the involvement of alcohol abuse and misuse. I have also taken into account a guideline describing how the chief executive will assess matters involving the banning of the use of regular glass (see Attachment B).<sup>17</sup>

In accordance with section 98 you are now invited to make representations to show why your premises, or any specific parts of your premises, should not be classified as high risk. ..."

[18] Attachment A to that letter contained information about incidents reported to the Queensland Police Service ("QPS") including QPS files QP0900027751 on 11/01/2009; QP0900119640 on 14/02/2009 0.01; QP0900131571 on 14/02/2009 3.00; QP0900165148 on 27/02/2009; QP0900162423 on 28/02/2009; QP0900205290 on 14/03/2009; QP0900316134 on 26/04/2009; QP0900411368 on 31/05/2009 2:53; QP0900411246 on 31/05/2009 3:00; QP0900473203 on 21/06/2009; QP0900559116 on 22/07/2009; and QP0900729609 on 18/09/2009. That is, the respondent was provided with information in respect of all the incidents listed in the document in contention,<sup>18</sup> save for the first matter there listed on 21 July 2009. The table Attachment A to the letter of 20 November is reproduced in part in Appendix A to this judgment. It contains five of the most relevant incident reports in Attachment A and reproduces the format of Attachment A in the appeal record book, but in a legible way.

[19] On 18 December 2009, the respondent's lawyers provided a lengthy response in terms which challenged the accuracy of many of the QPS reports. It emphasised the adequacy of the respondent's response as licensee to the incidents in QP090027751; QP0900119640; QP0900131571; QP0900165148; QP0900162423; QP0900205290; QP0900316134; QP0900411246 & QP0900411368; QP0900473203; QP0900559116; and QP0900729609. The response concluded:

"There are significant legal errors in relation to the furnishing of the previous and current sec 98 Notice(s) to my client. ..."

Of the 11 reported 'so-called' incidents relied upon by Police to demonstrate an unacceptable level of violence during the reporting period, the evidence shows that only one alleged violent incident can be established. Records held by the licensee prove that the venue is

<sup>17</sup> The guideline is relevantly set out in [14] of these reasons.

<sup>18</sup> Together with information about an additional incident QP0900119640 on 14/02/2009.

strictly managed in accordance with sound risk management, security and patron care procedures.

There is insufficient evidence upon which the Chief Executive could be satisfied that the licensed venue should be elevated to a high risk category; and; the licensee company hereby seeks and petitions your favourable consideration of these representations."

- [20] On 28 January 2010, the first appellant responded in terms which included:  
 "As the chief executive's delegate I have carefully considered your submissions on behalf of your client and have sought further information from the Queensland Police Service in relation to the matters you have raised. I enclose that material for your consideration.
- Having regard to this material and the material previously provided, I continue to consider all of your client's premises to be high risk. ...
- I invite you to make further submissions as to why the entire premises should not be classified as high risk. ..."
- [21] That further material pointed out that in relation to QP900119640 on 14/02/2009,<sup>19</sup> the charges were withdrawn. It also included detailed information about each of the incidents listed in the document in contention other than the first incident on 21/07/2009; the fourth incident on 11/01/2009; the seventh incident on 28/02/2009; and the ninth incident on 26/04/2009.
- [22] In relation to QP0900411368 on 31/05/2009 2:53.00 am, it relevantly included the following: "Offender arrested for Serious Assault, Common Assault, Possess Dangerous Drug, Public Nuisance."
- [23] In relation to QP900411246 on 31/05/2009 3:00:00 am, it reported: "The offender was arrested and ... charged with assaulting police officer, the assault against victim, obstructing police and public nuisance, violent."
- [24] In relation to QP0900473203,<sup>20</sup> it recorded:  
"QP0900473203

MO

At approximately 0215 hours on 22/06/2009 the victim was upstairs at the Mad Cow Tavern dancing with the witness and a group of other people. The victim has seen the suspect walk from the balcony onto the dance floor and began dancing within their group. The victim was facing the suspect when suddenly the suspect has fallen on his back and as he has fallen has grabbed the victims arm and pulled the victim on top of himself. The victim was on her knees on top of the suspect when the suspect has then sat up and rubbed his face into the victim's breasts moving his head from side to side, as he has done this the offender has bitten one of her breast and then bit the other breast. The witness has seen this helping the victim up and pushing the suspect away saying "you don't fucking do that to

<sup>19</sup> This is the first incident in Appendix A.

<sup>20</sup> This is the fifth incident described in Appendix A and F11 in the document in contention.

women". The bouncer of the club has come over and picked up the suspect at this time the witness has approached the suspect and had a conversation with him in which she advised the suspect that he had hurt her friend. The suspect has then said to the victim something along the lines of 'what did I do to you, did I hurt you?' The suspect's male friend has said to the victim 'I am sorry for my friend's behaviour'. The victim, witness and their two friends have left the club walked across the street and reported the incident to police. The witness and victim stated to police the events. The witness informed police that she can identify the suspect. Police have then attended The Mad Cow Tavern taking up with the suspect, the suspect's male friend and security. Police have then returned to the victim and advised her to attend Townsville police station if she wished to make a formal complaint.

#### GENERAL REPORT

Police took details from the informant as per the MO. Police attended The Mad Cow Tavern and took up with the manager and security staff in relation to obtaining CCTV footage of the incident. Police advised the victim to obtain medical attention and to attend the Townsville police station to make a formal complaint at 2300 21/06/2009 the victim and the witness have attended the Townsville police station and formal statements have been taken and scanned into this occurrence with the originals kept on file at the Townsville police station. SOC are required. Insurance is not applicable. Reporting officer to create an incident report. Suspect flagged and witness as nominated.

*Offender charged with common assaulted and first court appearance is the 22/12/09. Court records not yet updated." (my emphasis) (errors as in original)*

- [25] In relation to QP0900131571,<sup>21</sup> it stated that: "Due to the lack of evidence perhaps this matter be filed pending further information."
- [26] In relation to QP0900205290,<sup>22</sup> the information stated: "Perhaps this may be filed pending further information coming to hand."
- [27] On 8 February 2010, the respondent's lawyer replied in terms which included:  
**"RESPONSE TO THE ADDITIONAL POLICE MATERIAL**  
 For ease of reference, clarity and brevity, I have maintained the same numbering system for each police report as utilised in our previous submission. By way of overview, we can find nothing in the new materials provided which would bring us to believe that upon a review of all of the materials, that you could be satisfied that there is evidence upon which you could elevate the licensed premises to 'high risk'.

...

<sup>21</sup> This is the second incident in Appendix A and F4 in the document in contention at [16] of these reasons.

<sup>22</sup> F7 in the document in contention at [16] of these reasons.

2. QPS Reference QP0900119640<sup>23</sup>

The further police report in this instance confirms that the relevant complaint of alleged drink-spiking was withdrawn on 14 February 2009. A withdrawn complaint has the same effect as starting *de novo* – starting afresh, as if it had never been made in the first place. Our original submission indicated that the alleged incident alleges the consumption of liquor at several licensed premises and a complete lack of evidence as to where the alleged drink spiking may have occurred. Now it is revealed that the relevant complaint was withdrawn on 14 February 2009. This begs the questions: Why was this information not conveyed to us in the first instance? and Why was my client required to answer the allegations, when the complaint had already been withdrawn? On the basis of a withdrawn complaint, there is clearly no case to answer here and it is respectfully submitted that you could not rely on this incident to elevate the premises to high risk.

3. QPS Reference QP0900131571<sup>24</sup>

The further police report in this case completely corroborates and supports the licensee's version of events. In a previous submission, we informed you that this incident, between an Indigenous man and a publican from the Townsville suburban area involved one punch, was over in seconds, resulting in security removing the trouble-makers in the presence of Police. The subsequent complaint and review of CCTV footage, which was provided urgently upon request has resulted in insufficient evidence for anyone to be charged. Venue security personnel acted swiftly and in compliance with our House Policy and strict procedures on removal for fighting and we therefore submit that there is insufficient evidence to rely on this incident to classify the venue as high risk.

...

8. QPS Reference QP0900411246 & QP0900411368<sup>25</sup>

In the first instance it should be noted that both of these reports refer to the same incident. The further reports provided completely exonerate, validate and support the previous version of events provided by the licensee. In addition, the new information included in this report reveals that the offender was arrested and charged with possession and using marijuana. Queensland licensees have long argued that it is the use of illicit drugs, and not the consumption of alcohol which is contributing to serious and violent assaults on and near licensed premises. This additional police report now provides clear evidence of such matters and again begs the question: Why was this material not provided with the original particulars? The offender in the case was in possession of, and affected by drugs, other than alcohol and it is respectfully submitted that you could not use this incident to rely on an elevation to high risk.

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<sup>23</sup> Incident 1 in Appendix A and F4 in the document in contention at [16] of these reasons.

<sup>24</sup> Incident 2 in Appendix A and F3 in the document in contention at [16] of these reasons.

<sup>25</sup> These are the third and fourth incidents in Appendix A to these reasons and F9 and F10 in the document in contention at [16] of these reasons.

9. QPS Reference QP900473203<sup>26</sup>

The additional information reveals that an offender has now been arrested and charged as a result of the CCTV evidence taken and provided to Police by the licensee. This identifies another case of sound risk management practices and strict protocols being observed, whereby police are supported by venue management and can rely on CCTV footage. This is an example of how a venue should operate and work collaboratively with authorities and could not be used as evidence to elevate the venue to high risk status.

..." (errors as in original)

**The first appellant's notice of decision**

[28] On 3 March 2010, the first appellant wrote to the respondent stating that he continued to be satisfied that all of the respondent's premises were high risk under s 97(1)(b) for the reasons set out in the attached notice of decision and that he was classifying all of the respondent's premises known as the Mad Cow Tavern as high risk under s 99B as from 29 April 2010.

[29] The terms of the attached notice of decision included:

"By a letter dated 20 November 2009 the Acting Executive Director gave ... notice ... to the licensee pursuant to section 98 of the Act that he also considered the premises to be high risk for the purposes of section 97 and 98 of the Act on the grounds that there had been a level of violence at the premises during the previous 12 months that was unacceptable having regard to the Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse. That notice:

- attached details of 12 violent incidents alleged to have occurred at the premises during the previous 12 months based upon material provided by the Queensland Police Service and internal compliance records from OLGR
- invited the licensee to make representations within 28 days to show why the premises, or any part of them, should not be classified as high risk."

[30] After setting out correspondence between the parties and the respondent's submissions, the notice of decision continued:

"With respect to the notice issued on 20 November 2009, I have taken into account all of the representations made by the licensee in relation to both notices, the material provided by the QPS and the internal OLGR compliance records that were provided to the licensee, and the Chief Executive's guideline 'Banning use of regular glass'.

...

As delegate of the chief executive, I find on the balance of probabilities that:

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<sup>26</sup> This is the fifth incident in Appendix A to these reasons and F11 in the document in contention at [16] of these reasons.

a) Violent incidents did occur at the premises on 11 January 2009,<sup>27</sup> 14 February 2009 (in relation to QPS reference QP0900131571<sup>28</sup>), 27 February 2009,<sup>29</sup> 28 February 2009,<sup>30</sup> 14 March 2009,<sup>31</sup> 26 April 2009,<sup>32</sup> 31 May 2009,<sup>33</sup> 21 June 2009,<sup>34</sup> and on or about 22 July 2009.<sup>35</sup>

b) In each case injuries or harm were inflicted upon the victims. Injuries sustained included bites and lacerations.

...

g) I note the licensee's submission that there is insufficient evidence of a violent incident in relation to the allegation of drink spiking on 14 February 2009. Having reviewed the material I cannot be satisfied on the balance of probabilities that a violent incident has occurred and I do not propose to take this incident into account.

...

I do not accept the licensee's submission that incidents where the licensee had complied fully with its legal obligations cannot be taken into account in determining whether the premises are high risk.

On the information available to me I consider that alcohol abuse or misuse was likely to be a factor in most of the violent incidents referred to in the notice, given the location, timing, nature and circumstances of the incidents.

I note the licensee's submission that the offenders in the incidents on 28 February 2009 and 14 March 2009 had each only entered the venue a few minutes prior to each incident, and that they had had their intoxication levels checked prior to being permitted entry. In the circumstances I accept that alcohol abuse or misuse may not have been a factor in these incidents, although I do not consider the abuse or misuse of alcohol to be limited to excessive intoxication, nor that alcohol abuse and misuse will necessarily be obvious to witnesses.

In the circumstances I consider that, given the history and frequency of violence at the premises, there has been a level of violence that is unacceptable, having regard to the Act's object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse, and that the premises are high risk.

...

### **Decision**

Having considered all of the matters set out above, I continue to be satisfied that all of the premises are high risk pursuant to section

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<sup>27</sup> F3 in the document in contention at [16] of these reasons.

<sup>28</sup> This is the second incident in Appendix A and F4 in the document in contention at [16] of these reasons.

<sup>29</sup> F5 in the document in contention at [16] of these reasons.

<sup>30</sup> F6 in the document in contention at [16] of these reasons.

<sup>31</sup> F7 in the document in contention at [16] of these reasons.

<sup>32</sup> F8 in the document in contention at [16] of these reasons.

<sup>33</sup> See the third and fourth incidents in Appendix A and F9 and F10 in the document in contention at [16] of these reasons.

<sup>34</sup> F11 in the document in contention at [16] of these reasons.

<sup>35</sup> F1 in the document in contention at [16] of these reasons.

97(1)(b) of the Act. I therefore give notice, pursuant to section 99B of the Act, that I am classifying all parts of the premises known as The Mad Cow Tavern as high risk. ..."

### **The primary judge's approach**

[31] The judge set out the relevant facts, documents, legislative scheme, and aspects of the first appellant's decision before turning to the respondent's contention that it had been denied natural justice. Her Honour noted the appellants' concession that attachment 3 to the briefing note prepared for the first appellant (the document in contention)<sup>36</sup> was taken into account when he issued the 20 November 2009 s 98 notice.<sup>37</sup> But the appellants contended that the document in contention simply informed the process leading to the issue of the s 98 notice; there was no evidence it was taken into account in the 3 March 2010 decision to classify the respondent's premises as high risk.<sup>38</sup>

[32] Her Honour continued:

"[37] By s 97(2) the [second appellant] was obliged to give the [respondent] a notice under s 98, and by s 98(2)(b) that notice had to state the reasons the chief executive considered the premises to be high risk.

[38] In his letter of 20 November 2009 (the s 98 notice<sup>39</sup>) the [first appellant] said that he had formed the view the premises were high risk after reviewing 'a range of material from the Queensland Police Service and internal compliance records from the Office of Liquor and Gambling Regulation' showing a series of violent incidents there during the previous year. If the document in contention<sup>40</sup> was not within the rubric of material supplied by the QPS and internal compliance records from the OLGR, then the letter of 20 November 2009 was misleading as it did not specify all of the material taken into account.

[39] It is apparent from the notice of decision to classify the premises as high risk made on 3 March 2010<sup>41</sup> that the material taken into account at the initial stage was taken into account at the subsequent stage, too – what was taken into account at the subsequent stage being described as 'the material provided by the QPS and the internal OGLR compliance records that were provided to the [respondent]', along with the [respondent's] representations and the guidelines.

[40] The document in contention<sup>42</sup> contained material adverse to the [respondent], upon which it was not given an opportunity to make representations.

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<sup>36</sup> The relevant portions of the document in contention are set out at [16] of these reasons.

<sup>37</sup> *Cayneston Pty Ltd t/a The Mad Cow Tavern v Chief Executive of the Dept of Employment, Economic Development & Innovation & Anor* [2010] QSC 394, [36].

<sup>38</sup> Above.

<sup>39</sup> Set out at [17] of these reasons.

<sup>40</sup> See [16] of these reasons.

<sup>41</sup> Set out at [28]-[30] of these reasons.

<sup>42</sup> See [16] of these reasons.

- [41] It had the appearance of a convenient summary of relevant information. But it was inaccurate in two significant respects – in the material inserted in the column headed 'Charge', and in the material inserted in the column headed '10 or more Assaults (serious)', and it included an incident on 21 July 2009 which was not one of those referred to in the material supplied to the [respondent] on 20 November 2009.<sup>43</sup>
- [42] What appears under the second heading 'Charge' in the document in contention corresponds with what appears under the heading 'OCC TYPE' (Occurrence Type) in the document provided to the applicant on 20 November 2009.<sup>44</sup> However, it appears from the material under the heading 'Charge Sequence' in the document provided on 20 November 2009 and the further QPS material made available to the [respondent]<sup>45</sup> that what occurred on 31 May 2009 did not result in a charge of assault occasioning bodily harm, but rather in various other charges, and that what occurred on 21 June 2009 did not result in a charge of sexual assault, but rather in a charge of common assault. It follows that the summary in the seventh column of the document in contention<sup>46</sup> –
- '10 or more Assaults (serious)  
Y  
9 x AOBH  
1 x Sexual Assault  
2 x Assault'
- was inaccurate. The true picture was 8 x AOBH; 3 x assault. The charges laid reflected the seriousness of the violent incidents – a factor which the chief executive identified in the guideline as one to which he would pay regard.
- [43] In the circumstances the [respondent] has persuaded me that there was a breach of the rules of natural justice in making the decision to classify The Mad Cow as high risk."

- [33] Her Honour found that the first appellant did not take into account the first incident in the document in contention said to have occurred at 5.05 pm on 21 July 2009.<sup>47</sup>
- [34] The judge concluded that the first appellant's decision was tainted by a denial of natural justice to the respondent and should be set aside.<sup>48</sup>
- [35] Her Honour rejected the respondent's contention that s 97(1)(b) required a connection between the violence at the premises declared high risk and alcohol abuse or misuse. The judge also rejected the related contention that whether violence was caused by alcohol abuse or misuse was a relevant consideration which

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<sup>43</sup> Relevantly set out at [17] of these reasons.

<sup>44</sup> The relevant parts are set out in Appendix A to these reasons.

<sup>45</sup> The relevant parts of this material are set out at [20]-[26] of these reasons.

<sup>46</sup> See [16] of these reasons.

<sup>47</sup> *Cayneston Pty Ltd t/a The Mad Cow Tavern v Chief Executive of the Dept of Employment, Economic Development & Innovation & Anor* [2010] QSC 394, [45].

<sup>48</sup> Above, [56].

the first appellant should have but did not take into account. Her Honour instead accepted the appellants' contrary contention that s 97(1)(b) required an evaluative judgment to be made after considering the level of violence at the premises during the preceding 12 months and the *Liquor Act's* object to regulate the liquor industry in a way compatible with minimising the harm caused by alcohol abuse and misuse. This did not require that violent incidents must have been caused by alcohol abuse or misuse before concluding that the level of violence was unacceptable. Violent incidents may be described as unacceptable even though they were not the result of alcohol abuse or misuse. The first appellant did not err in taking the incidents of 28 February and 14 March 2009<sup>49</sup> into account even though he found they may not have been caused by alcohol abuse or misuse.<sup>50</sup>

- [36] The judge accepted that the incidents on 11 January, 26 April and 31 May 2009 which the first appellant did take into account occurred when security guards were removing patrons, consistent with the respondent's obligations under s 148A(4) and s 165 of the *Liquor Act*. The first appellant did not err in taking those matters into account when evaluating whether to give a notice under s 98.<sup>51</sup> That is because s 148A(4) and s 165 were measures discrete from those imposed under Pt 4 Div 9 of the *Liquor Act*.

### **The appellants' contentions in this appeal**

- [37] The appellants' contentions in this appeal are as follows. The document in contention,<sup>52</sup> which was not supplied to the respondent prior to the first appellant's decision on 3 March 2010, did not contain any new or additional material to that with which the respondent was provided before it made its written representations under s 99. The only exception was the first entry in the document in contention referring to an alleged incident on 21 July 2009. But this does not assist the respondent as the primary judge found the first appellant did not take it into account in classifying the respondent's premises as high risk.<sup>53</sup> There was therefore no need to give the respondent notice of that incident.
- [38] It was true that the document in contention referred to the incident which occurred on 21 June 2009 (QP0900473203) as a sexual assault whereas the documents supplied by QPS and given to the respondent indicated that the alleged offender had been charged with common assault.<sup>54</sup> The material provided to the respondent on 20 November 2009<sup>55</sup> referred to the incident as a "sexual assault". But the detailed material with which the respondent was provided concerning this incident made clear that the alleged assault had a sexual aspect. The document in contention provided a brief summary of violent incidents at the respondent's premises; it did not contain details. The material provided to the respondent about this incident matched the general description of it in the document in contention. It did not justify a conclusion that the respondent had been denied natural justice.

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<sup>49</sup> Above, [48].

<sup>50</sup> Above, [46]-[49].

<sup>51</sup> Above, [50]-[53].

<sup>52</sup> See [16] of these reasons.

<sup>53</sup> *Cayneston Pty Ltd t/a The Mad Cow Tavern v Chief Executive of the Dept of Employment, Economic Development & Innovation & Anor* [2010] QSC 394, [45], referred to in these reasons at [33].

<sup>54</sup> See the emphasised portions of [24] where it deals with QP0900473203.

<sup>55</sup> See incident 5 in Appendix A (attachment A to the first appellant's letter to the respondent on 20 November 2009).

- [39] The primary judge noted that Attachment A given to the respondent on 20 November 2009<sup>56</sup> referred to fewer and less serious charges than the document in contention. This mis-states the true position.
- [40] The document in contention described the incident said to have occurred on 31 May 2009 at 2.53 am (QP0900411368) as a single serious assault. The material provided to the respondent on 20 November 2009 relevantly referred to it as an "Assault or obstruct police; ... serious assault (assault .... obstruct police); ... common assault".<sup>57</sup> The QPS material provided on 28 January 2010 referred to it as a serious assault.<sup>58</sup>
- [41] The document in contention described the incident on 31 May 2009 at 3.00 am (QP0900411246) as involving only an assault occasioning bodily harm.<sup>59</sup> The material provided to the respondent on 20 November 2009 described it as relevantly "Grievous Bodily Harm; ... assault or obstruct police; ... serious assault (assault/resist/obstruct police)".<sup>60</sup> The QPS material provided to the respondent on 28 January 2010 described this incident as "assaulting police officer, the assault against victim, obstructing police and public nuisance, violent".<sup>61</sup>
- [42] The material provided to the respondent on 20 November 2009 referred to a total of 16 charges involving violence and gave much more detail than in the document in contention. By contrast, the document in contention referred to a total of only 12 charges involving violence. Apart from the 21 July 2009 incident which the first appellant did not take into account in making his decision on 3 March 2010, everything contained in the document in contention was contained, usually in more detail, in the material provided to the respondent, both on 20 November 2009 and on 28 January 2010. Had the respondent been given the document in contention prior to the first appellant classifying its premises high risk on 3 March 2010, it would have added nothing to the information the respondent already had.
- [43] As the appellants gave the respondent all the information about critical issues or factors on which the first appellant's decision was likely to turn, there was no breach of natural justice: *Kioa v West*.<sup>62</sup> Procedural fairness is an abstract concept concerned with avoiding practical injustice: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*.<sup>63</sup> The respondent has not identified any practical injustice it has suffered. Accordingly, the respondent has not established any denial of procedural fairness.

### **Was there a breach of natural justice?**

- [44] The issue is whether the first appellant's omission to provide the respondent with the document in contention, before the respondent was required to make representations under s 99 as to whether its premises should be classified as high risk, amounted to a breach of natural justice.

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<sup>56</sup> Reproduced in part as Appendix A to these reasons.

<sup>57</sup> See Appendix A to these reasons, incident 3.

<sup>58</sup> See [22] of these reasons.

<sup>59</sup> See [16] of these reasons.

<sup>60</sup> See Appendix A, incident 4.

<sup>61</sup> See [23] of these reasons.

<sup>62</sup> (1985) 159 CLR 550, 587; [1985] HCA 81.

<sup>63</sup> (2003) 214 CLR 1, 14 [37]; [2003] HCA 6.

- [45] It is true that the first appellant furnished the respondent with a great deal of information about the alleged violent episodes at its premises as listed in the document in contention, before the respondent made representations under s 99, and that the respondent made detailed submissions about these incidents. The exception was the first incident in the document in contention on 21 July 2009. The judge, however, found the first appellant did not take that incident into account in classifying the respondent's premises as high risk.<sup>64</sup> But the fact that those matters favour the appellants' contentions does not mean that there has been no breach of natural justice if procedural fairness was not otherwise met.
- [46] The first appellant's briefing note<sup>65</sup> made clear that relevant criteria in determining whether to classify premises as high risk under Pt 4 Div 9 *Liquor Act* included:
- "(a) Where a brawl or melee has occurred at the premises resulting in substantial injuries or arrests
  - (b) Where there have been at least 2 violent incidents, and in each case a charge of GBH (or worse) has been laid against a defendant and serious injuries suffered by a victim
  - (c) Where there have been 10 or more violent incidents at a premises resulting in charges of (at least) assault occasioning bodily harm
  - (d) Where a violent death has occurred on premises."
- [47] Those four criteria appear to be reflected in headings five to eight in the document in contention.<sup>66</sup> The entry in the column headed "10 or more Assaults (serious)" unequivocally recorded that nine assaults occasioning bodily harm, one sexual assault and two assaults had occurred at the respondent's premises during the relevant period. That meant that criterion (c) in the briefing note was met. This criterion for determining whether a premises was high risk under Pt 4 Div 9 *Liquor Act* was not evident from the terms of *Liquor Act* or the guidelines provided to the respondent prior to making its representations under s 99. The briefing note suggests that the fact that a premises met criterion (c) was a factor which would support the first appellant classifying premises as high risk.
- [48] The appellants conceded before the primary judge that the first appellant took into account the document in contention when issuing the 20 November 2009 s 98 notice. That notice stated that he had formed the view the respondent's premises were high risk "after reviewing a range of material from the QPS and internal compliance records from the OLGR. Copies of this material are enclosed (see Attachment A<sup>67</sup>)." That description of the material on which the first appellant's view was formed on 20 November 2009 therefore included the document in contention. In the first appellant's notice of decision classifying the respondent's premises as high risk on 3 March 2010, he stated that in making that decision he again took into account "the material provided by the QPS and the internal OLGR compliance records that were provided to the licensee, and the Chief Executive's guideline".<sup>68</sup> This suggests to me that he again took into account the document in contention in making the decision on 3 March 2010. It is true that the notice of decision of 3 March 2010 does not refer in terms to the briefing note or the

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<sup>64</sup> See [33] of these reasons.

<sup>65</sup> Relevantly set out at 0 of these reasons.

<sup>66</sup> See [16] of these reasons.

<sup>67</sup> Reproduced in part in Appendix A to these reasons.

<sup>68</sup> See [30] of these reasons.

document in contention. It is also true that it states that the first appellant took into account material "provided to the licensee". I nevertheless consider it likely that the first appellant took into account the document in contention, particularly its representation that the respondent's premises met criterion (c) in the briefing note, at least subconsciously, in classifying the respondent's premises as high risk.

- [49] As the primary judge recognised, an analysis of the material provided to the respondent on 20 November 2009, at least on one view, suggested that its premises did not meet criterion (c) in the briefing note, reflected in column 7 of the document in contention. Similarly, the further material the first appellant provided to the respondent on 28 January 2010 did not unequivocally support the conclusion which followed from the document in contention that the respondent's premises met criterion (c). Had the respondent been provided with the document in contention before making its representations under s 99, it could have addressed the apparently significant question as to whether its premises met criterion (c), that is, whether 10 or more serious assaults were committed at its premises during the relevant period.
- [50] Further, it could have emphasised to the appellants that no-one had been charged with a sexual assault arising out of an incident at its premises, contrary to what was asserted in the document in contention: see incident 5 in Appendix A to these reasons and the report of QP0900473203 provided by the first appellant to the respondent on 28 January 2010.<sup>69</sup> A sexual assault seems a more concerning and serious offence than a common assault.
- [51] The document in contention purported to be an accurate and succinct summary of violent episodes at the respondent's premises during the relevant period. It is likely to have been a useful and convenient document for the first appellant in making his decision. I consider the first appellant may well have relied upon it in making his classification of the respondent's premises as high risk on 3 March 2010, at least subconsciously.
- [52] In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*,<sup>70</sup> the High Court in a unanimous decision referred to Brennan J's much-cited statement in *Kioa v West*<sup>71</sup> as to what is to be done when a decision-maker has information adverse to the interests of the person who will be affected by the administrative decision to be made. In the ordinary case where no problem of confidentiality arises, the person should be given an opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made. That is because information of that kind creates a real risk of prejudice, although perhaps subconscious prejudice, so that it is unfair to deny the person an opportunity to deal with the information. The court emphasised:
- "Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do *in the course of* deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached.

...

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<sup>69</sup> Set out at [24] of these reasons.

<sup>70</sup> (2005) 225 CLR 88; [2005] HCA 72.

<sup>71</sup> (1985) 159 CLR 550, 628-629; [1985] HCA 81.

... 'Credible, relevant and significant' must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision.

...

It follows that the Tribunal's statement, that it gave no weight in reaching its decision to the letter or its contents, does not demonstrate that there was no obligation to reveal the information to the appellant and to give him an opportunity to respond to it before the Tribunal concluded its review. Deciding that it could reach its conclusion on other bases did not discharge the Tribunal's obligation to give the appellant procedural fairness.

...

... As has later been rightly said [*NIB Health Funds Ltd v Private Health Insurance Administration Council* (2002) 115 FCR 561, 583 [84] per Allsop J], 'the necessity to disclose such material in order to accord procedural fairness is not based on answering a causal question as to whether the material did in fact play a part in influencing the decision'. It follows that asking whether, despite what was said in its reasons, the Tribunal may have been subconsciously affected by the information distracts attention from the relevant inquiry. The relevant inquiry is: what procedures should have been followed? The relevant inquiry is neither what decision should the decision-maker have made, nor what reasons did the decision-maker give for the conclusion reached."<sup>72</sup>

[53] The document in contention may not have been as potentially adverse to the respondent as the unsolicited damning letter with which *VEAL* was concerned, but it did contain information adverse to the respondent's prospects of resisting a classification of its premises as high risk. It contained matters which were, at least arguably, wrong, and about which the respondent should have been given the opportunity to make submissions. Those submissions may not have affected the first appellant's decision but, as *VEAL* explains, that is not the point. The issue is whether proper procedure was followed. The document in contention should have been disclosed to the respondent but it was not. It may have influenced the first appellant's decision, at least subconsciously. Proper procedure in the sense of the abstract concept concerned with avoiding practical injustice described in *Lam* was not followed.

[54] For these reasons, I consider the primary judge was right in concluding that the first appellant's non-disclosure to the respondent of the document in contention amounted to a breach of natural justice. The appeal must be dismissed.

### **The notice of contention**

[55] In case I am wrong, I will briefly deal with the points raised in the respondent's notice of contention. True it is that the guidelines published by the first appellant under s 42A<sup>73</sup> refer to obligations imposed on licensees under s 148A(4)<sup>74</sup> to

<sup>72</sup> (2005) 225 CLR 88, 96-97 [16]-[19].

<sup>73</sup> Relevantly set out at [6] of these reasons.

<sup>74</sup> Relevantly set out at [10] of these reasons.

provide and maintain a safe environment in and around premises. Those matters are therefore relevant matters for the first appellant to take into account when considering whether licensed premises are high risk because there has been a level of violence at the premises that is unacceptable having regard to the *Liquor Act's* object to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse: s 97(1)(b)). Section 165 *Liquor Act*<sup>75</sup> permits an authorised person to require others to leave licensed premises in specified circumstances. The incidents alleged to have occurred on 11 January, 26 April and 31 May 2009 took place in circumstances where the respondent's security guards were removing misbehaving patrons, consistent with its obligations under s 165. In his notice of decision of 3 March 2010,<sup>76</sup> the first appellant rejected the respondent's contention that these incidents could not be taken into account in determining whether the premises were high risk. Section 148A and s 165 are contained in Pt 6 of the *Liquor Act* whereas the power to classify premises as high risk is in Pt 4. It does not follow from the fact that s 148A is mentioned in the guidelines issued under Pt 4 Div 9<sup>77</sup> that, because an incident occurred in the course of discharging obligations under s 148A, or indeed s 165, the incident must be ignored for the purposes of making a determination under s 97(1)(b).<sup>78</sup> These are matters which the decision-maker can consider, together with all other relevant factors, in making his or her decision under s 97(1)(b). The primary judge was right in concluding that the first appellant did not err in making his decision by taking into account incidents where the respondent was acting to provide and maintain a safe environment in its premises (s 148A(4)) or lawfully removing persons from its premises (s 165).

[56] And nor does s 97(1)(b)<sup>79</sup> in combination with s 3(a) *Liquor Act*<sup>80</sup> have the result that a violent incident can only be taken into account if it is shown to result from or be connected with alcohol abuse and misuse. Nothing in the terms of Pt 4 Div 9 *Liquor Act* requires that conclusion. Whilst the main purpose of the Act referred to in s 3(a) must be considered when acting under s 97(1)(b), the essential task in determining whether to classify premises as high risk under P 4 Div 9 is to decide whether there has been a level of violence at the premises during the relevant period that is unacceptable. It can be expected that commonly the violent incidents to be considered when acting under s 97 will have a connection with alcohol abuse or misuse. Incidents involving violence at licensed premises, even those not shown to be connected with alcohol abuse and misuse, may, however, be taken into account in determining whether the decision-maker is satisfied that the level of violence at premises is unacceptable. This will be a discretionary exercise turning on the relevant facts of each case. For example, fights between rival gangs at licensed premises, especially if involving broken bottles or glasses, may justify a high risk classification even where those involved were not abusing or misusing alcohol. But a single terrorist bombing of licensed premises, unassociated with alcohol abuse or misuse, may not justify a high risk classification.

[57] It follows that none of the issues raised in the respondent's notice of contention are made out.

<sup>75</sup> Relevantly set out at [11] of these reasons.

<sup>76</sup> Relevantly set out at [28]-[30] of these reasons.

<sup>77</sup> Relevantly set out at [14] of these reasons.

<sup>78</sup> Relevantly set out at [7] of these reasons.

<sup>79</sup> Above.

<sup>80</sup> Discussed in [5] of these reasons.

**Conclusion**

[58] The appeal must be dismissed. The appellants should pay the respondent's costs of the appeal.

**ORDER:**

1. Appeal dismissed with costs.

[59] **FRASER JA:** I agree with the reasons for judgment of the President and the order proposed by her Honour.

[60] **WHITE JA:** I agree with the President's reasons and the order she proposes.

**APPENDIX A**

| occnum   | OCC TYPE  | Charge Sequence | PAC Recorded Charge | Bus Org Name                                      | Suburb             | Occ Time            | Offender Status                  | Modus operandi  |
|--|---|-----------------|---------------------|---|--------------------|---------------------|----------------------------------|---|
| QP900119640<br>[Incident 1]  | 0217 - Assault<br>minor (not elsewhere<br>classified) |                 |                     | CAYNESTON PTY<br>LTD TRADING AS<br>MAD COW TAVERN | TOWNSVILLE<br>CITY | 14/02/2009<br>00.01 | Victim<br>Withdraws<br>Complaint | <p>THE OFFENCE LOCATION IS A NIGHT CLUB LOCATED ON THE TOWNSVILLE FLINDERS STREET EAST NIGHT CLUB STRIP. BETWEEN THE NOMINATED TIMES AND DATES. VICTIM HAS BEEN ASSOCIATING WITH THE SUSPECT WHO THE VICTIM KNEW BY FIRST NAME ONLY AND HAD MEET ONCE PREVIOUSLY AT ANOTHER NIGHT CLUB. VICTIM HAS ALLOWED THE SUSPECT TO PURCHASE A DRINKS, ALL OTHER DRINKS PREVIOUS HAD BEEN PURCHASED BY HER FRIEND WITNESS MOW, AFTER CONSUMING 2 X ALCOHOLIC DRINKS PURCHASED BY THE SUSPECT ALL PARTIES HAVE DECIDED TO LEAVE THE OFFENCE LOCATION AND GO TO ANOTHER NIGHT CLUB WHICH IS THE BULL WINKLES NIGHT CLUB. AFTER ENTERING THIS LOCATION THE VICTIM ENTERED THE TOILETS IN THE COMPANY OF WITNESS MOW. VICTIM DID NOT DRINK ANY ALCOHOL WHILST AT THIS NIGHT CLUB, VICTIM REPORTED TO WITNESS MOW THAT SHE WAS FEELING ILL AND PROCEEDED TO VOMIT. VICTIM HAS THEN LEFT THE NIGHT CLUB UNKNOWN TO WITNESS MOW. AFTER ATTEMPTING TO LOCATE WITNESS MOW CONTACTED THE VICTIM BY PHONE WHO STATED THAT SHE WAS IN THE GARDEN AREA AND STILL SICK. WITNESS MOW ATTENDED THIS LOCATION WHERE THE VICTIM WAS IN THE COMPANY OF THE SUSPECT. VICTIM STATED THAT SHE WANTED TO LEAVE AND THESE PARTIES CAUGHT A MAXI TAXI</p> <p>WHICH WENT VIA UNKNOWN AD AITKENVALE WERE THE SUSPECT RETRIEVED KEYS TO GAIN ACCESS TO HIS ACCOMMODATION FROM A BLACK HOLDEN UTE. ALL PARTIES ATTENDED LAVARACK BARRACKS WERE THE SUSPECT SIGNED SECURITY CLEARANCE GIVING ACCESS TO THE VICTIM AND WITNESS. DURING THIS TIME THE VICTIM WAS SICK AND NON RESPONSIVE AND DESCRIBED AS BEING OUT OF IT. SUSPECT STATED THAT HE WOULD TAKE THE VICTIM TO HIS ROOM AND SHE WOULD POSSIBLY REQUIRE A DRIP WHICH HE COULD ADMINISTER BECAUSE OF HIS TRAINING AND EXPERIENCE WORKING WITH CHILDREN WHILST IN IRAQ.</p> <p>SUSPECT THEN CARRIED THE VICTIM TO HIS ROOM BECAUSE SHE WAS INCAPABLE OF WALKING AND APPEARED TO BE IN A CONFUSED STATE AND AGAIN NON RESPONSIVE. WITNESS LEFT THIS LOCATION IN THE TAXI WERE THE TAXI DRIVER (FEMALE DRIVER) STATED TO THE WITNESS "THAT DOES NOT SOUND RIGHT" AND PROCEEDED TO THE SECURITY AT THE FRONT OF THE BARRACKS WERE THIS INCIDENT WAS RECORDED. WITNESS WAS THEN DROPPED AT HER HOME ADDRESS AND A SHORT TIME LATER SHE ATTEMPTED TO CALL THE VICTIM. VICTIM PHONE WAS ANSWERED BY THE SUSPECT WHO STATED THAT THE VICTIM WAS STILL IT OF IT AND THE MILITARY POLICE WERE CURRENTLY WITH HER.</p> <p>WHICH HE DID AND THE MILITARY POLICE CONFIRMED THAT THE VICTIM WAS OUT OF IT AND THE WITNESS NOW COULD COME AND COLLECT THE VICTIM OR SHE COULD STAY THERE THE NIGHT. WITNESS STATED SHE WOULD COME AND COLLECT THE VICTIM BUT MPS AGREED TO COME AND COLLECT THE WITNESS FROM HER HOME ADDRESS AND ACCOMPANY HER AND THE VICTIM'S PARTNER (WITNESS) TO THE BARRACKS TO COLLECT THE VICTIM. MILITARY POLICE THEN TRANSPORTED BOTH WITNESSES TO AN ACCOMMODATION AREA WITHIN THE LAVARACK BARRACKS WERE THE VICTIM WAS LOCATED.</p> |
| QP0900131571<br>[Incident 2; F4 in<br>the document in<br>contention] | 0214 - Assault<br>Occasioning<br>Bodily Harm          |                 |                     | CAYNESTON PTY<br>LTD TRADING AS<br>MAD COW TAVERN | TOWNSVILLE<br>CITY | 14/02/2009<br>3.00  | Unsolved                         | <p>DURING THE NOMINATED DATE AND TIMES VICTIM HAS ATTENDED THE OFFENCE LOCATION AND WAS SOCIALISING WITH FRIENDS WHILST CONSUMING ALCOHOL. THROUGHOUT THE NIGHT THE VICTIM CONSUMED APPROX TWELVE CORONA STUBBIES. THE VICTIM WAS STANDING AT THE END OF THE BAR NEAR THE POOL TABLE WITH A MATE HAVING GENERAL CONVERSATIONS WHEN UNKNOWN OFFENDER HAS KING HIT THE VICTIM FROM BEHIND CAUSING THE VICTIM TO FALL TO THE GROUND PAIN, DISCOMFORT AND CONCUSSION. AS THE VICTIM GOT UP HE SAW PEOPLE MOVING QUICKLY AND BELIEVES THE OFFENDER HAS DECAMPED IN THIS GROUP. WHEN THE VICTIM WAS HIT, HIS ASSOCIATE WAS ALSO HIT TO THE GROUND AND KICKED **** ADDENDIUM 20/02/2009 DURING THE NOMINATED DATE AND TIMES THE VICTIMS HAVE ATTENDED THE OFFENCE LOCATION AND WERE SOCIALISING WITH FRIENDS WHILST CONSUMING ALCOHOL. THROUGHOUT THE NIGHT VICTIM 1 CONSUMED APPROX TWELVE CORONA STUBBIES. VICTIM 1 WAS STANDING AT THE END OF THE BAR NEAR THE POOL TABLE WITH A MATE SEEN VICTIM 2 HAVING GENERAL CONVERSATIONS WHEN AN UNKNOWN OFFENDER HAS KING HIT VICTIM 1 FROM BEHIND CAUSING THE VICTIM TO FALL TO THE GROUND CAUSING HIM PAIN.</p>  |

|              |   |   |   |  |                    |                    |          |  |
|--------------|---|---|---|--|--------------------|--------------------|----------|--|
| QP0900411368 | 0215 - Assault<br>[Incident 3; F9 in<br>the document in<br>contention]  | 1 x Adult<br>Assault Or<br>obstruct police;<br>1 x Adult<br>serious assault<br>(assault .....<br>obstruct police);<br>1 x Adult<br>common<br>assault; 1 x<br>Adult commit<br>public nuisance;<br>1 x Adult<br>possesing<br>dangerous drug                   | 1 x 0215;<br>1 x 0218;<br>x 1011;<br>1316       | ...<br>CAYNESTON PTY<br>LTD TRADING AS<br>MAD COW TAVERN | TOWNSVILLE<br>CITY | 31/05/2009<br>2.53 | Arrested | <p>AN ALTERCATION HAS OCCURRED INSIDE THE MAD COW NIGHTCLUB INVOLVING THE OFFENDER, THE ALTERCATION MOVED TO THE OUTSIDE OF THE NIGHTCLUB ONTO THE FOOTPATH AREA WHERE VICTIM 1 WAS ASSAULTED BY THE OFFENDER ON A NUMBER OF OCCASIONS CAUSING HIM TO LOSE CONSCIOUSNESS FOR A SHORT AMOUNT OF TIME. POLICE WERE MADE AWARE OF THE INCIDENT AND HAVE ATTENDED AND VICTIM OFFICER 1 STRUGGLED WITH THE OFFENDER WITH THE ASSISTANCE OF OFFICER HANSEN FOR A CONSIDERABLE AMOUNT OF TIME BEFORE TAKING THE OFFENDER TO THE GROUND. THE OFFENDER CONTINUALLY STRUGGLED VIOLENTLY AND ASSISTANCE WAS GIVEN BY AN OFF DUTY POLICE OFFICER TO ASSIST IN THE HANDCUFFING OF THE OFFENDER. DURING THE RESTRAINT VICTIM POLICE OFFICER 1 RIGHT THUMB WAS CUT OPEN BY UNKNOWN MEANS. THE OFFENDER EVENTUALLY SUBDUED AND HANDCUFFED PROPER. ALL THE WHILE THE OFFENDER CONTINUED TO STRUGGLE VIOLENTLY. DURING THIS THE OFFENDER HAS GRABBED HOLD OF MICROPHONE TO THE POLICE RADIO ATTACHED TO VICTIM OFFICER PULLING HIM DOWN. THE OFFENDER WAS THEN TAKEN BACK TO THE POLICE VEHICLE AND UPON A SEARCH OF HIS PERSON A VERY SMALL BAG CONTAINING A VERY SMALL AMOUNT OF GLM WAS LOCATED AND OFFENDER WAS THEN</p> <p>TRANSPORTED TO THE WATCHHOUSE. AT THE WATCHHOUSE UNDER QUESTIONING THE OFFENDER STATED THE CONTENTS WERE HIS. OFFENDER NOT ELIGIBLE FOR DRUG DIVERSION AS HAS PREVIOUS DRUG OFFENCES. AS A RESULT THE VICTIM OFFICER HAS AN INJURY TO RIGHT THUMB GRAZING TO RIGHT ELBOW, SORENESS TO LEFT ELBOW, LEFT HAND AND DOWN THE LEFT OUTSIDE LEG. THE OFFENDER HAS RECEIVED MINOR CUT TO HIS THUMB WHICH IS BELIEVED TO HAVE OCCURRED WHILST ATTEMPTING TO HANDCUFF. THE VICTIM 1 WAS GIVEN MEDICAL AIDE AT THE TIME AND WAS TRANSPORTED BY AMBULANCE TO TOWNSVILLE HOSPITAL. NO VISIBLE INJURIES ON HENRY.</p> |
| QP0900411246 | 0214 - Assault<br>[Incident 4; F10<br>in the document<br>in contention] | 1 x Adult<br>Grievous Bodily<br>Harm; 1 x adult<br>driving motor<br>vehicle without<br>licence; 1 x<br>adult commit<br>public nuisance;<br>1 x adult assault<br>or obstruct<br>police; 1 x adult<br>serious assault<br>(assault/resist/o<br>bstruct police) | 1 x 0214; 1 x<br>0215; 1 x<br>1316; 1 x<br>1301 | CAYNESTON PTY<br>LTD TRADING AS<br>MAD COW TAVERN        | TOWNSVILLE<br>CITY | 31/05/2009<br>3.00 | Arrested | <p>BETWEEN THE OFFENCE TIMES, THE OFFENDER'S BROTHER WAS INVOLVED IN A FIGHT WITH SECURITY GUARDS FROM THE MAD COW TAVERN. THE VICTIM HAS ATTEMPT TO BREAK UP THE FIGHT. THE OFFENDER HAS ALSO GOT INVOLVED IN THE FIGHT CAUSING THE VICTIM TO SOMEHOW FALL TO THE GROUND. THE OFFENDER HAS THAN STOMPED ON HIS HEAD THREE TIMES CAUSING HIM TO LOSE CONSCIOUSNESS. POLICE HAVE THEN INTERVENED IN THE FIGHT BETWEEN THE SECURITY GUARDS AND THE OFFENDER'S BROTHER. AS POLICE WERE TRYING TO RESTRAIN THE OFFENDER'S BROTHER, THE OFFENDER HAS FORCIBLY WRAPPED HIS ARM AROUND THE CONS NECK IN AN ATTEMPT TO CHOKE HIM UNCONSCIOUS. THE CONS HAS TURNED HIS NECK TOWARDS THE OFFENDER TO PREVENT HIMSELF FROM BEING CHOKED UNCONSCIOUS AND WITH THE HELP OF OTHER POLICE OFFICERS AND OTHER SECURITY GUARDS HAVE WRESTLED THE OFFENDER TO THE GROUND WHERE THE OFFENDER WAS SUCCESSFUL. ARRESTED AND TAKEN TO THE WATCHHOUSE.</p>  |

|   |                                  |   |                    |                    |          |   |
|---|----------------------------------|---|--------------------|--------------------|----------|---|
| QP0900473203<br>[Incident 5; F11<br>in the document<br>in contention] | 0316 - Sexual<br>assault (other) | CAYNESTON PTY<br>LTD TRADING AS<br>MAD COW TAVERN | TOWNSVILLE<br>CITY | 21/06/2009<br>2.00 | Unsolved | <p>AT APPROXIMATELY 0215 HOURS ON 22/05/2009 THE VICTIM 1 WAS UPSTAIRS AT THE MAD COW TAVERN DANCING WITH THE WITNESS 1 AND A GROUP OF OTHER PEOPLE. THE VICTIM HAS SEEN THE SUSPECT WALK FROM THE BALCONY ONTO THE DANCE FLOOR AND BEGAN DANCING WITHIN THEIR GROUP. THE VICTIM WAS FACING THE SUSPECT WHEN SUDDENLY THE SUSPECT HAS FALLEN ON HIS BACK AND AS HE HAS FALLEN HAS GRABBED THE VICTIMS ARM AND PULLED THE VICTIM ON TOP OF HIMSELF. THE VICTIM WAS ON HER KNEES ON TOP OF THE SUSPECT WHEN THE SUSPECT HAS THEN SAT UP AND RUBBED HIS FACE INTO THE VICTIM'S BREASTS MOVING HIS HEAD FROM SIDE TO SIDE. AS HE HAS DONE THIS THE OFFENDER HAS BITTEN ONE OF HER BREAST AND THEN BIT THE OTHER BREAST. THE WITNESS NELSEN HAS SEEN THIS HELPING THE VICTIM UP AND PUSHING THE SUSPECT AWAY SAYING "YOU DON'T FUCKING DO THAT TO WOMEN". THE BOUNCER OF THE CLUB HAS COME OVER AND PICKED UP THE SUSPECT AT THIS TIME THE WITNESS HAS APPROACHED THE SUSPECT AND HAD A CONVERSATION WITH HIM IN WHICH SHE ADVISED THE SUSPECT THAT HE HAD HURT HER FRIEND.</p> <p>THE SUSPECT HAS THEN SAID TO THE VICTIM SOMETHING ALONG THE LINES OF "WHAT DID I DO TO YOU, DID I HURT YOU?" THE SUSPECT'S MALE FRIEND HAS SAID TO THE VICTIM "I AM SORRY FOR MY FRIEND'S BEHAVIOUR". THE VICTIM, WITNESS AND THEIR TOW FRIENDS HAVE LEFT THE CLUB WALKED ACROSS THE STREET AND REPORTED THE INCIDENT TO POLICE. THE WITNESS AND VICTIM STATED TO POLICE THE EVENTS. THE WITNESS INFORMED POLICE THAT SHE CAN IDENIFY THE SUSPECT. POLICE HAVE THEN ATTENDED THE MAD COW TAVERN TAKING UP WITH THE SUSPECT, THE SUSPECT'S MALE FRIEND AND SECURITY. POLICE HAVE THEN RETURNED TO THE VICTIM AND ADVISED HER TO ATTEND TOWNSVILLE POLICE STATION IF SHE WISHED TO MAKE A FORMAL COMPLAINT.</p> |
|---|----------------------------------|---|--------------------|--------------------|----------|---|

(Incident numbering and cross-references to document in contention added)

(errors as in original)