

NORTHERN TERRITORY LIQUOR COMMISSION
DECISION NOTICE AND REASONS FOR DECISION

CITATION: *COMPLAINT AGAINST P LAY ENTERPRISES PTY LTD* [2023] NTLiqComm 5

REFERENCE: LC2023/057

LICENSEE: P Lay Enterprises Pty Ltd

PREMISES: Howard Springs Supermarket
290 Whitewood Road
HOWARD SPRINGS NT 0835

LEGISLATION: Regulation 53(2) of the *Liquor Regulations 2019* and section 160(1)(b) of the *Liquor Act 2019*

HEARD BEFORE: Mr Richard Coates (Chairperson)
Dr Sean Taylor (Health Member)
Ms Christine Hart (Community Member)

DATE OF HEARING: 1 February 2023

DATE OF DECISION: 14 February 2023

DECISION

1. For the reasons set out below, the Northern Territory Liquor Commission (**the Commission**) is satisfied that P Lay Enterprises Pty Ltd (**the Licensee**) contravened Regulation 53(2) of the *Liquor Regulations 2019* (**the Regulations**) by exceeding the prescribed 25 per cent cap on sales of liquor in that liquor sales, for 2021/22 financial year totalled 33.02 per cent of all sales.
2. The Commission has determined it is appropriate to take disciplinary action against the Licensee pursuant to section 165 of the *Liquor Act 2019* (**the Act**) and imposes a monetary penalty of 60 penalty units.

REASONS

BACKGROUND

3. P Lay Enterprises Pty Ltd is the licensee of Howard Springs Supermarket (**the premises**), a licensed premises situated at 290 Whitewood Road, Howard

Springs NT, 0835. Mr Davin Lay is the nominee listed on current liquor licence number 80901218, which was initially granted on 15 August 1990.

4. On 12 August 2022, the Nominee signed a declaration as per regulation 53(3) of the Regulations. The Nominee declared that the percentage of their liquor sales for the 12 month period ending 30 June 2022 (2021/22 financial year), totalled 33.02 per cent. This is in contravention of regulation 53(2) as the licensee exceeded the prescribed 25 per cent cap on sales of liquor.
5. On 22 August 2022, pursuant to regulation 112 of the Regulations, the Director of Liquor Licensing (**the Director**) wrote to the Licensee and requested submissions or information that they believe should be taken into account by the Director should a complaint ensue. The licensee responded on 2 September 2022.
6. On 28 September 2022, a complaint was formally accepted by the Delegate of the Director of Liquor Licensing in accordance with section 161(2)(a) of the Act, and a notice of the complaint was provided to the licensee.
7. The complaint alleged that that the licensee had contravened regulation 53(2) of the Regulations. Regulation 53(2) provides that the gross value of the sales of liquor by the Licensee on the licensed premises must not exceed 25 per cent of the gross value of the sales of all products by the licensee during the financial year at the licensee's premises and any adjacent area where the non-liquor products are sold.
8. The Licensee requested an extension of time to respond to the complaint, which was accepted by the Delegate, pursuant to section 318(2) of the Act. The extension was permitted until COB 25 November 2022. A further extension was requested and granted on the 25 November 2022.
9. On 5 December 2022, a representative of the Licensee, Ms Mary Chalmers, provided a written response to the complaint. Attached to the response was an affidavit signed by nominee, Mr Davin Lay, and letters from; Mr Mark Aherne, Business Development Representative for Independent Grocers, Darwin; Sally Ozolins, Howard Springs resident; and Gerard Maley, MLA. The Licensee requested the Director consider 'alternative action' in response to the alleged breach.
10. On 13 December 2022, the Director referred the complaint to the Commission pursuant to section 163(1)(f) of the Act for disciplinary action.

THE HEARING

11. The hearing was originally listed for 18 January 2023, but counsel for the Licensee sought an adjournment and the hearing was re-listed for 1 February 2023. On that date, Ms Chalmers S.C. appeared for the Licensee, instructed by

Mr Vincent Close of Bowden McCormack Lawyers. Mr Lay, the nominee, was also present. Mr Bernard Kulda appeared to represent the Director. The Commission is grateful for the assistance provided by all those who participated in the hearing.

12. At the commencement of the hearing Ms Chalmers S.C., on behalf of the Licensee, admitted the substance of the complaint. She said that the Licensee had self-reported that it had exceeded the 25 per cent cap for the financial year ending 30 June 2022, and at all times co-operated with the licensing officials tasked with investigating the breach.
13. The Licensee acknowledged that it had been warned by the Director in relation to the fact that it had exceeded the cap by 4 per cent in the previous reporting period and that it should have taken greater care to ensure that its proportion of liquor sales were reduced rather than increased from the previous year.
14. In mitigation, it was submitted on behalf of the Licensee that it is a well-managed supermarket which provides an important amenity to the Howard Springs community and has done so for more than 30 years. It was stressed that whilst alcohol sales provided a vital revenue stream, it was not the focus of the business and there was no history of anti-social behaviour at or near the premises. The Licensee also relied on its prior unblemished compliance record as well as the positive contribution the Lay family has made to the Howard Springs community.
15. The Licensee also relied on testimonials from prominent local residents Ms Sally Ozolins and Mr Gerald Maley MLA, which emphasised the “excellent community relationship” this business has developed with the people of Howard Springs.
16. Although the Licensee properly conceded that it had received a warning that the previous year’s liquor sales exceeded the cap, it explained it had mistakenly attributed this to an extraordinary COVID related tourism boom. It acknowledged that it should have better monitored the percentage of liquor sales and detailed the measures it would implement to curtail sales in the future. These included a reduction in liquor trading hours, the cessation of bulk liquor sales to sporting clubs and an expansion of the delicatessen section of the store.

THE COMPLAINT IS UPHELD

17. As the Licensee has admitted the complaint, the Commission formally upholds the complaint on the ground for disciplinary action provided by section 160(1)(b) of the Act, that the Licensee has contravened a provision of the Regulations, specifically regulation 53(2).

DISCIPLINARY ACTION

18. The Commission has recently delivered two decisions in respect of similar complaints against licensed grocery stores exceeding the 25 per cent cap on liquor sales: Milner Road Foodtown, delivered on 14 December 2022¹; and Wanguri Supermarket, delivered on 20 December 2022².
19. In the Milner Road Foodtown decision the Commission considered the background, “context and rationale for regulation 53” and observed: -

3. *The Northern Territory has Australia’s highest alcohol consumption and suffers from the nation’s highest level of alcohol related harms. To address this issue, in 2017 the Northern Territory Government appointed an independent expert advisory panel to review the Northern Territory’s alcohol policies and legislation (the Riley Review). In its final report published in October 2017, the Riley Review made numerous recommendations, including:*

- 2.5.13 *Takeaway liquor only be permitted to be sold from a stand-alone business in which the primary focus of the business is the sale of alcohol.*

- 2.5.19 *Store licences transitioning to takeaway licences be subject to a condition restricting liquor sales to 15 per cent of the gross annual sales of the business, and a seven year sunset period in which time the licensee obtains a takeaway licence and the transitional licence will cease to operate.*

4. *In its final report, the Riley Review explained the basis for these two recommendations, as follows³:*

If the licensing framework was being created anew we would be of the view that no mixed business operations would be able to obtain a liquor licence. That is not the case and we must be mindful of the fact that some stores presently operate with liquor licences.

Both Queensland and Tasmania prohibit the sale of packaged liquor products in supermarkets under their respective Acts. Victoria and New South Wales permit packaged liquor sales from

¹ Commission’s decision LC2022/055, disciplinary action against Stuart Highway Investments Pty Ltd (Milner Road Foodtown)

² Commission’s decision LC2022/056, disciplinary action against VNR Enterprises Pty Ltd (Wanguri Supermarket)

³ Riley, Angus, Stedman and Matthews, Alcohol Policies and Legislation Review (Northern Territory Government, 2017), pp. 47-48

within a store, albeit with some restrictions. The Western Australian position is less clear, although in April 2016 the Director of Liquor Licensing did grant a liquor licence to an Aldi Supermarket. In granting the licence the Director imposed specific conditions to ensure the liquor products were adequately segregated from the general grocery shelves.

We have taken the position that the existing style of store licences should be phased out, and that takeaway liquor should only be sold from a standalone business (noting that this business could be attached to, but physically separate from, an on-premises licence). We consider that a business that does not have a primary focus of selling liquor should not be licensed to sell alcohol for takeaway consumption at all.

Some submissions in support of store licences argued that these stores are a convenience for shoppers by providing a 'one stop' shop for their groceries and alcohol. This convenience argument, when considered in the context of the harms that can arise from takeaway sales, is far from sufficient to change our position that store licences should be phased out. The approach we recommend will have a positive impact in two ways. First, it will reduce the availability of liquor overall. Secondly, it will send a clear message that alcohol need not be available in every context in community life. Alcohol is, as many have noted, 'no ordinary commodity'.

Some businesses have been operating under such a licence for some time. We therefore propose that existing operations be given some protection, while no further such licences should be issued. Existing businesses will be given the opportunity to transition to the new takeaway category of licence and, over a period of seven years, comply with the requirements of such a licence. In the period of transition the 'ancillary' aspect of the liquor licence will be subject to a restrictive definition.

The Riley Review went on to state⁴:

Sound harm minimisation principles require that alcohol products not be displayed in the same shelves as grocery products...

A store licence or an 'off premises licence' would be subject to particular transitional arrangements and to a sunset provision.... we have proposed a sunset period of seven years to apply to the

⁴ Ibid, pp 50-51

transitional arrangements. Further, and importantly, the transitional takeaway licence stores will hold in the interim, will be subject to a condition providing that the ancillary sales of takeaway liquor must not exceed 15 per cent of the licensees annual gross turnover....We have reached this figure by referring to information received from the Director-General advising the ancillary sales of liquor of individual store licence holders currently range from two per cent to 39 per cent, with an average of just under 13 per cent.

5. *In response to the Riley Report, the Northern Territory Government introduced the Act and the Regulations, which partially implemented these recommendations, by establishing a scheme for the licensing of grocery stores, with the following features:*
 - a. *A grocery store authority was established authorising the sale of liquor for consumption off premises at which the licensee or related entity sells groceries or other non-liquor items (section 47(1)(q)).*
 - b. *The creation or issue of new grocery store authorities was prohibited (section 84(2)).*
 - c. *The sale of liquor by a grocery store licensee must be “ancillary to the licensee’s primary business of selling goods and services other than liquor” (Regulation 53(1)).*
 - d. *The 25% cap was imposed (Regulation 53(2)).*
 - e. *Licensees are required to submit a declaration of compliance with the 25% cap in a form approved by and at the request of the Director (Regulation 53(3)).*
 - f. *The area where liquor is displayed, stored and sold must be clearly separated from the area where non-liquor products are displayed or sold (Regulation 55).*
 - g. *The Act and Regulations came into force on 1 October 2019, save for Regulations 53 and 55, which came into force on 1 October 2020.*
6. *It may be observed that this scheme departed from the Riley review recommendations in the following respects:*
 - a. *The proposed 15% cap was lifted to 25%.*
 - b. *The proposed 7 year sunset period was replaced with an indefinite “grandfather” scheme, pursuant to which no new*

grocery store authorities will be issued, but no express provision has been made to revoke existing store licences.

- c. *Affected licensees were allowed a year's grace to adjust their trading practices to bring them into compliance with the scheme. Indeed, as compliance with the 25% cap is assessed by reference to the financial year, licensees were in effect allowed until 30 June 2021 to commence compliance with the scheme, a date 21 months after the Act came into force.*

7. *The Commission infers that in enacting the scheme, the legislature intended not to give effect to the Riley review's preferred licensing framework, in which "no mixed business operations would be able to obtain a liquor licence", but instead intended to establish a scheme calculated to enable existing mixed businesses, many of which are small locally owned enterprises, to continue to trade. As will be seen below, the Commission has had regard to this in determining what disciplinary action to take in this matter.*

20. The Commission reiterated those observations in its Wanguri Supermarket decision and also noted:

...that in imposing disciplinary action in this matter, the principles of proportionality, parity and deterrence are significant⁵.

21. In both those earlier decisions, the Commission made it clear that, despite the harm caused by takeaway liquor trading, the statutory scheme of which regulation 53 (3) forms a part, was not established with the intention of making small businesses such as this untenable. The Commission stated⁶:

...Whether and how the licensee can establish a lawful mode of trade is up to the licensee. It may entail a reduction of trading hours, of trading days, and/or of the range of stock. It may involve making the substantial investment required to establish a takeaway food service. It may involve other measures.

However, although the Commission has not been prescriptive in specifying the particular measures the licensee should take, the Commission considers that it is appropriate to take firm steps to ensure that the licensee promptly brings itself into compliance with the law. In the event that the licensee fails to do so, the Commission expects that the Director will immediately bring the matter back to the Commission.

⁵ Commission's decision, disciplinary action against VNR Enterprises Pty Ltd (Wanguri Supermarket), para 11

⁶ Ibid, para 15

If that occurs, the licensee should expect to have its licence either suspended for a lengthy period or cancelled, measures that the Commission is well aware would likely result in the closure of the business.

22. In determining to impose a monetary penalty in both the previous cases, the Commission took the approach that as a starting point the penalty imposed should be substantially higher than the amount by which the Licensee has profited from its unlawful conduct. As licensees are only required to report the percentage of turnover generated by liquor sales and not the actual profit derived from liquor as opposed to grocery items, the Commission has had to proceed on the assumption that the profit margin is the same across liquor and non-liquor sales. The further complicating factor in this matter is that this Licensee has not yet prepared its financial statements for the 2021/22 financial year when this breach occurred. With the acquiescence of the Director, it was submitted by counsel for the Licensee that the best evidence available to gauge the extent of the unjustly derived benefit was the previous year's taxation returns (2020/21). Whilst not convinced that the previous year's profit and loss statement will necessarily serve as a reliable guide for the profitability of the business in the relevant year's trade, the Commission has accepted it as a starting point in the assessment process.
23. In the course of this hearing, the Commission handed to the representatives of the Director and the Licensee a draft "formula" which seemed to reflect the manner in which the Commission members that presided in the earlier two cases had calculated the penalty based on the level of the Licensee's "unjust enrichment". The draft formula multiplies the business's total net profit, plus any Director's wages, by the percentage difference between the 25 per cent liquor sales cap and the actual percentage of liquor sales. In this matter, the net profit was \$143,050 (albeit for the previous year) and the proportion of liquor sales to grocery sales was 8.02 per cent higher than the 25 per cent permitted by the Regulations. On that basis, it was suggested by the Commission that 8.02% of the total net profit of this business, namely \$11,472.61 should be regarded as unjustly derived.
24. Counsel for the Licensee sought a brief adjournment to consider the Commission's proposed method of calculating the unjust enrichment. It was then submitted that the 8.02 per cent should only be applied to the theoretical profit from liquor sales which was 33.02 per cent of the net profit.
25. Although Mr Kulda did not take issue with that submission, the Commission is not persuaded that it is mathematically correct nor does it seem to accord with the manner in which the Commission calculated the extent of the unjust enrichment in the earlier two cases. As there is no requirement for a Licensee to calculate the actual amount of profit derived from liquor as opposed to grocery

sales, the Commission can only operate on the assumption that 8.02 per cent of the gross sales of this business were not permitted by law. On that basis, if 8.02 per cent of total sales were unlawful then it is arguable that 8.02 per cent of total net profit is, in the circumstances, a reasonable approximation of the profit derived from the unlawful activity.

26. There is however, a degree of artificiality in these calculations and there will no doubt be instances where due to very high or low levels of turnover the application of the proposed formula produces unrealistic results. No doubt cases could also arise where the business records a loss, despite the fact that liquor sales are well above that permitted by the Regulations. It also behoves the Commission to have regard to the particular circumstances which arise in each case and to impose a penalty that is proportionate to the seriousness of the breach and the individual situation of the licensee.
27. In this matter the Commission has been impressed by the positive reputation that this Licensee holds within its local rural community. Whereas some of the small licensed grocery shops in suburban Darwin and Alice Springs are struggling to retain market share against competition from the major chains this business is clearly providing a quality of service and produce that the people of Howard Springs value. On the evidence before it, the Commission is satisfied that liquor sales are ancillary to the main business of this local supermarket which is grocery shopping.
28. The nominee, Davin Lay, gave a frank account of the reason for this breach in his affidavit sworn on 4 October 2022⁷. He stated at paragraph 20:

I admit that I did not keep a proper eye on the percentage of alcohol sales in the lead up to 30/6/22. I had not sat down and thought about what would happen with the alcohol sales percentage if the store renovation did not go through. I was a bit naïve in retrospect. I have never gone backwards in terms of operating a business. I am used to focussing on growing business not restricting it. I can now see that I should have put a plan in place to monitor alcohol sales percentages, and not risk that we would exceed the cap.

29. The Commission is satisfied that this Licensee is aware that any further breaches of this nature will be viewed most seriously and accepts that it is intending to implement a range of realistic measures to curtail future liquor sales. The fact that the Regulations now require quarterly returns on the percentage of liquor sales will also help keep Mr Lay focussed on the effectiveness of those measures.

⁷ Exhibit 1, page 36-41

30. In accordance with the decisions of Milner Road Foodtown and Wanguri Supermarket, the Commission takes the approach that as a starting point, a monetary penalty should be imposed that is substantially higher than the amount by which the Licensee has profited from its unlawful conduct⁸. The Commission has, however, reduced that penalty taking into account the Licensee's prior good record, its co-operation with the investigation and hearing of this complaint and more particularly, the positive findings in relation to the operation of this business referred to in paragraphs 27 to 29 above. In fixing the monetary penalty of 60 penalty units (which amounts to \$9,420) the Commission has also had regard to s. 167(1)(a), which fixes a maximum penalty of 200 penalty units and to the monetary penalties imposed on both the Milner Road Foodtown and Wanguri Supermarket licensees.
31. The Commission notes that section 167(3) provides that a monetary penalty must be paid within 28 days, or such longer period allowed by the Commission. The licensee did not seek a longer period.
32. The Commission is satisfied in accordance with section 165(1) of the Act that a ground for the disciplinary action exists and the disciplinary action it has taken is appropriate in relation to that ground.

NOTICE OF RIGHTS

33. Section 31(1) read with section 166(7) of the Act provide that the decision set out in this decision notice is reviewable by the Northern Territory Civil and Administrative Tribunal (NTCAT). Section 94(3) of the NTCAT Act provides that an application for review of a reviewable decision must be lodged within 28 days of the date of the decision.
34. In accordance with section 31(2) of the Act, the persons who may apply to NTCAT for a review of the decision are the Director and the licensee.



Richard Coates
CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
14 February 2023

On behalf of Commissioners Coates, Taylor and Hart

⁸ Commission's decision, disciplinary action against VNR Enterprises Pty Ltd (Wanguri Supermarket), para 16