

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

NOTE: BY ORDERS MADE ON 13 NOVEMBER 2023, THE NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL SET ASIDE THE LIQUOR COMMISSION'S DECISION AND ORDERS SET OUT BELOW, AND SUBSTITUTED A MONETARY PENALTY OF \$5,184 TO BE PAID IN MONTHLY INSTALMENTS OF \$500 ([2023] NTCAT 20)

MATTER: COMPLAINT AGAINST SMITH STREET SUPERMARKET
[2023] NTLiqComm 20

REFERENCE: LC2023/019

LICENCE NUMBER: 80901929

LICENSEE: Nulite Pty Ltd

PREMISES: Smith Street Supermarket
134 Smith St
DARWIN NT 0800

LEGISLATION: Part 7 Division 3 of the *Liquor Act 2019*

HEARD BEFORE: Mr Russell Goldflam (Chairman)
Mr Bernard Dwyer (Health Member)
Mr Denys Stedman (Community Member)

DATE OF HEARING: 19 July 2023

DATE OF DECISION: 26 July 2023

DECISION

1. On 19 July 2023, the Northern Territory Liquor Commission (**the Commission**) heard and upheld a complaint against Nulite Pty Ltd (**the licensee**), and decided to take disciplinary action against the licensee.
2. The Commission takes disciplinary action by imposing a monetary penalty of 80 penalty units (\$12,960) to be paid in monthly instalments of \$500 commencing no later than 28 days following the notification of this decision to the licensee.

STATEMENT OF REASONS

BACKGROUND¹

¹ For a more detailed account of the background to the regulatory regime discussed below, see complaint against licensee of Milner Road Foodtown (LC2022/055, 14 December 2022)

3. In October 2017, the Northern Territory Government published the Final Report of the *Alcohol Policies and Legislation Review (the Riley Review)*.² The Riley Review found that “[T]here is universal agreement that there are far too many licences to sell alcohol issued in the Northern Territory”.³ Accordingly, one of the Riley Review’s key recommendations was that “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”.⁴ The Expert Panel explained the rationale for this as follows:

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’.⁵

4. Noting that some mixed grocery businesses had been operating with “store licences” for many years, the Riley Review recommended that these licences be phased out over a period of seven years, and that in the interim they be subject to “a condition restricting liquor sales to 15 per cent of the gross annual sales of the business...”.⁶

5. The Northern Territory Government proceeded to partially implement these recommendations. In 2019, it enacted a permanent ban on the creation or issue of new grocery store authorities. In October 2019, the Minister for Alcohol Policy issued the *Liquor Regulations 2019 (the Regulations)*, including reg. 53, which provided:

(1) The sale of liquor under a grocery store authority must be ancillary to the licensee's primary business of selling goods and services other than liquor.

(2) For subregulation (1), the gross value of the sales of liquor by the licensee on the licensed premises must not exceed 25% of the gross value of the sales of all products by the licensee during the financial year at the licenses premises and any adjacent area where the non-liquor products are sold.

(3) A licensee with a grocery store authority must provide, on request from the Director, a declaration in the approved form that the licensee is complying with this regulation.

6. Grocery store licensees were allowed a year to adjust their business to comply with reg. 53, which was not brought into force until 1 October 2020.

7. In 2022, the Director of Liquor Licensing (**the Director**) referred several complaints to the Commission against a number of licensees trading with grocery store authorities for breaching reg. 53(2). For various reasons, the Director withdrew two of those complaints

² The Commission notes that Commissioner Stedman was a member of the Riley Review Expert Panel

³ Riley Review, p. 34

⁴ Riley Review, Recommendation 2.5.13

⁵ Riley Review, p. 48

⁶ Riley Review, Recommendation 2.5.19

before they were heard, and the Commission accordingly dismissed them.⁷ Three further complaints proceeded and were upheld, leading to the imposition of monetary penalties by the Commission.⁸

8. In the first half of 2023, the Northern Territory Government took further steps to implement this component of the Riley Review proposals. Firstly, on 24 January 2023, the Minister for Alcohol Policy issued an amendment to reg. 53(2), replacing the previous annual 25% cap with a requirement that the 25% cap apply to each quarter:

For subregulation (1), the gross value of the sales of liquor by the licensee on the licensed premises must not exceed 25% of the gross value of the sales of all products by the licensee, during each quarter, at the licensed premises and any adjacent area where the non-liquor products are sold.

9. Secondly, on 30 March 2023, the Minister for Alcohol Policy announced a “voluntary buy-back scheme... where grocery store licensees may express an interest for Government to purchase their liquor licence”. The Minister stated that the purpose of the scheme was:⁹

to reduce the number of alcohol takeaway outlets across the Territory as evidence shows the density of liquor outlets contributes substantially to alcohol-related harms and takeaway outlets pose the highest risk.

In January this year, the Territory Government enacted the quarterly reporting for 25 per cent cap on liquor sales – building on a recommendation of the Riley Review. It ensures that alcohol is not the primary product of grocery stores – alcohol sales must be ancillary to the key business of selling food and other groceries.

Grocery stores must be capable of making a profit without relying on the sale of alcohol. We have different licence categories for this reason – to protect our community.

10. Subsequently, in June 2023, the Director referred six complaints against licensees with a grocery store authority to the Commission. In each case, the complaint was that the licensee had breached reg. 53(2) by exceeding the 25% cap in the first quarter of the 2023 calendar year. One of those complaints was against the licensee.

THE HEARING

11. The matter proceeded as a public hearing on 18 July 2023. Mr Kulda appeared on behalf of the Director. Mr McGill, the licence nominee, appeared on behalf of the licensee. As the licensee was unrepresented, the hearing was conducted with a minimum of formality.

⁷ See complaints against the licensees of Woodroffe Fresh Food Supermarket (LC2022/004, 30 March 2022) and Mataranka Supermarket (LC2022/005, 5 May 2022)

⁸ See complaints against the licensees of Milner Road Foodtown (LC2022/055, 14 December 2022), Wanguri Supermarket (LC2022/056, 20 December 2022) and Howard Springs Supermarket ([2023] NTLiqComm 5, 14 February 2023)

⁹ “Voluntary Buy-Back of Grocery Store Liquor Licences across the Territory” (Media Release), accessed at https://newsroom.nt.gov.au/article/_nocache?id=2d29dd7bd6582f010603791958e564d5

12. The Commission received documentary evidence comprising details of the complaint, reg. 53(3) declarations by the licensee for various periods, financial records of the licensee's trading, and correspondence between the Director and the licensee. In addition, Mr McGill gave oral evidence.
13. The Commission received undisputed evidence from Mr McGill of the gross value of the sales by the licensee of liquor and other products in the relevant period, as well as the amount of mark-up applied by the licensee to its liquor products. The Commission has had regard to this evidence, but considers that as commercial-in-confidence information, it should be protected.

THE FACTS

14. The Commission finds the following facts, which are not in dispute.
15. The licensee submitted, in a timely fashion, declarations made in the approved form pursuant to reg. 53(3) stating the percentage of the gross value of the sales of all products by the licensee derived from the sale of liquor was:
 - a. 26.3% for the financial year ending 30 June 2021
 - b. 27.4% for the financial year ending 30 June 2022
 - c. 25.20% for the quarter from 1 January 2023 to 31 March 2023
 - d. 26.4% for the quarter 1 April 2023 to 30 June 2023
16. In August 2022, the Director wrote to the licensee stating that he would not take any action against the licensee for exceeding the annual 25% cap in the first complete financial year after reg. 53 had come into force, the 2021/2022 financial year.
17. In January 2022, the Director wrote to the licensee again, reminding him of the importance of compliance with the 25% cap, and warning him of the potential consequences of breaching it.

THE LAW

18. The amended regulations issued on 24 January 2023 came into force the following day. No transitional provisions were prescribed, and there are no express words in reg. 53 as brought into force on 25 January 2023 that they were intended to operate retrospectively.
19. It is a well-established principle of statutory construction that a statute is presumed not to have retrospective operation:

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.¹⁰

¹⁰ Maxwell v Murphy (1957) 96 CLR 261, 637–8 per Dixon CJ

20. The courts have applied this presumption with particular vigour in relation to penal provisions. Although reg. 53 is not in its terms a penal provision, penalties can apply to licensees who are found to have breached it, and accordingly in effect it has a penal character.
21. If the Minister for Alcohol Policy had intended the regulations she made on 24 January 2023 to apply to trading by licensees for a period commencing before that date, she could have, and in the view of the Commission would have, used express words to give effect to that intention. She did not do so. The Commission considers that there was no such intention on the part of the Minister.
22. Accordingly, the Commission proceeds on the basis that reg. 53 as in force since 25 January 2023 is applicable only to quarterly periods that commenced after that date.
23. It follows that it was not a breach of reg. 53 as now in force to trade in excess of the 25% cap for the first quarter of 2023. However, it does not necessarily follow that this complaint must be dismissed.
24. Section 166(4) the Act provides that the Commission “may hear a matter not referred to it but which arises from a matter that was referred to it”. In the view of the Commission, having regard to the history of reg. 53 and the policy that underlies it, a matter arising from the complaint referred to the Commission is whether the licensee breached the 25% cap in the *second* quarter of 2023, a quarter that commenced after the January 2023 amendments had come into force.
25. Following receipt of this referral from the Director, the Commission notified the Director and the licensee that it proposed to proceed accordingly, and requested the parties to provide a reg. 53(3) declaration for the period 1 April to 30 June 2023. The Commission delayed the hearing of this complaint until mid-July 2023 to provide the licensee with sufficient time to make that declaration, which it did.
26. At the hearing, the Commission provided Mr McGill with an opportunity to object to this proposed course. Mr McGill made no such objection, and the Commission notes that throughout the hearing he was co-operative and compliant.

METHOD OF CALCULATION

27. In its reg. 53(3) declarations, the licensee calculated the gross value of sales on a GST-inclusive basis. However, in the view of the Commission, reg. 53(3) declarations should be made by comparing the gross value of sales of liquor and other products exclusive of GST. When a product is sold, its value to the vendor does not include the GST that is charged to the customer, because the GST is paid on by the vendor to the state. Liquor is not GST-exempt, but some of the other products sold by supermarkets, such as fresh food, are GST-exempt.
28. Making a reg. 53(3) declaration on a GST-exclusive basis is therefore to the advantage of licensees, because it results in a modest reduction in the percentage of the gross value of the sales of all products derived from the sale of liquor. In this case, for example,

the licensee declared that it traded 1.4% over the cap in the second quarter of 2023. On a GST-exclusive basis, the Commission calculates that the cap was exceeded by about 0.7%.

29. The Commission suggests that the Director inform other grocery store licensees that when making future reg. 53(3) declarations, they do so on a GST-exclusive basis.

THE COMPLAINT IS UPHELD

30. For the reasons set out above, the Commission does not find that the licensee breached reg. 53(2) in the first quarter of the 2023 calendar year. However, the Commission finds that the licensee did breach reg. 53(2) in the second quarter of the 2023 calendar year and that this is a matter arising from the matter that was referred to it. Accordingly, the Commission upholds the complaint.

DISCIPLINARY ACTION

31. The Director recommended that the Commission take disciplinary action by imposing a monetary penalty on the licensee. The Commission agrees. The Director made no submissions as to how the amount of this penalty should be calculated.

32. The Commission considers that in imposing disciplinary action in this matter, the principles of proportionality, deterrence and maintaining consistency with previous similar decisions of the Commission are significant.

33. Despite being aware since 2019 of the looming requirement to reduce the proportion of its liquor sales, it appears that the licensee has to date never complied with the 25% cap. The licensee has knowingly continued to trade in breach of the regulations for over two years, during which it has failed to take effective steps to bring itself into compliance with the regulations.

34. The Commission considers that in the light of the Director's decision not to take any action against the licensee for exceeding the 25% cap in the 2021/2022 financial year, it would be unfair for the Commission to now penalise the licensee for its trading in that period.

35. However, although this complaint has been upheld only in relation to the licensee's trading in the second quarter of 2023, the Commission considers that in assessing the seriousness of the breach and determining the disciplinary action it takes, it is permissible and appropriate to calculate the penalty the Commission has decided to impose by reference to the licensee's conduct over the full 2022/2023 financial year, as it is apparent that the licensee has traded throughout that period in breach of the cap, despite the Director's written warnings not to do so issued in August 2022 and in January 2023. At the hearing, the Commission asked Mr McGill if he wished to make submissions that the penalty should not be calculated by reference to the full 2022/2023 financial year. Mr McGill declined to make such a submission.

36. In considering what disciplinary action to impose, the Commission has also had regard to the following circumstances:

- a. The licensee has attempted to reduce its liquor sales percentage by:

- i. keeping all liquor in a locked cage, including during liquor trading hours;
- ii. selling liquor only to customers who produce proof of local residence;
- iii. ceasing the sale of cheap bottled wine;
- iv. trialling a reduction of hours when liquor is sold (although that trial was ineffective, and the licensee currently trades in liquor from 10 am to 8 pm)

b. Over the last ten years the licensee has had a good record of compliance with the Act and the conditions of its licence, and the nominee has been co-operative and pro-active in his dealings with Licensing NT inspectors.

c. The licensee has accepted legal advice that he is precluded from entering into negotiations with the government to sell back the licence because the licensee's lease includes a clause that requires it not to do anything that would result in the liquor licence being cancelled.

d. The licensee, a small family-run business, has in recent times operated in extremely challenging financial circumstances.

e. Australia's liquor and grocery sectors are dominated by major national chains with large stores in Darwin that have been easily able to adjust their trading practices to comply with the Northern Territory's grocery stores regulatory regime. Small independent licensed grocery stores such as the licensee's have lost trade as a result of the downturn in tourism, on top of the ongoing disadvantages of competing with the large chains.

37. After considering the statutory scheme of which regulation 53 forms a part, in the view of the Commission, despite the harm caused by takeaway liquor trading, that scheme was not established with the intention of putting small businesses out of business. Accordingly, despite the seriousness of this breach, the Commission has decided to impose disciplinary action calculated not to put this licensee out of business. 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.

38. 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. 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.

39. As the licensee has unlawfully enriched itself, the Commission considers it appropriate to impoverish the licensee by imposing a monetary penalty in accordance with sections 165(2)(d) and 167. In fixing this penalty, the Commission takes as a starting point the approach that a penalty be imposed that is substantially higher than the amount by which the licensee has profited from its unlawful conduct. The Commission has reduced that penalty taking into account:

- a. the relatively modest margin by which the licensee has exceeded the 25% cap;
- b. the licensee's unblemished record of compliance;
- c. its co-operation with the investigation and hearing of this complaint;
- d. its significant (but to date ineffective) attempts to identify available measures to address the concerns raised by the complaint; and
- e. the licensee's current financial circumstances.

40. In fixing a monetary penalty of 80 penalty units (which the Commission calculates amounts to \$12,960, using the penalty unit amount of \$162 for the period 1 July 2022 to 30 June 2023), the Commission has also had regard to section 167(1)(a), which fixes a maximum penalty of 200 penalty units. The Commission considers that the monetary penalty it has fixed is sufficient to send a message to licensees and the community of the importance of complying with the 25% cap.

41. Section 167(3) provides that a monetary penalty must be paid within 28 days, or such longer period allowed by the Commission. The licensee requested that the monetary penalty be paid in monthly instalments of \$500. The Director did not oppose that course, and the Commission has so ordered.

42. 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.

43. As required by s 3(4) of the Act, the Commission has had regard to the purposes of the Act, and considers that its decision has been made in a way consistent with those purposes.

NOTICE OF RIGHTS

44. Section 31(1) read with s 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.

45. In accordance with s 31(2) of the Act, the persons who may apply to NTCAT for a review of the decision are the Director and the licensee.



RUSSELL GOLDFLAM
CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
26 July 2023

On behalf of Commissioners Goldflam, Dwyer and Stedman