

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: *COMPLAINT AGAINST WAGAIT BEACH SUPERMARKET*
[2023] NTLiqComm 35

REFERENCE: LC2023/015

LICENCE NUMBER: 80904232

LICENSEE: Shining Space Development Pty Ltd

PREMISES: Wagait Beach Supermarket
13 Wagait Tower Road
Wagait Beach NT 0822

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

HEARD BEFORE: Mr Russell Goldflam (Chairman)
Dr Sean Taylor (Health Member)
Mr Bernard Dwyer (Health Member)

DATE OF HEARING: 25 October 2023

DATE OF DECISION: 7 November 2023

DECISION

1. On 25 October 2023, the Northern Territory Liquor Commission (**the Commission**) heard and upheld a complaint against Shining Space Development 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 99 penalty units of \$162 (being the applicable value of a penalty unit for the year ending on 30 June 2023), to the sum of \$16,038 to be paid in monthly instalments of no less than \$500 commencing no later than 28 days following the notification of this decision to the licensee.

REASONS

BACKGROUND

3. This matter concerns a complaint against a licensee for breaching reg 53 of the *Liquor Regulations 2019 (NT)* (**the 25% grocery store cap**). The background to reg 53 and complaints made for breaching the 25% grocery store cap is set out in the Commission's decisions to take disciplinary action against the licensees of Milner Road Foodtown

(LC2022/055, 14 December 2022) and the Smith Street Supermarket ([2023] NTLiqComm 20).¹

4. Regulation 53 of the *Liquor Regulations 2019* (NT) (**the Regulations**) provides:
 - (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 each quarter, at the licensee's 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.
5. From 1 October 2020, when reg 53 originally came into force, until 24 January 2023, when it was amended, the prescribed reporting period for the purpose of reg 53(2) was "the financial year". Since 25 January 2023, the prescribed reporting period has, as stated above, been "each quarter".
6. In June 2023, the Director of Liquor Licensing (**the Director**) referred six complaints against licensees to the Commission for breaching the 25% grocery store cap in the first quarter of the 2023 calendar year. One of those complaints was against the licensee.
7. The licensee operates the Wagait Street Supermarket, a small general store on the Cox Peninsula, a fifteen minute ferry trip or 90 minute drive from Darwin. Customers are a mixture of local residents (many of whom are retired), members of the Belyuen Aboriginal community 12 km away, and visitors from Darwin who come for fishing and site-seeing. There are no other takeaway liquor outlets on the Cox Peninsula.
8. The licensee is a company owned jointly by Mr Chen Zhang (**Mr Zhang**), the licensee nominee, and Ms Hong Lim Wang (**Ms Wang**). Mr Zhang and Ms Wang both draw salaries as managers and employees of the business.
9. On 5 July 2023, the Commission Chairperson wrote to the licensee as follows:

Although the evidence in the brief appears to support the Director's allegation that the licensee exceeded the 25% cap in the first quarter of 2023, Regulation 53(2) in its current form only came into force after the commencement of that period, on 25 January 2023. Accordingly, in my tentative view, the Commission will be precluded from finding that the licensee breached Regulation 53(2) as a result of its conduct in the first quarter of 2023. However, also in my tentative view, it would be open to the Commission to uphold the complaint if it is satisfied that the licensee exceeded the 25% cap in the second quarter of 2023.

¹ As of the date of this decision, an application by the licensee of the Smith Street Supermarket to the Northern Territory Civil and Administrative Tribunal to review the Commission's decision is pending.

10. In its decision delivered on 26 July 2023 in relation to one of the other licensees the subject of the June 2023 complaints, the Commission confirmed these tentative views in the following terms:²

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.

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.³

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.

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.

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.

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.

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.

² *Smith Street Supermarket* [2023] NTLiqComm 20, [18] to [24]

³ *Maxwell v Murphy* (1957) 96 CLR 261, 637–8 per Dixon CJ

11. On 25 August 2023, the Director supplemented its referral of the present complaint to the Commission with a brief that included evidence that the licensee had exceeded the 25% grocery store cap in the second quarter of the 2023 calendar year. The Commission then proceeded to schedule the complaint for hearing on 20 September 2023.

THE HEARING

12. The matter was unable to proceed on 20 September 2023 because Mr Zhang was overseas, and had instead arranged for Ms Wang to attend on his behalf. Unfortunately, Ms Wang did not appear to be familiar with the details of the complaint, and the Commission formed the view that due to her lack of oral English proficiency, it would be unfair to the licensee for the hearing to proceed without the services of an interpreter. The Commission adjourned the hearing to 25 October 2023. Mr Zhang should have informed the Commission and the Director in advance of the circumstances of his non-attendance, and he should not have sent a representative who was unprepared and ill-equipped to appear on his behalf.

13. The hearing proceeded on 25 October 2023. Mr Verity appeared on behalf of the Director. Mr Zhang appeared, accompanied by Ms Aihua Feng, the landlord and owner of the premises, and former operator of the business. Mr James Ryan, Ms Feng's husband also participated in the hearing. The Commission arranged for Mr Hanshi Chen, a Mandarin/English interpreter, to also attend. The Commission thanks the parties and the interpreter for their attendance and assistance. At the commencement of the hearing, the Commission formed the opinion that to protect commercial-in-confidence information it would not be appropriate to conduct the hearing in public, and accordingly ordered that it continue in private. As the licensee was unrepresented, the hearing was conducted with a minimum of formality.

14. The Commission received documentary evidence including:

- details of the complaint;
- liquor licence 80904232;
- reg 53(3) declarations by the licensee for various periods;
- financial records of the licensee's trading;
- complaint dated 9 May 2023 that the licensee breached the 25% grocery store cap for the first quarter of the 2023 calendar year
- correspondence between the Director and the licensee;
- letter dated 23 October 2023 from Belyuen Community Government Council

In addition, Mr Zhang, Ms Feng and Mr Ryan gave oral evidence.

15. The Commission has had regard to all the evidence received, but declines to include in this decision notice information that the Commission considers to be commercial-in-confidence.

16. Following the hearing, the Commission corresponded with Mr Zhang and the Director to clarify an apparent discrepancy in the evidence received by the Commission during the hearing regarding some commercial-in-confidence information. This issue was clarified to the satisfaction of the Commission without having to re-open the hearing.

THE FACTS

17. The Commission finds the following facts, which were not in dispute.

18. On or about 5 July 2022, the Director transferred liquor licence 80904232 with a grocery store authority from the previous holder of the licence to the licensee, trading as Wagait Beach Supermarket at 13 Wagait Tower Road, Wagait Beach, NT 0822.

19. On 10 August 2022, the nominee signed a declaration as per regulation 53(3) of the Regulations, declaring that the percentage of the licensee's liquor sales for the 2021/2022 financial year was 32.50%.

20. On 15 August 2022, the Director wrote to the nominee acknowledging that the licensee had only recently acquired the business, and warning the licensee that its liquor sales were tracking higher than the allowable cap. As a result of this, the Director requested that a further declaration for the period 1 July to 30 November 2022 be submitted by 14 December 2022.

21. On 15 December 2022, the nominee provided a declaration for the period between 1 July 2022 and 30 November 2022 that liquor sales accounted for 32.89% of the total gross value of all sales at the premises.

22. On 3 January 2023, the Director issued a further warning to the licensee for breaching the 25% cap, and urged it to take urgent and immediate action to bring itself into compliance with the law.

23. On 30 January 2023, the Director wrote to all licensees who hold a grocery store authority, including the licensee, advising that the amended Regulations now required grocery store liquor licensees to be compliant with the 25% cap for each quarter of the financial year.

24. On 12 April 2023, the nominee signed a declaration as per reg 53(3). The nominee declared that the percentage of the licensee's liquor sales for the period between the first quarter of the 2023 calendar year was 29.88%, exclusive of GST.

25. On 15 May 2023, having accepted a complaint against the licensee, a Delegate of the Director invited the licensee to respond to the complaint. On 28 May 2023, the licensee submitted its response. The licensee's response can be summarised as follows:

a. The licensee was striving to reduce the sale of liquor to meet the 25% cap by:

- i. Limiting the amount of liquor customers would be permitted to purchase.
- ii. Expanding the range of grocery products to increase non-liquor sales, including adding more takeaway food varieties.

- iii. Researching opportunities to expand the scope of the current business, such as an accommodation service in the Wagait Beach area.
 - b. The licensee stated that the previous licensee's liquor sales had been well over 25%.
 - c. The licensee expressed concern that reducing the hours and days of liquor trading would have an impact on community peace and order and might cause issues around discrimination.
26. On 14 August 2023, the nominee provided a further declaration as per reg 53(3), declaring that the percentage of the licensee's liquor sales for the second quarter of the 2023 calendar year was 32.2%.
27. In October 2023 the licensee decided to cease opening its bottleshop on Tuesdays and Wednesdays, in an effort to comply with the 25% grocery store cap. The licensee adduced evidence, which the Commission accepts, that it traded in compliance with the cap for the period 1 October 2023 to 22 October 2023.⁴ That is to the licensee's credit.

THE COMPLAINT IS UPHELD

28. 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 licensee admits that it breached reg 53(2) in the second quarter of the 2023 calendar year, and the Commission so finds. In the view of the Commission, this is a matter arising from the matter that was referred to it, and accordingly the Commission upholds the complaint.

DISCIPLINARY ACTION: PRINCIPLES

29. Section 165(1) of the Act provides that in taking disciplinary action, the Commission must be satisfied that a ground for the disciplinary action exists, and that the disciplinary action is appropriate in relation to that ground. In the recent case of *Australian Building and Construction Commission v Pattinson (Pattinson)*,⁵ the plurality of the High Court that "an 'appropriate' [civil] penalty is one that strikes a reasonable balance between oppressive severity and the need for deterrence in respect of the particular case".⁶
30. The court also held in that in contrast to criminal sentences, "the purpose of a civil penalty [under the *Fair Work Act 2009* (Cth)] is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the Act by the deterrence of further contraventions of the Act".⁷ The plurality observed that a civil penalty "must be fixed with a view to ensuring that the penalty is not such as to be regarded by [the] offender or others as an acceptable cost of doing business."⁸

⁴ Exhibit Four: Wagait Beach Supermarket Department Sales report, 1/10/2023 to 22/10/2023

⁵ [2022] HCA 13; (2022) 274 CLR 450

⁶ *Pattinson*, at [46]

⁷ *Pattinson* at [9]

⁸ *Ibid* at [17] citing with approval *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [62]

31. Accordingly, the Commission considers that in imposing disciplinary action in this matter, the principle of deterrence is of primary significance. To give effect to that principle, and as the Commission has done in the other matters in which it has imposed disciplinary action on licensees for breaching the 25% grocery store cap, the Commission considers that the disciplinary action it takes should, at a minimum, effectively impoverish the licensee by the same amount as it has unlawfully enriched itself.

THE RELEVANT PERIOD

32. Having regard to the circumstances set out at paragraphs 18 to 24 above, the Commission considers that it is appropriate to have regard to the period from 1 January 2023 to 30 June 2023 when determining the disciplinary action it takes. The Commission considers that it would not be fair to now penalise the licensee for its trading before 1 January 2023, because on 3 January 2023 the Director elected to issue the licensee with a warning, rather than to take disciplinary action for the licensee's trading over the previous six months.

33. On the other hand, it is apparent that the licensee traded throughout the period 1 January 2023 to 30 June 2023 in breach of the cap, despite the Director's written warnings not to do so issued in August 2022 and twice in January 2023. Accordingly, the Commission considers that it is appropriate to fix the penalty it imposes by reference to this entire period.

34. This is consistent with the approach the Commission took with the licensees of the Smith Street Supermarket and Mataranka Supermarkets, which also breached the 25% grocery store cap. The Commission considers that this approach is supported by s 166(4) of the Act, which provides that the Commission "may hear a matter not referred to it but which arises from a matter that was referred to it".

35. Furthermore, the Commission infers that reg 53(2) was amended in January 2023 to increase the stringency of the 25% grocery store cap scheme. Had the scheme not been so amended, the Commission considers that in all likelihood the licensee would have been liable to a complaint that it had breached the 25% grocery store cap for the financial year 2022/2023, and that the Commission would have upheld such a complaint. It would be anomalous and inappropriate to now impose on the licensee less stringent disciplinary action only because of the (presumably unintended) consequence of an amendment that was intended to result in more stringent enforcement of the scheme.

THE CAP IS CALCULATED ON A GST-EXCLUSIVE BASIS

36. In accordance with the Commission's preferred approach,⁹ the licensee calculated the gross value of sales for the second quarter of the 2023 calendar year on a GST-exclusive basis in its reg 53(3) declaration.¹⁰

⁹ See *Smith Street Supermarket* [2023] NTLiqComm 20, [27] to [29]

¹⁰ Exhibit Two, p. 5

THE BELYUEN LETTER

37. The licensee is the closest takeaway liquor outlet to Belyuen Aboriginal Community, some 12 km away. Liquor is currently prohibited in Belyuen, an interim alcohol protected area.¹¹
38. However, liquor was not prohibited in Belyuen from 16 July 2022 (when the *Stronger Futures in the Northern Territory Act 2012* (Cth) expired) and 16 February 2023 (when the *Liquor Amendment Act 2023* (NT)) commenced. That period coincided with the first seven months following the acquisition by the licensee of its liquor licence.
39. On 25 October 2023, the day of the hearing, the CEO of the Belyuen Community Government Council sent a letter signed by the President of the Council (**the Belyuen letter**) to Licensing NT. The Belyuen letter contained allegations that the licensee's liquor trading practices were contributing to serious problems in the Belyuen community. Over the objection of the licensee, the Commission admitted the Belyuen letter into evidence. However, the Commission indicated to the parties that as neither the licensee or the Director had been provided with an opportunity to respond to the allegations in the Belyuen letter, it would be unfair for the Commission to have regard to those allegations when considering the current complaint, and the Commission has not done so. Instead, as provided for by s 158(1)(a) of the Act, the Commission Chairperson has requested the Director to conduct an investigation into the licensee, specifically in relation to the matters raised in the Belyuen letter.
40. The Commission notes that the licence contains the following condition:

Community Agreement

A reasonable written agreement must be in place with the Belyuen Community. If this agreement is breached or there is an indication that it may break down the matter must be referred to the Commission as soon as practicable or in any event within three (3) working days.

No sales of beer in glass containers to known Belyuen residents.

No sales of wine or spirits to known Belyuen residents.

41. It is of concern to the Commission that neither the licensee or the Director was able to provide the Commission with a copy of the Community Agreement, or information regarding its content, establishment or current status. The Belyuen letter made no reference to the Community Agreement. Mr Zhang's evidence was that the licensee does not sell bottled beer, wine or spirits to known Belyuen residents, and that about 25% of the licensee's general and liquor business is with Belyuen residents.

THE CIRCUMSTANCES OF THE BREACH AND THE LICENSEE

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

¹¹ See Part 8 Division 1 of the Act

43. The licensee has taken the measures to reduce its liquor sales percentage set out at paragraph 25.a) above. Unfortunately, however, those measures did not enable the licensee to make substantial progress in meeting the challenge of reducing its liquor trade to achieve compliance with the law.
44. Since early October 2023 the licensee has ceased the sale of liquor on Tuesdays and Wednesdays, and during that brief period it has operated in compliance with the cap.
45. The Commission has had regard to financial records provided by the licensee showing profit and loss, income and expenditure and associated statements and reports for its trading from 1 July 2021 to 30 June 2022. The Commission notes that this period expired before the Mr Zhang acquired the business. Ms Feng's evidence, which the Commission accepts, was that in 2021, when she purchased the business from its former long-standing proprietor, about 35% of the store's turnover was from the sale of liquor. To bring itself into compliance with the grocery store cap, the licensee has had to implement a very substantial change to its business model. On the other hand, the Commission also accepts Ms Feng's evidence that when Mr Zhang and Ms Hong purchased the business from Ms Feng, she had informed them of both the existence of the 25% grocery store cap, and the business's trading history.
46. Australia's liquor and grocery sectors are dominated by major national chains with large stores in nearby Darwin that have been easily able to adjust their trading practices to comply with the Northern Territory's grocery stores regulatory regime. The big chains have an enormous competitive advantage over small family businesses such as the licensee's.
47. The licensee has decided not to take up the Northern Territory Government's recent offer to buy back grocery store liquor licences, because, as Mr Zhang put it, "we are a convenience store and the people in the community really need us".
48. The Wagait Beach Supermarket is the only takeaway liquor outlet on the Cox Peninsula, which has a population of about 600. Locals generally do their weekly grocery shopping at a Darwin supermarket, but many of them rely on the licensee to supply them with liquor, in part because it is inconvenient to carry home bulky items on the ferry. The Commission received evidence that there appears to be a recent trend for nearby residents to purchase liquor on-line and pick it up from the Wagait Beach Supermarket, which is an Australia Post Community Postal Agent (CPA). The licensee makes negligible profit from providing this community service.
49. The licensee has in recent times operated in highly challenging financial circumstances. The Commission accepts the licensee's evidence that on the days in October 2023 when no liquor was sold, its total sales declined by about 50%. Without the availability of liquor, it appears that some local residents who would otherwise have done some general shopping at the Wagait Beach Supermarket shop elsewhere.

A MONETARY PENALTY

50. In the view of the Commission, despite the harm caused by takeaway liquor trading, the 25% grocery store cap 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.

51. The Commission does not consider that it would be appropriate or efficacious to vary the conditions of the licence: the licensee has demonstrated the capacity and willingness to vary its trading operations on its own initiative as a means of reducing its liquor trade, and the Commission expects that the licensee is likely to continue to do so as required by changing circumstances.
52. As with the other licensees that have been dealt with for breaching the 25% grocery store cap, in the circumstances of this case, the Commission does not consider that it is necessary to go beyond a penalty that impoverishes the licensee by the same amount as it has unlawfully enriched itself.
53. The Commission indicated to the licensee that it would, if requested, give consideration to taking hybrid disciplinary action comprising a combination of licence suspension and a monetary penalty, as the Commission has recently done in another case. The licensee, however, made no such request. Accordingly, the Commission has determined to take disciplinary action solely by way of a monetary penalty.
54. In the event that the licensee fails to comply with the 25% grocery store cap in the future, 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.
55. In fixing the monetary penalty component of the disciplinary action, 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 disciplinary action it has imposed is sufficient to send a message to licensees and the community of the importance of complying with the 25% grocery store cap.
56. Section 167(3) of the Act 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.
57. The Commission is satisfied in accordance with s 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.
58. 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

59. 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.

60. 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.

A handwritten signature in blue ink, appearing to read 'R. Goldflam', with a long horizontal flourish extending to the right.

RUSSELL GOLDFLAM
CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
7 November 2023

On behalf of Commissioners Goldflam, Dwyer and Taylor