

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: *COMPLAINT AGAINST MATARANKA SUPERMARKET* [2023]
NTLiqComm 31

REFERENCE: LC2023/014

LICENCE NUMBER: 80900058

LICENSEE: Mataranka Supermarket NT Pty Ltd

PREMISES: Mataranka Supermarket
42 Roper Terrace
MATARANKA NT 0852

LEGISLATION: Part 7 Division 4 of the *Liquor Act 2019*

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

DATE OF HEARING: 20 September 2023

DATE OF DECISION: 9 October 2023

DECISION

1. On 20 September 2023, the Northern Territory Liquor Commission (**the Commission**) heard and upheld a complaint against Mataranka Supermarket NT Pty Ltd (**the licensee**), and decided to take disciplinary action against the licensee.
2. The Commission takes disciplinary action by:
 - a. suspending liquor licence 80900058 for a period of 28 days commencing at 13:59 hours on 6 November 2023; and
 - b. imposing a monetary penalty of 32 penalty units (\$5,184) to be paid in monthly instalments of \$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 are 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 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. On 25 January 2022, the Director referred a complaint to the Commission that the licensee had breached the 25% grocery store cap for the financial year 2020-2021 (**the first complaint**). On its face, that complaint was fundamentally flawed, because when the 2020-2021 financial year commenced on 1 July 2020, reg 53, which was not expressed to have retrospective effect, had not yet come into force. At the ensuing complaint hearing, for which the licensee had gone to the expense of engaging legal representation, the Commission drew attention to this issue, and invited the Director of Liquor Licensing (**the Director**) to consider whether to pursue the matter. On 4 May 2022, the Director withdrew the complaint, which the Commission accordingly dismissed the following day.²
7. In June 2023, 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.
8. Unfortunately, the June 2023 complaints suffered from exactly the same type of apparent

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.

² See Northern Territory Liquor Commission decision, LC2022/005 (5 May 2022)

defect as the first complaint. It is of serious concern to the Commission that this basic error was repeated. As a result, this and several other licensees have been subject to expense, inconvenience and stress that could and should have been avoided.

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.

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:³

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.⁴

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.

³ *Smith Street Supermarket* [2023] NTLiqComm 20, [18] to [24]

⁴ *Maxwell v Murphy* (1957) 96 CLR 261, 637–8 per Dixon CJ

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.

11. On 24 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, which, at the request of the licensee, was postponed to 20 September 2023.

THE HEARING

12. The matter proceeded as a public hearing on 20 September 2023. Mr Kulda appeared on behalf of the Director. Ms Toni Kutschki, the licence nominee, appeared on behalf of the licensee with her brother, Mr Michael Kutschki, the manager of the supermarket. Other Licencing NT officers were also in attendance. The Commission thanks the parties for their attendance and assistance. Shortly after 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.

13. The Commission received documentary evidence including:

- 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.

The Commission also received undisputed evidence from the licensee of the amount of gross profit the licensee earned from the sale of its liquor products. In addition, Ms Kutschki and Mr Kutschki gave oral evidence.

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

THE FACTS

15. The Commission finds the following facts, which are not in dispute.

16. The licensee submitted declarations in the approved form pursuant to reg 53(3) stating that the percentage of the gross value of the sales of all products by the licensee derived from the sale of liquor was:
- a. 49.2% for the financial year ending 30 June 2021
 - b. 37.38% for the financial year ending 30 June 2022
 - c. 28.50% for the period 1 June 2022 to 30 November 2022
 - d. 32.31% for the quarter from 1 January 2023 to 31 March 2023
 - e. 28.22% for the quarter from 1 April 2023 to 30 June 2023
17. On 12 August 2022, the Director wrote to the licensee, reminding it of the importance of compliance with the 25% grocery store cap, and warning it of the potential consequences of breaching it. Although the licensee had traded in breach of the 25% grocery store cap for the 2021-2022 financial year, the Director in his discretion determined not to initiate a complaint against the licensee for that period.
18. On 10 January 2023, the Director wrote to the licensee further reminding it of its obligation to comply with the 25% grocery store cap.

COMPLAINT IS UPHELD

19. 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

20. The Director recommended that the Commission take disciplinary action by imposing a monetary penalty on the licensee.
21. The Commission considers that in imposing disciplinary action in this matter, the principles of proportionality, deterrence and parity with previous similar decisions of the Commission are significant.
22. 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 been unable to bring itself into compliance with the regulations. Indeed, the licensee has, on occasion, candidly conceded that it believes it can not comply with the 25% grocery store cap and survive as a going concern.⁵ As will however be discussed below, the licensee has taken significant steps to reduce its reliance on liquor sales, and is to be commended for having reduced liquor sales from about 50% of its total turnover before the introduction of the 25% grocery store cap, to less than 30%.

⁵ For example, Exhibit One, p. 42, p. 50

The relevant period

23. As stated above, on 4 May 2022 the Director withdrew the first complaint, which related to the licensee's trading in the 2020-2021 financial year. Having regard to the circumstances set out at paragraph 17 above, the Commission considers it would be unfair to now penalise the licensee for its trading before 1 July 2022.
24. On the other hand, the Commission considers that it is appropriate to have regard to the period from 1 July 2022 to 30 June 2023 when determining the disciplinary action it takes, as it is apparent that the licensee 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. This is the approach the Commission took with the licensee of the Smith Street Supermarket, which breached the 25% grocery store cap in relevantly similar circumstances. 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".
25. 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 licensee would have been liable to a complaint that it had breached the 25% grocery store cap for the financial year 2022-23, and the Commission would have upheld such a complaint. It would be anomalous 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

26. In accordance with the Commission's preferred approach,⁶ 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.⁷

The licensee's circumstances

27. In considering what disciplinary action to impose, the Commission has had regard to the following circumstances.
28. The licensee has taken the following measures to reduce its liquor sales percentage:
- a. Reducing liquor trading hours on weekdays from 14:00 hours to 18:00 hours and on Saturdays from midday to 15:00 hours
 - b. Restricting liquor sales to one item per customer

⁶ See *Smith Street Supermarket* [2023] NTLiqComm 20, [27] to [29]

⁷ Exhibit Two, p. 3

- c. Closing the bottle shop for one week in March 2023
- d. Reducing the range of liquor products on sale
- e. Ceasing the sale of liquor to cattle stations and the local rodeo
- f. Installing a kitchen to increase the trade in takeaway food
- g. Increasing the price of grocery store items

29. Licensing NT audited the licensee's compliance between 1 January and 31 March 2023 with the first of the above-listed measures. The Commission is satisfied that the licensee substantially complied with this self-imposed measure, a record that supports a finding that the licensee has been conscientious and genuine in its attempts to comply with the 25% grocery store cap.
30. The Commission notes that as a result of the measures it has taken, the licensee has made substantial progress in meeting the challenge of reducing its liquor trade from almost half to no more than a quarter of its business.
31. 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 2020 to 31 May 2023, as well as the gross profit earned from the liquor products it sells.
32. The licensee has co-operated with the investigation and hearing of this complaint. As noted at paragraph 8 above, the licensee has suffered unnecessary additional inconvenience, expense and stress as a result of the manner in which both the first and the present complaint have been prosecuted.
33. Over the last seven years, the Director has issued the licensee with infringement notices on two occasions for contraventions of the Act or its licence that the Commission accepts were relatively minor in nature.
34. Australia's liquor and grocery sectors are dominated by major national chains with large stores in nearby Katherine that have been easily able to adjust their trading practices to comply with the Northern Territory's grocery stores regulatory regime. On top of the ongoing disadvantages of competing with the large chains, small independent licensed grocery stores such as the licensee's have lost trade as a result of the downturn in tourism following the COVID pandemic.
35. Although the licensee lodged an Expression of Interest in response to the Northern Territory Government's recent offer to buy back grocery store liquor licences, it does not currently intend to negotiate for the sale of the licence because it considers that unless it is authorised to continue to sell liquor, its business will become unsustainable.
36. The Kutschki family and their small businesses, including the Mataranka Supermarket, have been and continue to be key contributors to the economic, social, recreational and cultural lifeblood of the Mataranka community, which has a population of less than 500, but which is visited by over 200,000 travellers a year, many of whom refresh themselves at the nearby Mataranka Hot Springs. The supermarket was established in 1968 by

Ms Kutschki's grandfather, after whom "Bruno's Park", the town's public park, is named. The supermarket has remained in the Kutschki family ever since. The Commission accepts that either the closure of the supermarket or the departure of the Kutschki family would be a substantial loss to the town, and extremely distressing to the Kutschki family.

37. The licensee has in recent times operated in highly challenging financial circumstances, to the point where Ms Kutschki has foregone a substantial amount of her salary, while continuing to work in the shop. The licensee informed the Commission that it has the capacity to pay a monetary penalty in instalments of \$500 a month. The licensee also expressed a preference for disciplinary action involving a combination of a monetary penalty and licence suspension instead of a monetary penalty alone.

Hybrid disciplinary action

38. 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.

39. 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 is satisfied that the licensee is likely to continue to do so as required by changing circumstances.

40. As the licensee has unlawfully enriched itself, the Commission considers the disciplinary action it takes should, at a minimum, effectively impoverish the licensee by the same amount as it has unlawfully enriched itself. 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 that minimum.

41. However, in the view of the Commission, the unusual circumstances of this licensee make it appropriate to depart from imposing a purely monetary penalty (as it has done in all other reg 53 complaint matters to date), and instead to impose hybrid disciplinary action comprising both a monetary penalty and a period of licence suspension. The Commission calculates that in combination, this monetary penalty and licence suspension will effectively impoverish the licensee by an amount approximately equivalent to the amount by which the licensee unlawfully enriched itself by exceeding the 25% grocery store cap between 1 July 2022 and 30 June 2023.

42. The licence suspension period of 28 days will impoverish the licensee, but it will also assist it to comply with the 25% grocery store cap in the fourth quarter of 2023, by forcing it to reduce the amount of liquor it sells in that period.

43. 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.

44. 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.
45. 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.
46. 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.
47. 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

48. 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.
49. 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
9 October 2023

On behalf of Commissioners Goldflam, Dwyer and Taylor