

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: **COMPLAINT AGAINST MOULDEN SUPERMARKET**
[2023] NTLiqComm 17

REFERENCE: LC2023/017

LICENCE NUMBER: 80904159

LICENSEE: Cached (NT) Pty Ltd

PREMISES: Moulden Supermarket
37 Moulden Terrace
PALMERSTON NT 0830

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: 18 July 2023

DATE OF DECISION: 18 July 2023

DECISION

1. On 18 July 2023, the Northern Territory Liquor Commission (**the Commission**) heard and dismissed a complaint against Cached (NT) Pty Ltd (**the licensee**).

STATEMENT OF REASONS

BACKGROUND¹

2. In October 2017, the Final Report of the Northern Territory *Alcohol Policies and Legislation Review* (**the Riley Review**) was published.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

¹ For a more detailed account of the background to the regulatory regime discussed below, see the Commission’s Milner Road Foodtown decision (LC2022/055, 14 December 2022)

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

³ Riley Review, p. 34

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

3. Noting, however, that some mixed grocery businesses had been operating with “store licences” for some time, 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% of the gross annual sales of the business...”.⁶
4. The Northern Territory Government (**NTG**) 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 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. 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.
6. 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 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

⁴ Riley Review, Recommendation 2.5.13

⁵ Riley Review, p. 48

⁶ Riley Review, Recommendation 2.5.19

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)

7. In the first half of 2023, the NTG 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:

(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 licensed premises and any adjacent area where the non-liquor products are sold.

8. 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.

9. 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

10. The matter proceeded as a public hearing on 18 July 2023. Mr Kulda appeared on behalf of the Director. Ms Harvey, the licence nominee, appeared on behalf of the licensee. At the outset of the hearing, Mr Kulda announced that the Director had decided to withdraw the complaint. It is regrettable that neither the Commission, nor, more importantly, the licensee, was given advance notice of the withdrawal. Had notice been provided, the Commission would have had the opportunity to cancel the hearing, and save the attendant expense and inconvenience.

11. As the Acting Director, in the exercise of her discretion, withdrew the complaint,¹⁰ the Commission proceeded to dismiss it. Nevertheless, although there have been no

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

¹⁰ See complaints against the licensees of Woodroffe Fresh Food Supermarket (LC2022/004, 30 March 2022, [14] – [15]) and Mataranka Supermarket (LC2022/055, 5 May 2022, [16] – [18])

findings adverse to the licensee, the Commission considers that it is in the public interest to record the events that led to the hearing, and to explain the reasons for the outcome.

THE FACTS

12. It was not in dispute, and the Commission finds, that the licensee had submitted to the Director a declaration made on 6 April 2023 in the approved form pursuant to reg. 53(3) to the effect that 25.50% of the gross value of the sales of all products by the licensee for the period 1 January 2023 to 31 March 2023 had been from the sale of liquor.
13. The brief of evidence provided by the Director with the referral of the complaint to the Commission also included the licensee's reg. 53(3) declaration for the financial year ending 30 June 2022, over the course of which 23.10% of the gross value of the sales of all products by the licensee had been from the sale of liquor.
14. In addition, at the request of the Commission, on 7 July 2023, the licensee made a reg. 53(3) declaration to the effect that 24.83% of the gross value of the sales of all products by the licensee for the period 1 April 2023 to 30 June 2023 had been from the sale of liquor.
15. The licensee provided a detailed and, in the view of the Commission, reasonable explanation for exceeding the 25% cap in the first quarter of 2023. However, it is unnecessary to set out the details of that explanation, because the complaint was dismissed for other reasons, as discussed below.

THE LAW

16. 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 the amended reg. 53 as brought into force on 25 January 2023 stating that the amendment was intended to operate retrospectively.
17. 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.¹¹

18. 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.
19. 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

¹¹ *Maxwell v Murphy* (1957) 96 CLR 261, 637–8 per Dixon CJ

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 proceeds on the basis that there was no such intention on the part of the Minister.

20. Accordingly, the Commission finds that reg. 53 as in force since 25 January 2023 is applicable only to quarterly periods that commenced after that date.
21. 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 did not necessarily follow that this complaint would be withdrawn and dismissed.
22. Section 166(4) of 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 was whether the licensee had breached the 25% cap in the *second* quarter of 2023, a quarter that commenced after the January 2023 amendments came into force.
23. 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.
24. In the event, as set out above, the licensee’s trading in the quarter ending 30 June 2023 was compliant with reg. 53(2). In these circumstances, had the Director not withdrawn the complaint, the Commission would have dismissed it.
25. The Commission commends the licensee for having adjusted its trading practices so as to achieve compliance with the law following the imposition of the quarterly 25% cap.

NOTICE OF RIGHTS

26. 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.
27. 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

21 July 2023

On behalf of Commissioners Goldflam, Dwyer and Stedman