

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE *LIQUOR ACT 2019*

REFERENCE: LC2022/055

LICENCE NUMBER: 80902951

LICENSEE: Stuart Highway Investments Pty Ltd

PREMISES: Milner Road Foodtown
28 Gason Street
ALICE SPRINGS NT 0870

LEGISLATION: Part 7 of the *Liquor Act 2019*

HEARD BEFORE: Mr Russell Goldflam (Acting Chairperson)
Mr Bernard Dwyer (Health Member)
Ms Amy Corcoran (Community Member)

DATE OF HEARING: 30 November 2022, 14 December 2022

DATE OF DECISION: 14 December 2022

DECISION

1. On 14 December 2022, the Northern Territory Liquor Commission (**the Commission**) upheld a complaint against Stuart Highway Investments Pty Ltd (**the licensee**) for breaching Regulation 53(2) of the *Liquor Regulations* (**the Regulations**), and took the following disciplinary action against the licensee pursuant to section 165 of the *Liquor Act 2019* (**the Act**):
 - a. Impose a monetary penalty of 62 penalty units on the licensee.
 - b. Direct the licensee to take the following actions:
 - i. Restrict the gross value of the sales of liquor by the licensee on the licensed premises to no more than 25% of the gross value of the sales of all products by the licensee at the licensed premises and any adjacent area where the non-liquor products are sold in each of the following periods:
 - 1 January 2023 to 31 March 2023
 - 1 April 2023 to 30 June 2023

- 1 July 2023 to 30 September 2023
 - 1 October 2023 to 31 December 2023
- ii. Provide to the Director of Liquor Licensing (**the Director**) by no later than three business days after the end of each month in 2023 a declaration dated and signed by the nominee including:
- The gross value of the sale of all products by the licensee at the premises during the previous month;
 - The gross value of the sale of liquor by the licensee at the premises during the previous month; and
 - The gross value of the sale of liquor as a percentage of the gross value of the sales of all products by the licensee at the premises during the previous month

STATEMENT OF REASONS

THE 25% CAP FOR GROCERY STORES

2. Regulation 53(2) of the Regulations requires licensed grocery stores to cap their liquor sales so that they do not exceed 25% of total turnover in a financial year (**the 25% cap**). This is the first occasion on which the Commission has been required to determine a complaint against a licensee for breaching this provision, and the Commission anticipates that it will be not be the last. Accordingly, in order to satisfy itself of the appropriate disciplinary action to take in such a matter, the Commission has considered the background, context and rationale for regulation 53.
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 follows:¹

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 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 state:²

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

¹ Riley, Angus, Stedman and Matthews, *Alcohol Policies and Legislation Review* (Northern Territory Government, 2017), pp. 47-48

² *Ibid*, pp 50-51

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 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.

THE LICENSEE

8. The licensee is a small locally owned Alice Springs enterprise, the principal executive officers of which are Mr Haydn Rodda and Mrs Mary Rodda. Mrs Rodda is the licence nominee. The licensee also owns and operates another Alice Springs licensed grocery store, "Pigglys", of which Mr Rodda is the nominee. Both licences operate with a grocery store authority.
9. The licensee has never previously breached the Act or its licence conditions at either of its premises. Notably, Pigglys currently operates in compliance with the 25% cap. The Commission accepts Mr Rodda's unchallenged evidence to the Commission that this is primarily due to the fact that Pigglys, unlike Milner Road Foodtown, offers a takeaway food service.

THE COMPLAINT

10. On 6 November 2022, a delegate of the Director referred a complaint to the Commission that the licensee had breached the 25% cap in the 2021/2022 financial year. The Commission fixed the matter for hearing at the first conveniently available date.

THE HEARING

11. The hearing commenced on 30 November 2022. Mr Kulda appeared on behalf of the Director. Mr Whitelum appeared on behalf of the licensee, accompanied by Mr and Mrs Rodda. Having formed the opinion that it was not appropriate to conduct the hearing in public because of the need to protect commercial-in-confidence information, the Commission acceded to a request by the parties that it direct that the hearing be conducted in private.
12. The hearing continued and concluded on 14 December 2022, with Mr Robson SC now appearing for the licensee. On that occasion NT Police Superintendent Deutrom attended at the request of the Commission to give evidence regarding the maintenance of Point of Sale Intervention (**POSI**) patrols at the premises.
13. The Commission thanks all those who attended for their contribution.

THE COMPLAINT IS UPHELD

14. As the licensee indicated that it did not intend to contest the complaint, the hearing proceeded by a recital of the facts relied on by the Director, and an admission by the licensee of the truth and accuracy of the recited facts. Accordingly, the Commission

finds that for the 12 month period ending 30 June 2022 the gross value of the sales of liquor by the licensee on the licensed premises was 40.51% of the gross value of the sales of all products by the licensee at the premises.

15. The Commission accordingly upheld the complaint on the ground for disciplinary action provided by section 160(1)(b), that the licensee had contravened a provision of the regulations, specifically regulation 53(2). The Commission then proceeded to consider what disciplinary action to take.

DISCIPLINARY ACTION

16. The Director made no recommendations or submissions as to what disciplinary action the Commission should take.

17. The Commission considers that in imposing disciplinary action in this matter, the principles of proportionality and deterrence are significant.

18. Despite being aware since 2019 of the looming requirement to reduce the proportion of its liquor sales, the licensee failed to comply with that requirement, and indeed increased the proportion of its liquor sales in 2021/2022, by about 2.5%, from the previous year. The licensee has knowingly continued to trade in breach of the regulations for in excess of a year, during which it has failed to take effective steps to bring itself into compliance with the regulations. The licensee has not only exceeded the 25% cap, but exceeded it by a large margin. This is a serious breach deserving of serious disciplinary action.

19. 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 expanding the range of groceries on offer, capping the mark-up on its liquor products, and reducing the hours and days of liquor trading.
- b. The licensee has investigated the feasibility of establishing a takeaway food service at the premises (as is already the case at its other licensed premises, Pigglys) as a means of generating another non-liquor income stream. The Commission accepts that the fit-out costs would be substantial, and potentially unaffordable for the licensee at this stage.
- c. The licensee currently employs 15 staff, and provides an amenity to the neighbourhood as a convenient “corner store” in Gillen, a well-established Alice Springs suburb.
- d. The licensee co-operated fully both with the Director’s investigation of this matter, and with the Commission’s conduct of the hearing.
- e. The Commission accepts unchallenged evidence from the licensee’s accountant that if the licensee’s liquor licence were cancelled the business would become “an unsustainable enterprise immediately”. If the licence were suspended for a period of six months, it would trade at a very substantial loss during that period. If the liquor trading hours were reduced by 30%, this would not in itself be sufficient to achieve compliance with the 25% cap.

- f. The Commission accepts the unchallenged evidence of Mr Rodda that if the licence were suspended, the licensee would be obliged to lay off several members of its staff.
- g. During liquor trading hours, NT Police maintain a POSI presence at the premises, as is the case with all nine takeaway outlets in Alice Springs. The Commission accepts the unchallenged evidence of Superintendent Deutrom that the annual direct staffing cost of maintaining POSIs at the premises is almost \$160,000. A reduction in trading hours would reduce the cost of providing this service. If the licensee ceased to sell liquor, then POSI patrols would not be required at the premises, a saving to the public purse of about \$160,000 per year.
- h. The Commission estimates that during the period the subject of the complaint, the 2021/2022 financial year, the licensee unlawfully enriched itself by an amount in the order of \$10,000, this being approximately the net profit on the licensee's sale of liquor in excess of the 25% cap.
- i. As stated at the outset of these reasons, this is the first occasion on which a Northern Territory licensee has been found to have breached the 25% cap. Accordingly, the licensee, despite repeatedly seeking advice from the Director as to the consequences of the breach, has not had the benefit of being able to ascertain the likely outcome of a complaint of this nature.
- j. The licensee is a small family-run business attempting to survive in very challenging market conditions. Australia's liquor and grocery sectors are dominated by major national chains with two large stores in Alice Springs that have been easily able to adjust their trading practices to comply with the Northern Territory's grocery stores licensing scheme. Small independent licensed grocery stores, of which there are five in Alice Springs (two owned and operated by the licensee, and three by LAE Supermarkets Pty Ltd) have been beset with staffing shortages resulting from the COVID-19 epidemic on top of the ongoing disadvantages of competing with Coles and Woolworths.

20. As stated above, after considering the statutory scheme of which regulation 53(3) 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. Similarly, 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.

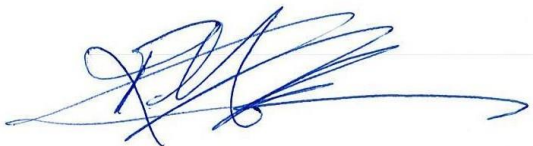
21. However, although the Commission has not been prescriptive in specifying the particular measures the licensee should take, the Commission considers that it is appropriate to take firm steps to ensure that the licensee promptly brings itself into compliance with the law. In the event that the licensee 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. The Commission has taken the disciplinary action set out in paragraph 1.b) above in accordance with section 165(2)(e) of the Act.

22. As the licensee has unlawfully enriched itself, the Commission also 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 the licensee's unblemished record of compliance, its co-operation with the investigation and hearing of this complaint, its genuine (if somewhat belated) attempts to identify available measures to address the concerns raised by the complaint, and the circumstance that this is the first occasion on which this type of breach has been dealt with by the Commission. In fixing the monetary penalty (which amounts to \$9,734), the Commission has also had regard to section 167(1)(a), which fixes a maximum penalty in this instance of 200 penalty units. Finally, 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.
23. 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.
24. 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

25. 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.
26. 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.



RUSSELL GOLDFLAM
ACTING CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

19 December 2022

On behalf of Commissioners Goldflam, Dwyer and Corcoran