

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2018/146

LICENCE NUMBER: 80902690

LICENSEE: LAE Supermarkets Pty Ltd

PREMISES: **Northside IGA**
ALICE SPRINGS NT 0870

LEGISLATION: Section 102 and Part VII of the *Liquor Act*

HEARD BEFORE: Mr Russell Goldflam (Acting Deputy Chairman)
Ms Pauline Reynolds (Health Member)
Mr Blair McFarland (Community Member)

DATE OF HEARING: 12 February 2019

DATE OF DECISION: 25 February 2019

DECISION

1. On 12 February 2019, the Northern Territory Liquor Commission ("the Commission") heard a complaint against LAE Supermarkets Pty Ltd ("the Licensee") in relation to its Northside IGA premises ("the premises"), and reserved its decision. On 19 February 2019, the Commission on its own initiative re-opened the proceedings, heard further evidence, and dismissed the complaint. These are the reasons for that decision.

REASONS

HEARING

2. The background to this matter and the reasons for the Commission's ruling on a preliminary issue that arose in these proceedings are set out in the Notice of Preliminary Ruling delivered by the Commission on 19 December 2018, which should be read with and is hereby incorporated into this Decision Notice.

3. The substantive hearing of the complaint commenced as a public hearing conducted by the Commission on 12 February 2019 at Alice Springs. Ms Morley appeared for the Director-General of Licensing ("the Director-General"). Mr Stirk appeared for the Licensee. The Commission is grateful for the considerable assistance counsel provided to the Commission in this relatively complex matter.
4. The evidence adduced at the hearing on 12 February 2019 by the Director-General comprised:
 - a. A redacted version¹ of the brief of evidence provided by the Director-General with her referral to the Commission, including:
 - i. An unsigned, undated document headed "*Liquor Act* (NT) Section 68 – Complaints" identifying Northern Territory Police as the complainant, and endorsed as "Accepted" under the signature of Dean Maloney, Director Liquor, Gambling and Racing, on 24 May 2018
 - ii. Statutory Declaration Detective Senior Constable Alexander McDonald ("McDonald") dated 15 February 2018
 - iii. Statutory Declaration Constable Mary-Ellen Pascoe ("Pascoe") and notes dated 15 February 2018
 - iv. A *Drager Alcotest 7110* result for Angus Raymond of 0.207 grams of alcohol in 210 litres of breath at 18:30 hours on 15 February 2018, signed by Pascoe
 - v. Mobile telephone video-recording made by McDonald on the premises commencing at about 18:11 hours on 15 February 2018
 - vi. CCTV footage of the premises commencing at about 18:10 hours on 15 February 2018
 - vii. Letter signed by Dean Maloney, Delegate of the Director-General, dated 24 May 2018 notifying the Licensee of the complaint.
 - b. A document dated 15 May 2018 headed "*Liquor Act* (NT) Section 68 – Complaint" signed by Licensing NT Senior Compliance Officer Elsie Ballard, with an unsigned, undated concluding endorsement headed "Decision of the Director-General of Licensing" stating that "Dean Maloney Delegate of the Director-General of Licensing" has determined to accept the complaint.
 - c. Oral evidence of Mark Wood, Director Liquor, Gambling and Racing.²
 - d. Oral evidence of McDonald (with leave, by telephone).
 - e. Oral evidence of Pascoe (with leave, by telephone).
5. The Licensee did not call any evidence.

¹ By agreement between the parties, Body Worn Video recorded by police at the Alice Springs watchhouse was redacted from the brief, as were associated notes of the recorded events.

² The Commission was informed and accepts that Mr Wood has assumed the position formerly held by Mr Maloney.

6. On 19 February 2019, the Commission re-opened the hearing on its own initiative, and invited the parties to tender the item of evidence that had been redacted from the brief, namely the body worn video recorded by Police Officer Danny Bell at about 6:27 am on 16 February 2018 at the Alice Springs watchhouse. That item was tendered jointly by the parties and marked Exhibit 3. The Commission took this initiative as, after consideration of the evidence tendered at the hearing on 12 February 2019, it appeared to the Commission that Exhibit 3 might be of real importance in determining the outcome of this complaint.

THE LAW

7. Section 102 of the Act provides:

A licensee or employee of the licensee must not sell or otherwise supply liquor to a person who is drunk.

8. Section 7 of the Act provides:

Meaning of *drunk*

A person is ***drunk*** if:

- (a) the person's speech, balance, coordination or behaviour appears to be noticeably impaired; and
- (b) it is reasonable in the circumstances to believe the impairment results from the person's consumption of liquor.

9. The Commission proceeds on the basis that the "reasonable satisfaction" standard of proof enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is applicable to the determination of complaints under s69 of the Act.

THE UNDISPUTED FACTS

10. Having considered the evidence adduced at the hearing, the Commission finds the following facts, which were not in contention.
11. On 15 February 2018, McDonald was engaged in covert surveillance at the takeaway liquor store within the premises. The surveillance was part of Operation Haven, a police operation targeting licensed alcohol outlets and the secondary supply of alcohol in Alice Springs, among other Northern Territory districts.
12. At about 1810 hours, McDonald noticed a customer on the premises who McDonald believed was drunk, and made a covert video-recording on his mobile phone of the customer's movements and actions on the premises. The customer purchased a carton of 12 bottles of chardonnay wine, and walked out of the premises, followed by McDonald.
13. McDonald saw the customer walk towards a taxi in the carpark of the premises, before being approached by a uniformed police officer who had just arrived in a caged police vehicle.

14. Pascoe, together with another constable, was conducting social order duties which included patrolling for anti-social behaviour around licensed premises, in the course of which she drove a caged police vehicle to the carpark of the premises, where there were no Point of Sale Intervention (POSI) police rostered that evening. At about 18:15 hours Pascoe saw a man near a taxi in the carpark. She approached him. He identified himself as Angus Raymond. She apprehended him and placed him in "protective custody" pursuant to s128 of the *Police Administration Act*.
15. Pascoe took Angus Raymond to the Alice Springs watchhouse, where, at 18:30 hours, he submitted to a breath analysis that Pascoe conducted, returning a reading of 0.207% grams of alcohol per 210 litres of breath.

THE DISPUTED FACTS

16. There was contention between the parties in relation to two factual issues. Firstly, was the customer McDonald observed and video-recorded the same person Pascoe apprehended? Secondly, was the customer McDonald observed drunk?

Was he the same man?

17. McDonald describes the customer whose movements he covertly video-recorded as "a slim Aboriginal male, approximately 185 centimetres tall with long black hair in a ponytail, wearing a grey t-shirt". This description is generally consistent with the appearance of the man in McDonald's video-recording. On the video-recording, that man is seen to purchase a yellow and white wine carton and walk out of the premises carrying it. McDonald's evidence is that he followed the man he had seen out of the premises, saw him walk towards a taxi, and then saw him being approached by police. Under cross-examination, McDonald was unsure if he actually saw the man being apprehended, and conceded that he was watching his target from a distance of twenty metres in a poorly lit area.
18. Pascoe saw "an indigenous male with shoulder length curly hair, solid built, approximately 180 cm tall, wearing jeans and a grey t-shirt walk out of the shops with a yellow and white carton of Richland Chardonnay". She approached the man "at the rear of a Taxi in the car park" and shortly after that, she apprehended him.
19. Whether or not Pascoe attended the scene in response to a call from McDonald to apprehend the man he had recorded is an issue about which the evidence is somewhat unclear, but it is unnecessary to make a finding about this issue.
20. On re-opening the proceedings, the Commission viewed Exhibit 3, body worn video footage ("BWV") of a conversation between two police officers and a man in custody who they address as Angus, and who identifies himself as Angus Raymond. Although the date and time of the recording are not entirely clear, the Commission is reasonably satisfied that the BWV is a record of a conversation that took place with Angus Raymond at about 6:30 am on Friday 16 February 2018, some twelve hours after the incident the subject of the complaint.

21. The Commission also infers that Angus Raymond, the man in custody in the BWV, is the same man Pascoe had apprehended the previous evening. This is because:
- a. he uses the same name he gave Pascoe;
 - b. his physical appearance generally matches Pascoe's description of him;
 - c. the timing of the conversation (which ends when the man is released from custody) is consistent with him having been detained for a period of 12 hours in protective custody to sober up;
 - d. Pascoe performed the breath analysis on Angus Raymond; and
 - e. he says that he had been apprehended after leaving "Hoppy's Shop", which the Commission accepts is a name commonly used for the Licensee's premises.
22. The Commission has carefully viewed the BWV, the CCTV footage and the mobile phone footage.
23. Angus Raymond is not wearing the same shirt as the man McDonald recorded. However, the Commission accepts that this may be because his shirt was changed at the watchhouse, and the Commission attaches no weight to this discrepancy.
24. McDonald's footage shows a man with long curly dark shiny hair tied up in a "man bun".
25. The BWV shows Angus Raymond the next morning with an unruly mop of curly dark dull hair. Pascoe says "Whilst we were at [IGA north side] I observed an indigenous male with shoulder length curly hair...".
26. The Commission cannot rule out the possibility that it is the same head of hair, but their appearance is nevertheless strikingly different.
27. In addition, the Commission has doubts that the body of the "solid" man Pascoe apprehended is the same as the body of the man depicted in McDonald's footage, who McDonald described as "slim". Curiously, the man McDonald recorded had a noticeable pot belly. In the BWV footage, Angus Raymond did not. The man depicted in McDonald's recording appears to be taller than Angus Raymond. Their posture appears to be different.
28. Finally, and most significantly, the Commission is inclined to the view that the faces depicted are of two different men. The face of the man McDonald recorded looks younger and appears to have sharper features than the face of Angus Raymond in the watchhouse, who appears to have a broader nose, and looks older.
29. In conclusion, the Commission is not reasonably satisfied that Angus Raymond, who Pascoe apprehended, is the man McDonald recorded on the premises.

Was the man on the premises drunk?

30. McDonald describes the man he recorded as "unsteady on his feet and extremely blood shot eyes... extremely loud and slurring his words... extremely intoxicated."

31. Pascoe obtained a breath analysis of the man she apprehended, which in the view of the Commission strongly corroborates her evidence that Angus Raymond was drunk. However, in the light of the Commission's findings above at paragraph 29, the Commission considers that it is obliged to disregard the evidence of Pascoe and, in particular, the breath analysis of Angus Raymond.
32. The Commission accepts Ms Morley's submissions that the video evidence in this matter was not of sufficient quality to enable the Commission to positively find that the man on the premises did not exhibit clear signs of being drunk, and that the eye witness McDonald, who the Commission accepts was experienced and skilled in detecting signs of drunkenness, was in a better position to make such an assessment than the Commission from viewing the video footage.
33. However, considered together with the video footage viewed by the evidence, the Commission considers that McDonald's observations should be treated with caution. The video footage does not show the man he recorded to be noticeably unsteady. He is seen to stand in a queue for a few minutes holding under his arm without any apparent difficulty a carton containing what the parties agree is twelve bottles of wine. He is seen and heard to speak rather loudly and jocularly to another customer, but this was in a language unfamiliar to McDonald, who conceded under cross-examination that he did not know if the man was actually slurring his words. The CCTV footage shows that McDonald was at all times standing behind the man he was observing and recording, at a distance of several metres.
34. The Commission is not reasonably satisfied that the speech, balance, coordination or behaviour of the man McDonald recorded were noticeably impaired. It follows that the Commission is not reasonably satisfied that the man who was supplied liquor on the premises was drunk.
35. Accordingly, the complaint is not upheld, and is dismissed.

NOTIFICATION OF THE COMPLAINT TO THE LICENSEE

36. In the course of the hearing, Mr Stirk made contentions regarding several legal issues, which, given the dismissal of this complaint, it is unnecessary for the Commission to consider. However, one of these matters raises an issue of general application in relation to the administration of Part VII of the Act. Accordingly the Commission considers it appropriate to make the following observations.
37. The *Licensing (Director-General) Act* (NT) relevantly provides:

8 Meaning of *delegate decision*

- (1) A ***delegate decision*** is a decision, under any Act, of the Director-General that is made by a delegate of the Director-General.
- (2) However, the following are not delegate decisions:

- (b) a decision under another Act that is declared by that Act not to be a delegate decision for this Act.

9 Meaning of *affected person*

A person is an ***affected person*** for a delegate decision if any of the following apply:

- (b) for a decision that relates to disciplinary action relating to a licence – the person is the licensee;

10 Notice of delegate decision

(1) As soon as practicable after making a delegate decision, a delegate of the Director-General must give written notice of the decision to each affected person.

(2) The notice must state the following:

- (a) the delegate decision and the reasons for it;
- (b) that the affected person may apply for a review of the decision under section 11;
- (c) the period allowed for applying for a review.

11 Application for review

(1) An affected person for a delegate decision may apply to the Director-General for a review of the decision.

(2) The application must be made:

- (a) within 28 days after written notice of the delegate decision is given to the affected person; or
- (b) if the Director-General extends the time allowed for making an application – within the additional time that the Director-General allows.

(3) The application must:

- (a) be in the form approved by the Director-General; and
- (b) be accompanied by the prescribed fee; and
 - (c) state the grounds on which it is made and the facts relied on to establish the grounds.

38. Section 120ZD(2) of the Act provides:

The regulations may declare that a decision made under this Act by a delegate of the Director-General, other than a decision specified in the Schedule, is not a delegate decision for the Licensing (Director-General) Act.

39. The *Liquor Regulations* do not declare that any decisions are not delegate decisions, and do not prescribe a fee for an application for review of a delegate decision.

40. The decision to accept the complaint made pursuant to s68(3) was a delegate decision made by Dean Moloney, a Delegate of the Director-General.³ Mr Moloney notified the Licensee (an "affected person" pursuant to s8(2)(b) of the *Licensing (Director-General) Act*) of the delegate decision and the reasons for it, in compliance with s10(2)(a) of that Act, but failed to notify the Licensee that it was entitled to apply for a review of the decision within a specified period, as required by s10(2)(b) and (c).

41. Instead, in his notification to the Licensee dated 24 May 2018 Delegate Moloney, as required by s68(4) of the *Liquor Act*, invited the Licensee to respond to the complaint within a specified time period.

42. It is unnecessary to decide whether this alleged non-compliance invalidated the complaint, and how, if at all, such non-compliance might have affected the outcome of this matter had the Commission been minded not to dismiss the complaint because the elements of the alleged breach were not established.

43. However, the Commission recommends that the Director-General take appropriate action to address what Mr Stirk suggested is this "legacy issue".

NOTICE OF RIGHTS

44. Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. Any application for review of a reviewable decision must be lodged within 28 days of the date of the decision.

45. The Schedule specifies that a decision made pursuant to s69(3) ("Decision to take disciplinary action against licensee") is a reviewable decision. Section 69, which is headed "Commission's power to take disciplinary action" confers on the Commission the power to dismiss a complaint (s69(4)(b)(i)) or to uphold a complaint and take disciplinary action (s69(4)(b)(ii)).

46. However, s69(3), the specific provision in the Schedule, does not in its terms refer to a decision to either dismiss a complaint or uphold a complaint and take specified disciplinary action. It provides:

The Director-General must give the licensee details about the referral when referring the matter to the Commission.

³ See documents referred to at paragraphs 4(a)(i) and 4(a)(vii) above

47. In this matter, the Commission has dismissed the complaint. It is unnecessary for the Commission, which has not had the assistance of argument on this issue, to determine whether or not this decision is a reviewable decision, and the Commission expresses no view on the issue.

48. If this decision is a reviewable decision, in accordance with section 120ZB(1)(a) and (c) of the Act, the affected person would be the person who made the complaint.

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

RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
25 February 2019

On behalf of Commissioners, Goldflam, Reynolds and McFarland