

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Alawa Foodland
Licensee:	LI JI LIM
Licence Number:	80900686
Proceeding:	Sec 48 complaints
Heard Before:	Mr John Withnall (Presiding Member)
Date of Hearing:	01 November, 04 November 2002
Date of Decision:	31 January 2003
Appearances:	Mr E Yuen and then Mr A Crane, for the Licensee Mr T Anderson, Counsel Assisting the Commission

1. The complainant in this matter was Mr Christopher Moffitt, who operates a business of manufacturing jeweller in the Alawa shopping centre.
2. He claimed that the licensee of Alawa Foodland, Mr "Tim" Lim, was selling liquor to intoxicated persons and was still offering a bookup facility for liquor despite the restrictive changes in that regard that were introduced into off-premises licences in May 2002. Mr Moffitt supported his complaints with evidence as to his observations of a specific incident in relation to each.
3. Following a hearing of the complaints, on 4 November 2002 I delivered an ex tempore decision declining to uphold Mr Moffitt's specific complaints.
4. In reaching that decision I did *not* accept Mr Lim's defensive position that with a history of prickliness between the two businessmen on the subject of the anti-social behaviour of some of Mr Lim's aboriginal customers, Mr Moffitt was engaging in a deliberate (and elaborate) fabrication.
5. I did *not* find against Mr Moffitt's credibility; I found him to have a genuine belief in the conclusions he had reached upon his observations. However, those observations were insufficiently exclusive of alternative explanation to persuade me that I could safely come to the same conclusions as had Mr Moffitt.
6. However, I did come to the conclusion on the evidence that Mr Lim had breached the Commission's restriction on retention of credit cards. I indicated to Mr Lim, by then represented by lawyer Mr Tony Crane, the likelihood of my tightening up the "credit condition" to prohibit retention of cards in any circumstances for any purpose, and gave them the opportunity on 4 November 2002 and also by subsequent written submissions to address such intimated consequence of the breach.
7. On Mr Lim's evidence the offending practice is quite widespread among suburban store owners, and the decision in this matter may well have broader implications for all operators of such licences. For this reason the background to the issue needs to be carefully appreciated.
8. I reproduce the so-called "no credit" liquor licence condition which has been in place since May 2002:

Without the written consent of the Commission, no liquor shall be sold for consumption off or away from the licensed premises unless payment for the sale shall be made before or at the time of the supply or delivery of the liquor.

For the purposes of this condition, payment shall mean payment only by one or more of the following methods:

- (i) by legal tender within the meaning of Australian currency legislation (ie. Australian banknotes and/or coins);
- (ii) by cheque drawn by the purchaser and banked by the licensee in the normal course of business, the cheque to be neither post-dated nor held by the licensee against future availability of sufficient funds in the account on which the cheque is drawn;
- (iii) by any nationally recognised charge card, whether a credit card or debit card;
or
- (iv) by authorised debit to a pre-existing account with the licensee in the name of, and operated by, a body incorporated under any Commonwealth, State or Territory law.

Following the point-of-sale processing of a sale by credit card or debit card, the licensee shall not retain possession of the card nor retain or store any data or information taken from or in any way relating to the card except only as may be essential for the purpose of completing the transaction with the licensee's bank in accordance with normal commercial practice. Without in any way limiting the generality of this requirement, in no circumstances shall the licensee seek to know or record a purchaser's PIN in relation to any card or bank account.

9. It will be seen that liquor sales are still necessarily permitted by way of a third-party credit card in the normal course of business, as this is not a credit transaction as between merchant and purchaser. It is the second part of the foregoing condition that comes under review as not having prevented a problematic situation that has seemingly continued regardless of the intent of the restriction.
10. Mr Lim swears that he never permits liquor to be booked up, and I do not make any adverse finding in that regard. He demonstrated an accurate knowledge of the requirements of the previous version of the condition, with which he said he had always complied, and produced some documentary support for his contention that his liquor sales had significantly fallen away by reason of his compliance with the more restrictive condition after May 2002.
11. Although he denies allowing liquor to be booked up, he does allow aboriginal customers to book up groceries and non-liquor purchases. He keeps the credit cards of all those who book up groceries, in envelopes in a shoebox at the till, *and the respective pin numbers are kept written (in Chinese) on the backs of the envelopes*. He keeps the cards as security for the food accounts. From time to time he swipes the cards to check if they are in sufficient credit to authorise payment of his accounts, in which case he then processes the debit to the customer's card and pays himself. He goes in to the shop each Sunday morning and routinely tries them all.
12. He keeps track of the bookup by tearing off the relevant dockets from the cash register and putting them in the envelopes with the respective cards. (His tills at the time of the hearing were not upgraded for GST, so that the individual items purchased did not appear on these dockets. Thus when the inspectors checked up on him, there was no way to verify whether the book-up dockets did or did not relate to liquor).
13. Mr Lim testified as to having received advice from his lawyer and from MLAs Paul Henderson and Matthew Bonson to the effect that the Commission's restriction on the retention of cards and PIN numbers did not apply to him because the cards were being

retained by him only as security against food bookup, not liquor bookup. Mr Lim says that to his knowledge most neighbourhood stores and mini-markets do the same thing, that he has personally confirmed it with many of them.

14. I accept that Mr Lim certainly believes the tenor of his advice to have been as he relates it. His argument is that as the condition reads, if a card is not used for a liquor purchase, then our restriction against retaining that card does not kick in.
15. The argument is undermined, however, by Mr Lim's admission that retained cards *are* used for liquor purchases from time to time, *if there are sufficient funds available in a customer's card account to process the purchase on the spot at the time of sale*. That of course is perfectly lawful as far as it goes; we have not restricted normal use of cards in liquor trading. But Mr Lim then breaches our prohibition against retaining a card used for a liquor purchase. As he explains, when aboriginal customers come in to purchase liquor and groceries, available funds in their card account are used firstly for the liquor, and only secondly for groceries. With most of them there is rarely enough money in the card account to cover everything they want at the time of purchase, so food gets booked up to the extent that the card's credit balance will not cover it, and Mr Lim keeps the card and the PIN to process the food purchase at a time when he knows there is likely to be sufficient money in the customers card account to acquit the debt, or some part of it.
16. As that debt is always for food, he says, the Commission's credit condition does not apply.
17. I have held him to be in breach of the condition, in that he has processed point-of-sale liquor purchases with cards which he has then retained. He has kept a record of the PIN number of such cards.
18. I have indicated to the licensee that in all the circumstances I do not intend to impose any penalty per se for the breach but that I do intend to re-draft the second part of the credit condition of the liquor licence to clarify its originally intended purpose: to prevent obfuscation of any system of extended credit by a liquor licensee whereby the purchase of liquor is facilitated for vulnerable customers in a way that sees them tied into a situation of virtual financial bondage to the particular outlet. I find the explanation of liquor being the priority purchase with available card account funds, thus pushing only non-liquor items into a bookup situation in which the merchant retains the card and its PIN, to be inflammatory rather than reassuring. The capture of the customer in this way facilitates the capture of that customer's liquor purchases, and the potential for exploitation is unacceptable to the Commission.
19. Mr Crane submitted a draft of several suggested variations of licence conditions that would tend to at least reduce that potential, but not to the extent of alleviating the Commission's concerns in that regard.
20. The remedial variation of licence condition to now be implemented will unequivocally indicate that if the store wishes to trade in liquor then it will not keep any cards or PINs at all, for any purpose.
21. Mr Lim submitted that such a restriction will put him out of business, that probably 70% and certainly over 50% of his turnover is booked up in this way. Upon reflection I have come to the conclusion that this should not be a determinative consideration. The new condition will restrict neither the normal commercial use of charge cards nor the running of any non-liquor "bookup" account; it will simply prevent the licensee from keeping the cards as security for the debt. Credit risk will have to be assessed on more traditional criteria rather than by the opportunity for continuous, exclusive and unilateral access to a customer's card facility.
22. Mr Lim may be mollified to hear that I shall be strongly recommending to a meeting of the Commission that the same condition be inserted into all "store" licences. Viability would then be a matter of each proprietor's judgment and acumen from a position within a level playing field.

23. Pursuant to s.49(4)(a) of the *Liquor Act*, the conditions of licence No. 80900686 shall be varied by the deletion of the condition labelled "Credit" and substituting therefore a condition in the following terms:

Without the written consent of the Commission, no liquor shall be sold for consumption off or away from the licensed premises unless payment for the sale shall be made before or at the time of the supply or delivery of the liquor.

For the purposes of this condition, payment shall mean payment only by one or more of the following methods:

- (i) by legal tender within the meaning of Australian currency legislation (ie. Australian banknotes and/or coins);
- (ii) by cheque drawn by the purchaser and banked by the licensee in the normal course of business, the cheque to be neither post-dated nor held by the licensee against future availability of sufficient funds in the account on which the cheque is drawn;
- (iii) by authorised debit to a pre-existing account with the licensee in the name of, and operated by, a body incorporated under any Commonwealth, State or Territory law; or
- (iv) by any nationally recognised charge card, whether a credit card or debit card.

The licensee shall not take nor retain possession of any customer's card for any purpose whatsoever. Without in any way limiting the generality of this requirement, in no circumstances shall the licensee:

- retain possession of any credit card or debit card as security against any personal debt or account whatsoever, nor
- seek to know or record, or retain any record of, any customer's PIN in relation to any card or bank account.

24. I appreciate that Mr Lim will need some lead time in which to return to their respective owners those cards he is presently holding, and it is not intended that the new condition should ambush him with retrospective effect. His position will therefore be that he is not to be in possession of any card or PIN record in relation to any credit given to any customer after the date of this decision. As each debt currently secured by his possession of a card shall be acquitted, the relevant PIN record is to be expunged. The licensee shall have divested himself of all cards and PIN records by 14 March 2003 in any event.

John Withnall
Presiding Member

31 January 2003