

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: DISCIPLINARY ACTION PURSUANT TO THE LIQUOR ACT

REFERENCE: LC2018/151

LICENCE NUMBER: 80902628/FLL

LICENSEE: LAE Supermarkets Pty Ltd

PREMISES: **Eastside 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: 15 February 2019

DECISION

1. On 12 February 2019, the Northern Territory Liquor Commission ("the Commission") dismissed a complaint against LAE Supermarkets Pty Ltd ("the Licensee") in relation to its Eastside IGA premises. These are the reasons for that decision.

REASONS

2. On 8 December 2017, an incident took place which gave rise to a complaint against the Licensee. On 27 November 2018, Director-General of Licensing ("the Director-General") referred the complaint to the Commission. The Commission listed the matter for hearing at Alice Springs on 12 February 2019.
3. Licensing NT Director of Liquor, Gambling and Racing Mark Wood appeared for the Director-General. Mr John Stirk appeared for the Licensee. The Commission thanks them both for their attendance and assistance.
4. The Director-General's referral was supported by a brief of evidence, which was exhibited at the commencement of the hearing and marked Exhibit 1.
5. The Commission makes the following findings and observations from Exhibit 1:

- There was a delay from the date of the subject incident to the referral of the complaint to the Commission of almost a year.
- In the brief of evidence, no explanation is provided for the delay from 23 March 2018 (when the Licensing NT investigation of the complaint was completed) to 27 November 2018 (when the complaint was referred to the Liquor Commission).
- The Licensee, who was formally notified of the complaint on 6 February 2018, does not appear to have contributed to the delay.
- The Licensee co-operated with the investigation conducted by Licensing NT, and the relevant employee of the Licensee promptly submitted to an interview with investigators.
- The complaint alleges that the Licensee sold 11 bottles of wine to a drunk person, contrary to s 2 of the *Liquor Act* (“the Act”).
- The evidence in support of a finding that the complaint be upheld is limited, having regard to the following:
 - there is no useful CCTV footage
 - there is no Body Worn Video footage
 - the salesperson’s account is that he assessed the customer as not being drunk
 - police observed signs of drunkenness, but did not breath test or breathalyse the customer, or take him into protective custody
 - the customer told police he had drunk five beers earlier in the evening.

6. The Commission has regard to the circumstance that had the Licensee been prosecuted under s102 of the Act, the complaint would have had to be laid within 6 months of the date the offence was allegedly committed.¹

7. On 14 January 2019, the Commission wrote to the Acting Director-General of Licensing,² stating that it had:

formed the preliminary view that the licensee may be prejudiced by the delay in progressing this complaint, and that as a consequence it may not be appropriate to take disciplinary action against the licensee in this instance. Accordingly, I now write to provide you with an opportunity, if you decide to maintain this complaint, to show cause as to why it should not be dismissed because of excessive delay.

8. On 5 February 2019, the Acting Director-General provided a response to the Commission, in which she did not indicate that she intended to discontinue the complaint, and did not provide an explanation for the delay in referring the complaint to the Commission. The Commission acknowledges the Acting Director-General's response as a carefully considered analysis of the scheme of Part VII Division 2 of the Act.

9. In the course of the hearing, Mr Wood adopted and extended that analysis by submitting that the Director-General has no power to withdraw a complaint after referring it to the Commission under s69(1) of the Act. Mr Wood further submitted that the Director-General may not be a party to a hearing conducted by the Commission pursuant to s69(4)(a), which necessarily implies that such a hearing is inquisitorial rather than adversarial in nature.

¹ See section 52, *Local Court (Criminal Procedure) Act* (NT)

² In 2017 and 2018, the position of Director-General was held by Ms Cindy Bravos. On 1 January 2019, following the resignation of Ms Bravos, Ms Sally Ozolins commenced as Acting Director-General.

10. Although the Commission considers that the submissions made by and on behalf of the Acting Director-General in relation to the construction of Part VII Division 2 of the Act to be both important and tenable, they were not fully argued. For the purpose of determining this matter it is unnecessary for the Commission to rule on these issues, and the Commission does not do so on this occasion.
11. In her letter of 5 February 2019, the Acting Director-General also stated:

It is of course open to the Commission to seek information from inspectors involved in the course of the hearing to determine if it is satisfied that disciplinary action is appropriate in the circumstances.
12. Following the tender of the hearing brief, the Commission indicated that in the event that it was not satisfied by any explanation provided to it for the delay, it was minded to summarily dismiss the complaint. No submissions were made opposing that foreshadowed course, and the matter subsequently proceeded as had been foreshadowed.
13. The Commission thereupon invited Mr Wood to provide an explanation for the delay between 23 March 2018, when the Licensing NT investigation was completed, and 23 November 2018, when the Director-General referred the complaint to the Commission.
14. Mr Wood explained that this delay was primarily due to limited resources, and in particular, the competing demands on a small team of Licensing NT officers. He submitted that time had been taken to finalise the referral, with the complaint file being passed back and forth between Licensing NT staff to ensure, to put it colloquially, that the i's were dotted and the t's crossed. Mr Wood submitted that the Licensee had not been materially prejudiced by the delay, which was comparable with the delay in the Local Court between the laying of a complaint and a matter proceeding as a contested hearing. Mr Wood further submitted that there is no prescribed timeframe within which the Director-General is required to dispose of a complaint.
15. The Commission does not accept that this is a satisfactory explanation for the delay, and finds that the delay was unreasonable. As a result of this delay, a complaint arising from an incident that occurred late in 2017 was unable to be resolved until early in 2019. The Commission is concerned that such a lengthy delay, none of which was caused by or could have been reduced by the Licensee, tends to impair the confidence of both licensees and the public in the administration of the *Liquor Act*, and in particular it tends to impair confidence in the administration of Part VII of the Act, which establishes a scheme to enforce compliance by licensees with the Act.
16. Although the Licensee has not pointed to any specific prejudice arising from the delay, it remains the case that the Licensee has been vexed by this complaint since at least 6 February 2018, a period in excess of one year. Although the common law does not recognise a right to a speedy trial in criminal cases, "[t]hat is not to say that the courts of this country do not regard speed in the disposition of criminal cases as desirable. To the contrary, it is a truism that justice delayed is justice denied."³ These proceedings are not criminal proceedings, but nevertheless they are accusatory in nature, and expose the

³ *Jago v District Court of New South Wales* (1989) 168 CLR 23 per Brennan J at [20]

Licensee to liability to substantial penalties. As with criminal proceedings, it is desirable that proceedings pursuant to Part VII of the Act be resolved without undue delay.

17. Section 69 of the Act requires that where a complaint has been referred to the Commission:

(4) The Commission must:

(a) conduct a hearing for deciding the complaint; and

(b) on completing the hearing – by written notice to the Director-General and licensee:

(i) dismiss the complaint; or

(ii) uphold the complaint and take specified disciplinary action against the licensee (whether or not it is the disciplinary action recommended by the Director-General in the referral).

(5) The Commission may take disciplinary action against the licensee only if the Commission is satisfied:

(a) a ground for taking the disciplinary action exists; and

(b) the disciplinary action is appropriate in relation to that ground.

18. The Commission considers that s69(4)(b)(ii) operates conjunctively: in other words, the Commission must dismiss a complaint unless it decides to both uphold the complaint and take specified disciplinary action against the licensee. Pursuant to s69(5)(b), the Commission may only take disciplinary action if it is satisfied that it is appropriate to do so. It follows that if the Commission is not so satisfied, it must dismiss the complaint.

19. In the view of the Commission, unsatisfactorily explained and unreasonable delay by the Director-General in referring a complaint to the Commission is a relevant consideration in determining whether or not it is appropriate to take disciplinary action against a licensee.

20. Taking the evidence of the complaint at its highest and having regard to the circumstances of the delay in referring the matter to the Commission in the context of the circumstances of the complaint set out at paragraph 5 above, the Commission is not satisfied that disciplinary action is appropriate in relation to the alleged ground of complaint.

21. Accordingly, whether or not the complaint should be upheld, a question which it is unnecessary to answer, the complaint must be dismissed.

ORDER

22. The Complaint is dismissed.

NOTICE OF RIGHTS

23. 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.
24. The Schedule specifies decisions made pursuant to s68 (“Decision to dismiss complaint”) and s69(3) (“Decision to take disciplinary action against licensee”) as reviewable decisions. Section 68 confers power on the Director-General to dismiss complaints against licensees, and accordingly has no application to this decision. Section 69, which is headed “Commission’s power to take disciplinary action” confers on the Commission both the power to uphold a complaint and take disciplinary action (s69(4)(b)(ii)), and the power to dismiss a complaint (s69(4)(b)(i)).
25. However, s69(3), the provision in the Schedule, does not in its terms refer to a decision to either dismiss a complaint or take specified disciplinary action. It provides:
- The Director-General must give the licensee details about the referral when referring the matter to the Commission.
26. In this matter, the Commission has decided not to uphold the complaint or to take disciplinary action. 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.
27. If this decision is a reviewable decision, in accordance with section 120ZB(1)(a) and (c) of the Act, the affected persons would be the Licensee and the person who made the complaint, namely Chris Wade, Senior Compliance Officer, Licensing NT.



RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

15 February 2019

On behalf of Commissioners, Goldflam, Reynolds and McFarland