

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Flynn Drive IGA Supermarket
Licensee:	LAE Supermarkets Pty Ltd
Proceedings:	Disciplinary Action for Alleged Breach of S102 of the <i>Liquor Act</i>
Heard Before:	Mr Richard O'Sullivan (Chairman) Ms Helen Kilgariff (Member) Mr Paul Fitzsimons (Member)
Appearances:	Mr Mark Wood for the Director of Licensing Mr John Stirk for the Licensee
Witnesses:	Sergeant Glennys Green, NT Police Senior Constable Marek Hutchinson-Goncz, NT Police Ms Rachel Inkamala, Assault Victim Mr Adam Palmer, LAE Supermarkets
Date of Hearing:	6 June 2014
Date of Decision:	20 August 2014

Background

- 1) The Director of Licensing ("the Director") has made application to the Licensing Commission ("the Commission") for disciplinary action against the Licensee of Flynn Drive IGA Supermarket ("the Supermarket") for the alleged sale of liquor to an intoxicated person on 4 May 2013, in breach of section 102 of the Liquor Act ("the Act").
- 2) Section 102 of the Act contains the following provision:

"102 Prohibition of sale or supply of liquor to person who is drunk
A licensee or an employee of a licensee must not sell or otherwise supply liquor to a person who is drunk.
Maximum penalty: 100 penalty units."
- 3) It is alleged that Mr Heinrich Katarinja entered the Supermarket on 6 occasions between 11.49am and 3.53pm on 4 May 2013 and on 5 of these occasions he was sold bottles of white wine by staff at the Supermarket. On one of these occasions, 2.57pm, when Mr Katarinja attempted to make purchase of wine he was refused service by an employee of the Licensee, Ms Julie Tauchman. Following this refusal Mr Katarinja was sold bottles of white wine on 2 subsequent occasions by Ms Tauchman, the times being 3.21pm and 3.53pm.

- 4) Mr Katarinja was subsequently arrested when Police were called to an incident at a park opposite the Supermarket in which Mr Katarinja stabbed a female in the neck with a broken wine bottle. Police at the time of Mr Katarinja's arrest observed that he was "extremely intoxicated with slurred speech and blood shot eyes", according to a Statutory Declaration by Constable Marek Hutchinson-Goncz on 4 May 2013. Statutory Declarations from Police Officers Santiago Bernadez and Glennys Green also refer to Mr Katarinja's intoxicated state at or around the time of his arrest.
- 5) The Director made application for disciplinary action pursuant to section 69(1) of the Act in February 2014. Section 69(1) states:

"69 Disciplinary action

(1) *The Director or a person prescribed by regulation may apply to the Commission for disciplinary action to be taken against a licensee."*

- 6) Following consideration of the application the Commission on 3 March 2014 determined to conduct a Hearing pursuant to section 69(5) of the Act. The relevant powers are conferred to the Commission in sections 69(4) and (5):

"(4) The Commission must, after considering the application, by written notice to the applicant and licensee:

(a) accept the application if the Commission considers a hearing should be conducted for deciding the application; or

(b) otherwise – refuse to accept the application.

(5) The Commission must conduct a hearing for deciding the application if the Commission accepts the application."

- 7) A Hearing was subsequently convened in Alice Springs on 9 June 2014.

The Hearing

- 8) Mr Wood outlined the history of the matter which Police had initially commenced through prosecution in the Court of Summary Jurisdiction. On becoming aware that jurisdiction for determining the matter rested with the Commission, Police referred the alleged breach as a complaint to the Director. Consistent with Police intention, the Director has laid the charges against the Licensee, not the individual employee involved in the sale of alcohol.
- 9) Mr Wood presented the facts of the matter as provided in the application for disciplinary action by the Director for an alleged breach of section 102 of the Act. He submitted that on the day of 4 May 2013, Mr Katarinja presented himself at the Supermarket checkout on 6 occasions and on 5 of those occasions he was sold bottles of white wine by supermarket staff. Two of these sales took place after Mr Katarinja had earlier been refused sale because of alleged intoxication. In Mr Woods submission these subsequent sales should not have taken place and constitute a breach of section 102 of the Act.

- 10) Mr Stirk, Counsel for the Supermarket sought the deletion of folios in the Hearing Brief on the basis of lack of relevance and being prejudicial to his client. Mr Wood did not make submission in opposition and the Commission agreed to the removal of specified folio material in the Brief.
- 11) Parties to the Hearing agreed that the CCTV footage available for the alleged breach was not conclusive in illustrating the purchaser's balance, coordination or other intoxication indicators and therefore there was no value in presenting the footage at the Hearing. Mr Wood advised that statements from Mr Peter Gannon, Group Business Manager of LAE Supermarkets of 4 May 2013 and undated correspondence from the person who served Mr Katakarinja, Ms Julie Tauchman, confirm that alcohol was sold on the occasions outlined in the complaint. Mr Stirk agreed that Liquor was sold on the specified occasions.
- 12) Police witnesses were introduced to give evidence over the incident they attended on the afternoon of 4 May 2013 when Mr Katakarinja was arrested following his assault on a fellow drinker Ms Rachel Inkamala. Senior Constable Hutchinson-Goncz and Sergeant Green both gave evidence which was consistent in the recounting of events relating to the assault, the subsequent arrest of Mr Katakarinja and evidence as to his evident intoxication.
- 13) Police evidence was that on 4 May 2013 at around 4.30pm they were called to an incident at a park on Flynn Drive opposite the Supermarket. They were presented with a lady who was bleeding from the neck. She identified Mr Katakarinja as the person who injured her. In the evidence of Sergeant Green the male perpetrator was slurring his words and drunk. She stated that she "*could not understand his words, he was unsteady on his feet and reeked of alcohol*".
- 14) Police described the area as littered with wine bottles as evidence that a number of people had been drinking at the location. Evidence was provided that most people were drunk, with some asleep, when Police arrived at the incident scene. Senior Constable Hutchinson-Goncz advised that he took an "*incredibly intoxicated*" Mr Katakarinja back to the Police vehicle and placed him under arrest. At the scene he spoke to a Mr Tommy Ross and was informed that Ms Inkamala was stabbed in the neck with a broken wine bottle by Mr Katakarinja. While at the location Police viewed CCTV footage of the wine purchases made by Mr Katakarinja on several occasions that day.
- 15) The victim of the assault, Ms Rachel Inkamala, gave evidence that a drunk Mr Katakarinja stabbed her with a broken bottle. She had been drinking with the group leading up to the assault. She described her condition at the time as "*full drunk*" as she had been drinking rum at the time.
- 16) Mr Stirk introduced Mr Adam Palmer, Liquor Co-ordinator with LAE Supermarkets, to provide evidence on behalf of his client. Mr Palmer outlined his employment history with LAE Supermarkets (who own and operate IGA stores in Alice Springs), including for a time as manager of the Flynn Drive Supermarket. He advised that he knew Ms Tauchman, the person who had served Mr Katakarinja on several occasions.

- 17) He explained that Ms Tauchman had obtained a Responsible Service of Alcohol (RSA) certificate, did on the job training required by LAE Supermarkets and also undertook cultural awareness training. Submissions from Mr Palmer were that Ms Tauchman was equipped to make proper assessment and judgement of the indicators of intoxication evident in people she served.
- 18) In summary submission Mr Wood referred to persons "*masking*" their state of intoxication in order to purchase further alcohol. He submitted that staff are usually taught or experienced enough to identify persons seeking to "mask" their drunken or intoxicated state. In the matter before the Commission another staff member served Mr Katarinja earlier in the day and following this Ms Tauchman refused to serve him, but then when he came back she served him bottles of wine on both occasions.
- 19) In Mr Wood's submission after already having refused Mr Katarinja, Ms Tauchman should have maintained that course of action as if he was intoxicated when refused service at 2.57pm, he would have still been intoxicated at 3.21pm and 3.53pm when he purchased bottles of white wine. When he was arrested at approximately 4.45pm Mr Wood stated he was in a very drunken state in the evidence of Police and Ms Inkamala who described him as "*full drunk*". Corroborating other indicators of drunkenness Mr Wood referred to the evidence of Senior Constable Hutchinson-Goncz that when Mr Katarinja was back at the Police Station after his arrest he recorded a reading of .262 BAC.
- 20) Mr Wood maintained that the action in refusing Mr Katarinja at 2.57pm is supported and the subsequent serving when Mr Katarinja was intoxicated were negligent actions and the Licensee therefore is guilty of breaching section 102 of the Act.
- 21) Mr Wood submitted that as the Licensee had no recent history of breach, the failure on 4 May 2013 was not indicative of systemic systems failures or ongoing negligence. The actions of the Supermarket had resulted in harm, that being serious assault and injury to Ms Inkamala, and therefore there is no mitigation in this regard. If found to be in breach, he advised that the Director sought a penalty of a \$3,000 monetary fine.
- 22) Mr Stirk drew the Commission attention to the CCTV footage which parties had agreed did not assist in determining if indicators of intoxication were present in Mr Katarinja's actions and movement. He stated that Police evidence of Mr Katarinja's intoxication were observations taken nearly 1 hour after his last purchase of wine and in that time he could have consumed up to 2 bottles of wine.
- 23) Regarding the actions of the shop attendant, Mr Stirk referred to her statement contained in the Hearing Brief where Ms Tauchman refers to not serving him due to his failure to engage or communicate with her so as to enable a proper sobriety assessment.
- 24) If the Commission does determine a breach of the Act has occurred Mr Stirk submitted that the penalty should be at the lower end of the scale. He referred the Commission to the evidence of Mr Palmer on the training and cultural awareness programmes undertaken by LAE Supermarkets to prevent breaches, including of

serving drunks and underage persons. Credit for those initiatives needs to be taken into account in his submission.

Consideration of the Issues

- 25) On 4 May 2013 a number of people had evidently gathered on the oval or park grounds on Flynn Drive opposite the Supermarket. It is also evident to the Commission that many of these people were engaged in drinking alcohol. Presented to the Commission is that a particular individual, Mr Katakarinja, who was one of those persons gathered at the oval, purchased alcohol from the Supermarket on 5 separate occasions. These purchases totalled 7 bottles of white wine.
- 26) Mr Katakarinja was initially served by another attendant, but on the last 3 occasions when he presented at the counter to purchase bottles of wine he was served by Ms Tauchman. On the initial occasion, that is at 2.57pm, he was refused service. A signed but undated statement from Ms Tauchman gives as the reasons for refusal:
- “I remember refusing a person not long after I started my shift. I started a conversation with him, he however did not respond, mumbled something, did not look at me and just put the money on the counter. Therefore, I refused service to him and explained to him why I did not serve him.”*
- 27) Ms Tauchman is a German national and has since returned home and is therefore not able to give evidence or be subject to questioning. In the statement, part of which is quoted above, Ms Tauchman then goes on to say she does not recall Mr Katakarinja returning on 2 more occasions, being served by her and purchasing in total 3 more bottles of white wine.
- 28) It has been put to the Commission that Ms Tauchman refused to serve Mr Katakarinja because he was drunk and that when he subsequently presented and was served, her actions were negligent. A counter argument has been put by Mr Stirk that Mr Katakarinja was subsequently served because he engaged with Ms Tauchman and did not display any obvious signs of intoxication. In Mr Stirk’s submission Mr Katakarinja was not intoxicated at the time of service but that in the intervening hour before being arrested by Police he consumed quantities of wine, causing his drunken state.
- 29) The Commission’s consideration is based on the test threshold of balance of probability. The Commission does not accept that Mr Katakarinja, who purchased a total of 7 bottles of white wine over a 4 hour period from before midday to around 4pm, only commenced heavy drinking in the last hour immediately before his assault on Ms Inkamala. It is far more likely that Mr Katakarinja was engaged in drinking from his original purchase before midday up until his arrest. From the time of his last purchase at 3.53pm his condition and level of intoxication would likely have worsened, but it is also most likely that he was intoxicated at the time of his purchase at 3.21pm and more so at 3.53pm.
- 30) What Police have presented in evidence is that on their arrival at the Flynn Drive oval area they were presented with people asleep and people intoxicated. There were numerous wine bottles scattered throughout the area. This is indicative of a “drinking session” by a large gathering of people. Mr Katakarinja was an active

member of the group, who alone had purchased 7 bottles of white wine from the Supermarket.

Decision

- 31) The Commission finds that in all probability Mr Katakarinja was intoxicated at the time he was refused service by Ms Tauchman. In subsequent presentations he was more than likely intoxicated and should have been refused service. Therefore the Commission finds that the Licensee has breached s102 of the Act through these actions.
- 32) Mitigating penalty is the former good record of the Supermarket. Also in favour of the Supermarket is the training it provides to staff, Ms Tauchman included, over identification of intoxication and of cultural awareness.
- 33) The Director has sought a penalty of \$3,000 if the breach is made out. The Commission is of the view that a general deterrent penalty, to give notice of consequences of service intoxicated persons, is warranted. Taking into account the efforts of the Supermarket and LAE Supermarkets in training and mentoring staff to avoid sales to intoxicated persons, the Commission imposes a monetary fine of \$2,000. This penalty is to be paid to the Receiver of Territory Monies within 28 days of this Decision.

Richard O'Sullivan
Chairman

20 August 2014