

## Decision Notice

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| <b>Matter:</b>           | Complaint pursuant to section 68 of the <i>Liquor Act</i>  |
| <b>Premises:</b>         | Wycliffe Well Hotel  |
| <b>Licensee:</b>         | Arcvan Pty Ltd as Trustee for Arc Vanderzalm Trading Trust |
| <b>Licence Number:</b>   | 80802878   |
| <b>Nominee:</b>          | Mr Anthony Raymond Vanderzalm                              |
| <b>Legislation:</b>      | Sections 110, 102 and 19A of the <i>Liquor Act</i>         |
| <b>Decision of:</b>      | Director-General of Licensing                              |
| <b>Date of Decision:</b> | 07 July 2016   |

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### Background

1. On 21 August 2015, a complaint was lodged with the Delegate of the Director-General of Licensing (“the Delegate”) pursuant to section 68 of the *Liquor Act* (“the Act”) against the Licensee of the Wycliffe Well Store (“the Premises”). The licensee at the time of the incident was Arcvan Pty Ltd as Trustee for Arc Vanderzalm Trading Trust. At the relevant time Mr Arc Vanderzalm was both the manager/nominee for the Premises and the sole Director of Arcvan Pty Ltd.
2. The complaint resulted from an incident that occurred at the Premises on 19 July 2015, where it was alleged that the following sections of the Act had been breached:
  - Section 19A: Failure to comply with reasonable request of Inspector;
  - Section 102: Sale or supply of liquor to a person who is drunk; and
  - Section 110: Contravention of licence condition.
3. On 28 January 2016 the liquor licence for the Premises was transferred from Arcvan Pty Ltd to XXXX. As a consequence Arcvan Pty Ltd no longer has any association with the Premises or the conduct of the business under the current liquor licence.

### Substance of the Complaints

#### Matter 1 - Section 110 of the Act, contravention of licence condition.

4. The liquor licence for the Premises is subject to a condition relating to the volumes of take away alcohol that may be sold to patrons. That condition includes a provision that full strength beer sold for consumption away from the premises is restricted to 6 x 375ml bottles or cans per person per day.
5. NT Police allege that on 19 July 2015, XXXXX attended the Premises on two separate occasions during which XXX was sold one six pack of full strength beer at 2.25 pm and a second six pack of full strength beer at 7.43 pm. Statutory declarations sworn by Police and XXXX were provided Licensing Inspector XXXX in support of the allegation, as was a copy of the Alcohol Purchase Register required to be maintained by the Licensee.

Matter 2 - Section 102 Prohibition of sale or supply of liquor to a person who is drunk.

6. In addition, Police allege that XXXX was drunk at the time of XXX purchased the second six pack of full strength beer at 7.43 pm. The Statutory declarations received from Police and XXXX supported this allegation. In addition, a statutory declaration sworn by an officer stationed at the nearby Ali Curung Police Station states that XXXX was taken into protective custody by Police at Ali Curung at 10.45 pm at which time XXX recorded a blood alcohol concentration reading of 0.125%.

Matter 3 - Section 19A(1)(b) of the Act, failure to comply with reasonable request of inspector.

7. Police alleged that the Licensee failed to comply with a reasonable request when asked to supply CCTV footage for 19 July 2015. Police state they were required to visit the Premises several times before the CCTV footage was made available by the Licensee. In addition, when Police viewed the footage on a USB provided by the Licensee they found it did not contain the requested footage and had to return to the Premises again to collect the correct footage. That allegation is also supported by a statutory declaration sworn by Police.

Matter 4 - Section 110 of the Act, contravene a licence condition.

8. The liquor licence for the Premises includes a licence condition requiring the licensee to install and maintain CCTV monitoring equipment. That condition also stipulates that CCTV footage must be retained by the licensee for a period of not less than 14 days.
9. Police alleged that the Licensee contravened the Camera Surveillance Requirement licence condition by not properly maintaining the CCTV equipment or CCTV footage. Police allege that the CCTV footage supplied in respect of the complaint under consideration was not maintained appropriately as there were noticeable gaps in time and discrepancies when footage was reviewed. A Statutory Declaration from Police was provided in support of this allegation.

## Evidence and Submissions

10. The Alcohol Purchase Register maintained by the Licensee shows that XXXX purchased two six packs of full strength beer at the Premises on 19 July 2015. Witness statements obtained from both NT Police and XXXX state that XXXX was served take away alcohol twice on the same day and that XXX was drunk when served on the second occasion.
11. Mr Vanderzalm, on behalf of the Licensee of the Premises, responded to the allegations that form the substance of the complaints on 28 September 2015. Mr Vanderzalm advised that the Licensee did not dispute the allegation that XXXX was sold a six pack of full strength beer twice on the one day in breach of the relevant licence condition. He explained that he had made a mistake in this instance and the breach of licence condition was not a deliberate act. Mr Vanderzalm noted that he was sorry for his actions.
12. Mr Vanderzalm added that the abandonment of the former Banned Drinker Register made the task of complying with the restrictions on the sale of take away alcohol more problematic. The process now involves manually checking through the alcohol sales register for earlier purchases and, in addition, checking whether the purchaser is subject to an alcohol protection court order which in turn made each sale of take away liquor more time consuming than previously. Mr Vanderzalm attached examples of extracts from the Alcohol Purchase Register maintained for the Premises from various dates and the list of people subject to alcohol banning court orders.

13. Mr Vanderzalm disputed the allegation that XXXX was drunk when XXX purchased a second quantity of alcohol on 19 July 2015. In his response to that element of the complaint, Mr Vanderzalm stated that he and staff of the Premises regularly refuse service to people who are drunk and ensure they leave the Premises. He states further that XXXX is known to him and that XXX had been refused service on other occasions when XXX had been drunk.
14. In his response Mr Vanderzalm reiterates his belief that XXXX was not drunk when he served XXX on the second occasion at 7.43 pm on 19 July 2015. He added that he understands and respects the laws regarding the responsible service of alcohol and continues to train and educate his staff on the importance of responsible service of alcohol.
15. Mr Vanderzalm disputed the allegation that Police were obstructed when requesting CCTV footage. In his response he stated that footage was downloaded to a USB stick within a couple of days of him receiving the request. When Police attended the Store to collect the USB, a staff member gave Police a USB without checking first if it was the correct one. The correct USB was provided to Police after this was realised. Mr Vanderzalm stated that he is not obstructionist towards Police and that he assists Police when requested to do so.
16. Mr Vanderzalm also disputes the allegation that the CCTV System was not maintained. In his response he stated that he was unaware of any problems with the system. The CCTV system was purchased and installed by a company registered as an approved supplier and installer with Licensing NT. He stated that a staff member inspected the system after the incident involving XXXX and the clock was found to be out by one hour, which Mr Vanderzalm submits may have been caused by power outages. Mr Vanderzalm stated that, as at the date of his response to the complaints the CCTV system had been adjusted and was operating correctly.

## Consideration of the Complaints

### Section 110 of the Act – Breach of Licence Condition- Take Away Liquor Restriction:

17. In respect of the complaint relating to the sale of take away alcohol to XXXX in breach of the take away liquor licence condition, Mr Vanderzalm, on behalf of the licensee, admitted the breach. Whilst there is no evidence suggesting the breach was deliberate, it was a serious oversight given the nature and extent of alcohol related issues impacting detrimentally on nearby Aboriginal communities. The restrictions on the sale of take away alcohol are designed to minimise the impacts of alcohol abuse on those communities and to reduce the anti-social behaviour and dysfunction associated with alcohol abuse. It was the Licensee's responsibility to be vigilant and comply with all the conditions attached to the liquor licence and in this instance the licensee, through its manager/nominee, failed to discharge that obligation to the required standard.

### Section 102 of the Act – Sale or supply of liquor to a person who is drunk:

18. In respect of the allegation that XXXX was intoxicated at the time of the second purchase of take away alcohol, the evidence provided by Police and Mr Vanderzalm is conflicting. In a statutory declaration obtained by Police XXXX states that XXX left Ali Curung at lunch time on 19 July 2016 and purchased a six pack of Victoria Bitter cans. The alcohol sales register maintained by the licensee confirms that XXXX made the purchase at 2.56 pm. XXXX says that XXX travelled from the Premises to XXX XXXX house in Tennant Creek and after drinking the beer purchased from the Premises a further 30 pack of Victoria Bitter cans was purchased and consumed. XXXX states that after consuming all the beer XXX left Tennant Creek between 5.00 pm and 6.00 pm and returned to the Premises where XXX purchased another six pack of Victoria Bitter cans. XXXX states that after consuming all the beer in Tennant Creek XXX was "full drunk". The alcohol sales register confirms that XXXX purchased the second six pack of beer at 7.43 pm.
19. Mr Vanderzalm denies that XXXX was drunk when he sold XXX the second six pack of beer. He stated that he has considerable experience in identifying drunk patrons and that the

Premises has a strict policy of refusing service to drunken patrons. He notes that all staff of the Premises have Responsible Service of Alcohol accreditation and experience in detecting signs of intoxication. Mr Vanderzalm stated that he saw no indication that XXXX was drunk at the time of the second sale and if he had noticed any signs of intoxication he would have refused to serve XXX, as he has in the past when XXX was assessed as being drunk.

20. Section 124B of the Act provides that the result of a breath analysis is prima facie evidence that the person tested had a concentration in his or her breath of not less than the concentration of alcohol assessed by the analysis. In this instance XXXX returned a breath analysis concentration of 0.125%. Under the *Traffic Act* driving a motor vehicle with a BAC reading higher than 0.08% grams but less than 0.15% is classified as medium range drink driving offence. Whilst XXXX was well over the BAC limit at which XXX would be prohibited from driving a motor vehicle without further indicia of drunkenness I am unable to determine that XXXX was drunk to the extent that XXX should have been denied service of take away alcohol when XXX visited the premises for the second time on 19 July 2015.
21. In addition, Police obtained CCTV footage from the Premises relating to the sale of alcohol to XXXX. The Police statements tendered to the Licensing Inspector make no mention XXXX was drunk at the relevant time. It is reasonable to assume that, in the absence of any Police comment on the issue, that the CCTV footage was of no assistance in determining whether or not XXXX was drunk when XXX was sold alcohol for the second time on 19 July 2015.
22. For those reasons I find that the allegation that the licensee, through Mr Vanderzalm, sold take away alcohol to XXXX on 19 July 2015 when XXX was drunk is not made out.

Section 19A(b) of the Act – Failure to comply with reasonable request of inspector.

Section 19A of the Act provides that a person commits an offence if the person fails to comply with a reasonable request of an inspector. Section 19(10) of the Act provides that Police officers have the same powers and authority as inspectors.

23. Police allege that Mr Vanderzalm failed to comply with a reasonable request to provide them with CCTV footage for 19 July 2015 in respect of the sales of take away alcohol to XXXX and that Police were required to visit the premises on several occasions prior to the footage being made available to them. Police further allege that when the CCTV footage was eventually provided to them they found that it did not include the CCTV footage actually requested and they were required to return to the premises again.
24. In response to this allegation Mr Vanderzalm disputes that he failed to comply with the request from Police and that the CCTV footage was downloaded to a USB stick within a couple of days of the date of the request from Police. He states further that when Police arrived to collect the CCTV footage a staff member handed them the wrong USB stick. Mr Vanderzalm states that the correct USB stick including the requested CCTV footage was provided to Police as soon as the error was realised.
25. Mr Vanderzalm's own evidence confirms the statements by Police that they were initially provided with a USB stick that did not contain the requested footage. Mr Vanderzalm also confirms that the error was corrected and the requested CCTV footage was provided to Police as soon as the error came to light.

26. In those circumstances I am unable to conclude that Mr Vanderzalm deliberately set out to avoid providing the CCTV footage to Police or that he took any deliberate action to delay the provision of the footage. As a result I find that this component of the complaint is not made out.

Section 110 of the Act – Breach of Licence Condition – Camera Surveillance Requirement:

27. The liquor licence for the Premises includes a condition requiring the licensee to comply with such requirements in relation to camera surveillance as are notified to the licensee in writing. The Camera Surveillance Requirements include a provision requiring a licensee to maintain and operate a secure camera surveillance system which allows access to and copies to be made of recordings on the system at the request of NT Police and licensing inspectors.

28. In reviewing the CCTV recordings obtained in respect of this complaint, Police observed that the camera surveillance system appeared to have not been properly maintained as there were “noticeable gaps in time throughout the day and the times people were on the register were not matching the footage”.

29. In his response to this component of the complaint Mr Vanderzalm disputed the allegation that the CCTV system at the Premises was not properly maintained. He stated that the CCTV system was purchased from and installed by a company registered as an approved supplier and installer with Licensing NT. Mr Vanderzalm stated further that a staff member had inspected the system after the incidents the subject of this notice and found that the clock on the CCTV system was out by one hour, presumably due to power outages and/or loose wiring connections. He stated that the system had subsequently been adjusted and was operating correctly at the time of sending his response to the complaint on 9 October 2015.

30. In respect of this component of the complaint, there is insufficient evidence on which to reach a finding that the licensee failed to properly maintain the CCTV system at the Premises, either deliberately or through neglect. Police allege there were gaps in the footage, which was denied by Mr Vanderzalm. Unfortunately no independent examination of the footage was conducted during the investigation into the complaint. Mr Vanderzalm conceded that the clock on the system at the time of the incident involving XXXX was out by one hour and that was corrected as soon as he became aware of that situation.

31. In all the circumstances I am unable to determine that this complaint has been made out.

**Decision**

32. On the basis of the reasons set out above, I have determined that there is insufficient evidence on which I am able to find that the manager of the Premises sold alcohol to XXXX when XXX was drunk. There is also insufficient evidence available to me on which to reach a finding that the Licensee breached the camera surveillance licence condition or that he failed to comply with a reasonable request from Police for the production of relevant CCTV footage.

33. In accordance with section 68(5)(a)(i) of the Act I have determined to dismiss those complaints on the basis there is insufficient evidence in respect of the grounds of complaint.

34. Mr Vanderzalm, on behalf of the Licensee, has admitted the breach of contravening the take away liquor restriction limiting sales to one six pack of full strength beer per person per day. Mr Vanderzalm candidly admitted the breach at the first available opportunity and apologised for his failure to refuse service to XXXX on the second occasion. The take away liquor restriction was imposed on the Wycliffe Well Hotel for the specific purpose of minimising the harms and risks associated with the irresponsible purchase and consumption of take away alcohol and the resultant alcohol related antisocial behaviour and violence. Those concerns and risks are heightened in circumstances where licensed premises are in proximity to Aboriginal communities in which alcohol is not permitted.

35. Section 69 of the Act provides that on completing an investigation into a complaint about a licensee, the Director-General may give the licensee written notice that the Director-General proposes to take disciplinary action against the licensee. The notice must specify the proposed disciplinary action and invite the licensee to make a written submission in response to the proposed action.
36. As noted in paragraph 3 above, on 28 January 2016 the liquor licence for the Premises was transferred from Arcvan Pty Ltd to XXXX with the result the former Licensee and Mr Vanderzalm no longer have any association with the Wycliffe Wells Hotel or the business conducted under the liquor licence. As a consequence a number of the disciplinary actions available under the Act, for example suspension of the licence, would be of no effect in terms of the former Licensee.
37. In respect of the breach of section 110 of the Act, being a breach of the take away liquor restriction licence condition, I propose to impose a monetary penalty on Arcvan Pty Ltd pursuant to section 70 of the Act. Section 70 provides that the amount of the monetary penalty must not exceed the lesser of the maximum amount of the fine specified for the particular offence or, where no penalty is prescribed, 100 penalty units. The maximum penalty prescribed for a breach of section 110 of the Act is prescribed as 100 penalty units which equates to \$15,300.00.
38. In this instance, and taking account of the early admission by Mr Vanderzalm and the fact that his company is no longer the Licensee of the Premises, I propose to impose a fine set at 10% of the maximum fine permissible, namely 10 penalty units or \$1,530.00.
39. In accordance with section 69(2)(c) of the Act Mr Vanderzalm is to be invited to make a written submission on behalf of the former licensee in response to the proposed action within a specified period ending not less than 28 days after the notice is given.

### **Review of Decision**

40. Section 120ZA of the Act provides that a decision of the Director-General, as specified in the Schedule to the Act, is a reviewable decision. A decision to dismiss a complaint under section 68 of the Act is specified in the schedule and is a reviewable decision. Section 120ZC of the Act provides that a person affected by this decision may seek a review before the Northern Territory Civil and Administrative Tribunal. Any application for review of this decision to dismiss the three complaints identified above must be lodged within 28 days of the date of this decision. For the purpose of this decision and in accordance with section 120ZB(c) of the Act, the affected persons are the Licensee, Arcvan Pty Ltd as Trustee for Arc Vanderzalm Trading Trust, and the complainant, Licensing Inspector XXXX.



**Cindy Bravos**  
**Director-General of Licensing**

Date: 07 July 2016