

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	GOOD FORTUNE TAKEAWAY MINI MARKET
LICENSEE:	Leang Soy Te
LICENCE NUMBER:	80901818
PROCEEDING:	Complaints Pursuant to Section 48(2) of the <i>Liquor Act</i>
COMPLAINANT:	Licensing Inspector Marc Mackenzie
HEARD BEFORE:	Mr John Flynn (Chairman) Ms Brenda Monaghan Ms Veronica McClinitc
DATE OF HEARING:	7 March 2006, 24 March 2006 (mention) and 6 April 2006
DATE OF DECISION:	5 June 2006
APPEARANCES:	Mr Phil Timney for the Complainant Mr Alan Woodcock for the Licensee

- 1) On 8 November 2005, Mr Marc MacKenzie, Licensing Inspector lodged various complaints against the Licensee for selling liquor before hours and for bookup infringements. The Licensee denied the complaints and the matter proceeded to a hearing on the evidence.
- 2) The first complaint is that at some time before 8am on Tuesday 18 October 2005, the Licensee sold liquor in the form of a cask of wine to a member of the public named Barry Jagamarra. Mr Jagamarra gave evidence at the hearing.
- 3) There seems to be no dispute that the liquor was purchased before hours. The question is the identity of the outlet where it was purchased. Mr Jagamara in evidence described the storekeeper who sold him the cask as a Chinese woman with long hair. He advised that he and his friends were on their way to Lims (Nightcliff Hotel) but that they had seen the liquor signs outside one particular store and had stopped to ask if they

could purchase liquor there. He was told to wait until other persons left the shop. He was then served but told not to tell anyone. The chilled cask was wrapped in newspaper and placed in a plastic bag.

- 4) Mr Jagamara described the distance between the store and the place where Sgt James ultimately stopped him to talk as being similar to the distance between the Commission hearing room and Centrelink. He described the store as being near the school.
- 5) Mr Jagamarra admitted in evidence that when spoken to by Sgt James, he at first denied that the cask had just been purchased but ultimately acknowledged the details of sale. His evidence at the hearing was consistent with his signed statement made by him on the day that the cask was confiscated.
- 6) The evidence of Sgt James was that by chance he saw a group of persons outside the Good Fortune store before licensed hours began. He tracked the group, which comprised two (2) men and three (3) women. One man had a blue plastic bag. He waited around the corner until the group approached. He noted that the blue bag contained a yellow Barunga Ridge wine cask wrapped in newspaper. The wine cask was cold. After two (2) initial denials, the holder of cask, Mr Jagamarra admitted that they had bought the cask from the store. Sgt James assumed that the store Jagamarra was talking about was the Good Fortune on the basis that it was the closest liquor outlet and because he had just minutes before seen the same group outside it. He had a firm belief that both he and Mr Jagamarra were talking about the same store. Sgt James arranged for Mr Jagamarra and one other in the group to make statements at the police station that same day.
- 7) The evidence of the Licensee, Ms Te included an acknowledgment that on the day in question, she had been approached by an indigenous itinerant with dirty clothes at around the relevant time but had refused to sell him liquor. She had also seen a group of indigenous people outside in the vicinity of the shop around the same time. Ms Te denied selling a cask to Mr Jagamarra or to anyone else before hours.
- 8) There are some conflicts in the evidence of Mr Jagamarra in that he told us the wrong colour (yellow) of the plastic bag at hearing. The bag is in fact blue. Further, his initial advice to Sgt James was that he had had the cask "*long time*" which seems to be in conflict with any evidence that it had been recently purchased.
- 9) On balance of probabilities, however, whilst we found the evidence of Mr Jagamarra vague in some aspects, he was generally believable on crucial issues. Whilst he could not name the store, the combination of his evidence and that of Sgt James was sufficient to satisfy us that the store in question was the Good Fortune. The Licensee is a Chinese woman with long hair. The Good Fortune is across from the school. It was clearly on the path that Mr Jagamarra is likely to have walked with his friends that

morning. They were seen to be milling outside the store by Sgt James and soon after were seen carrying a blue bag with a wine cask in it. The Good Fortune uses blue bags of the same type. The cask was cold suggesting it was not long out of a fridge. Further, Mr Jagamarra's description of distances between the site where he spoke to Sgt James and the Good Fortune (ie similar to the distance between the Hearing Room and Centrelink) accords with the latter being the supermarket in question rather than any of the other liquor outlets in the general vicinity.

- 10) On the question of whether or not he purchased the cask at the Good Fortune, we preferred the evidence of Mr Jagamarra to that of Ms Te. We also note that the Anunga Rules were not strictly adhered to but we do not consider that this has led to any injustice to either Ms Te or to Mr Jagamarra and we do not consider that their evidence has been compromised as a result. Ms Te's command of English was good and the fact that Mr Jagamarra's evidence at the hearing accorded with his earlier written statement to Police satisfied us that he was well able to retell his story in an honest and consistent fashion. It also confirmed that he has good recall and a pretty clear recollection of events on 18 October 2005.
- 11) In summary, we uphold the complaint that the Licensee served liquor to a patron before licensed hours in breach of her liquor conditions.
- 12) The next complaints relate to breaches by the Licensee as follows;
 - a) The alleged retention of customers pin numbers in contravention of the credit conditions of the liquor license.
 - b) The use of bookup for the sale of alcohol.
 - c) The retention of a customer's credit card in contravention of the credit conditions of the liquor license.
- 13) Following the tendering of evidence to support these three (3) breaches, Mr Timney on behalf of the Director of Licensing conceded that there was no case to answer with respect to the complaint that the Licensee was retaining customers pin numbers in contravention of the credit conditions in the liquor licence. The complaint is accordingly dismissed.
- 14) Mr Timney also withdrew the complaint that the Licensee had used bookup for the sale of alcohol. That complaint is withdrawn. This leaves one (1) complaint to be considered by us and that is that the Licensee retained customer's credit cards in contravention of section 33E of the *Liquor Act*. Section 33E states as follows;

(1) A Licensee must not retain possession of a person's credit card or debit card as security for payment by the person for the sale of liquor.

(2) *Subsection (3) applies to a prosecution for an offence against section 110 for a contravention of subsection (1).*

(3) *In the absence of evidence to the contrary, on production of a certificate signed by the Director stating that on a specified date a specified Licensee had possession of a specified person's credit card or debit card, the Licensee must be taken to have had possession of the card in contravention of subsection (1).*

(4) *Without limiting subsection (3), proof of compliance with record keeping requirements in guidelines approved by the Minister is evidence to the contrary for that subsection.*

(5) *The approval of guidelines must be published in the Gazette.*

(6) *In this section –*

"possession", of a credit card or debit card, includes having the card under control in any place, whether or not another person has the custody of the card.

15) In accordance with Section 33E(3), a certificate signed by the Director has been produced stating that on 18 October 2005, the Licensee had possession of two (2) credit cards or debit cards in the name of Esther Jimmy. It is the complainant's case that pursuant to Section 33E(3), there is a rebuttable presumption that the Licensee held those cards as security for payment by Esther Jimmy for the sale of liquor.

16) When considering this submission, the Commission noted the wording of s33E(2) which states :

Subsection (3) applies to a prosecution for an offence against section 110 for a contravention of subsection (1).

The wording and intent of s33E(2) is rather unusual. At the hearing, both Counsel assumed that it applied equally to matters before the court or the Commission. After some consideration, however, the Commission has reached a different view. A "*prosecution for an offence*" implies action taken through the Court rather than the Commission. If this is so, then one would conclude that the ability to tender a s33E(3) Certificate in prosecuting a matter is an option that is only open for Court prosecutions rather than Commission complaints.

17) In order to clarify this issue, the Commission looked to the Second Reading Speech of Mr Stirling, Minister for Racing Gaming and Licensing on 9 October 2003. It states at page 2 of 2 as follows:

"Provision is made to enable the Licensee to be prosecuted in a court of law if found to be in possession of another person's keycard, and the Licensee is unable to produce evidence to show a legitimate purpose

for keeping a person's card. The onus of proof is with the Licensee. However, if the Director deems that prosecution is not warranted, the Licensing Commission may conduct its own hearing, in which case the onus of proof is with the director and the Commission to prove any wrong doing."

- 18) It appears to the Commission after a closer perusal of both s33E and the Second Reading Speech, that the Director is unable to rely on the s33E Certificate as evidence of a breach when the matter proceeds as a complaint rather than a prosecution. If that is the case, then what evidence do we have before us that Ms Jimmy's card was used for book up of liquor in breach of both s33(1) and the Credit condition in the Licence? We have evidence that two of Ms Jimmy's cards were held by the Licensee (Folio 34). We also have evidence before us that Ms Jimmy used "book up" for some purchases from the Licensee (Folio 33). What we do not have before us however, is proof that bookup was used for the purchase of liquor. Ms Te certainly denies that this is so.
- 19) Based on our above analysis, we reach the conclusion that on the balance of probabilities, there is insufficient evidence to find a breach and the complaint is dismissed.

SUMMARY: We note that the Licensee has been found in breach of her licence conditions by selling liquor to a patron outside licensed trading hours. The other complaints are dismissed. Counsel have asked to be heard on penalty and this matter is accordingly adjourned for submissions to a date to be fixed.

John Flynn
CHAIRMAN

June 2006