

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	MAC'S LIQUOR ALICE SPRINGS
LICENSEE:	Woolworths (SA) Pty Ltd
LICENCE NUMBER:	80102200
DUAL NOMINEE:	Ms Dawn Sarah Bingham Mr Greg Testro
PROCEEDING:	Complaint Pursuant to Section 48(2) of the <i>Liquor Act</i> - Breach of Section 31A(5a) and Section 110
HEARD BEFORE:	Mr Richard O'Sullivan (Chairman) Ms Brenda Monaghan (Legal Member) Ms Helen Kilgariff
DATE OF HEARING:	15 July 2009
DATE OF DECISION:	30 September 2009
APPEARANCES:	Mr Ray Murphy for the Director of Licensing Mr Tony Whitelum for Mac's Liquor

BACKGROUND

- 1) In January 2009 a complaint was lodged with the Director of Licensing pursuant to Section 48(2) of the *Liquor Act* (the Act). The complaint was that the Licensee, Woolworths(SA) Pty Ltd had breached Section 31A(5)(a) of the Act when a staff member failed to obtain or scan the identification of seven (7) customers who purchased liquor at their Alice Springs store in the Yeperenye Shopping Centre. Further alleged breaches relating to the *Northern Territory National Emergency Response Act* were made but have since been withdrawn. A written response to the complaint was received from the Licensee and the matter was ultimately set down for hearing before the Commission.

THE HEARING

- 2) The hearing commenced on 15 July 2009 in Alice Springs. A Statement of Agreed Facts was tendered and camera surveillance footage relating to the alleged breaches was viewed by the Commission. Detailed submissions were made by Counsel for the Director and the Licensee regarding the correct interpretation of Section 31A of the Act and Counsel are commended for the helpful manner in which material was presented. Submissions centred on the availability of the defence provisions in Section 31A(7) to protect the Licensee when faced with a complaint of a breach of their licence conditions because of the acts of a staff member. The hearing was then adjourned part heard to allow the Commission the opportunity to consider the submissions made and provide a written decision on its deliberations. This decision is set out below.
- 3) The Agreed Facts (summarised) are:
 - a) From 15:45 to 17:00 hours on 18 December 2008, an employee of Mac's Liquor sold liquor to seventy-five (75) individuals whilst on duty at the outlet. Seven (7) of those seventy-five (75) sales were made without obtaining or scanning authorised forms of Identification from the customer as is required by Section 31A(5)(a) of the Act.
 - b) When later questioned, the employee, Mr Paterson confirmed that he has received training in Responsible Service of Alcohol and in the procedure required to sell liquor from the licensed premise using the laptop/scanner provided. The employee acknowledged that he did not follow the correct procedure on the specified occasions and acknowledged that he had no reasonable excuse for failing to do so. He was later dismissed for his actions.
- 4) Counsel for the Director, Mr Murphy and for the Licensee, Mr Whitelum made a number of submissions at the hearing regarding the correct interpretation of the new provisions in the Act and Regulations which introduced the identification scanning system to prescribed premises including the Mac's Liquor outlet in question. The Licensee relies on the protection of Section 32A(7) of the Act and submits that, despite the actions of an employee, it has a valid defence of reasonable excuse to a complaint of licence breach by the Licensee. The excuse is that the Licensee took all reasonable steps to ensure that employed staff, including the staff member in question, were well trained in the electronic scanning requirements and submits that the Licensee should not be responsible for an employee's breach in such circumstances. Mr Murphy for the Director submits that the excuse provided in this matter does not protect the Licensee from being responsible for the breach. A more detailed summary of counsels' submissions is set out below.
- 5) The relevant section of the Act relating to electronic identification systems, states:

31A Conditions about identification system

- (1) *This section applies to a sale of liquor to an individual under a licence prescribed by regulation.*
- (2) *The Minister may establish an identification system for determining whether the individual is subject to a prohibition covered by any of the following provisions:*
 - (a) *a prohibition order or alcohol intervention order under the Alcohol Court Act;*
 - (b) *a bail condition as defined in the Bail Act (otherwise than for a bail granted under Part III of the Act) relating to liquor;*
 - (c) *a condition of a court order under the Domestic Violence Act or the Domestic and Family Violence Act relating to liquor;*
 - (d) *a provision under a law in force in the Territory prescribed by regulation.*
- (3) *For subsection (2), a scanner must be given to the licence holder:*
 - (a) *to enable a person who may sell liquor under the licence (the authorised seller) to scan an identification of the individual; and*
 - (b) *to indicate to the seller whether the individual is prohibited from buying liquor or liquor of a particular kind or quantity.*
- (4) *The identification must be one of the following (an approved identification):*
 - (a) *the individual's passport;*
 - (b) *the individual's driver licence;*
 - (c) *any other identification approved by the Director.*
- (5) *Each of the following requirements is a condition of the licence:*
 - (a) *the authorised seller must not sell liquor to an individual without scanning an approved identification of the individual with the scanner;*
 - (b) *the authorised seller must not sell liquor to an individual contrary to a prohibition mentioned in subsection (2) indicated in the scanner;*
 - (c) *except for this Act or another law in force in the Territory, the authorised seller must not disclose or use any information indicated in the scanner;*
 - (d) *the authorised seller must not damage or tamper with the scanner or any other component of the system;*

(e) any requirement about maintaining the system specified by the Director in writing;

(f) any other requirement specified by regulation for the system.

(6) A person must not contravene a requirement in subsection (5).
Maximum penalty: 20 penalty units.

(7) It is a defence to a prosecution for the offence if the defendant has a reasonable excuse.

Example

A reasonable excuse for a contravention of the requirement in subsection (5)(a) or (b) may be based on a failure of the system to operate properly for reason other than the defendant's conduct.

(8) The Director may, by Gazette notice, exempt a licence from a requirement in subsection (5) for a specified period.

SUBMISSIONS OF DIRECTOR

6) A summary of the principal submissions of the Director are as follows:

- a) There is no dispute that the breaches involving a failure to use the ID system for seven (7) purchases were committed by the employee Mr Paterson. The question is whether the employer becomes vicariously liable for those breaches. Case law supports the finding that if the wrongful act of an employee has been authorised by the employer, the employee will be directly liable. The employer is also “liable for unauthorised acts if they are so connected with the authorised acts that they may be regarded as modes, albeit improper modes of closing them”¹. The question for the Commission is whether the unauthorised acts (ie failure to scan ID) were so connected to the authorised acts (sale of liquor) that the employer is vicariously liable.
- b) In *Northern Territory Liquor Commission v Rhonwood*² (Rhonwood), the Northern Territory Court of Appeal considered the wording of Section 121 and found that an employee’s failure to remove an intoxicated person from the premises amounted to a breach by the absentee Nominee of Section 121 of the Act (being a requirement on the Licensee or employee to remove an intoxicated person from licensed premises). Section 121 places an obligation on both Licensee and employee to comply and failure to do so is a regulatory offence. The Court stated at page 450:

‘The proper conduct of licensed premises is of such public importance that Licensees who are granted the privilege of selling liquor can reasonably be expected to assume responsibility for the

¹ Salmond on Torts (1st ed)pp83-84

² [140]FLR 447

acts of their employees who are selling liquor on their behalf....The Licensee is in a position quite different from any of his employees. His responsibilities are not confined by his hours of employment. He is responsible for the conduct of the business on the licensed premises. Indeed whereas in the present case the Licensee is a body corporate, it will have no personal presence on the premises but can only act by its nominated manager and by its employees.'

- c) The differences between Rhonwood and the matter currently before the Commission are:
- i) Section 121 of the Act speaks of 'Licensee or employee' whereas Section 31A speaks of 'authorised seller' and 'licence holder'- terms not seen elsewhere in the Act. The term licence holder appears to be the Licensee of a prescribed premise. An authorised seller appears to be a person who is authorised by the licence holder to sell liquor on his or her behalf. This is a logical conclusion as the authority to sell does not come from the Act or licence conditions. Thus there is a causal link between the authorised seller and the licence holder. Further Section 31A(5) states that the requirements placed on an authorised seller to responsibly use the equipment becomes a licence condition. This clearly puts the onus or responsibility back on the Licensee. Such interpretation is consistent with the attitude of the Court in *Rhonwood* towards an absentee Licensee/Nominee's overriding responsibility to conduct the business of the premises.
 - ii) Section 121 of the Act (the section considered in *Rhonwood*) provides for a regulatory offence not requiring proof of intent whereas Section 31A (being considered in this case) is a simple offence. Thus in order to prove a breach of Section 31A(5)(a), foresight or intent on the part of the authorised seller must be proved pursuant to Section 31 of the *Criminal Code*. *TTS Pty Ltd v Griffiths*³ supports a finding that the relevant intent is that of the authorised seller and not of the licence holder who employs him. The authorised seller, Mr Paterson has admitted the necessary foresight or intent in that he admitted he knew that he was not following the correct process when making the seven (7) sales but that he proceeded regardless.
 - iii) In considering whether or not there is a breach, Section 31A(7) of the Act may provide a defence if the defendant (the authorised seller) has a reasonable excuse. On the admitted facts, he has none.
 - iv) In the alternative, the wording of Section 31A(7) relates only to a 'prosecution' of an 'offence' against a 'defendant'. The matter before us is not a prosecution but a complaint regarding a breach of licence conditions by the Licensee. Therefore Section 31A(7) does not apply.

³ 105 FLR 255

SUBMISSIONS OF LICENSEE

- 7) A summary of the principal submissions of the Licensee are as follows:
- a) The Licensee denies committing any offence on the basis that it has a reasonable excuse. The Licensee was aware of and understood its obligations under the Act and it ensured that staff members (including Mr Paterson) were properly trained in the ID system. Mr Paterson knew the correct procedure to follow and he had no excuse as to why he failed to follow it on seven (7) occasions out of sixty-five (65) on the night in question. Following the alleged breach, Mr Paterson was dismissed and all remaining staff underwent retraining. The Licensee could do no more in the circumstances and is entitled to rely on the reasonable excuse provision provided in Section 31A(7) of the Act.
 - b) Section 31A(7) of the Act provides one example only of such an excuse namely the failure of the system to operate properly for reason other than the defendant's conduct. Section 2(d) of the *Interpretation Act* supports the view that this example is not an exhaustive list of one and that its inclusion does not limit or extend the meaning of the provision. Case law supports a finding that what is a 'reasonable excuse' depends both on the circumstances of the individual case and on the purpose of the legislation to which the defence of 'reasonable excuse' is an exception. It is simply an excuse that a reasonable person would find reasonable⁴.
 - c) Other Acts allowing for the defence of reasonable excuse and the relevant case law confirms that excuses must be objectively reasonable. Examples accepted in other jurisdictions have included mistake or ignorance of fact, duress, intervening conduct or event and lawful authority.
 - d) The Licensee is able to rely on the defence provided in Section 31A(7) of the Act as regards this current matter before the Commission. The section speaks of 'defendant' but does not clarify who the defendant is. Unless specifically stated, both Licensee and authorised seller should potentially have the benefit of the reasonable excuse defence. In this case, the Licensee is the one with the reasonable excuse and not the authorised seller.

CONSIDERATION OF THE ISSUES

- 8) There is a need at the outset to clarify the processes available to the Director (or others) when an incident occurs on licensed premises. If the incident complained of relates to a matter arising out of the conduct of the business or a breach of licence conditions (eg a noise complaint) and there is no avenue under the Act for a criminal prosecution, then there is only one enforcement option and that is to make a complaint against the Licensee and Nominee to the Commission.

⁴ Taikato v R[1966]HCA28

- 9) If the complaint relates to a matter specified in the Act as an offence provision (eg with a financial penalty or period of imprisonment imposed), then the Director (or Police) may elect to prosecute the matter in the Court of Summary Jurisdiction. Depending on the offence, they may prosecute either or both the employee who allegedly committed the offence and the Licensee and Nominee. Once a conviction is entered they may bring the matter to the Commission for additional penalty via Section 124AAA. Alternatively, they may choose to forego a criminal sanction and instead lodge a complaint directly with the Commission with respect to the matter.
- 10) The complaint in question is based on an alleged breach by the Licensee of Section 31A(5)(a) of the *Liquor Act* which states:

Each of the following requirements is a condition of the licence: (a) the authorised seller must not sell liquor to an individual without scanning an approved identification of the individual with the scanner.

A successful prosecution and conviction in the Court of Summary Jurisdiction would attract a maximum fine of twenty (20) penalty units. Had the matter been dealt with in that forum, the authorised seller or the licence holder or both could have been prosecuted - with the licence holder being held responsible for the actions of its employee:

Liquor Act 123A Prosecution of Licensee for actions of employee

Where the actions of a person employed by a Licensee would constitute an offence against this Act, the Licensee may be prosecuted for the offence (whether or not the person employed is also prosecuted) as if the Licensee had personally performed those actions.

Had the licence holder been prosecuted, then as a 'defendant' it could have attempted to persuade the Court that pursuant to Section 31A (7) of the Act, that it had a reasonable excuse to protect it from a conviction.

- 11) In the matter before us, the Director chose not to pursue a criminal conviction. Instead, he made a Section 48 complaint to the Licensing Commission against the licence holder (and therefore the Nominee) 'arising out of the conduct of the business at licensed premises' and alleging a breach of the Act and licence conditions.
- 12) The questions for the Commission are as follows:
- a) Has there been a breach of Section 31A(5)(a) of the Act by the authorised seller Mr Paterson who on seven (7) occasions sold liquor to individuals without scanning an approved identification of each individual with the scanner?
 - b) If there has been a breach of Section 31A(5)(a) of the Act, does Section 31A(7) provide a reasonable excuse for the authorised seller's actions such that he has a defence to the breach?

- c) If no reasonable excuse exists to protect Mr Paterson from liability, then does the breach of the Act by him amount to a breach of licence conditions by the licence holder?
- d) If the licence holder is prima facie liable for the authorised seller's actions, is a defence available to the licence holder under Section 31A(7) to protect it from being found in breach of licence conditions because of the authorised seller's actions?
- 13)Q: *Has there been a breach of Section 31A(5)(a) of the Act by the authorised seller Mr Paterson, who on seven (7) occasions sold liquor to individuals without scanning an approved identification of each individual with the scanner?*
- a) Whilst a complaint before the Commission is not a 'prosecution', the Commission must be satisfied on the balance of probabilities that a breach of Section 31A(5) of the Act has been committed before it can find that there has been a breach of licence conditions. In this matter, there is no dispute that the authorised seller failed to comply with the Act when he failed to scan certain purchasers' identification. A Statement of Agreed Facts is evidence of this.
- b) Intent is relevant to a breach of Section 31A(5) as this section is not one of those that is specifically defined as a regulatory offence under Section 124AA of the Act. It is the Commission's view that the intent that is relevant is that of the person committing the act and not the intent of the licence holder. Such a view is in accord with the reasoning of Asche J in *TTS Pty Ltd v Griffiths*⁵ on this issue. In the matter before us, the relevant intent is that of the authorised seller who knowingly made the sales without the requisite scanning of identification. When questioned, the authorised seller, Mr Paterson acknowledged that he was trained in and fully aware of the correct process which must be followed for takeaway sales at the prescribed licensed premise where he had been working for many months. Further, CCTV footage showed him repeatedly following the correct process when making other sales. Mr Paterson could give no valid reason why he failed to follow the correct procedure on the seven (7) occasions in question.
- 14)Q: *If there has been a breach of Section 31A(5)(a) of the Act, does Section 31A(7) provide a reasonable excuse for the authorised seller's actions such that he has a defence to the breach?*
- a) Pursuant to Section 31A(7) of the Act, "*it is a defence to a prosecution for the offence if the defendant has a reasonable excuse*". If the defence provisions under Section 31A(7) apply to protect the authorised seller in this matter, then there is no actionable breach of the Act by him. As stated above, Mr Paterson could give no good reason why he failed to scan the identification as required.

⁵ [105]FLR 255

15)Q: *If no reasonable excuse exists to protect Mr Paterson from liability, then does the breach of the Act by him amount to a breach of licence conditions by the licence holder?*

- a) Counsel for the Director submits that the Licensee is vicariously liable for this breach because the act of scanning liquor items was within the scope of the employee's duties in that it was so closely connected to his job of selling liquor. Further, a person only fits within the category of "authorised seller" when he or she is authorised by the licence holder (or Licensee) to sell liquor on the Licensee's behalf. The Commission accepts these submissions.
- b) It is questionable however whether an argument regarding vicarious liability needs to be put forward when the Commission is considering a complaint regarding a breach of licence conditions. The licence conditions clearly state that "*a breach of the Liquor Act by any person employed by or on behalf of the Licensee shall constitute and shall be deemed to be a breach of the licence conditions by the Licensee*". The wording of this licence conditions supports a view that if the Commission finds a breach of the Act by an employee (or authorised seller) for which there is no defence, then the Licensee must take responsibility for that breach, irrespective of the circumstances of the breach.

16)Q: *If the licence holder is prima facie liable for the authorised seller's actions, is a defence available to the licence holder under Section 31A(7) to protect it from being found in breach of licence conditions because of the authorised seller's actions?*

- a) Counsel for the Licensee submits that the licence holder / Licensee can rely on their own actions in providing adequate staff training and use this as a 'reasonable excuse' to defend them against a finding of a breach of Section 31A(5). It would seem logical that if a licence holder is facing a criminal prosecution, then in their capacity as the 'defendant', they can submit that they have a reasonable excuse including the rigour of their staff training. It is then a matter for the court to consider. On a complaint before the Licensing Commission relating to the conduct of the business of their licence however, such submissions which relate to the Licensee's actions are mitigatory only and the only excuse that is relevant is that of the authorised seller who committed the breach. In this matter, there was no such reasonable excuse put forward to justify or excuse the authorised seller's actions.

DECISION

- 17) In these circumstances, the Commission finds on the balance of probabilities that there has been a breach of the Section 31A(5) of the Act and that there is no reasonable excuse to explain or justify the authorised seller's actions. A breach of the Act is also a breach of licence conditions for which the Licensee must accept ultimate responsibility.
- 18) Unless the parties indicate that they would prefer to provide written submissions on penalty, the hearing will now be reconvened to consider this issue.

Richard O'Sullivan
CHAIRMAN

30 September 2009