

Northern Territory Licensing Commission

Reasons for Decision

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| Premises: | Good Fortune Take-Away Mini Market 157 Ryland Road Nightcliff NT 0810 |
| Licensee: | Leang Soy Te |
| Licence Number: | 80901818 |
| Proceedings: | To determine whether the Licensing Commission should Cancel a Liquor Licence-Section 72(1)(b) and (d) of the <i>Liquor Act</i> To determine whether the Licensee is a fit and proper person to hold a liquor licence-Section 72(5) of the <i>Liquor Act</i> |
| Members: | Mr Richard O'Sullivan (Chairman) Ms Brenda Monaghan (Legal Member) Mrs Jane Large |
| Date of Hearing: | 22 June 2009 |
| Appearances: | Ms Leang Soy Te, Licensee Ms J Truman, for the Director of Licensing Mr A Borg, Licensing Inspector |

Background

- 1) In June 2007, a covert operation, involving Licensing Inspectors and Aboriginal Community Police Officers (ACPOs) was initiated, specifically targeting licensed supermarkets in the Darwin and suburban areas. Between 18 June and 27 June 2007, ACPOs Souey, David and Davis, disguised as itinerants or 'long grassers', regularly attended the Good Fortune Take Away Mini Market in Nightcliff. While there, ACPO Souey purchased from the Licensee cask wine and cigarettes using a bank card in the name of Emily Baker.
- 2) On a number (the actual number is disputed) of occasions during this time, the Licensee was approached by one or other of the ACPOs to allow purchases to be made on credit (which is colloquially known as "book-up"). On these initial occasions, either the Licensee or her father, who was serving in the shop, refused.
- 3) On 25 June when ACPOs Souey and David attempted to purchase a 4 litre cask wine with the bank card, there were insufficient funds available. Upon a request by ACPO David to book-up the purchase and pay for the wine on payday, the Licensee eventually or after some persuasion, accepted. She supplied a four (4) litre cask of wine and retained from ACPO Souey the bank card and the card's PIN number. On 26 June, a further purchase of a four (4) litre cask of wine was made on book up.
- 4) On the 14 April 2008 Ms Leang Soy Te was convicted and fined in the Court of Summary Jurisdiction on two (2) charges of selling liquor without receiving payment contrary to Section 33D(1) of the *Liquor Act* (the Act) and one (1) charge of retaining a person's credit or debit card as security for payment for the sale of liquor contrary to Section 33E(1) of the Act.
- 5) On 25 February 2009 an application was made by the Director Licensing to the Licensing Commission for a Hearing to be conducted in relation to the Licensee, Ms Te, to:

- i) determine whether the Commission should cancel the liquor licence under Section 72 (1)(b) and (d); and/or to
- ii) determine whether the Commission should cancel the liquor licence on the basis that the Licensee is not a fit and proper person to hold a liquor licence under Section 72 (5)(c) of the Act.

The Hearing

- 6) At the Hearing Ms Truman, representing the Director of Licensing, called Inspectors Allan Borg and Christine O'Brien as witnesses to explain the investigation which led to the application being made by the Director. Ms Te, who was unrepresented, gave evidence in her own defence. She also called Ms Cherelle Tiedeman as a character witness.
- 7) The full transcript of the Court of Summary Jurisdiction hearing was included as part of the Commission's Hearing Brief and extracts from Statutory Declarations made by ACPOs Souey, David and Davis were tendered by Ms Te.
- 8) In addressing the Commission on whether the liquor licence should be cancelled under Section 72 (1)(b) and (d), Ms Truman submitted that the breaches in June 2007 were of sufficient gravity to warrant cancellation. She stated that it is a basic tenet of the *Liquor Act* that "book up" for the purchase of liquor is not permitted and it is a grave situation when a Licensee cannot comply with this basic concept. In addition, Ms Truman drew the Commission's attention to an earlier breach of licence condition in July 2006. Ms Truman pointed out that the Good Fortune Take Away Mini Market was a neighbourhood supermarket and the problems that take away liquor causes in the Northern Territory have been well documented. The two (2) transactions of sale of liquor would not have happened without the Licensee allowing book up to the customers in question.
- 9) In addressing whether Ms Te is a fit and proper person to hold a liquor licence, Ms Truman submitted that Ms Te had a record of irresponsible service of alcohol; the character witness's evidence was not sufficient to counter this argument; the transaction could not be excused as it was not undertaken in a highly emotional or stressful situation and at the very least, Ms Te acted injudiciously.
- 10) Ms Truman tendered four (4) previous decisions for the Commission to take into consideration, namely Corroboree Park Tavern (30 May 2003); Borooloola Hotel (14 December 2006); Tiwi Supermarket (23 July 2007); and Indoor Sport Winnellie (9 November 2007). She highlighted, for the Commission's attention, paragraphs 7 and 15 of the Tiwi Supermarket Decision.
- 11) Ms Te made the following submissions:
 - a) That she was not happy that she had been coerced into getting into trouble and felt that the officers, by asking repeatedly for "book up" of alcohol, went overboard in persuading her to give credit. Ms Te alleges that she and her father were asked for book up by the ACPO's five (5) or six (6) times before she gave in.
 - b) That she had a lot of trouble dealing with the gangs and itinerants in her area and that she was often called to the store out of hours for security issues. She advised the Commission that she feels frightened as to what might happen to her if she does not give in to requests from some customers and that she has to deal with them as best she can.
 - c) That other Licensees had breached the *Liquor Act* many, many times before there was a cancellation of their licence. Her store was already struggling and the loss of her liquor licence would have a major impact on her business.

- d) Ms Te asked the Commission to take into account alleged highlighted variations between the extracts from statements of the ACPOs tendered by her as exhibits and their evidence given in the Court.
 - e) Ms Te advised that she now had a prominently displayed sign advising patrons that “book up” is not allowed.
- 12) Ms Tiedeman, as character witness, advised that Ms Te was a thoughtful, kind person who is a non-drinker. Ms Te ran the shop with help from her father and she had to deal with a lot of harassment from some customers which makes her worry about her safety. On several occasions Ms Te had asked Ms Tiedeman to stay in the shop with her. Ms Te appeared unsure at times how to deal with the harassment from some customers and maybe needed guidance and training.

Consideration of the Issues

- 13) In reaching its decision, the Commission has examined all the evidence pertaining to the offences which gave rise to the convictions. It has also taken into consideration the submissions made by Ms Truman, on behalf of the Director of Licensing and those made by Ms Te herself.
- 14) The Commission must consider whether or not the conduct of the Licensee is such that her liquor licence should be cancelled. Of relevance are Sections 72 (1)(b) and (d) of the Act which state:

72 Cancellation of licence

- (1) The Commission, after conducting a hearing, may, by order, cancel a licence where:*
- (a) the Licensee has been found guilty of an offence against this Act;*
 - (b) the Licensee has contravened or failed to comply with a condition of his licence.*
 - (c) the Licensee has contravened or failed to comply with a direction of the Commission under Section 49(4)(b) or 65; or*
 - (d) the Licensee has contravened or failed to comply with a condition of his licence.*

- 15) It is not contested that Ms Te, the Licensee of the Good Fortune Take Away Mini Market, has been convicted of offences against the *Liquor Act* by allowing the ACPO's to “book up” liquor at her store. She has breached her licence conditions by these actions.

- 16) Prior to making any decision on the cancellation of a liquor licence under Section 72(1)(b) and (d) however, the Commission must consider Section 72 (3) of the Act, which states:

- (3) The Commission shall not make an order upon the ground specified in subsection (1)(b) or (d) unless it is satisfied that -*
- (a) the offence of which the Licensee has been found guilty or the contravention or failure to comply with the condition, as the case may be, is of sufficient gravity to justify the cancellation of the licence; and*
 - (b) in all the circumstances, the matter is not one in which the giving of directions by the Commission would be likely to be effective to prevent the commission of further offences or further contraventions or failures to comply with the condition, as the case may be, by the Licensee.*

- 17) The question for the Commission is whether the breaches are of “sufficient gravity” to justify cancellation of the licence. Ms Truman submits that they are. She carefully took the Commission through the relevant portions of the court transcript and of Ms Te's evidence

before the Commission. Ms Truman submitted that the evidence supported a licence cancellation for the following reasons:

- (a) That the disguise's of the ACPO's as itinerants was not entrapment;
 - (b) That Ms Te was asked for book up only 2 or 3 times by the ACPO's before she allowed it, not 5 or 6 as Ms Te alleges;
 - (c) That at no time was Ms Te threatened or intimidated by the ACPO's and she cannot allege that her will was overcome by such behaviour;
 - (d) That Ms Te's comment that she is a caring person who finds it hard to ignore a hungry person's request for food is irrelevant as the book up in this case and the earlier licence breach in 2006 related solely to liquor;
 - (e) That the failure of Ms Te to comply with simple, clear obligations of both her licence and the Act regarding book up liquor are matters of "sufficient gravity" to justify cancellation;
 - (f) That the giving of directions by the Commission would be unlikely to be effective to prevent further offences or licence breaches by the Licensee.
- 18) The Commission has considered the submissions of both Ms Te and Ms Truman and makes the following observations:

- (a) Ms Te has submitted that she is not happy with the circumstances that led up to the provision of alcohol without the receipt of payment. The Commission accepts the finding of Mr R Wallace, S M when reaching his decision in this matter in the Court of Summary Jurisdiction. Mr Wallace found that the pressure applied by Ms Souey was slight and that there was no suggestion of any threats. He further stated:

"It seems to me that police must, the police and the Liquor Commission for that matter, must have a certain amount of latitude in order to enforce the laws that they're charged with enforcing. And, it seems to me that when it comes to licensing laws, as with drug laws, that a degree of deceit is from time to time going to be necessary in order to find out whether so and so is selling drugs from his house or is selling drugs at such and such place or whether so and so is selling liquor to drunken people, to under age people, to people on book."

- (b) Similarly, the Commission accepts Mr Wallace's assessment on the variances in the number of times that the ACPOs had requested and been refused book up as being "two, three or more" but he felt "Ms Te's exaggerated a bit about the number of occasions".
- (c) The Commission has stated in published decisions and media releases over the past few years that it is intolerant of Licensees who flout their licence conditions – particularly if they do so repeatedly or if the breaches involve serving liquor to minors or to drunks. Ms Te has appeared twice before the Commission, once in 2006 for serving a cask to an itinerant person before opening hours and more recently for book up. Both breaches, however, fall short of the category of the most serious offending – such as those captured by Section 124AAA of the Act.
- (d) The examples given in Act of offending that would lead to cancellation of a licence are those that rate imprisonment or are serious drug offences of the Licensee or repeat drug offending by staff with irresponsible management by Licensee. That is a completely different category of offending to that of the book up. The Commission in its decision in the matter of Indoor Sport Winnellie dated 9 November 2007 stated:

Cancellation or long term suspension is considered by the Commission for offences such as serving minors or intoxicated persons or the habitual serving of alcohol outside trading hours."

- (e) In the previous Commission decisions, referred to by Ms Truman, the two (2) which resulted in a cancellation of a liquor licence, namely Tiwi Supermarket and Borroloola Hotel, had an extensive prior history of breaches or numerous breaches within a short period of time.
 - (f) Although Ms Te had been found guilty of four (4) breaches of the Act and her licence conditions, the Commission has taken into consideration the circumstances of the breaches. The first breach was in 2005, shortly after she took over the licence and was for a completely different offence, namely serving alcohol outside licensed trading hours. The three (3) breaches in July 2007 were, in effect, related to one operation. In the Commission's opinion, this does not signify habitual offending, nor is it numerous enough to justify a cancellation of licence.
 - (g) Without excusing in any way the unacceptable nature of the breaches, it is questionable whether the history before the Commission is of 'sufficient gravity' to justify cancellation. Even if the Commission was satisfied that the breaches were of 'sufficient gravity', these most recent incidents leading to a conviction occurred some two (2) years ago. The fact that there have been no known breaches since then leads one to consider that the Licensee has made some changes to her business practices to ensure that she complies with the law. This period without offending is a significant factor that the Commission has taken into account when deciding that it is not appropriate to cancel the licence pursuant to Section 72(1)(b) and (d).
- 19) As an alternative, Ms Truman emphasised the ability of the Commission to make a finding under Section 72(5)(c) of the Act that Ms Te is not fit and proper to hold a liquor licence. In short, Ms Truman's submission is that Ms Te's character and history means that she cannot be trusted to comply with licence conditions or with the Act.
- 20) In assessing whether Ms Te is a fit and proper person, we rely on our comments made in paragraph 17 above regarding the regularity and gravity of the offending. In particular, the Commission notes that in the two (2) years since the second series of offences, Ms Te has had no offences against the Act nor breaches of the licence conditions recorded against her. For these reasons, whilst the Commission retains some reservations about Ms Te's judgment, the Commission is not satisfied that the time has come where the only appropriate response is cancellation.
- 21) As cancellation is not an appropriate response, the Commission has instead reconsidered Ms Te's current licence conditions and intends to amend the licence to remove some of the pressure or temptation from her. The Commission is very aware of the problems that arise from the sale of take away and the impact on residential neighbourhoods of antisocial behaviour and public drunkenness. It is also well documented that a large cask of wine is a liquor of choice for many problem drinkers as it is cheap. Ms Te's actions in allowing the purchase of cask wine by "book up" is simply exacerbating problem drinking. Ms Te must also realise the seriousness of meeting her responsibilities as a holder of liquor licence and be aware that any further breaches may result in a cancellation of her licence.

Decision

- 22) The Commission determines that the liquor licence for the Good Fortune Take-Away Mini Market should not be cancelled pursuant to Section 72 of the Act.
- 23) Noting the evidence provided at the hearing that Ms Te's prior breaches of the Act relate to the sale of large wine casks and noting Ms Te's own admission that she has found it hard in the past to refuse her clients' requests for "book up", the Commission intends to take proactive steps to prevent further offending by way of the following directions pursuant to Section 65 of the Act:
- a) From 1 August onwards, the sale of all four (4) and five (5) litre wine casks from the Good Fortune Store is prohibited and the licence shall be amended accordingly to include such a prohibition; and

- b) The Licensee is required to erect and maintain in prominent positions in the store, posters in a form approved by the Director confirming that “book up” for food and liquor is prohibited.

Richard O’Sullivan
Chairman

9 July 2009