

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

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| PREMISES: | 3UP YARRAWONGA |
| PROCEEDING: | Objection to Application for New Off-premises Licence |
| APPLICANT: | 3UP PTY LTD |
| NOMINEE: | Mr Michael Rasmussen |
| HEARD BEFORE: | Mr John Withnall Ms Jill Huck Mr Alan Clough |
| DATE OF HEARING: | 15 September 2003 |
| DATE OF DECISION: | 18 November 2003 |
| APPEARANCES: | Mr A Sprigg for Applicant Mr G Buckley for Objector |

1. These Reasons For Decision assume a prior reading of the Commission's earlier decision in this matter dated 30 September 2002, which is available on the Commission's website.
2. In May 2003 the applicant lodged further material in support of the application: a set of design drawings, another dozen letters of support, and a survey bearing the signatures of 206 identified persons, 201 being in favour of the proposal.
3. At its meeting of 8 July 2003 the Commission considered the new material and made a determination in the following terms:

Commission noted the changed plans of the premises and the length of time taken to provide material relating to needs and wishes of the

community and determined that the application should be re-advertised and that all of the material relevant to the original application be made available to the parties.

Commission noted that as a re-advertisement of an earlier application the provisions of Section 47F of the *Liquor Act* in force from 24 January 2003 do not apply.

4. The plan changes referred to involved a broadside exposure of the proposed building to the service road, and an allegedly safer re-entry from the driveway to the service road. As the changed footprint of the building still remained entirely within Lot 6596 Town of Palmerston as originally proposed and advertised, the Commission regarded the matter as requiring only fresh advertising rather than a fresh application.
5. The applicant requested a review of the Commission's decision to require re-advertising of the application, and such review was conducted by the Commission by way of a hearing on 24 July 2003. The outcome of the review was a reaffirmation by the Commission of the requirement to readvertise, and advertisements appeared in the "NT News" on 30 July 2003, 1 August 2003 and 2 August 2003, the latter correcting what the Commission believes most readers would have easily identified in context as a typographical error in the two preceding advertisements.
6. The re-advertising elicited just one objection, from Mr Gary Coleman jointly with Tally Won Pty Ltd. The grounds of objection were stated as being (and paraphrasing) unsuitable location, adverse affect on the amenity of the area and its possible future use, not meeting the needs and wishes of the community, lack of substance and unlawful substitution of applications.
7. The Notice of Hearing sent to the parties consequent upon the new objection was carefully headed "Hearing of Objection", and was in part in the following terms:

Please take notice that the Northern Territory Licensing Commission will conduct a Hearing of the objection lodged by Morgan Buckley on behalf of Mr Gary Coleman and Tally Won Pty Ltd in respect of the application of 3Up Pty Ltd for the grant of a liquor licence. The Commission will expect Mr Gary Coleman and Tally Won Pty Ltd to be *dux litis* in this matter.

8. It was the intention of the Commission in the circumstances to restrict the hearing to a consideration of the merits of the new objection, a process consistent with the wording of the old s.49(2)(c) of the *Liquor Act* which in the Commission's view still applied to the proceeding (inasmuch as the application predated the commencement of the amending Act No. 76 of 2002). At the outset of the hearing Mr Buckley for the objector queried the nature of the hearing and argued

that the applicant should have to present its case for the licence applied for, or certainly that part of its case as postdated the previous hearing, allowing Mr Buckley the opportunity to cross-examine on it. After much discussion as to the ambit of the proceedings and the respective obligations of applicant and objector at that point, the Commission delivered an *ex tempore* ruling which is now reproduced hereunder after undergoing some non-substantive editing for the sake of readability:

When the first hearing concluded there was no objection left in the process. That decision indicated what more the Commission would need for a favourable reconsideration of the application. The additional material supplied by the applicant thus went before the corporate Commission rather than the Hearing Panel. It was the full Commission's reconsideration of the application as a whole that resulted in a determination to have it readvertised, and that was based mainly on issues of staleness of the application rather than any conclusion or finding on any substantive issues still outstanding after the hearing. The readvertising brought forth the Coleman/Tally Won objection. At this stage of the application the corporate Commission determined that the objection(s) should be heard by a hearing panel appointed for that purpose (per the old Section 49(2)(c) of the *Liquor Act*, prior to the coming into effect of Act No. 76 of 2002).

The actuality of the current situation is that the objector maintains that the totality of what is before the Commission as to needs and wishes should be held to be insufficient. On that issue the objector is to be *dux litis*, as it was warned, and is therefore to make out its case. To rule otherwise would be to confound if not ambush the applicant at this stage of the progress of the application. If the objector does make out its case then, of course, the hearing panel's ruling as to the manner in which the objection is upheld will bind the corporate Commission. If the objector does not make out its case, then the objection will have been unsuccessful in having any impact on the further consideration of the application and its final determination by the corporate Commission.

9. Tally Won was known both to the Commission and to the applicant, the objector having itself successfully obtained an approval in principle from the Commission in April 2000 for the then proposed Biggles Highway Inn on a site on the same outbound side of the Stuart Highway as the 3Up proposal and in the same general locality. That approval lapsed on 31 December 2002, but in such manner as left the way open for Mr Coleman to re-apply without prejudice.
10. Mr Sprigg for the applicant submitted that the objection must be seen to be driven by commercial considerations, in protection of Tally Won's and Mr Coleman's commercial interests. Mr Sprigg expressed his frustration in not being able to

cross-examine Mr Coleman, who had advised the Commission of his inability to personally attend the hearing. However, given that the grounds of objection do not prima facie offend against (the old) s.48(1A) of the *Act* and that no reapplication in respect of the Biggles site has come to the Commission's knowledge at the time of this present decision, it is not possible for the Commission to be confident that the objection ultimately comes down to no more than a desire on the part of the objector to prevent further competition in what it may still perceive to be its marketplace. In the Commission's view the objection cannot be summarily dismissed on that basis.

11. Mr Buckley for the objector focused on the applicant's admission that the applicant's discussions with the originally envisaged operator had failed, and that Mr Doug Sallis's company Hibernia Pty Ltd was now proposed as operator of the outlet. Unlike Mr Buckley, the Commission is not able to read anything of significance into the disaffection of the originally proposed operator. As already indicated, we do not see the application in its current form as being a different application. In that context, Mr Buckley submitted that the application cannot substitute another "proposed licensee". We agree with that contention of the objector. In our view the application remains an application for a developer's approval under s.26(2) of the *Act*. Such approval can result in the "grant" of a licence only to the applicant company, not to any other entity. Only the manager nominated under s.25 may change. If a licence should be granted, Mr Sallis would need to join in an application for transfer in due course, and matters of his and his company's probity and suitability to take on the licence would come under the normal scrutiny at that stage.
12. Mr Buckley's major substantive submission was as to the inadequacy of what is before the Commission as to community needs and wishes, with the alleged inadequacy of the applicant's survey being specially targetted by way of the evidence of Ms Jenny Malone, a graduate in Business (Marketing and Management) with a background in market research and the conduct of surveys. Ms Malone presented the survey she had done in October 1999 for the objector when the objector had been the applicant for the Biggles Highway Inn liquor licence approval.
13. Her purpose in reviving the old survey was said to be its erosion of the validity of the 3Up survey by demonstrating a high consumer demand for complementary services in the provision of liquor, a link between consumer demands for liquor and food. For the reasons that follow, it is the Commission's considered view that her survey did not support that submission, despite the clear degrees of support for the respective services the Biggles application proposed (in May 1999) as complementary to the provision of take-away liquor.
14. The Malone survey seems to the Commission to have been almost just as much a "push poll" as was Ms Malone's criticism of the 3Up survey. Both surveys advised of what was proposed; the Malone survey then asked correspondents to

separately indicate support for the individually specified elements of the proposal, while the 3UP survey asked correspondents to indicate which of the nominated allegedly beneficial elements they did not support.

15. The total sample of the Malone survey was 160, of which 139 respondents indicated they would use the proposed Biggles facility. Of these 139 persons the highest response to the services proposed at Biggles was for the drive-through liquor service: 83% indicated they would use it.
16. While we do not accept that the Malone survey established a “demand” for any of the complementary services, we imagine that Mr Sprigg would not have been in any way dismayed by the Malone statistic on the support for a drive-through service.
17. Ms Malone had other criticisms of the 3Up survey, including:
 - Not a viable or sufficiently representative sample (but a higher raw number than the Malone survey’s 160 which represented about 1.25% of daily traffic movement outward on the Stuart Highway at that time);
 - Responses not dated (but obviously garnered subsequent to the Commission’s decision of 30 September 2002 – and obviously fresher than 1999);
 - Not entirely localised (but was responding to the Commission’s earlier decision. In any event, Ms Malone’s own survey included “...other consumers that travel along the Stuart Highway to and/or from work”); and
 - Has a clear purpose to support the application (but it did allow for indications of non support, as mentioned above. Then too, Ms Malone herself offered an opinion on normal consumer patterns in relation to unpacking and repacking eskies, a remark not within her established expertise and transparently supportive of the objector).
18. It will be gathered from our foregoing comments that we have not been persuaded by Ms Malone’s evidence that the Commission should disregard or give no weight to the 3Up survey. In the course of considering the Biggles application in 1999 we accepted the Malone survey for the face-value information it contained, and in our view it remains open to the Commission to accept the 3Up survey in the same way in its consideration of the 3Up application. The weight given to the information in a survey will depend on its context within the over-all available evidence of needs and wishes.
19. Mr Buckley called no evidence other than that of Ms Malone.
20. Mr Buckley referred to a “concerted failure” on the part of the applicant to address

s.32 requirements, but the Commission's previous decision determined what are the only matters still outstanding, (they being the need for concept drawings, construction timetable and more on needs and wishes).

21. Mr Buckley submitted that the over-all evidence on needs and wishes at this point is insufficient to sustain an approval of the licence, but we disagree with that submission. In our view it is open to the Commission as a reasonable exercise of its discretion to approve the application on the totality of the now available evidence if it should so decide, and the objection does not remove or reduce that option.
22. Having agreed with the objector that there can be no substitution of licensee at this stage, we formally decline to uphold any of the other grounds of objection, and determine that the application for licence approval may proceed without further reference or regard to the objection.
23. We now record that pursuant to s.15(2) of the *Northern Territory Licensing Commission Act* the Chairperson has appointed the three members of the Commission who constituted the Commission for the purposes of the hearing of the objection to now also constitute the Commission for the purposes of considering and determining the licence application. While what follows is therefore strictly in the nature of being minutes of the meeting of those three members for that purpose, their decision is now appended below in the interests of continuity, transparency and convenience of reference.
24. We do not intend to go over all those matters already dealt with in the Commission's decision of 30 September 2002. Given the set of drawings now submitted, the current development approval of the Development Consent Authority and the applicant's estimated construction time of only twelve weeks from Commission approval, the only outstanding issue is that of needs and wishes.
25. What has been submitted in this regard since the September 2002 decision is another sixteen letters of support and the survey, together with the further written explanations and submissions of Mr Sprigg by letter dated 30 June 2003.
26. We now have over two dozen letters of individually reasoned support. By "individually reasoned" we mean that (with only two exceptions) they are all quite different and clearly appear to be the genuine thoughts of the respective authors. Many state the author's belief that the letter is representational of a group or demographic of like mind. Almost all either expressly or impliedly embrace the expansion of shopping choice, and evince an intention to use the new outlet because of a preference for its safer traffic configuration for outbound travellers.
27. The petition-like survey contains the signatures of over two hundred identified persons in support of the application, the addresses indicating a fairly broad

spread across the Darwin area. It also includes several expressions of non-support. It is not a professional survey, and certainly could have been more felicitously drafted, but is nevertheless an expression of support to which over two hundred people volunteered to commit their identities. It is to be given weight in that context. It is true that in several prior applications before the Commission some very professional surveys based on quite large sample numbers have failed to carry the day for the respective applicants, but in most such cases the surveys were presented to the Commission as the *only* evidence of community needs and wishes. Such is not the case here, and in any event as we reiterate from time to time, the respective weights given to the various evidentiary elements of an application for a new liquor licence will vary on a case by case basis, with the process more often than not being (inter alia) location-specific.

28. So the survey is to be included in the evidentiary mix for the Commission's consideration along with other matters relevant to needs and wishes.
29. It may be a timely reminder that those other matters in the present instance include the notification by the police of their considered lack of objection, and the lack of any community objection even after a second round of advertising.
30. After a total of five advertisements of the application in the "NT News", the only objections came from two players in the liquor industry. There were no community objections even though each of the five advertisements identified the proposal as a takeaway licence and the last three advertisements carefully specified that it was to be a "stand-alone drive-through bottleshop" and was a re-advertising. The notification of lack of objection from the police – a body well known to the Commission as not reticent in objecting to new liquor licence applications – acknowledges the awareness of the police that the proposal was for what they believed would be the only stand-alone drive-through bottleshop in the Territory. The Palmerston Town Council was similarly aware of the nature of the application when resolving not to object.
31. It is true that the Commission in the past has often held that the absence of objections is not necessarily to be equated with community support, and that to "have regard to" community needs and wishes by way of inference from silence or minimal response must be approached with caution. While that remains the Commission's position as a general guideline, the qualifier is of course "not necessarily", and each case must always be adjudged on its own merits. On this occasion the absence of any response from the general community in the context of two separate rounds of advertising some eighteen months apart can now be seen to be a significant aspect, to be considered along with the positive evidence in support.
32. The aspect of the allegedly novel nature of the application has been dealt with in the Commission's decision of 30 September 2002.

33. In terms of needs and wishes the Commission has also considered the issue of proliferation of licences. As we have said previously (in relation to the *Liquorland* application in Mitchell Street), as long as the door is not shut against new applications, new licences will occur. “Undue proliferation” is not sensibly referable to raw licence numbers (which we note in any event are actually reducing in recent times, due partly to attrition) but is a consideration which must unavoidably involve a multiplicity of dynamics and pertinent issues including in the present case the nature of the licence applied for, location and precinct, relevant community, traffic configuration, product range, demographic “catchment”, competition issues, and liquor-shopping patterns and indicators of changes in community preferences.
34. The location of the proposed facility has been a major element in the Commission’s deliberations. Whether one is travelling outbound from the city or from the northern suburbs, there is currently no liquor outlet on the left side of the Stuart Highway before Noonamah. The proposed outlet would be the only one, now that the Biggles approval has lapsed. Road traffic configurations in the Palmerston and Yarrowonga areas militate against convenient use of the proposed outlet by anybody other than outbound motorists. The site is considerably removed from the nearest residential area, and is pedestrian unfriendly. The applicant volunteers measures to keep it pedestrian unfriendly.
35. What has been giving the Commission pause for considerable thought in its deliberations is that the survey has specifically characterised the proposal as a Doug Sallis operation, and it is in the light of that branding that the survey respondents have indicated their support. Several of the individual supporting letters also acknowledge an understanding of the proposal as a Sallis operation.
36. Admittedly the applicant disclosed the Sallis connection to respondents as an initiative in transparency, but as previously indicated Mr Sallis’s company is not the applicant, and has not been nor cannot have been substituted as the applicant in the present application. The presumed acceptability to the Commission of Mr Sallis as operator has played no part in the Commission’s deliberations on the merits of the application. It is obvious however from the face of the survey that the involvement of Mr Sallis was a given for those who indicated their support. That circumstance did raise a question as to the degree of useability of the survey at this stage of the Commission’s deliberations.
37. As we so often note, in *Lariat Enterprises and Liquorland (Australia) Pty Ltd v Joondanna Investments Pty Ltd and the Liquor Commission of the Northern Territory (1995) NTSC 38* the Northern Territory Court of Appeal remarked that:

In most cases, the Commission will be faced with considerations which point in opposing directions and are of differing weight. It

will ordinarily be involved in a balancing exercise in determining how its discretion should be exercised.

38. It has been just such a balancing exercise as has resulted in the outcome now outlined below.
39. The application is approved, and a grant of off-licence is made to 3Up Pty Ltd as applied for, but upon and subject to the conditions that follow.
40. Before commencement of construction the applicant is to lodge with the Director finalised works plans which must satisfy the Director as being substantially in accordance with the concept drawings which were before the Commission for the purposes of this approval.
41. Pursuant to s.31(3) of the *Liquor Act*, the sale of liquor on and from the premises is not permitted until the approval in writing to do so shall have been obtained from the Commission. Such approval must be obtained within nine months of the date of this decision, and will be granted by the Commission upon the Director's satisfaction within that nine month timeframe that the premises have been completed substantially in accordance with the plans lodged with the Director as aforesaid. 3Up Pty Ltd can have no expectation of the nine month period being extended.
42. Pursuant to s.31(3) of the *Liquor Act*, the sale of liquor on and from the premises is not permitted until the licence shall have been transferred under s.40 to Hibernia Pty Ltd or such other company associated with Mr Doug Sallis as the Commission may approve. This condition in no way pre-empts the acceptability of such transferee, which upon application to transfer will undergo the normal investigations and checks and be subject to the exercise of the Commission's normal discretion in such matters.
43. Trading hours shall be standard takeaway hours Monday to Saturday inclusive.
44. The licence as issued shall include the following special conditions:

Advertising and Signage

The licensee shall cause to be removed or withdrawn any signage, advertising or promotional material or hoarding which in the opinion of the Commission, notified in writing to the licensee, shall be offensive, excessive, inconsistent with the concept or nature of the premises or the liquor licence or unacceptable to the Commission in any other way or for any other reason whatsoever.

Product Limitation

The licensee shall stock and offer a product range that shall reflect and be sensitive to the main focus of the business being on drive-through rather than pedestrian trade. This emphasis and sensitivity shall apply particularly to the licensee's selection of liquor for sale in containers larger than two litres. Fortified wine shall be sold only in bottles, not including flagons; no fortified wine shall be stocked or sold in casks of any size or description.

Camera Surveillance

The licensee shall comply with such requirements for and in relation to camera surveillance as the Commission shall at any time notify to the licensee in writing as being thereafter applicable.

Adherence To Concept

The licensee shall maintain the presentation of the premises and the grounds in a way which shall be consistent with the emphasis of the business on drive-through rather than pedestrian trade. In particular, the landscaping shall not provide any shade, no seating or public toilets shall be provided, and any and all external water taps shall have recessed keyways rather than handles.

No hot food or heated snack food shall be offered for sale on or from the licensed premises. The licensee shall offer to surrender the licence if any such food outlet or any automotive fuel outlet should commence business anywhere within the development of Lot 6596 Town of Palmerston.



John Withnall
(Presiding Member)
18 November 2003

(Addendum: the foregoing special conditions were finalised following a further meeting with representatives of 3Up Pty Ltd on 27 November 2003).