

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

APPLICANT: 3UP PTY LTD

PROCEEDING: Application for the grant of a liquor licence

HEARD BEFORE: Mr Peter Allen (Chairman)
Mr John Withnall
Mrs Shirley McKerrow

DATE OF HEARING: 8 July 2002

DATE OF DECISION: 30 September 2002

APPEARANCES: Mr Alan Sprigg for the Applicant
Mr Michael Grove for Liquorland Pty Ltd

1. This application is made pursuant to sec. 26(2) of the *Liquor Act* by a developer who candidly acknowledges the intention to “meet the needs of a national supermarket chain which has approached our company”. Should the envisaged deal not come to fruition, the applicant developer will operate the facility itself only as a fallback position.
2. The proposal is for a stand-alone drive-through bottle shop in respect of Lot 5 in a development of Lot 6596 Town of Palmerston, which is on the left hand side of the outward bound Stuart Highway Palmerston by-pass in the Yarrowonga area. The Development Consent Authority confirms that a liquor shop is a consent use in the Light Industry zoning, and covered by the relevant Development Permit.
3. After meetings with the Police and the Palmerston City Council, the applicant commendably came to the hearing with letters of non-objection from those bodies, and with hearsay evidence (folio 43 of Exhibit 1) - which we accept - that there is no objection on the part of the Aboriginal Development Foundation which has a housing development some three kilometres to the south. The ADF did not see the proposal as being attractive to any aboriginal groups, based on the pedestrian-unfriendly nature of the proposed facility. The applicant summarises the facility’s location as being “in the middle of nowhere in an industrial area”.

4. The only formal objection was by Liquorland (Australia) Pty Ltd, a company which the applicant described in the course of the hearing as “becoming a serial objector”. The applicant referred to Liquorland’s history of objections and applications in impugning the status of this objection as being “commercial”, and it is therefore necessary to rule on the status of the objection in terms of sec. 48(1A) of the Act.
5. As we have so often pointed out, sec 48(1A) does not prohibit “commercial” objectors from objecting. Parliament has not prohibited a competitor from objecting, only from objecting on the ground of adverse impact on the objector’s business. Where this is not one of the grounds set out in the written objections lodged with the Commission, one has to then receive and consider all the objectors’ (relevant) evidence and submissions in order to be able to ascertain whether the *substance* of the objections should be ruled to be grounded in the “competitive effect on the operation of the objector”, to quote from the Minister’s second reading speech on the amendment that led to Section 48(1A).
6. Liquorland’s grounds are that there are sufficient licensed outlets in the vicinity catering to the needs and wishes of any community that may utilise the new outlet, that the managerial and financial capacity of the applicant is unknown, and that the location is detrimental to road users and inappropriate for a takeaway liquor outlet.
7. The Commission has previously held that even if it be found that an objector was in fact motivated to make the objection by an apprehension of adverse business impact, the objection as a whole will not necessarily be disallowed unless it is clear that such motive is the real substance of all the stated grounds of objection.
8. The difficulty in assessing the substance of the Liquorland objection on this occasion has been that the objector elected not to call any witnesses; the applicant likewise called no witnesses and the hearing proceeded by way of submissions and argument.
9. Mr Grove on behalf of Liquorland explained the motivation of the objection as being the concern of his client, as a “significant player” in the retail liquor industry, to maintain its reputation and that of the industry as a whole by seeing the industry properly represented to the consumer. Unsuitable entrants into the industry, and consequential complaints, would reflect on the industry and on established operators within the industry. We are told by Mr Grove that Liquorland sees itself as having an “objecting role” which it takes seriously.
10. However, nobody from Liquorland management was produced to present any such corporate view, and its veracity was unable to be tested by either the applicant or the Commission.
11. It is to be noted that Mr Grove in his submissions made many well-considered points in relation to the application, including
 - The novelty of the proposal, calling for close scrutiny;
 - The need to identify the relevant community as being broader than just the target market;

- The lack of any canvassing of any broader community;
- The statements in support of the application address only the aspect of convenience, whereas it is the community's *preferences* that are more relevant to the assessment of the community's needs and wishes;
- A lack of transparency in relation to the applicant's intentions as to the future disposition of the licence applied for; and
- The application being for too bald an in-principle approval.

12. However engaging or relevant the objector's submissions, the objector's legal standing to make those criticisms of the application was very much in question.

13. It was Mr Sprigg's submission on behalf of the applicant that "when Liquorland does something it's healthy competition; when somebody else does it, it's proliferation". Liquorland's history of objections and applications is of course within the Commission's corporate knowledge, and having been raised by the objector and discussed before us by the parties' representatives we feel that elements of such history can properly be taken into account in our consideration of the issue of the status of the objection.

14. On the one hand Liquorland over the past several years has objected to several new bottleshop applications on the ground (inter alia) of there being no community need for any more bottleshops, while on the other hand itself applying for several new bottleshops. While remaining sensitive to possible protestations of different "relevant communities", (which we do not believe would stand up on a case by case comparison), a level of understandable cynicism on the part of applicant, if not the Commission, was in need of being displaced by the objector. In several past matters before the Commission the evidence of an objecting company's management personnel has sufficiently countered a natural scepticism arising out of a particular objection and persuaded the Commission that the objector had genuine concerns other than or in addition to wanting to protect its own place in the market.

15. No such exercise was even attempted here. We have only the assurance of the objector's legal representative as to his client having been motivated to object out of some sort of broad industry altruism, and we have not been so persuaded. We are of the view that in this matter that Liquorland's self-perceived "objecting role" ultimately comes down to no more than a desire to prevent further competition in its marketplace.

16. On the face of the objection and having considered the submissions of both parties on the issue, we find on the balance of probabilities that the substance of the objection by Liquorland offends against Sec. 48(1A) of the Liquor Act, and it is disallowed accordingly.

17. We emphasise that this determination can in no way characterise any other objection by Liquorland in any future matter, or have any bearing on any future application by Liquorland. It is a determination arising out of the circumstances and presentation of the present matter, and is so limited. Any future matter involving Liquorland must of course be considered on its own merits at the time.
18. The exclusion of the objection does not of itself ensure or allow the success of the application. Had there been no objection there may or may not have been a hearing in any event (see Sec. 29(2) of the Act), but regardless of the mode of the Commission's consideration of the matter the onus remains on the applicant to satisfy the Commission as to the merits of the application.
19. Some of the issues raised by the objector correspond with concerns of the Commission. In so saying we are sensitive to it having been argued in the past that if an objection is disallowed then no part of its case should be considered by the Commission, for to do so would allow an objector in the back door, in effect, even though refused admission at the front entrance. Such argument really relates to unfair utilisation of an excluded objector's evidence, and is not relevant to the present situation. We simply note that the Commission has some of the same concerns with the application as did the objector.
20. A major concern of the Commission is the lack of any suggestion of architectural shape or layout for the proposed outlet, much less any proposed building plans or even preliminary sketches. The applicant could not provide any estimate of how long it is likely to be before all is to be revealed by way of a set of approved building plans.
21. Admittedly approvals in principle have been granted by the Commission on occasions in the absence of any detailed building plans or specifications at that stage, but never in such cases without at least some sort of architectural sketch or artistic representation of what is proposed. We are being asked to blindly approve proposed premises of some complexity, given the stated intentions of the applicant for the site. It can be argued that the Commission can retain absolute control over the project by restricting its approval for a liquor licence to a building design still to be approved by the Commission, or perhaps by the Director of Licensing, but such lingering uncertainty would surely prove as unsatisfactory to the developer in its decision-making on the deployment of resources to the preparation of a building application as it would be to the Commission in not having any idea in the interim as to even the general nature of the structure to be the subject of that eventual building application.
22. All we have is a drawing of the "possible...(access)...layout". We have no problem with the proposed access; what we need is less amorphousness in terms of the premises themselves, something to indicate the style and layout, however generalised, of what is asked to be approved at this stage and to which the eventual plans would be required to generally conform.

23. The applicant concedes that the open-ended timeframe extends to any estimate of the time needed to be ready to commence trading. The applicant cannot provide any estimate for even the commencement of construction. Mr Sprigg concedes that premises could not be operational within twelve months, a period of time suggested to him by the Commission as being desirable, but insists that the project is nevertheless not a case of “pie in the sky”.
24. The Commission in recent times has been reluctant to allow any open-ended timeframe for an applicant to implement its in-principle approval. The longest lead time allowed in comparatively recent times (that is, the limitation of the time between grant of approval “in principle” and the issue of the licence to operating premises) has been eighteen months. In a liquor licensing climate in which arguments as to saturation are becoming more insistent, there has to be a limitation on how long the beneficiary of an in-principle approval should be allowed to rely on it to tie up a place in the relevant market, thereby keeping other potential applicants at bay, without having to utilise the approval and provide that market with the appropriate bricks and mortar facility.
25. Mr Sprigg was unable to give us even an outside estimate of the time that might be needed. We have to know how long a time is required in order to ascertain whether such time may be reasonable in all the circumstances or whether the application may be premature in terms of the applicant’s readiness to proceed. What is needed from the applicant is an achievable timetable for its implementation of the approval being sought.
26. The Commission has also been considering the applicant’s attention to the requirements of Sec. 32(1)(d), needs and wishes of the community.
27. We have before us eight personal letters extolling the convenience of the proposed outlet as perceived by the writers and allegedly, in several letters, their friends and acquaintances. The letter from Alex Julius, a well known fishing personality, is more representational, anticipating general patronage by outbound travellers and recreational trippers.
28. Mr Sprigg conceded that needs and wishes is a broader issue than mere convenience. As the Commission has said in the recent *Liquorland - Mitchell Street* decision, a correspondent acknowledging convenience is not necessarily indicating a preference. Looking then at the eight supportive letters for indications of *comparative* convenience, we read five of them as indicating a preference for the convenience of the proposed new outlet as against present shopping patterns. The other three express unspecified support.
29. The five potential patrons are of course all from within the applicant’s target market, which Mr Sprigg acknowledges to be a subset of the relevant community. He allows that the relevant community has to be “Darwin and Palmerston”. In that situation it is problematical for the Commission to accept the personal views of the eight correspondents and the assurances of the applicant as sufficiently indicative of broad community support.

30. We indicate that the application would benefit from a broader canvassing of the relevant community. Some assistance may be gained from the observations that follow.
31. There is no Commission policy or bias against either new free-standing bottleshops (one was granted in Cullen Bay in comparatively recent times) or drive-through bottleshops (as witness most suburban hotel bottleshops). Bottleshop applications have failed in the past for a variety of reasons, often location-specific and often including too close an association with fuel stops, but not through any resistance on the part of the Commission to the concept. Every application is dealt with open-mindedly on its merits, as it must.
32. Admittedly this application breaks new ground in seeking to combine the drive-through concept with a free-standing bottleshop, but it is to be dealt with on its merits like any other application. What is statutorily unavoidable is that whatever the Commission's perception of the merits of the proposal, the Commission must have regard to the needs and wishes of the community, and to do this we need in every case an adequate evidentiary picture of those needs and wishes.
33. Admittedly the comparative weighting of the requirements of sec. 31(1)(d) of the Act (needs and wishes) as against other requirements will vary with the type and circumstances of each application, as will the evidentiary burden (*Lariat Enterprises and Liquorland (Australia) Pty Ltd v Joondanna Investments Pty Ltd and the Liquor Commission of the Northern Territory (1995) NTSC 38*). In practice, the type of development, type of licence, scale of facility, location, nature of surrounding neighbourhood, potential for residential disturbance, potential for problems with itinerants and density of existing licences in the immediate and surrounding areas are all matters which play a part in the Commission's balancing exercise in relation to needs and wishes.
34. It is relevant to such balancing exercise in this matter that the applicant set out to deliberately harvest any objections from the Police, historically "never slow in coming forward" as Mr Sprigg suggested, yet has deterred the Police from taking such a course in this instance. It is relevant to the balancing exercise that the Palmerston City Council has no objection, in full awareness of the proposal being for a free-standing drive-through bottleshop. It is relevant to the balancing exercise that the ADF sees the proposed facility as unattractive to local Aboriginal groups.
35. Given the nature of the application, it is relevant to the balancing exercise in this particular matter whether or not it can be deduced from the evidentiary material before us that the relevant community as a whole is generally supportive of the proposal. While it is an essential element in the indication of such support that a sufficiently representative cross-section of the relevant community expresses a preference for the convenience of the new facility as against their present liquor shopping patterns, the Commission needs to feel an actual persuasion that the needs and wishes of the whole of the relevant community are likely to encompass the new facility, not just the needs and wishes of a targetted pool of anticipated patronage.

36. While the type and quantum of evidence required for such persuasion will vary with the circumstances of each application (*Lariat Enterprises*, *ibid*) the hurdle of persuasion remains with the applicant.
37. In this matter we are not yet persuaded as to community needs and wishes. The Commission perceives the hurdle to be something more than does the applicant.
38. It was obvious during the hearing that Mr Sprigg had made himself familiar with certain previous decisions of the Commission, and we detected the suggestion that he perceived the Commission to be somewhat sceptical of the value of surveys and petitions. Any such scepticism on the part of the Commission in the past has been restricted to individual applications for the specific reasons given in the relevant decisions. It needs to be made clear that the Commission by no means discourages surveys and petitions. Certainly a survey will not carry the day if perceived to be only an exercise in market research, or if as sometimes occurs the survey results do not actually support the applicant's primary propositions, but many has been the new licence granted on the basis of a sufficiently effective survey or petition. The major issue with surveys and petitions is to couch the questions and target an unfiltered relevant community sufficiently effectively for a breakdown of the responses to be helpful to the Commission's statutory task in relation to the needs and wishes of a community as a whole.
39. Moving on now, we indicate that we have no problem with the location of the proposed outlet or its proposed access design; we see the location as a positive factor in our consideration of the proposal.
40. In the circumstances we accept on the evidence that the applicant will have the financial capacity to conduct the business if unable to transfer the licence as envisaged. The financial capacity of any proposed transferee will be a separate matter. Given that any proposed transferee will be subject to the usual investigation if and when an application for transfer may be made, we are not concerned with the present coyness on the part of the applicant as to the identity of the proposed operator. Both the present application and any application for transfer will stand or fall on their own respective legs.
41. Given the directors' history as officers of a successful local company for many years, and the several directors' business references, we are also satisfied with the managerial capacity of the applicant to operate the licence should such turn out to be the necessity.
42. So where does that leave us at this stage? This has been in general a well put together application, but certain aspects are in need of further attention by the applicant. Since there is no objector remaining as a party with a legitimate expectation of a decision on the case as presented at the hearing, we are prepared to defer a final decision on the application and give the applicant the opportunity to put further material before us. In summary, what we are looking for is:
- Some indication, either in architectural or artistic terms, of the nature, scale and layout of the premises to be constructed, to which the eventual building plans will be expected to generally conform;

- The length of time requested for an approval to remain alive, ie. a timetable for getting the facility up and running following an in-principle approval;
- Something more on needs and wishes.

43. The Commission will further consider the matter when the applicant should indicate that it rests on its case at that point and seeks a final decision on the application. In the meantime the matter stands adjourned *sine die*.

Peter R. Allen
CHAIRMAN
30 September 2002