

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES:	BANYAN TREE CARAVAN AND TOURIST PARK
LICENSEE:	Harald Willms
LICENCE NUMBER:	8115510
PROCEEDING:	Hearing of objections and application to vary liquor licence conditions to allow takeaway liquor sales.
RELEVANT LEGISLATION:	Sections 31, 32, 47F, 47I of the <i>Liquor Act</i> .
HEARD BEFORE:	Ms Jill Huck (Presiding) Mr Alan Clough Mr Paul Costigan
DATE OF HEARING:	29 & 30 March 2004
APPEARANCES:	Harold Willms, licensee Ms Alison Worsnop for Sergeant Carlon, objector Mr Steven Robertson, objector

1. The outcome of this application to vary the conditions of the Banyan Tree Caravan and Tourist Park was communicated to the applicant in a letter dated 13 August 2004, with a short explanation of the decision to reject the application. In that letter, the Chairman of the Licensing Commission explained that due to unforeseen circumstances there had been a delay in finalising the written reasons for the decision and that full written reasons for the decision would be provided to the applicant in due course. This document constitutes those written reasons.

Background:

2. On 26 November 2003 and 28 November 2003 Mr Harald Willms placed advertisements in the *NT News* notifying the public of his application to vary the conditions of the liquor licence for the Banyan Tree Caravan and Tourist Park. The advertisements stated that the application was for the premises to be able to sell liquor for consumption away from the premises on Monday to Friday between the hours of 1000 to 2200, Saturday and Public Holidays

between the hours of 0900 to 2200, with no trading on Good Friday, Christmas Day or any Sunday. The existing liquor licence for the Banyan Caravan and Tourist Park allowed for a limited capacity to sell liquor for consumption on the premises (to people traveling to the premises in registered omnibus and tourist vehicles and to any member of the public in conjunction with a meal) as well as some capacity to sell takeaway alcohol to bona fide residents of the caravan park. Takeaway sales to residents were limited to 6 cans of beer per person per day. The effect of the advertised application was therefore to eliminate the limits on sales to caravan park residents and to allow takeaway sales to the general public.

3. Two letters of objection were received in relation to Mr Willms' application to vary the licence. The first letter was from Sergeant Neale Carlon, OIC Batchelor Police Station, and the second letter was from Steve Robertson, a local resident and tourist operator. The Commission member selected under section 471 of the *Liquor Act* (the Act) to consider the substance of the objections decided that both objections met the requirements of section 47F of the Act and referred them to the Commission for hearing.
4. The hearing, held on 29 and 30 March 2004 served two overlapping functions, namely:
 - the hearing of the objections; and
 - the consideration of the application to vary the licence conditions.
5. The relationship between the objection process and the consideration of an application is not a straight forward one. As a result of amendments to the *Liquor Act* which came into force in January 2003, the grounds for objections to liquor licence applications were restricted to the issue of whether the grant of a licence would affect the "amenity of the neighbourhood" (s47F(2)). However, the factors to which the Commission was to have regard, under section 32 of the Act, when considering whether to grant an application and determining the conditions of a licence, were never amended to specifically include an "amenity of the neighbourhood" criteria. The criteria set out in section 32 were as follows:
 - the location of the licensed premises;
 - the location and conditions of any licensed premises in the vicinity of the premises in respect of which the application is made;
 - the needs and wishes of the community;
 - the nature of any business to be conducted on the premises;
 - the financial and managerial capacity of the applicant;
 - where the premises which are the subject of an application for a licence are located in a community government area and the community government council for that area has the power to make by-laws with respect to liquor, advice offered by that community government council; and

- any other matter the Commission thinks fit.
6. Despite the lack of exact fit, it is arguable that the potential impact of a licence on the “amenity of the neighbourhood” was something that could have relevance under a number of these criteria, but would vary on a case by case basis, depending on the nature of the application.
 7. Central to the Banyan Tree Caravan and Tourist Park application were the concepts of neighbourhood and community. The Commission member considering the standing of the objections found that, because the licence being applied for was of a takeaway nature, Batchelor township, the surrounding rural area and the tourist destinations in the area, including the Finnis River, Litchfield National Park and the Rum Jungle Recreation Lake, could all be regarded as being in the neighbourhood of the Banyan Tree Caravan and Tourist Park (the Park). The Commission concurred with this assessment. Again, the nature of the application affected the parameters of who was considered to be a member of the relevant community for the purpose of assessing community needs and wishes. Because of the high level of tourist traffic through the area, the relevant “community” arguably included transient members of the neighbourhood such as intrastate, interstate and overseas tourists and day visitors from Darwin as well as those working and living in the area. The relevance of this issue will become clearer at a later stage of this statement of reasons.

The application

8. Mr Willms’ original letter of application and the subsequent newspaper advertisements indicated that he was seeking a fairly standard takeaway licence, with standard trading hours and no restrictions on the type of liquor to be sold or the persons to whom it could be sold. In particular, his application letter indicated that he wished to be able to sell takeaway to the “passing traffic”. A follow-up email from Mr Willms stated his wish to sell to residential neighbours, tourist guests and “passing through Darwinites” on their way into the National Park on weekends. The application was then modified as the objection and hearing process unfolded. In Mr Willms’ response to the objections he said that he only wished to sell takeaway beer to his Park patrons and maybe to some residential neighbours who buy groceries from the store. During the course of the hearing Mr Willms provided further detail, saying he wanted to be able to sell cartons of beer to his caravan park residents and also to people living in his immediate neighbourhood (the people residing within 2 kilometres either side of the Caravan and Tourist Park). He said he would like to be able to sell takeaway beer to these customers between 4.00pm and 8.00pm, to coincide with his neighbours coming home from work in the afternoons. He said he was not interested in staying open late, attracting customers from the Batchelor township or selling takeaway alcohol to passing tourists and day visitors. He

was adamant that he would want to avoid serving people thrown out of, or banned from, the Rum Jungle Motor Inn and advised the Commission that he had a particular aversion to drunks, which had developed through his long experience of operating pubs in Europe (13 years in Berlin). This aversion was one reason he was not interested in having any sort of bar at the Park or creating any situation which might lead to heavy drinking.

9. Mr Willms said that he would be prepared to accept a condition in his licence that he not advertise takeaway liquor sales. He did not anticipate a large increase in liquor sales if he was successful in obtaining the variation and saw the sale of liquor as continuing to be ancillary to other aspects of the Park's operation. He said that he sells the equivalent of 4 cartons of beer a week in the Wet Season and 20 cartons per week in the Dry Season. If his application was successful, he would see himself as keeping about 30 cartons of beer in stock at any one time (5 different varieties). He said he was not interested in selling takeaway wine (cask or otherwise) as he does not have the storage space for it.
10. He said he would also be willing to accept a non transferability provision for the takeaway part of his licence as his commitment to this business was of a long term nature. Mr Willms indicated that he was very interested in accommodating the Police concerns about alcohol problems in the area and was willing to become a participant in any regional initiatives coordinated by the Police.
11. Mr Willms said that the profile of the types of people who stay at the Park is such that an increased availability of takeaway beer was unlikely to cause any problems. He said that most of the people who stay at his caravan park are retirees with caravans - the so called "grey nomads"; and overseas visitors driving motor homes. Mr Willms said that these customers are not interested in getting drunk and are very careful about drink driving, especially the retirees who often have their savings invested in their vehicles and caravans. Mr Willms said there were also increasing numbers of customers who have arrived in Darwin on cruise ships or on cheap flights and have hired small cars or joined one day tours to see the sights. Another part of the market were the backpackers, who turn up in old cars and were not interested in spending much money on alcohol. Mr Willms advised that he no longer encouraged permanent residents at the Park as some had caused problems in the past, with drug and alcohol abuse being a factor.
12. Mr Willms said that many of his Park residents would be interested in buying cartons of beer, rather than the 6-pack per day currently available, especially if he could sell cartons of beer at reasonably competitive prices.
13. Mr Willms' other potential customers were his neighbours. He described his neighbourhood as being 2 kilometres up the road and 2 kilometres down the

road. About 50 to 70 people live in this area, with many working in Batchelor. Mr Willms said that some of these neighbours were interested in purchasing takeaway beer from the Park if it was available at a reasonable price. He said that he often gets requests for takeaway alcohol from neighbours when they purchase takeaway food, soft drinks or cigarettes from the Park. "From talking to them, you know there is a demand". The neighbours currently buy their alcohol in Darwin or Palmerston when they do their weekly grocery shopping. If they run out of alcohol, they will purchase takeaway from the pub in Batchelor, however many would prefer to have the option of another local alternative.

14. Mr Willms said that he only occasionally gets asked for takeaway alcohol by passing tourists and mostly these are Darwin people on day trips.
15. Aside from his own oral evidence regarding the needs and wishes of his potential customers, Mr Willms presented no other written or oral evidence of support, opposition or lack of opposition to the application in its original form or as amended.

The objections

16. At the hearing, the Commission heard evidence from Sergeant Carlon and Steven Robertson about their concerns regarding the possible impact of another takeaway licence on the neighbourhood. In addition, the Commission heard evidence from Brett Norman, a Senior Ranger with the Parks and Wildlife Commission, who appeared as a witness for the Police. Although not the only issue, both the objectors and the witness expressed particular concern about the potential impact of greater access to takeaway alcohol on Litchfield National Park. They stated that alcohol consumption was already a problem in the National Park, with litter from empty alcohol containers and antisocial behaviour such as "hooning", vandalism and loud behaviour. Evidence was given by the Senior Ranger Norman that premixed drink cans constituted about 95% of litter in the area. He said that excessive alcohol consumption was also involved in risky behaviour leading to accidents at waterholes and with road accidents in the area. The objectors and the witness all identified the main problems as coming from Darwin people visiting the National Park on day trips or overnight, rather than from interstate or overseas visitors or from itinerants. Young Darwin people who drink premixed drinks in cans were singled out as the problem group, although some beer-drinking fathers in family groups were also seen as causing problems. The type of people who stay at the Banyan Caravan and Tourist Park were not seen as contributing to the alcohol related problems in the area. The Easter long weekend was singled out as the worst period for alcohol related incidents in the National Park.

17. The evidence was that 270,000 to 300,000 people visited the National Park each year, with many of these being day-trippers from Darwin. It was believed that most of the alcohol brought into the National Park was purchased in Darwin, with some people leaving their camp sites to purchase top-ups of their alcohol and ice supplies from Batchelor. The concern was expressed that a full takeaway licence at the Banyan Caravan and Tourist Park would make it even easier for the problematic drinkers to top up their alcohol supplies.
18. Senior Ranger Norman advised that the problems in Litchfield are exacerbated by the fact that the camping grounds are very small, with camp sites being crowded together. He said that people camping in the National Park complain about this crowding and the resultant problems - it is not the peaceful wilderness experience they are expecting in the Northern Territory, and also not conducive to the lifestyle of going to bed early that many have adopted. Senior Ranger Norman advised that most tourist complaints are about mosquitoes, crowding, noise and abusive language and that some tourists ask for refunds of their camping fees.
19. Mr Robertson advised the Commission that he also had concerns about the potential impact of a full takeaway licence on the Finnis River area, where he runs his tourist business. He already has some problems with anti-social behaviour from people trespassing on his property, including the occasional "hoon". These problems occur in the Dry Season (about once or twice a week). Again, the Easter Weekend was identified as a difficult time and intoxicated young single people from Darwin were the problematic group. In addition, about once a month, he finds groups of local people trespassing on his property and drinking alcohol down by the river. Despite these problems, he has not yet had to call the Police. Mr Robertson also said that, because he had the first public telephone outside the Litchfield National Park, he had first hand experience of road trauma in the area. This road trauma is sometimes associated with alcohol. He was concerned that there might be an increase in the frequency of accidents if alcohol was more readily available in the area. He also expressed a concern about the potential for an itinerant problem to develop in the area.
20. The Police also expressed a concern about road safety, as there were no speed limits on the roads in the area and there were practical impediments to having adequate Random Breath Testing (RTB). Inadequate telecommunication coverage, including the complete absence of mobile phone coverage and only a few public phones, was also seen as a problem; as was the inadequacy of the Police resources to properly police the area.
21. Sergeant Carlon also expressed concern about the impact of an additional takeaway outlet on Batchelor. He said that the pub in Batchelor was a significant part of the Police workload and that an additional outlet in the area

could divert Police resources and would have the potential to make the control of problem drinkers more difficult. He said that, although the situation had greatly improved since the closure of the Club, there were still significant alcohol problems in Batchelor. He was particularly concerned that patrons who had been issued with trespass notices by the Pub would be able to go to the Banyan Tree Caravan and Tourist Park for takeaway alcohol. He was also concerned that people who had been put "off-tap" might do the same. He said the trouble usually started after 8.00pm, although it could start as early as 4.00pm. He was not convinced that Mr Willms' undertaking to cease trading by 7.30pm or 8.00pm and willingness to cooperate with the Police and the Pub's licensee, would be sufficient to stop problems arising.

22. Police confirmed that they did not have any concerns about the current operation of Mr Willms' premises. They also did not have any concerns about alcohol related problems in Mr Willms' immediate neighbourhood; they simply did not get call outs to the premises or to the area. Senior Ranger Norman also said that he was not aware of any alcohol or other problems associated with Banyan Tree Caravan and Tourist Park and confirmed that the type of tourist who stayed there did not cause problems in the National Park. Mr Robertson agreed, and said he would have no objection to Mr Willms selling takeaway alcohol to Park patrons and his immediate neighbours.
23. However, despite there being a general consensus that the modified version of the application put forward by Mr Willms at the hearing (the sale of takeaway beer to only neighbours and Park residents and very short trading hours), was less likely to impact on the wider neighbourhood than the original application for a full takeaway licence, there was still some concern expressed about how easy such a licence would be to administer and monitor, especially in the peak season. There was also concern expressed by Police about the potential for "licence creep"- a significant change to the nature of a licence through a series of small changes; concern that any "non transferability" provision incorporated in the licence conditions might be legally challenged during a transfer process; and a concern that a precedent might be set for other licensed premises in the area. Police also argued that Mr Willms' application had failed to establish the needs and wishes of the community in respect of the application.
24. At the end of the hearing, Police sought leave to make a written submission to the Commission. The Commission granted leave for such a submission on the basis that Mr Willms would have an opportunity to provide a response to the Police submission, perhaps after seeking legal advice. A lengthy submission was received from the Police on 23 April 2004, with a copy made available to Mr Willms.

25. The Police submission summarised much of the evidence from the hearing and urged the Commission to apply the “precautionary” principle to the matter and refuse the application to vary the licence. The conclusion to the submission read in part:

The burden of proof lies on the Applicant to prove that his proposal will meet community needs and wishes and will not adversely affect the amenity of the neighbourhood and will be in the public interest. It is submitted that until the Applicant has done this, transparently and defensibly, the Commission should be cautious and maintain the status quo by not extending the Applicant’s takeaway sales and not further jeopardising the amenity of this important tourism neighbourhood.

26. Mr Willms was provided with an opportunity to comment on the contents of the submission and given until the end of May 2004 to do so. He subsequently advised the Commission by facsimile that he would not be providing a response, stating that the issues had already been covered – in writing and verbally at the hearing.

Discussion and application of the law:

The objections

27. The Commission was satisfied that the concerns of the objectors were genuinely held; that they were not frivolous, irrelevant or malicious in nature; and that they needed to be taken into account in the Commission’s decision as to whether the application should be granted and, if it was granted, in the nature of any specific licence conditions that might apply.
28. It was clear from the evidence that the objectors were very concerned about the impact of a full takeaway liquor licence on the neighbourhood, and much less concerned about the impact of the more modest version put forward by Mr Willms at the hearing. That said, the Police in particular, expressed some continuing disquiet about even this.

The application

29. As explained earlier in this statement of reasons, in making the decision about whether to grant the variation to the licence, the Commission was required to consider the factors set out in section 32 of the Act. Of the factors listed, the ones most pertinent to this application were: the location of the premises (s32(1)(a)); the nature of any business associated with the licence (s32(c)); the needs and wishes of the community (s32(1)(d)); the managerial capacity of the licensee (s32(e)); and the catch-all provision of “any other matter that the Commission thinks fit”(s32(1)(g)).

30. Location of the premises. The location of the Banyan Tree Caravan and Tourist Park at the threshold of Litchfield National Park and its proximity to the Finnis River and to Batchelor were the focus of much of the concern expressed by the objectors. The perception was that alcohol was already a problem in these areas and that a takeaway outlet in such a location could lead to an escalation of existing problems. The Commission agreed that there were risks associated with the granting of a full takeaway licence for the amenity of some of these identified areas. That said, there was far less concern about the impact of a full licence on the amenity of the immediate neighbourhood (the caravan park itself and the area in the 2 kilometres either side of the park). The concern about the impact of the modified version of the application was focused around the perceived problems of managing and monitoring such a licence.
31. The financial and managerial capacity of the applicant. The Commission had no reason to doubt Mr Willms' financial or managerial capacity as a licensee. There were no concerns expressed during the hearing about Mr Willms' management of the existing business or his general competence as a licensee. In fact, there appeared to be a consensus that Mr Willms was an experienced and responsible licensee and there was an appreciation of his candor and willingness to compromise on the details of his application. His reputation and attitude were therefore favorable factors in our considerations.
32. The nature of the business conducted on the premises. The Banyan Tree Caravan and Tourist Park consists of camping areas, areas and facilities for caravans, a shop, a small restaurant and some cabin-style accommodation. The business currently has, what the Commission describes as, a "caravan park liquor licence". While not identical in all details, caravan park licences commonly have a restriction on takeaway sales to bona fide residents of the park only, with restricted quantities and restricted types of alcohol available for sale. The purpose of these limitations is, in part, to ensure that takeaway alcohol remains an ancillary part of these businesses.
33. While there is nothing in the legislation that requires the liquor licences issued in respect of caravan park premises to be the same, it is arguable that there are sound policy reasons for keeping the licence conditions of such businesses reasonably consistent. Although every application must be considered on its merits, the Commission has taken the view that it needs to be positively persuaded of the need to depart far from any "standard" types of licence conditions, especially if that departure is in a more liberal direction. It is in that area of demonstrated need that the Commission had considerable concerns.
34. The needs and wishes of the community. Without the benefit of any independent evidence of community attitudes, it was difficult for the Commission to know the level of community support for the proposed

variation - either the original application or the revised one. There were no petitions, no letters of support, no witnesses at the hearing, no survey of the neighbourhood, no survey of passing tourists and no survey of people staying at the Park. The only evidence the Commission had before it was Mr Willms' anecdotal evidence that his neighbours and guests were supportive of the application. While there were only two objections to the applications, we agree with the Police submission that this, by itself, is of little significance. It was thus very difficult for the Commission to know whether the community (however defined) supported or opposed the application or whether the community was largely indifferent. This was a major weakness in Mr Willms' application and the presentation of his case.

35. Any other matter the Commission thinks fit. Another aspect of this application which caused some mixed feelings for the Commission was its changing nature. The type of variation being applied for was modified considerably during the application and hearing process. On the one hand, this was a positive feature of the application as it demonstrated that Mr Willms was prepared to be responsive to the objectors' concerns and the issues raised at the hearing. On the other hand, the Commission was left with some residual concerns about how well the application and the variations to that application had been thought through by Mr Willms. It is unfortunate that Mr Willms declined the opportunity to make a written submission to the Commission as this may have provided greater clarity on this issue.

Summary

36. On the evidence presented in this case, the Commission was persuaded that a full take away licence could not be granted. The grant of such a licence would involve considerable risks, which the Commission considered could not be justified on the existing evidence about alcohol related problems in the National Park and in Batchelor, the lack of evidence about the needs and wishes of the community, and the fact that it would be a major change in the nature of the licence.
37. The Commission gave considerable thought to whether a more limited licence variation, along the lines suggested by Mr Willms, could be approved. Certainly, the suggested licence conditions, if strictly complied with, were far less problematic than the original application. However, the obstacle which the Commission encountered in discussing this option was that there was simply no adequate evidence about the needs and wishes of the community. The only information we had on this important issue was Mr Willms' anecdotal evidence of need. Mr Willms was on notice of this issue being perceived as a weakness in his application, the issue having been explicitly discussed in the hearing and emphasized in the written Police submission. Despite this, Mr Willms did not take any action to address this shortcoming in

his application until some months after the decision to reject the application had been formally communicated to him. While the Commission had some other concerns, it was the lack of evidence on community needs and wishes that proved the fatal flaw for the modified application.

The decision

38. After very careful consideration the Commission decided not to grant the application to vary the licence of the Banyan Tree Caravan and Tourist Park either in its original form or as modified during the hearing process.
39. As explained to Mr Willms in a letter sent to him on 13 August 2004, the Commission's decision on this occasion does not prevent him from lodging a fresh application. If he chooses to do so, he should note that the *Liquor Act* has been amended since his original application was lodged. The most significant changes have been the expansion of the grounds for objection, the repeal of the section 32 criteria and the introduction of new objects for the Act. In considering an application the Commission is now required to have regard to the new objects of the *Liquor Act*, which include a public interest test. As these amendments have only recently come into effect, it is unclear at this stage whether the amendments will present licensees such as Mr Willms with an easier or more difficult path to achieving a variation of their licences.

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Jill Huck
Presiding Member
10 January 2005