

NORTHERN TERRITORY LICENSING COMMISSION**REASONS FOR DECISION**

PREMISES: LIQUORLAND, FAIRWAY WATERS: UNIVERSITY AVENUE PALMERSTON

DATE OF HEARING: 18, 19 and 20 JULY 2000

DATE OF DECISION: 6 SEPTEMBER 2000

Application: New licence

Applicant: LIQUORLAND (AUSTRALIA) PTY LTD

Nominee: Mr Philip Dowling

Heard before: Mr John Withnall (presiding)
Ms Shirley McKerrow
Ms Annette Milikins

Apearances: Mr Gordon Berner, for the Applicant
Mr Tom Anderson, for NT Police
Mr Ross Kleinhanss, for Palmerston Golf & Country Club
Mr Tony Clementson

Liquorland (Australia) Pty Ltd (“Liquorland”) applies for a liquor licence for a take-away (“off-licence”) facility within a development under construction at Lot 6389 Town of Palmerston, at the corner of University Avenue and Randy Avenue, and immediately adjacent to the Fairway Waters subdivisions..

The Licensing Commission determined to conduct a hearing of the application in the face of objections received from the NT Police, the Palmerston Golf & Country Club Inc. (“the Golf Club”) and nearby resident Mr Tony Clementson. It is not improper to remark that in all likelihood the Commission would still have conducted a hearing even had there been no objections, given the contentiousness of the proposed outlet both as to the nature of the facility and its location within a development on behalf of a major oil company for the primary purpose of a large service station.

Mr Berner, Counsel for Liquorland, indicated at the outset his awareness of the hurdles before him in relation to the proposal. The written objection on behalf of the Police had also identified the two major hurdles in the way of the application: the inappropriateness of being “associated” with a fuel outlet and of being a “stand alone” liquor outlet in that location (in addition to the more usual grounds of police objection, viz. undue proliferation of licences in the area, lack of community needs and wishes and being contrary to sound public policy). Mr Tom Anderson appeared for the Police.

Mr Clementson and the Manager of the Golf Club, Mr Ross Kleinhanss, attended and participated in the hearing. Both these objectors gave articulate and informative evidence.

The Palmerstown Town Council gave written notice that it had resolved “not to make any comment in regards to the application” (folio 25, Exhibit 1).

The Commission accepted the financial and managerial capacity of Liquorland as a given, and likewise the acceptability of the very experienced Mr Philip Dowling as initial nominee for the proposed corporate licensee. The hearing proceeded to address the nature of the proposed outlet and the issue of community needs and wishes.

The site is being developed for Shell Australia by Spectator Investments Pty Ltd, a Western Australian company with considerable experience in the development of neighbourhood shopping centres both in that state and in New South Wales. The company has successfully completed service station projects for both Mobil and Liberty Oil in Perth. What is proposed for 130 University Avenue Palmerston is a large Shell service station and seven “specialty shops” as shown at folios 16 and 17 of Exhibit 1 and updated vide Exhibit 4. With the exception of one of the shops, not affecting this matter, Spectator Investments will become the registered proprietor of the development from Shell, the current owner, and lease the service station back to Shell for its favoured franchisee and lease out the other shops to diverse retailers including “Tenancy No. 3” to Liquorland.

Liquorland's agreement for lease is subject to its application for a liquor licence being successful. The continuation and completion of the whole project by Shell and Spectator Investments is not dependant on such licence being granted, and in the event of the failure of Liquorland to obtain a licence and take up its tenancy the shop will be leased by Spectator Investments to an alternative retail tenant.

What could be called Tenancy No. 1 in numerical sequence will be what Mr Rhys Goldsworthy of Shell described as a Shell convenience store, referred to in more detail later in these reasons, and one of the other shops is contracted to Domino's Pizza. Other tenancies may include another fast food outlet and/or a restaurant, and possibly a pharmacy and medical practitioner. An alfresco dining area is proposed at the front of the shops.

Mr Philip Dowling, the Northern Territory area manager for Liquorland, testified that the initiative for a Liquorland bottleshop as part of the development had come from Liquorland itself, not from Shell. Mr Dowling said that he identified the potential of the site some eighteen months ago, and it was he who sought out Shell with Liquorland's expression of interest. Even so, Liquorland always anticipated the specific difficulties in getting the proposal licensed by the Commission; Liquorland's general manager for licensing, Mr Patrick O'Sullivan, gave evidence that the particular considerations of the "development committee" were that it was their first application in the Territory for a free standing bottleshop and the first involving "service station issues".

Mr O'Sullivan went on to explain that the co-location of liquor and fuel was a strong issue within the liquor industry, which was opposed to it, and Liquorland supported such industry opposition. However, Mr O'Sullivan said that Liquorland was of the view that the present application does not offend against the industry policy, because the policy relates to liquor outlets within the service station itself whereas what is being looked at here is "a small neighbourhood shopping centre to which a service station is attached".

It can properly be remarked by the Commission that certainly by the time this present application was made, Liquorland was well aware of the Commission's concern in relation to a nexus between liquor and fuel, Liquorland having objected in 1999 to a liquor licence for TC Fuel Distributors essentially on that very ground (inter alia), and having seen TC's application fail for the reason

that the evidence of community needs and wishes was not such as to overcome the Commission's caution and concern as to the linkage of fuel and liquor sales....

The Commission's perception of the undesirable advantage to be enjoyed by the fuel stop in capturing an impulse-buying liquor market sector militates against this particular application in respect of these particular premises.

Mr O'Sullivan distinguishes TC's as being (i) on a major highway, as distinct from being within a village-like shopping centre close to the residential area of the majority of customers, and (ii) an application by the service station operator, in respect of co-located premises. At Fairway Waters, he argues, the operators and premises will be separate.

In 1999 Liquorland also objected to an application for a tavern licence for Biggles Highway Inn on the outbound side of the Stuart Highway between Berrimah and Palmerston. That application involved a proposal for a tavern and its bottleshop being part of a shopping village to be developed on the site, and Liquorland will be aware that a licence was approved subject to a special condition (inter alia) providing for

The suspension of the licence for such time as any of the businesses at or within the development shall be operating as an automotive service station or fuel outlet.

Again in 1999 Liquorland objected to a liquor licence within a shopping village development at the corner of Bishop Street and Woolner Road in Darwin, where the proposal was for a supermarket bottleshop to open on to a driveway and be able to be operationally and physically independent of the supermarket. Although no service station was contemplated for the site, Liquorland objected that “it may lead to *impulse purchases by motor vehicle drivers*”, and watched the eventual licence be granted as a standard store licence only. Liquorland distinguishes the Woolner Road project as having proposed a drive-through liquor facility, while the present application involves people having to park and alight from their cars in order to make a purchase of liquor.

As to its current application being a free standing bottleshop rather than a service ancillary to a Coles or other store, Liquorland points to the size and quality proposed for the “mini-supermarket” or “convenience store” to be operated by the service station proprietor. Mr Goldsworthy predicted an impressive monthly turnover for the Shell shop, said to be comparable to Shell Daly Street and Shell Casuarina in terms of product lines and turnover. Exhibit 6 demonstrates the breadth of product lines; even a bakery is planned to be included.

This estimate of turnover derives from a researched projection of monthly fuel sales for the service station, with Shell’s figures on average sales producing an estimate of some 9200 customers per month for the service station, a statistical 60% of whom will purchase something in the shop additional to fuel.

No Shell shop in Australia operates a liquor licence.

Mr O’Sullivan testified that what is being sought is not prohibited anywhere in Australia, that the majority of Liquorland’s many hundreds of outlets around Australia are free standing bottleshops, with only a minority attached to stores, and that Liquorland’s corporate mind can see no difference between this proposed outlet and a supermarket outlet, given that exactly the same controls will be in place.

Evidence of needs and wishes of the community was put essentially on the basis of customer convenience, with a survey of Palmerston residents by McGregor Tan Research presented as supportive of Liquorland’s perception of the attractiveness of the proposed new outlet to the target market.

Mr O'Sullivan anticipates the proposed new outlet attracting customers from its existing Palmerston store, and from Mac's Liquor and all other outlets in Palmerston. He is not bothered by the expected impact of the new store on the existing store. The existing Liquorland store in Palmerston was said to be outstandingly successful, so much so that the anticipated migration of patronage to the new store will not affect its viability, and it will become more comfortable to shop in. Mr O'Sullivan and Mr Dowling referred to the parking difficulties that had come with the success of the Palmerston Shopping Centre. The new site will have ease of traffic movement, ease of access, ease of parking, and nearness to the new residential areas. Mr O'Sullivan saw the over-riding factor in the choice of the site as being the convenience of the location. The bulk of customers are envisaged being within a short distance of their place of residence, in contradistinction to the TC's and Biggles proposals.

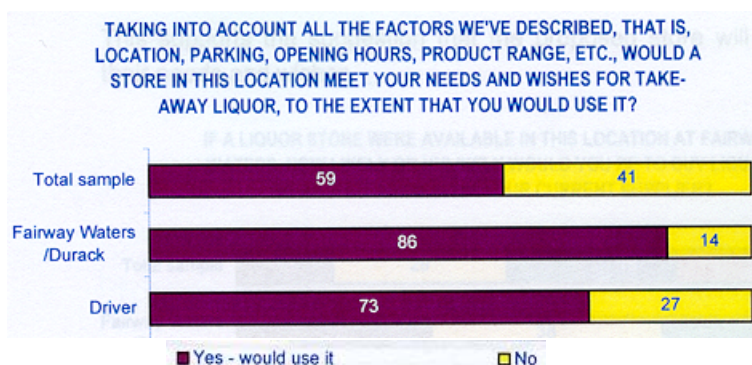
The McGregor Tan survey was presented through Ms Frances Eltridge of that firm. She is a qualified member of the Market Research Society of Australia (being South Australian treasurer of that Society), and has been in the industry for some fifteen years. She has responsibility within her firm for methodology design, data capture, analysis, reporting and executive assessment of results, and prepared the report (Exhibit 9) at the request of Liquorland's solicitors.

The survey was conducted by telephone at random among five Palmerston suburbs: Fairway Waters/Durack, Driver, Gray, Moulden and Woodroffe. Only adults were spoken to. After screening for compliance with sample criteria, a contact list of 928 reduced to a sample of 400. Persons within the industry were screened out, and a second screening was effected by interviewing only the person in the household "who most regularly purchases take-away liquor".

The latter screen was vigorously criticised by Mr Anderson and his expert witness, Mr Gregory Albrecht, who holds a Masters degree in Research and has been with the NT Government for three years, currently as principal statistician. Their criticism of the screening was essentially twofold: firstly, there could be no assertion that the sample had been 400 *households*, because other persons in the household may well have held divergent views, and secondly, to screen out people who do not regularly purchase alcohol is to measure the opinions of only those who do regularly purchase alcohol, thus biasing the sample as representative of the needs and wishes of the community as a whole.

Ms Eltridge conceded that she had measured a subset of the community but insisted that it remained effectively representative because the only persons excluded by the screening in question were persons who *never* purchased alcohol, which she described as a tiny and insignificant percentage of the populace.

The expression "needs and wishes" was included in question 6, which was also attacked by Mr Anderson and Mr Albrecht, and also by the objector Mr Clementson who revealed that he had been one of the interviewees. As this question and its charted response was presented as the key finding of the survey, we reproduce it in part over the page:



In Mr Albrecht's view, by being loaded up with a multiplicity of positive attributes favouring the proposal, the question ceases to be neutral. There are no balancing negatives; the structuring of the question prompts an answer in the affirmative. It follows in Mr Albrecht's opinion that all questions and responses subsequent to question 6 are impacted or skewed by the bias built into question 6.

Mr Clementson's objection to question 6 was that it presented the proposed liquor outlet as a *fait accompli*, and should have asked him if he *wanted* it rather than if he would use it. He said that he honestly answered this question in the affirmative, as if it were to go ahead he would probably use it, but his preference was that the outlet should not go ahead at all. The question did not encompass his attitude to the liquor store's very existence, as distinct from how convenient he might see it to be.

Mr Clementson's substantive objection to the proposal was in effect that the proposed liquor store in that particular location would create another zone of anti-social behaviour in the nearby public greenfield space. His concern was that the site was adjoining the unfenced golf course and seven kilometres of bike paths, both the golf course and the cycle paths winding around the lakes in Fairway Waters. This open space would become even more attractive to the "problem people" if there was an adjoining take-away liquor outlet. From discussions with his neighbours, he was surprised that there were not more objections. His formal written objection forms folio 32 of Exhibit 1.

Mr Ross Kleinhanss of the Golf Club confirmed that there was already an unacceptable level of anti-social behaviour on and around the golf course, with campfires on fairways and greens and problems with resulting broken glass. There was currently a problem camp at the 8th tee. There had been six break-ins at the clubhouse in the last eight months. The Golf Club was prohibited from fencing or lighting the course. There is a pathway on the club side of everybody's homes, and he feared an influx of more "undesirables" if the new bottleshop went ahead. Given the new surveillance measures proposed for the Palmerston CBD, in his view the current behavioural problems would quickly migrate to the golf course/ Fairway Waters area if a conveniently adjoining bottleshop came into existence. The area would become very attractive to the problematic "long-grassers" who currently obtain their supplies in the CBD.

Mr Kleinhanss has lived in Palmerston for eight months, coming from Karratha. He testified that Roebourne has a reputation for alcohol abuse and anti-social behaviour, but that Palmerston is quite a lot worse than Roebourne. He described Palmerston's problems in this regard as the worst he has seen in a populated area.

It was emphasised by Mr Kleinhanss that the Golf Club's objection was not against competition, the club's take-away sales being insignificantly minimal. The Golf Club was the largest neighbouring landholder, and had the task of looking after the largest area of unsecured unlit public land in Palmerston. The club has a membership of about 1400 persons, about 80% of them being residents of Palmerston. Some 600 are active golfers entitled to vote. Committees were formed to speak to members and ascertain their views on the Liquorland proposal, the result being that a large majority did not want the outlet to go ahead.

Although Mr Kleinhanss made it clear that he was speaking to the club's objection, he added that he believed that no members had individually objected because the Committee had informed the membership that the club would be putting in an objection. He has personally spoken to some four dozen members who believed that the Club would be looking after their personal interests in the matter.

Mr Anderson called Sgt Sattler to speak to the police objection. He has been sixteen years in the police force, has lived at Palmerston for seven years, and has been stationed there for the last three years. He is OIC of a complement of forty three officers. Doubtless with some thought for a possible challenge of the standing of the police force to object to liquor licence applications, Sgt Sattler saw himself as having a duty to serve and protect the community, that being a duty which brought him to this hearing.

Sgt Sattler described a litany of ongoing callouts to disturbances in public areas involving arguing, fighting, offensive language, offensive behaviour, and general public drunkenness, normally caused by transients or "long-grassers" of mixed backgrounds but "predominantly aboriginal". Although referring mainly to so-called street offences, there was also an incidence of criminal damage, unlawful entries and assaults.

The disturbances are predominantly alcohol based; 75% of callouts in Palmerston are alcohol related. The people causing the problems camp out in makeshift camps in scrub areas within walking distance of the CBD and alcohol supplies. The campsites look like rubbish tips, with empty containers left in situ (as reference the photographs taken by Sgt Glaisbrook of a camp in bushland 150 metres behind the shops at Gray, Exhibit 11). The residents of such camps often obtain water from residents' garden taps. There are lots of complaints from residents as to noise, language and drug use.

Sgt Sattler is of the firm view that if Liquorland is granted a licence for the site applied for, the surrounding area with its open public space and ready availability of lake water will soon see camps set up there to form another undesirable network which will have a new area of residents complaining. Sgt Sattler could not say if

there was a distance from the CBD beyond which the campers would not migrate, but is certain that they would migrate as far as the proposed new site.

The sergeant also expressed the police concern as to the proposed liquor outlet being too close to a fuel outlet. Although the bottleshop will not be immediately adjoining the service station, the police see the near proximity as a common opportunity to purchase fuel and liquor, a situation counter-productive to all their ongoing effort against drink driving. Sgt Sattler conceded that most people these days have to get into their car to purchase alcohol, and that the majority would not open take-away liquor in the car, but insisted that in the police view the availability of liquor in association with refuelling the car is irresponsible where there are other outlets available. They want the purchase of liquor to require a preconceived intention rather than being a matter of impulse on stopping for fuel.

We have already referred to the Commission's own caution and concern in relation to a nexus between the sale of liquor and fuel, and the applicant in the present case has not persuaded us that a nexus does not exist by reason of the service station and bottleshop being separately operated and technically not "co-located". There was much reliance on the need for a fuel purchaser to have to re-park the vehicle away from the bowsers in order to patronise the bottleshop. Not only does this appear to be not necessarily so, when one looks at the walkways going from the Shell shop to the bottleshop just around the corner, but the Commission believes that the degree of difficulty in parking away from the bowsers is not such as to require any real resolve, as distinct from surrendering to an impulse once the motorist has committed to the site for fuel.

The bottleshop will be on the same site that will have been developed by Shell's "preferred developer" for the primary purpose of setting up a large and busy Shell service station. In this motorised age service stations have the attraction of being essential facilities, drawing in passing motorists. The developer Mr McCubbing referred to the suburbs of Fairway Waters and Driver as the "primary catchment" for his development. Once the residents of the catchment are caught by the site's primary lure of the service station, the other adjoining shops surely enjoy a distinct advantage in terms of impulse buying. In the case of a liquor shop the Commission agrees with the police view that opportunities for impulse purchasing of liquor by motorists should not be encouraged *where adequate alternatives already exist*.

Can it fairly be said that there are adequate alternatives already existing, that there are other outlets "proximately available", to use Sgt Sattler's description? The multiple liquor outlets of the Palmerston CBD, including Liquorland's own very successful outlet, are only two kilometres away, or just a little over two minutes by conservatively driven motor vehicle. Neither Sgt Sattler or Mr Clementson has experienced parking difficulties at the Palmerston Shopping Centre. We believe that our query could not be more clearly answered than by Liquorland's Mr O'Sullivan when he said in evidence

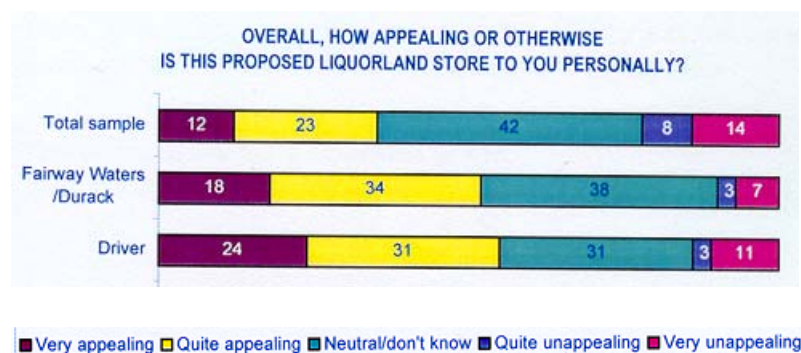
I don't believe there's anyone in Palmerston now who's going without liquor for want of facilities. It's all a matter of convenience.

That is the applicant's own view, and if this application is **all** about convenience the Commission would remain reluctant to allow the proximity of the bottleshop to the fuel outlet; the *convenience* of such a proximity or nexus is undoubted. It is the too-easy convenience that causes the disquiet. However, Liquorland's perception of the convenience of the proposed new shop is not the only evidence in relation to community needs and wishes; there is the McGregor Tan survey.

Every case must of course be decided on its own merits, and the Liquor Act requires the Commission to have regard to all evidence of needs and wishes. The Commission's line of deliberation thus now becomes whether the needs and wishes of the community as demonstrated by the report are such as to persuade the Commission to overcome its expressed reluctance to allow the bottleshop / fuel proximity.

The standard of proof applied by the Commission is that of the balance of probabilities, but on the basis of the nature of an issue affecting the process by which we are reasonably satisfied (*Briggenshaw -v- Briggenshaw*, 60 CLR 336). On a contested or contentious issue we require to be positively persuaded rather than indulging in any artificial or mathematical weighing exercise. We therefore look to the persuasiveness of the survey report.

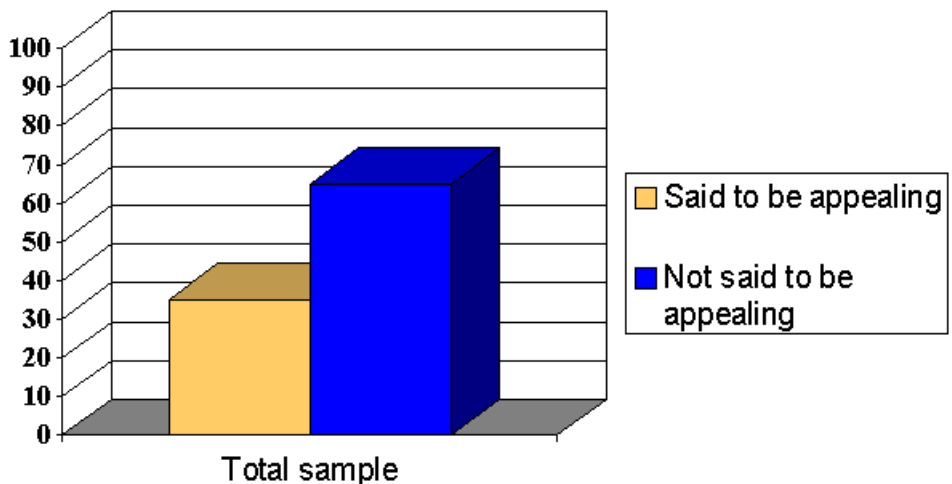
Mr Berner submits that the only practical demonstration of needs and wishes is use, but going back to the usage chart at page 5 of these Reasons for Decision, we are struck by how uneasily it sits with the result of question 9 as to the *appeal* of the proposal. That chart is in part as follows:



Looking at the "Total sample" bar in both charts, we see that although 59% said that they would use the facility if it went ahead, only 35% found it appealing. This disparity would seem to erode somewhat the key finding said to be embodied in the question 6 response, and highlights Mr Clementson's difficulties in relation to that question. Mr Kleinhanss too said that although he was not a respondent to the survey, he and his wife had difficulties with the questions when they went through the exercise of answering them. The wide variation between the two charts suggests to the Commission that Mr Clementson's difficulties with question 6 may well have been replicated with other respondents. Only a little over half of those who said they would use the outlet actually found the prospect appealing.

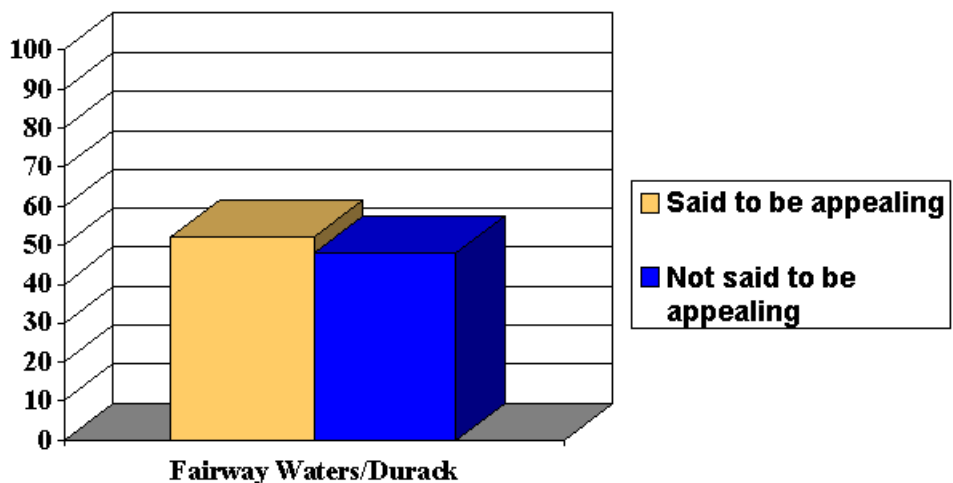
Ms Eltridge pointed to the small percentage of respondents who actually said that they found it unappealing, and emphasised the large percentage of neutral

responses. We do not see that Liquorland can gain any assistance from the neutral block, given the applicant’s task of positive persuasion. We are looking for positivity of support, and the large “Neutral/don’t know” group is indicating mere tolerance at best; no higher “spin” can be put on that segment of the response. The question responded to was how appealing *or otherwise* the proposal was regarded. Comparing the group who found it appealing with those who said something “otherwise” produces a graphically different picture of the support:



Same figures, but not a persuasive picture.

Mr Berner concedes at least that “the result is not overwhelming across Palmerston”, but conducting a similar charting exercise in relation to the Fairway Waters/Durack figures is also quite graphic. Although the Commission holds the view that the community relevant to the application is all those who live or work in the broader town of Palmerston (see the judgment of Thomas J of the Supreme Court of the Northern Territory in *Tyeweretye Club Inc. v Northern Territory Liquor Commission (1993) NTSC 15*), much reliance was placed by Liquorland on the Fairway Waters neighbourhood being the prime beneficiary of the convenience of the new bottleshop, the major part of the “catchment”. In that immediate target area the “appealing or otherwise” survey figures can realistically look like this:



Admittedly this is a better result for Liquorland than the total sample, but still demonstrates no more than the immediate local community being just about evenly divided on the project's appeal "or otherwise". The picture remains unpersuasive, even more so when it is remembered that respondents were selected on the basis of being the *most regular purchasers of liquor* in their household. Such a screening in the Commission's view rendered the survey an exercise in market research, more relevant to Liquorland's assessment of commercial viability than to the Commission's assessment of community support for the licensing of the outlet. The distinction was precisely delineated by Mr Clementson.

Another aspect of considered concern in relation to the survey is that it may not have been clear to many correspondents that the take-away liquor outlet being described to them was to be free-standing. Looking at Appendix 4 of Exhibit 9, the preamble to question 4 refers to the development including a "convenience store", question 5 refers to the proposed inclusion of "a take-away liquor outlet...in this development", and then the preamble to question 6 was that "if it went ahead, the take-away liquor outlet would be a Liquorland store, carrying Liquorland's usual range of products". Mr O'Sullivan's evidence acknowledged that the Territory public is accustomed to Liquorland stores being appurtenant to general supermarkets, and there is nothing in the over-all description of the proposal put to respondents to clearly indicate that the convenience store will be a Shell shop, and that the Liquorland store would be no part of it nor part of any general store or supermarket at all.

For all the foregoing reasons the Commission is unable to accept the question 6 response at face value as indicative of the needs and wishes of the community as to the proposed outlet being licensed. Even so, even if we were to accept that aspect of the survey without query or disquiet, a specifically negative response on the part of over 40% of the relevant community is considered too high to allow the application.

As Liquorland would no doubt be aware, the Northern Territory Court of Appeal in *Lariat Enterprises and Liquorland (Australia) Pty Ltd -v- Joondanna Investments Pty Ltd and the Liquor Commission of the Northern Territory (1995) NTSC 38* clarified that the Commission may give different weightings to the aspect of needs and wishes in different applications before it. The Court held that

The Commission is not obliged to give any matter any particular degree of weight. The Commission must "have regard to" each specified matter but it is clearly entitled, in a particular case, to give a (specified matter in Sec 32(1) of the Liquor Act) great weight, little weight or no weight at all. The statutory obligation is to "have regard to" the specified matter and decide what weight, if any, it should be given in the particular circumstances. As the weight to be given to the specified or other matters relevant to a particular application may vary, so may the requirements as to evidence. In respect of some matters a minimum of evidence may suffice, for others a great deal more may be required to satisfy the Commission.

In this matter, as already mentioned, Liquorland was aware of the hurdle it faced, and in the Commission's determination the evidence of needs and wishes has not been such as to get the application "over the line". The Commission was known to

have a historical and ongoing reluctance in relation to free-standing bottleshops and to the juxtaposition of liquor and fuel (a position enabled by Section 32(1)(g) of the Liquor Act, if no other), and this reluctance has not been overcome by the evidence, as well presented and professional as it all was. Even had we not ruled against that juxtaposition, we share the apprehension of *all* the objectors as to the vulnerability of the open space in the Fairway Waters area to infiltration by a problem transient element if a take-away liquor facility were to set up as applied for, and find as a high probability that a free-standing bottleshop in the particular location would render the area unacceptably susceptible to an influx of anti-social and problematic behaviour.

The decision to refuse the application should not be taken as any reflection on Liquorland or that company's operations. It is well known as a good corporate citizen and an efficient licensee of many excellently presented outlets in the Territory. It earmarked the site as strategic in terms of its business operations in full awareness of the controversial aspects in terms of liquor licensing. Mr Berner pointed to the absence of what he referred to as broad based opposition to the application, but the survey report highlighted the low level of awareness of the proposed take-away liquor outlet as distinct from an awareness of a commercial development there. That is a matter of some concern to the Commission and one likely to continue to have our attention, but it weakens Mr Berner's attempt to find a positive in the low level of formal opposition.

In the *Lariat Enterprises* decision above referred to, the Court of Appeal also said 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.

In this matter, the Commission on balance was unable to be positively persuaded that there were sufficient positives in the application and the evidence to outweigh the Commission's perception of the negatives.

John Withnall
(Presiding member)
6 Sept 2000