

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: **OLYMPIA CAFE**

LICENSEE: MR ARMINIO NICEFORO

NOMINEE: (NOT APPLICABLE)

PROCEEDING: APPLICATION TO VARY LICENCE

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

DATES OF HEARING: 23-24 January and 06-07 February 2001

DATE OF DECISION: Delivered 28 February 2001

APPEARANCES: Ms D Elliott, for the Licensee
Mr D McConnel, Counsel Assisting the Commission
Ms C Tys, for NT Police
Mr S McGrath, for AHA-NT

The background to this application is to be found within the evidence of the applicant given at the hearing and in the formal view conducted of the premises as part of the hearing.

In February/March 1999 Mr Arminio Niceforo "took on" a restaurant liquor licence in Katherine, to use his own expression, by acquiring real estate which included a licensed restaurant facility which had operated as "Alfie's" prior to the Katherine flood of 1998 but which had remained dormant after the flood. The restaurant licence was transferred to Mr Niceforo as being for the "Olympia Cafe".

The building also houses a fast food facility adjoining the restaurant on the ground floor, while the upper storey is the subject of a proposal by Mr Niceforo to be made over into backpacker accommodation.

The premises are located on the outbound side of the Victoria Highway, no more than a few hundred metres from its intersection with Katherine Terrace.

A few months later, in July of 1999, Mr Niceforo was given approval to add an outdoor patio-like dining area to the licensed area. This outdoor area is at the front of the building, facing the Victoria Highway. At that stage the restaurant comprised three distinct areas: two internal areas of some 50 sq.m. and 70 sq.m. respectively, clearly

demarcated by the internal walling, and the outdoor area of 80 sq.m. in the dry season but not in use during the wet.

Some seven months after that, Mr Niceforo applied for, and was allowed, the concession which the Commission refers to as the “liquor without a meal” conditions for restaurants, and in March 2000 the licence re-issued in the format shown at folios 3 to 9 in Exhibit 2, allowing the service of liquor without the necessity of being ancillary to a meal provided that certain other conditions are met. These other conditions include the requirement that patrons be seated at table, and that the premises shall at all times **have the appearance of** and trade predominantly as a restaurant (emphasis added).

Thereafter Mr Niceforo re-arranged and re-fitted the restaurant by creating what he calls a “sports lounge” in the larger of the two internal areas, being that part of the premises shown as “lounge area” in the sketch plan attached to the current application as formally amended during the course of the hearing. The so-called lounge area contains a bar, two pool tables, and lounge-type seating adjacent to low tables that look very much like the common perception of “coffee tables”. Sports posters and memorabilia adorn the walls of this area. Most of the more traditional-looking dining seating is restricted to the smaller of the two internal areas, while outside are wooden tables with wooden bench seating (not in use at the time of the Commission’s view of the premises).

The pool tables provide a facility not just for social games of pool but as a venue within the Katherine pool competition conducted by the Katherine Eight Ball Association. The Olympia is the “home ground” of three separate teams in the competition.

Mr Niceforo conceded in evidence that he knows of no other restaurant in the Northern Territory that has any pool tables, but says it occurs “down south”. When asked if he saw being a venue in a formal pool competition as a normal use consistent with having to look like, and be, a restaurant, Mr Niceforo responded that his patrons accepted it and that “it’s where we’re heading”.

The Director of Licensing did not accept where Mr Niceforo was heading. On 6 July 2000 the Director wrote to Mr Niceforo (Exhibit 4) in relation to advertisements of darts and pool competitions for cash prizes at “Olympia Sports Lounge”, advising him that such activities were outside the boundaries of his liquor licence and must cease immediately. Such advice concluded as follows:

“If you wish to pursue this line of business you will need to make an application to the Commission to vary the conditions of your liquor licence....”

Mr Niceforo maintains that he ceased offering cash prizes, and that pool games continued on either a purely social basis or as part of the competition organised by the Association (obviously inclusive, on the evidence, of practice by the three home teams in addition to scheduled competition matches).

Mr Niceforo continued to have contact with various liquor inspectors (by phone to Darwin, and personally in the case of Inspector Marc Mackenzie in Katherine), and he says in essence that he was advised that he should apply to change his licence to a

tavern licence to avoid possible action for breach of his restaurant licence conditions. This he did by letter to the Commission of September 4, 2000.

The Commission has consistently published decisions on the nature of applications for variation of conditions of this nature as being applications for a different licence and therefore simply applications for a licence within the meaning of Part III of the Liquor Act. Mr Niceforo was therefore required to advertise the application under section 27 of the Act (folio 12, Exhibit 2).

The advertising attracted written objections from the police, the AHA-NT, four persons who were nominees of different licensed premises in Katherine, several nearby residents, the St. Vincent de Paul Society and a petition against the application signed by 45 persons on circulation by a member of the Katherine Club. A hearing was thus unavoidable, vide sec. 49(2) of the Liquor Act.

Remarkably, in the Commission's view, the Katherine Town Council advised that it had no objection to the application.

At the hearing the applicant, the police and the AHA were all ably represented by legal counsel.

It became Mr Niceforo's position during the hearing that he did not necessarily want a "tavern" licence, but sought only the removal of the requirements that patrons must be seated at table and that the premises must have the appearance of a restaurant. He was prepared to undertake to still trade predominantly as a restaurant, not to advertise as a tavern, never to apply for a take-away component to the licence and never to apply for gaming machines. After debate between Commission and counsel as to the absence of formalised categories of licence under the Liquor Act, (except by way of the now redundant section 35), the Commission accepted the amendment on the basis that what was being asked for could be seen to be within the parameters of the public perception of the application as advertised.

The amendment raised consideration of what the criteria might be for monitoring the predominance of restaurant trading at the venue when appearance and drinking environment no longer had to be tied to a restaurant concept, and as to how volunteered restrictions on gaming machines could be made to prevent a subsequent purchaser of the business from applying for the same. Mr Niceforo kept emphasising the quality of his personal management and control of the new tavern-like licence that was being sought, but when questioned as to the likelihood of his putting the business on the market, given his history of building businesses up and on-selling them, his response was that he was a businessman and "who knows what might happen tomorrow".

In the Commission's view the amendment did not alter Mr Niceforo's evidentiary burden in the context of community needs and wishes; the licence he sought was still of such a nature as to require the Commission to be quite positively persuaded that the Katherine community's needs and wishes in relation to the proposed facility are such as indicate clear community support for the application. In this regard Mr Niceforo called six witnesses, all except one being existing Olympia customers. Although all expressed their support for the application, with only one exception

they conceded that they themselves had no personal need or wish for any further changes in the operation of the venue.

Ms Janet Richards plays social eight-ball at the Olympia. She is happy with it as it is, and doesn't "need anything further" to be done there.

Ms Debbie Horder does not think that the application will affect her personally, and agrees that there is nothing that she cannot do at the Olympia that she would want to.

Ms Miranda Austin testified that the Olympia satisfies her requirements as it is, without change.

Ms Evelyn Dunn is a member of one of the eight-ball teams that use the Olympia as their home ground. The application to allow service and consumption of liquor standing at the bar "doesn't bother me. It suits me to sit".

Mr Brian Friar was the one witness who was not already an Olympia patron. He has never been there, but expressed a preference for having a relaxing drink and a quiet meal in an environment other than a formal restaurant atmosphere. However, on learning during cross-examination that there was already no requirement that liquor consumption at the Olympia had to be with a meal, he conceded that the venue would probably suit his needs as it stands.

Mr Sean Johnston is an employee of Mr Friar. He plays pool at the Olympia. He would like to be able to walk around with a beer in his hand as he can at the Katherine Club. He has had a physical altercation with the present manager of the Katherine Club.

All the foregoing supporters are happy with the Olympia and its management. The problem for Mr Niceforo is that with the exception only of Mr Johnston they are *too* happy, too content with the way things are to personally need or particularly want the proposed changes. Admittedly the venue with which they are content already includes pool tables, but it is Mr Niceforo's own argument that he has not needed to make this application to cover the presence of the pool tables, that he has not in effect "fudged" part of this application by putting the pool tables in because, he says, they do not alter the appearance of the premises as a restaurant. The Commission will therefore leave that issue to be separately resolved as hereinafter appears.

In terms of Mr Niceforo wanting to move *further* away from the premises being required to have the appearance of a restaurant, the evidence of community needs and wishes is thus almost non-existent. The personal needs and wishes of five of the six witnesses who supported the application are satisfied without any further changes needing to be made. Evelyn Dunn does venture the opinion that "some of the guys would probably prefer it" (ie. the ability to drink without being tied to table service), but to call just one such guy (Sean Johnston) cannot be expected to persuade us of the "vibes" for change that Mr Niceforo tells us he feels.

It is the Commission's determination that the application fails on the issue of needs and wishes; we have not been persuaded on the applicant's case that the broad

Katherine community is supportive of the proposal. That being so, it becomes unnecessary to deal with the merits of the various objections; the case that stands to be eroded by the objections is not strong enough in any event for the application to succeed.

It may be queried why such decision did not follow immediately upon the close of the applicant's case, but not only did the structure of the hearing with the interposing of several witnesses not readily lend itself to such a resolution, it has been a decision reached only after much consideration and could not fairly have been reached in any summary way. The final submissions of all parties and of counsel assisting the Commission were also of assistance.

The applicant can be assured that even if there had not been any objections, the Commission would still have insisted on a hearing of this particular application (see its discretion in this regard in section 29(2)(c) of the liquor Act), such that the applicant was always going to face having to discharge a burden of proof in relation to the merits of the application, and in the present Katherine liquor environment (if not in all cases) the onus was always going to be primarily in relation to community needs and wishes.

It was argued that such burden should reduce somehow as a matter of scale, given the modest size of the enterprise and its location in a town of modest size. The Commission certainly has a discretion in relation to the comparative weightings and evidentiary requirements of the different considerations set out in section 32(1) of the Act (*Lariat Enterprises and Liquorland (Australia) Pty Ltd v Joondanna Investments Pty Ltd and the Liquor Commission of the Northern Territory (1995) NTSC 38*). In the present case though we regard the evidence of needs and wishes as having been too perfunctory, given the type of licence to which Mr Niceforo wanted to upgrade in a town in which he has played a leading role in the institution of measures to curb the anti-social results of excessive drinking. He is still publicly opposed to any "new outlets". We take his point that his proposal is not necessarily inconsistent with his public advocacy, but in our view the evidence of a handful of his customers who supported the application but did not particularly need or want it themselves was manifestly insufficient in the current Katherine liquor environment, and in all likelihood would have been found to be so had this sort of licence extension been sought in relation to any other premises anywhere in the Northern Territory.

One example that quickly springs to mind of evidence that might have been expected is that while Mr Niceforo named the Katherine Eight Ball Association as having been the initiator of his decision to head in the new direction, he did not call any officebearer of the Association to give confirmatory corporate support for the application. (It is noted editorially that just after our decision had been reached the Commission learned that a letter apparently in support of the application was received in the office of the Commission from the Katherine Eight Ball Association. The Commission declined to allow the letter to be put before it; to take any account of it in favour of the applicant would have required the hearing to be re-convened).

It was argued by Mr Niceforo's counsel that given the newspaper advertisements of the application and the letter-drop of 150 surrounding residences and establishments by the Katherine liquor inspector, the comparatively small number of

“residential” objections should be taken as a sign of support for the advertised proposal, such objections having been received from only Mrs Scattini and Mr and Mrs Gage (and evidence received from Mr Coutts). It was put to us that such a submission was valid for Katherine as a town so publicly attuned to the problems of alcohol.

The Commission has consistently held that in the case of the more potentially impactful applications the absence of formal objections is not necessarily to be equated with community support. Section 32(1)(d) of the Liquor Act imposes a positive statutory duty upon the Commission to “have regard to” community needs and wishes. To do so by way of inference from silence or minimal response must be approached with extreme caution. In any event, we do not see the response as significantly minimal in terms of the submission. Also, the submission omitted to satisfactorily deal with the petition against the application, which in the Commission’s view on the evidence cannot be easily seen to be just an initiative of a competing organisation.

The inferences able to be drawn from lack or paucity of objection to an application must depend on the nature of the proposal, the relevant community and the nature and extent of community consultation on the part of the applicant, and in the present case we are unable to draw any inference which would be of assistance to the applicant.

In the exercise of our discretion, we adjudge the application to have insufficient weight at this time without the necessity of weighing up the objections.

One of the issues that arose during the hearing and which needs to be specifically dealt with was that of Mr Niceforo’s fitness to be a licensee under the Liquor Act. This was suggested as being mainly on two different fronts; firstly, his obvious lack of familiarity with much of the detail of relevant areas of the Liquor Act and his own licence conditions, and secondly, instances of inappropriate lapses in self control. Counsel assisting the Commission also commented adversely on alleged instances of lack of candour in his evidence.

The Commission accepts that it cannot in these present proceedings re-appraise the applicant’s suitability to hold his current licence; the issue of “fit and proper” in these proceedings can only be an issue in relation to the new extended licence which has now been refused. It is not improper to remark, however, that the Commission acknowledges that its concerns with Mr Niceforo’s apparent “short fuse” and his somewhat casual approach to some of his responsibilities as a licensee were undoubtedly made quite obvious to him during the hearing, and we would like to believe that Mr Niceforo will have benefitted as a licensee from the experience of that hearing.

As to where the decision now leaves Mr Niceforo in terms of his current operation, part way through the proceedings the Chairman advised Mr Niceforo’s counsel that the Commission had reached a tentative view on Mr Niceforo’s *modus operandi* of his present licence, and foreshadowed that if the present application were unsuccessful the Commission may be moved to ensure that the premises revert to having the appearance of a restaurant. Mr Niceforo of course is of the belief that his premises do not operate in breach of his licence conditions, and his counsel argued

in effect that these proceedings could not be an appropriate forum for such a declaration, The Commission has determined that this must be the correct position, and will take no further action in these proceedings beyond refusing the application. This will leave Mr Niceforo vulnerable to such future complaint by liquor inspector, police officer or even a competitor as may be sustainable on the evidence at that time.

In all the circumstances it is not improper for the Commission to proffer some guidance as to the way in which it approaches the operation of the "liquor without a meal" system. The removal of the requirement for liquor consumption by restaurant patrons to be ancillary to a meal is seen by the Commission as a concession, a privilege of good restaurant management, and essentially a matter of good faith. Should the Commission lose that faith at any time in relation to any particular restaurant, the continuance of the "liquor without a meal" concession for those premises will be in jeopardy.

The requirement for patrons to consume liquor while seated at table must of course be subject to normal social variables and personal exigencies. People will naturally visit friends at other tables and visit the washroom in any licensed restaurant operation. The only change from normal licensed restaurant operation effected by the liquor without a meal concession should be that some of the patrons seated in the restaurant in the same way as diners will not order food, and need not partake of a meal in order to consume liquor in the restaurant in the manner of persons dining there. It is a concession intended as an endorsement to a restaurant licence, not a springboard into another direction of operation.

These remarks cannot pre-empt any decision on any future complaint; all matters must of course be determined on their merits at the time. We merely offer some insight into what the Commission sees as the guiding principles in determining whether the "liquor without a meal" privilege is being abused.

Peter R. Allen

**Chairman
28 February 2001**