

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PROCEEDING:	Application to substitute premises pursuant to Section 46A of the <i>Liquor Act 1978</i> .
APPLICANT:	Spartacus Pty Ltd
HEARD BEFORE:	Mr Peter Allen, Chairman Ms Shirley McKerrow Mr Brian Rees
DATE OF HEARING:	27 & 28 May 2002
DATE OF DECISION:	2 October 2002
APPEARANCES:	Ms Sue Porter for the Applicant Mr Lex Silvester for Fugitives' Drift Pty Ltd Mr Peter McNabb for the Northern Territory Police Mr Peter Wilson assisting the Commission

This decision is the second decision handed down in respect of applications made by Spartacus Pty Ltd to substitute the premises of the licence known as Petty Sessions situated at the ground floor of NT House, corner of Bennett and Mitchell Streets, Darwin, to the premises formerly known as Blush, situated at 85 Mitchell Street and now known as Madison on Mitchell. The Commission's earlier decision was handed down on 24 June 2002.

Spartacus Pty Ltd is the licensee of Madison on Mitchell and the licensee of Petty Sessions.

Petty Sessions is classified by the Commission as a Tavern with the additional and special licence conditions approved and applied by the Commission to what it describes as "Late Trading Venues". "Late Trading Venue" conditions permit the premises to trade to 04:00AM, subject to the provision of entertainment.

A number of premises or sections of premises with "Late Trading Venue" conditions are commonly regarded as nightclubs. Applications to obtain or extend licences of this nature are in the main, vigorously contested.

The decision handed down on 24 June 2002 was to dismiss the substitution application because the Petty Sessions licence stood suspended and was thus not "in force" at the time of application.

Upon receipt of this earlier decision, Spartacus Pty Ltd, as the legitimate holder of the licence, sought revocation of the suspension on the basis of its clearly stated intention to reopen Petty Sessions.

The Commission revoked the suspension and a licence naming Spartacus Pty Ltd as Licensee and Michael Robert Coleman as Nominee was issued with the date of effect shown as 2 July 2002.

The Commission is well satisfied that the Petty Sessions premises opened and commenced trading from the date of effect.

By letter dated 3 July 2002, Ms Porter for Spartacus Pty Ltd lodged a fresh application for the substitution of the premises. Ms Porter submitted that her client should not be required to advertise the application and that the Commission "has before it all the matters which were presented to it on 27 and 28 May 2002". It was Ms Porter's submission that the "interested parties" had been heard in the "hearing" already conducted, with respect to the application and on the issues of close proximity and adverse effect.

The Commission accepted Ms Porter's submissions and in its written advice to the parties dated 11 July, advised that the suspension had been revoked and a fresh application made for substitution of the premises. The Commission's letter also invited the parties to make such written comments as they saw fit and to do so prior to close of business on Monday 22 July. The parties were informed that "in finally determining this matter the Commission will consider such written comments as you wish to make available, together with the full transcript of the 'hearing' held earlier".

All parties and Counsel Assisting responded to the invitation and the Commission was, in its view, well positioned to proceed to consider and ultimately determine the application.

The Commission's further consideration of the application was immediately overtaken and delayed by other matters; complaints lodged by Licensing Inspectors with the Director of Licensing.

The complaints, made pursuant to s.48 (2) of the *Liquor Act*, were lodged by Inspectors who inspected the premises of Madison on Mitchell on the evenings of Thursday 25 July and Saturday 27 July.

The inspections coincided with a letter, faxed on 25 July from the Commission to Spartacus Pty Ltd, the Madison on Mitchell licensee and the applicant in this matter. The letter informed Spartacus of a decision of the Commission, made at a special meeting held that day, to decline to further vary the conditions of the Madison licence.

The Inspectors' complaints were placed before the Commission by the Director in a report dated 29 July. The report contained material which indicated, that on the night of 25 July and again on 27 July, the conditions of the Madison licence were not being complied with as on both occasions about half the patrons were permitted to consume liquor while not being seated. The Director later advised the Commission that he would not be proceeding with the Inspectors' complaints.

A separate complaint was lodged by Mr Mitch McNamee.

Mr McNamee's complaint was lodged with the Director of Licensing on 10 July and lodged again in a more particularised form on 16 July. The substance of the complaint, made in respect of the Madison premises of Spartacus Pty Ltd, was notified to the licensee by the Director in a letter dated 17 July. Mr McNamee's complaint alleged the licensee was not complying with the conditions of the licence.

Mr McNamee's complaint and the Director's report thereon was considered by the Commission at a special meeting on 31 July and its decision was to conduct a hearing into the complaint.

The Commission's decision to conduct a hearing was conveyed to Ms Porter in a letter dated 1 August. The same letter advised Ms Porter that the Commission was unable to come to any final conclusion on the substitution application while the licensee company's commitment to adherence with liquor licence conditions remained the subject of a complaint. In order to expedite the hearing of Mr McNamee's complaint the Commission set the earliest available dates for the hearing, 20 and 21 August.

The complaint process initiated by Mr McNamee was finalised upon the handing down of Presiding Member Ridsdale's decision on Friday 20 September.

Mrs Ridsdale's formal written reasons for her decision are not, as yet, published. In order to expedite its consideration of this application the Commission has relied on the verbatim transcript of the handing down and has decided that Mrs Ridsdale's decision does not encumber us in any way. As a consequence, the Commission is now free to further consider and determine this application.

A great deal has been said and argued in submissions regarding the processes adopted by the Commission in its consideration of the application to substitute the premises.

In the Commission's opinion it was open to Spartacus Pty Ltd to apply to substitute the premises of the Petty Sessions licence for the premises of the Madison on Mitchell licence and for the Commission to consider and if satisfied, approve the application.

In the Commission's opinion the relevant section of the Act is clear and unambiguous.

46A. Substitution of premises

- (1) A licensee may apply to the Commission in a form approved by the Commission for the substitution of other premises for the premises specified in a licence held by the licensee.
- (2) The Commission may approve an application made under subsection (1) and substitute other premises for the premises specified in a licence held by an applicant where –
 - (a) the other premises are in close proximity to the premises specified in the licence; and

(b) it is satisfied that the substitution will not adversely affect the public.

The Act is silent as to how such an application is to be considered and the Commission, mindful of its statutory duty to investigate and assess the application against the requirements of sec. 46A, chose to advertise the application, to allow “objections” to be lodged and to conduct a “hearing”.

The Commission explained the process in its earlier decision, handed down on 24 June 2002 as follows:

The proceedings was not a hearing pursuant to Part V of the Liquor Act 1978 but a process adopted by the Commission to assist its investigations; the Commission investigating as is its statutory duty, the proximity of the premises and the public affect of the proposed substitution. The advertisement of the application forms part of the investigative process as do the “notices of hearing” issued to respondents to the advertisement. The notices of hearing represent an invitation to attend and be heard, an opportunity to be taken advantage of if so desired, not a legal right provided by the Act.

The submissions of Mr Silvester and Mr McNabb are to the effect that the application made by Spartacus was nothing more than an attempt to evade the tests that would normally be required of an applicant for the grant of a licence. Mr Michael Coleman of Spartacus Pty Ltd admitted as much in his refreshingly frank and fulsome response to cross-examination on this point.

For its part, the Commission, mindful of its duty to fully assess the application in the light of the public interest surrounding the grant or variation of liquor licences in the Darwin CBD, chose to adopt a process, of which the applicant was well informed and which was similar, if not identical in all significant respects to the processes normally followed for an application for the grant of a licence. That is to say, the application was publicly advertised, “objections” were lodged and a “hearing” conducted.

The Commission does not invariably follow this path in its assessment of sec. 46A applications. However it did so in the case of Vintage Cellars, the Stuart Arms Hotel and likewise in an application by Liberty Liquor of Western Australia to substitute the premises of Jeany’s Liquor for a location in Harriet Place. For the record, the latter application did not survive the initial consideration of objections.

For all applications, the Commission has made an assessment as to the public interest in the particular circumstances of each application and has chosen the pathway of its consideration accordingly. An application by Liquorland to substitute the premises of a bottleshop at Winnellie for another premises at the opposite end of Winnellie was assessed as being of limited public interest. The Commission was satisfied the application met the requirements of sec. 46A; it was approved without advertisement or further inquiry.

In its consideration of the application the Commission has focussed on the specifics of sec. 46A and in particular on the tests contained at sub-section (2) sub-sections (a)&(b).

Sub-section (a) of sec. 46A (2) requires that the “other premises are in close proximity to the premises specified in the licence”.

The Commission has considered the submissions made in relation to “close proximity” and the numerous authorities tabled in relation to proximity. In the Commission’s view the authorities are in the main unhelpful in that they contain a wide and varied range of interpretations such that no one authority stands apart from the others as being of value in the specific circumstances of the application before the Commission.

In its consideration of the issues, the Commission noted that the linear distance between the current premises and the proposed premises is consistent with previous decisions of the Commission. The Vintage Cellars, Liquorland Winnellie and Liberty Liquor applications all involved existing and proposed premises roughly one (1) kilometre apart.

Further, the premises are in the same street and both are situated in the entertainment and nightlife precinct of Darwin, which at the time of application was regarded as being centred on Mitchell Street, between Bennett and Daly Streets. Both have other licensed premises, accommodation houses, government offices, business offices and other commercial premises nearby, and along the adjacent portions of Mitchell Street.

In the Commission’s opinion the premises to be substituted are sufficiently closely proximate to the current premises of the licence.

Sub-section (b) of sec. 46A (2) requires the Commission to be “satisfied that the substitution will not adversely affect the public”.

In the Commission’s view the evidentiary onus of satisfying the Commission “that the substitution will not adversely affect the public” lies with the applicant.

Further, in determining its state of mind as to satisfaction, the Commission sees the proper test as being not whether the consequences of the substitution are likely to be significant, but a test as to whether the substitution will not adversely affect the public. (Emphasis added)

In applying this test the Commission is cognisant that a responsible licensee may be able to operate the premises in such a manner that the potential for adverse affects might be lessened. The Commission is similarly cognisant that a responsible licensee may have contingency plans in place and that such plans may be able to be activated in the event adverse affects occur.

However in the Commission’s opinion the test goes beyond being satisfied that the licensee will at all times act with responsibility and foresight. The Commission views sec. 46A (2) (b) as requiring an examination as to whether the fact of the substitution of itself, will not, on the balance of probability, adversely affect the public.

The applicant’s evidence was to the effect that although the Petty Sessions licence permits trade to 04:00AM in the manner of a nightclub, the actual presentation and mode of trade will be somewhat less than a nightclub, or at least somewhat less than a nightclub for the younger set. The applicant’s evidence was that the premises would

be an up-market lounge bar that would nevertheless provide music as entertainment, but music of a subdued nature and not of the "typical" nightclub, disco, or techno variety.

The Commission conducted a view of the premises and was satisfied that the fit-out was consistent with the lounge-bar concept and that the audio equipment recently installed can be adjusted so as to minimise the sound that might otherwise emit from the premises. The Commission notes that although the application was advertised, no objections were received from the corporate bodies or any resident of the residential units situated at the rear of the proposed premises. A report prepared by Arafura Audiology entered as Exhibit #9 concluded that; "It seems highly unlikely that sound emissions levels from the premises will significantly affect residents in the adjoining flats".

The applicant, through separate entities, is known to conduct other licensed premises in the Territory and elsewhere. The Commission acknowledges these licences are conducted in a responsible manner.

The Commission considered, as Exhibit #1, a letter from the Taxi Council of the Northern Territory in which the author, the Council's Executive Officer, stated he did "not anticipate a problem" regarding the availability of taxis for patrons departing the premises at 04:00AM. Similar evidence is provided by Exhibit #2, a letter signed by Ms Julie Smith, a taxi owner-operator.

The concerns of the Northern Territory Police were presented in the main through the evidence of Superintendent Robert Rennie. Superintendent Rennie's statement, together with a letter to the Director signed by the Superintendent on 28 March 2002 and an extract from the "NT News" dated 23 April 2002 titled, "Police slam city grog louts", were entered as Exhibit #4.

Superintendent Rennie testified that he has on at least two occasions served as Officer-In-Charge of the region that encompasses the Mitchell Street precinct and that he is familiar with the law and order issues of the area. He identifies these issues as drunkenness and street violence.

The Superintendent testified that he was familiar with the operation of the Petty Sessions licence and that a search of Police records revealed six or seven incidents for the period since October 1997, incidents related to persons who had been drinking at the premises. Superintendent Rennie attributes this low number to the nature of the clientele and in particular to the premises' location in close proximity to the courts, chambers, Parliament House and government offices.

Superintendent Rennie's evidence is that the substitution, if approved, will place another late-closing nightclub in close proximity to existing late-closing venues. He maintains this would add significantly to the problems already experienced when large crowds leave nightclubs in the area at the same time and that such problems will include an increased risk of violence and alcohol-related street offences. The Superintendent's statement lists seven apparently serious incidents in the area during the period mid-February to late March 2002. All the reported incidents involve an actual or likely fight involving patrons; most are in the early hours of the morning, at or

around the 04:00AM closing time of the licences already in that area of Mitchell Street.

The incident reported in the "NT News" of 23 April 2002, which forms part of Exhibit #4, tells of a fight involving at least 20 persons in Mitchell Street near Daly Street. The item states that the fight occurred at about 04:15AM, that 15 police officers attended, two of whom were treated for injuries.

The Superintendent's evidence as to possible adverse affects of the nature just described was not disturbed during cross-examination.

The Superintendent's evidence included concerns regarding what he describes as increasing noise levels in the area adjacent to the proposed premises, an area that contains several blocks of residential units. While there may be concerns regarding noise in the area as a whole, the Commission is well satisfied with the potential effectiveness of the sound equipment installed at the proposed premises.

The Superintendent's evidence also included a report by Dr Peter d'Abbs titled; "The relationship between alcohol availability and alcohol related harm, with special reference to nightclubs: a discussion paper prepared for Clayton Utz". The Commission is familiar with the research of Dr d'Abbs and in particular his research and the research of other learned academics into the relationship between nightclubs, the availability of alcohol and alcohol-related harm. While the Commission generally accepts the veracity of such research we have not relied on it in anyway in our consideration of this application. In our view the extensive local knowledge of the Commission, the Police and the applicant limits the report's usefulness in our assessment of this application.

The statute requires the Commission to be satisfied that the substitution will not adversely affect the public. In its reading of the section the Commission has taken particular note of the words "will not" and noted the choice of the legislature to cast the sub-section in the future tense.

Although it is in our view allowable to read the sub-section in the context of the reasonably foreseeable future we nevertheless regard the level of satisfaction required of the Commission to be towards the higher end of the scale. The Commission is in accord with Counsel Assisting's comments; "If the Commission is of the view that the substitution **may** adversely affect the public, it cannot then be satisfied that the substitution **will not** adversely affect the public".

It is clear from the evidence of Superintendent Rennie that the present location of the Petty Sessions licence is of no real concern to the Police in terms of alcohol related harm and the likelihood of offences related to street violence and disorder in that location. The number of recorded incidents was minimal in the four years reported in evidence.

It is equally clear from the Superintendent's evidence that significant problems occur in the area surrounding the proposed location of the Petty Sessions licence and that these problems involve alcohol related harm and street violence. In particular, the Commission noted that the majority of the incidents occurred at around 04:00AM, the closing time of the Petty Sessions licence.

The clear inference of the Police evidence is that the substitution, if approved, will place another premises that closes at 04:00AM into an already troubled area and that the additional late licence may of itself be likely to increase alcohol related incidents in that area.

It is not in any way suggested that such problems might occur or increase as a result of some flaw in the licensee's management of the new premises. Indeed the Commission recognises that some of the issues surrounding the problems testified to by Superintendent Rennie may be matters outside a licensee's control. But the test implicit in sec. 46A (2)(b), in the Commission's view, is not one of management standards. The test is whether the fact of the substitution, of itself, will not adversely affect the public.

In its assessment of the application and the evidence, the Commission finds the evidence of Superintendent Rennie and the inferences that can be drawn from that evidence, compelling to the extent that the Commission is unable to be satisfied, on the balance of probability, that the substitution will not adversely affect the public.

The Commission is therefore unable to approve the application.

Peter R. Allen
Chairman

3 October 2002