

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: **WOOLNER BOTTLESHOP
AND LIQUOR STORE**

DATE OF HEARING: **11 and 12 MAY 2000**

DATE OF DECISION: **6 JULY 2000**

Application	New licence
Applicant	ROE UNLIMITED PTY LTD
Nominee	Mr Theo Katapodis
Heard before	Mr John Withnall (presiding) Ms Shirley McKerrow Ms Annette Milikins
Appearances:	Mr L Silvester, for the Applicant Ms J Kelly, for NT Police Mr D de Zwart, for Dowling
Holdings Pty Ltd	JTR Investments Pty Ltd Liquorland (Australia) Pty Ltd Neville Pantazis (Parap Fine Foods and Parap Village Traders Assoc.) Charon Pty Ltd (Manuel Kotis) M P and R Materazzo Mr John Pudney, for Darwin City Council Ms Clare Martin MLA, in person

In this matter Roe Unlimited Pty Ltd applied for a licence for what would be in effect a drive-through free-standing bottleshop, albeit attached to a supermarket, within a complex to be developed on Lot 4241 Town of Darwin at the corner of Bishop Street and Woolner Road. Although the bottleshop was to be accessible through the supermarket, it was also to be directly accessible from the street; “a drive through” service was envisaged, and indeed was advertised in that way.

Not unexpectedly, such an application attracted a multiplicity of objections, and a hearing of the application became unavoidable.

At the commencement of the hearing two persons separately applied for leave to appear as objectors, although many months out of time. Both applications were refused by the Commission, Dr Chris Harrison (of the the Stuart Park surgery in Westralia Street) not having attempted to lodge his objection in writing as required by the Liquor Act, and Mr Nicholas Sanders (of the 5 Star Supermarket in Stuart Park) conceding that he had been aware of the application within the time for objections but “made very few enquiries at the time”.

Counsel for the applicant, Mr Lex Silvester, then challenged the Commission’s late admission of the Police objection and the status of the Police in the hearing. The substantive grounds of such challenge were twofold: (1) the police force as set up by the Police Administration Act was not established as a body corporate, nor is it a body politic, and is therefore unable to be a “person” within the meaning of Section 48(1) of the Liquor Act, and (2) neither the Police as a force nor any member of that force has any conferred right, duty or power which would require or enable their objecting to any application for a liquor licence.

As part of her response on behalf of the Police, Counsel Ms Judith Kelly indicated that the Police objection was aimed only at the drive-through aspect of the proposal, and that the Police would have no objection to the granting of a liquor licence so long as it was made ancillary to the supermarket in the normal way, with no direct access from the outside.

After taking instructions from his client on such disclosure by the Police, Mr Silvester amended the application by abandoning the drive-through and free-standing aspects of the proposed bottleshop. The application then proceeded on the basis of being an application for the bottleshop to be licensed only as ancillary to the supermarket, and with access to be only through the supermarket.

Such change in the nature of the application resulted in the majority of objectors then departing the hearing, leaving four objections still standing, those of Neville Pantazis (Parap Fine Foods and Parap Village Traders Association), Manuel Kotis (5 Star Supermarket Fannie Bay),

Clare Martin the MLA for Fannie Bay and a joint objection by Maurizio, Peter and Robert Materazzo. During the course of the applicant's evidence Messrs Kotis and Pantazis withdrew from the proceeding, and Mr Maurizio Materazzo ceased appearing for the Materazzos although making it clear he wished their written objection to stand.

The Commission in its recent decision in relation to the Humpty Doo Tavern on 7th February 2000 considered the position of a written objection which has been properly received but the author of which declines to take any active part in the subsequent hearing. In that matter the Commission ruled on that issue as follows:

.....the Commission...now consider(s) the status of a written objection which is neither withdrawn nor backed up by an appearance by the objector at the subsequent hearing.

We do not believe that in this situation the objection should be dealt with in any way analogous to being struck out. It should be assumed thatthe objector remains opposed to the application. The written objection remains on foot, and remains a hurdle for the applicant, albeit an increasingly lesser one as the hearing progresses and the evidence of the applicant, especially in relation to the specific objection, is uncontested by or on behalf of the objector.

In the present case Mr Materazzo made it clear that he wished the written Materazzo objection to remain in consideration by the Commission. Mr Silvester was therefore required to present the applicant's case in full, as the objections of Martin and the Materazzos remained on the record and confirmed by each at the hearing as their respective ongoing position. Ms Martin later attended and gave evidence in the proceeding, but the evidence on behalf of the applicant was not subjected to any cross-examination by or on behalf of any objector.

Mr Silvester quite properly presented his client's case with reference to those matters set out in Section 32 of the Liquor Act to which the Commission must have regard. As clarified by 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* the Commission may give different weightings to these different elements in different applications before it.

On the evidence, with specific reference to folio 25 of Exhibit 5 and to Exhibits 7 and 9, the Commission has no difficulty in finding as a strong probability that the applicant company and Mr Theo Katapodis as proposed nominee possess the financial and managerial capacity to conduct the proposed business of licensed supermarket. As is so often the case, in the Commission's view the main issue with this application must be that of the needs and wishes of the community, the

ascertainment of which will normally include consideration of the location of the proposed premises in relation to the location of other licensed premises in the vicinity.

The case for the applicant clearly identified the target market as being (1) the new suburban development of City Valley, now at the bottom of Woolner Road, with Stage 2 extending outwards parallel to Tiger Brennan Drive, (2) the existing and still developing Bayview Haven, especially when the major access to that development shifts from the Winnellie end to the new access under construction at the foot of Woolner Road, (3) the proposed new development of Woolner Heights as outlined by Mr Ernest Chin, and (4) the existing industrial area on both sides of Bishop Street. A 1996 publication of the Department of Lands, Planning and Environment titled "Planning Concepts and Development Opportunities for Central Darwin" relevantly outlines the key governmental planning concepts for both Bayview Haven and Woolner, vide pages 49 and 55 of Exhibit 3. At page 17 of that publication Woolner is designated as one of the areas of largest anticipated growth.

The precincts to be served by the applicant's new development having been identified, it can be seen that the alternatives for the residents of Bayview Haven, City Valley and Woolner Heights are either to access Stuart Park outlets by negotiating a series of *residential* streets (or committing to the longer route to Stuart Park via the Stuart Highway) or alternatively to cross the Stuart Highway to shop in Parap several kilometres away. There is a "Liquorland" outlet which has been recently relocated to the new northern Winnellie area, just outward of Bayview Haven and across Tiger Brennan Drive, but the proposed new access arrangement for Bayview Haven will put that outlet at a further remove from the Bayview Haven precinct than may at first appear. It is a free-standing bottleshop, one of three in Darwin that historically have survived in that form for several decades, and does not offer any other services or attractions. The Commission can accept that a one-stop shopping complex is likely to be a more attractive suburban option for most residents of the new areas under discussion.

Ms Martin in evidence suggested that there is no precedent for every new "area" having its own liquor outlet, but such bald statement may not match historical actuality; it is difficult for the Commission to identify any area in Darwin which may not have entailed or attracted at least a licensed store as part of, or early in, its development. The Territory Government certainly envisaged local shopping facilities for the Woolner and Bayview precincts, vide Exhibit 3.

Exhibit 15 is a petition of some eight hundred and twenty signatures, consisting of three parts: a doorknocking campaign along Bishop Street by Mr Katapodis personally, a doorknocking exercise by one Bob Dingle in the City Valley, Bayview Haven and Fisherman's Wharf areas, and several informational "sausage sizzles" which had been advertised and promoted on radio and in Darwin newspapers. Mr Katapodis gave evidence that over five hundred people attended the promoted events over two days and had the proposal explained to them. Mr Katapodis testified as to what he called overwhelming support along Bishop Street, with nine out of ten interviewees signing the petition, a result of some two hundred and forty signatures in that area. He told the Commission that he had insisted that people who did not actually reside in the area were asked to only sign if they thought the location would convenience them often enough to merit their signature. Mr Dingle testified that in his areas ninety-six percent of interviewees signed the petition after having the development explained to them, with only occasional negative reactions.

The Commission was initially concerned that the development as explained to the signatories on the petition had changed during the course of this application. The proposal is no longer for the "bottleshop and liquor store" which attracted the signatories to the petition. We note however that Mr Katapodis emphasised to interviewees the nature of the development as a shopping centre. Over 80% of persons interviewed in Bishop Street were reported to express interest in the "high quality food outlet" along with the liquor outlet. What was being promoted was essentially a shopping centre with a takeaway liquor facility. On the evidence the Commission is satisfied that the scaling back of the profile of the bottleshop does not invalidate the general thrust of public support indicated by the petition.

Ms Clare Martin raised the possibility of the Society of St Vincent De Paul relocating its Ozanam House from Westralia Street to Iliffe Street in Stuart Park, which she says would place it some three hundred metres from the new shopping centre. This was also a concern of the Stuart Park Residents Association, whose letter of protest was far too late to be acceptable as a formal objection and who had no representative at the hearing. Mr Katapodis gave evidence that he had discussed such a proposal with the Society's managers, who had informed that there is nothing definite as yet; negotiations between the Society and the Northern Territory Government are ongoing. Mr Katapodis in effect volunteered to have the store licence subject to a condition that the shopping centre would always be provided with such level of security personnel as circumstances at any time would require. As far as the Commission is aware, no dedicated security staffing is in place at or in the vicinity of any Westralia Street licensed store. Even if the relocation of Ozanam House comes to fruition, its location across Woolner Road

and some three hundred metres further away along Iliffe Street is not exactly a case of being cheek by jowl with the supermarket.

As part of her submission as to increased access to alcohol leading to exacerbation of anti-social behaviour, Ms Martin focussed mainly on problems with Housing Commission accommodation at the northern extremity of her electorate of Fannie Bay, which is seen by the Commission as being somewhat remote from both the geography and circumstances of the proposed shopping centre liquor outlet in Woolner Road. The Commission has a track record in addressing regional social issues relating to take-away liquor, and can be expected to continue to do so, but must also continue to consider every liquor application on its particular merits.

Each of the objections that remained on foot complained of there being too many liquor outlets in Darwin. This is a view that the Commission is now hearing quite frequently, and not just by way of “commercial” objections but from an increasingly broad spectrum of the community. It is a view which the Commission sees as gaining increasing validity. The relevant “community” in relation to this application would have to be that of the Darwin municipal area, and the number of liquor outlets in the Darwin area may now arguably be such as to deny applicants for new licences the benefit of any ready assumption that the size or ambition of a development should be seen to be determinative of a market for it. It may well be that the time is fast approaching in the Territory when neither national competition policy guidelines nor Section 48(1A) of the Liquor Act can be relied on to provide the usual degree of comfort for an applicant for a new licence. It may be that there will be future legislative changes as a result of an assessment of consumer benefit against public cost coming out in favour of raising certain barriers; notwithstanding that possibility, in the meantime it is likely that the Commission will find itself giving even heavier weighting to the needs and wishes aspect of its statutory considerations.

This is not to pre-empt any future decisions of this Commission, of course, as every application must and always will be dealt with on its merits, and in accordance with relevant legislation of the day. We are identifying the issue as one which the Commission sees as likely to gain in public profile in the immediate future, and one which was to the forefront of our deliberations on the present application.

In the present matter, as informative and relevant as the petition undeniably is, it was essential for Mr Katapodis to have identified the market he did. The location of the proposed licensed premises in relation to the surrounding demographic has played a critical part in the Commission’s decision that the grant of this licence, strictly ancillary to

the supermarket and with some additional special conditions as hereinafter detailed, will not constitute or contribute to any pattern of undue proliferation of liquor licences in the Darwin area at this time.

Pursuant to the provisions of Section 26 (2) of the Liquor Act, an off-licence is granted in respect of the premises as proposed by the applicant, and pursuant to Section 31(3) of the Act such grant of licence is subject to the condition that the sale of liquor from the premises is not permitted until the approval in writing to do so shall have been obtained from the Commission. Such approval will be granted upon the Commission's satisfaction that the premises have been completed in accordance with the applicant's presentation to the Commission at the hearing and that the applicant is ready to trade in a manner consistent with the evidence and the concept that has been presented to the Commission at the hearing.

The licence will be subject to the following special conditions:-

1. the sale of liquor shall be at all times ancillary to the operation of the supermarket, ancillary both in terms of turnover and of the general shopping environment presented by the store; the main business of the store must remain the sale of product other than liquor.
2. The designated liquor storage and display area within the store is to be accessible to customers only through the main body of the supermarket. The licensee shall not trade in liquor by way of any door or opening giving access to the designated liquor area directly from outside the building;
3. The licensee shall stock at all times a range of low or "light" alcoholic beverages, with maintenance of price differentiation;
4. Sales of cask wine shall be restricted to premium brands in casks not exceeding two litres;
5. Sales of fortified wine shall be restricted to premium brands by bottle only; no fortified wine shall be stocked or sold in casks of any size;
6. All employees of the licensee and all other persons on behalf of the licensee directly involved in the service of liquor products to the public shall have successfully completed an approved patron care training course;
7. The licensee shall ensure the provision of such level of security services in and about the licensed premises as shall be perceived by the Commission to be reasonably adequate at any time;
8. The licensee shall cause to be removed or withdrawn any signage, advertising or promotional material or hoarding which in the opinion of the Commission, notified to the licensee, shall be offensive, excessive, inconsistent with the approved concept

of the premises or unacceptable to the Commission in any other way whatsoever.

The licence will also contain such standard conditions as may at the time of issue be normally contained in licences of this type (including disclosure of leasing or management agreements, compliance with Health regulations, prohibition against “book-up” etc.).

Mr John Pudney of the Darwin City Council gave evidence of the Council resolving not to issue a permit in relation to the shopping centre egress proposed by Mr Katapodis (even before he had applied for such a permit, according to Mr Chin), and asked the Commission to include a condition in any liquor licence that egress to Woolner Road be resolved to the satisfaction of the Darwin City Council. The Commission declines to include such a condition. Whether any particular access or egress to or from the shopping centre or any of its carparks or driveways (as distinct from the licensed premises) is unlawful at any time is seen by the Commission as being entirely a matter for the particular Authority having the appropriate statutory jurisdiction. The Darwin City Council will have its own remedies in the event of non-compliance of any egress from Lot 4241 with any Council by-law, and enforcement must remain a matter for that Authority.

The applicant now has what is often referred to as a licence in principle. In terms of its duration in this guise it is not open ended, and it is a further condition of its grant that it may be cancelled by the Commission if upon the expiration of a period of eighteen calendar months from the date hereof the applicant shall have failed to obtain from the Commission either the approval to commence trading or an extension of time within which to seek such approval. The allowance of any such extension of time shall be a matter entirely within the Commission’s absolute discretion.

At the discretion of the Commission the licence may not be assigned or transferred until the Commission has approved the commencement of trading as aforesaid.

The licensee should liaise with the Director of Licensing in the event that any of the foregoing matters should give rise to any queries at any time.

John Withnall
(Presiding member)
6 July 2000