

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Diggers Den
Licensee:	HLC (NT) Pty Ltd
Licence Number:	80804951
Complaints:	Application to Vary Liquor Licence from an On Licence to a Tavern Licence
Heard Before:	Mr Richard O'Sullivan (Chairman) Ms Veronica McClintic Mr John Brears
Date of Hearing:	9 September 2007
Appearances:	Ms Sue Porter for Licensee Mr Marc MacKenzie for Director of Licensing

Background

- 1) An application was made on 23 February 2007 to vary the licence held by HLC (NT) Pty Ltd (Diggers Den) from an On Licence to a Tavern Licence pursuant to Section 32A of the *Liquor Act*.
- 2) As there have been a number of previous applications before the Commission with respect to this premises which had some bearing on the current application, it is useful to provide a background of the applications and decisions.
- 3) In 1999 the current Nominee, Mr Arminio Niceforo acquired a restaurant licence to operate a restaurant at the premises then known as the "Olympia Family Restaurant". The licence was varied in 2000 to enable the premises to trade as a restaurant, but offer liquor without a meal under specified conditions - largely relating to the requirement of patrons to be seated and for the premises to have the appearance of a restaurant. Subsequently, following "issues" in relation to the operation of the premises, application was made in late 2000 for a Tavern Licence for the premises then known as Olympia Café.

That decision includes:

"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."

- 4) In approving the "revised" application the Commission decision stated:

"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."

- 5) In further application to the Commission, heard in June 2003, the Nominee of the premises renamed "Diggers Den Restaurant" applied to vary the licence conditions from a Restaurant

Licence entitlement to serve liquor without a meal to that of an On Licence and for the patron seating requirement to be relaxed with patrons able to be served while standing.

- 6) The Commission's decision in relation to this application handed down on 29 July 2003 states:

"It follows from the Commission approval of the requested variations that the 'authority' of the licence ceases to be that of 'restaurant' and become that of an on-licence in the nature of a tavern".

- 7) The current application before the Commission is to further vary the "On Licence" to that of a "Tavern Licence". In the application to this variation made on 23 February 2007 the Commission is advised:

"Our client seeks this variation in order to give him the right to make an application for a Gaming Machine Licence under the Gaming Machine Act".

- 8) The application further states:

"we suggest that the merits of any application for a gaming machine licence by our client ought not to be considered in this application but in any future application that our client may make under the Gaming Machine Act".

Hearing

- 9) The presiding Commissioners were afforded the opportunity to inspect the premises which appeared neat and tidy and provided for patrons to be seated in a courtyard and be seated for restaurant purposes in the "lounge/bar" area. Patrons could also be served standing and use amenities which included a pool table and dance floor.
- 10) Ms Sue Porter ably outlined the context in which her client was making application and obtained evidence from her client to the effect that both current patrons to the establishment and visitors who had entered the premises and left, following realisation that there were no gaming machines on the premises, had expressed a wish to have gaming machines, ie pokies, on the premises.
- 11) While the issue of a Gaming Machine Licence is not directly under consideration in this application, nonetheless in both the application and throughout the hearing, the issue of a tavern licence enabling application for a Gaming Machine Licence was very prominent. Much of the evidence of Mr Niceforo related to this issue.
- 12) Ms Porter drew parallels with a number of other establishments in the Darwin area which had made application and received licence variations from "Restaurant" or "On Licences" to "Tavern". Similarly there have been applications for tavern licences which have not been successful. It is clear from the cases presented by Ms Porter and those known to the Commission that each case is determined on its merits.
- 13) While the *Liquor Act* does not prescribe or provide for licence categories such as "On Licence" and "Tavern", the differentiation is critical in that Tavern status or category does enable application to be made for a Gaming Machine Licence.
- 14) The Commission accepts that licences are distinguished by the conditions attached thereto and that the categorisation of "Hotel", "On Licence", "Tavern" etc is for administrative purposes and that administrative policy has developed to assist in decision making under the *Liquor Act*. Ms Porter raised the issue of these administrative categorisations being developed for the guidance of the Commission and for consistency, due to the discretion it is able to exercise in this regard. The *Gaming Machine Act* has recognized and embodied these administrative categories such as Public Hotel and Tavern, where the primary activity is liquor sale and consumption.

- 15) Mr Niceforo stated that with his premises he wants “to be on a level playing field with competitors”. He referred to seizing commercial opportunities and the development of the business since being taken over by him following the Katherine flood in 1998. The reason for the change of attitude since advice to the Commission in 2000 that he would exclude the potential for a tavern licence to be a precursor to having poker machines were described as changing market conditions and patron demand (refer paragraph 11).
- 16) Ms Porter drew the Commission’s attention to the Tavern Licence operating at Duck’s Nuts which was transferred and varied from the earlier On Licence operated by Sizzlers at the same locality. However, the comparison is not straight forward as in this instance it was not a simple transfer and upgrade of licence. Following the closure of Sizzlers, the proprietors of Duck’s Nuts spent millions of dollars in redeveloping the premises with a strong tavern theme and purpose, including the incorporation of a Vodka Bar.
- 17) This premises serves thirteen (13) types of beer on tap and meets the self defining condition that “if it looks like a tavern it is a tavern”. Similarly other “Tavern” licences in the Darwin CBD have been developed or redeveloped to have a design and appearance, and cater for, a tavern market (the Deck Bar has thirteen (13) types of beer on tap and Shenannigans has fourteen (14) types of beer on tap).
- 18) Additionally when examining the licences of Ducks Nuts, Fox and Fiddle etc referred to by Ms Porter as having licence variation from “Restaurant” or “On Licence” to “Tavern”, regard must be given to their location within an entertainment precinct where some harmony to their licence category/conditions has been applied.
- 19) Ms Porter drew the Commission’s attention to a number of Darwin and wider region licensed outlets, many of which hold Tavern licences and which have similar conditions and trading hours to that held by Diggers Den. It is the Commission’s contention that the absence of consistency between licence category and licence conditions demonstrates the Commission has historically and correctly applied informed discretion in its decision making. In its décor, fitout, general appearance and availability of alcohol, especially on tap beer, references to taverns such as Duck Nuts, Deck Bar, Shenannigans, Wisdom Bar and Café etc are not altogether relevant in considering the Diggers Den application, as they are not considered entirely comparable.
- 20) Some regard must also be given to the information provided by the Deputy Director of Licensing in his report to the Commission of 3 July 2007 in which he refers to the decision to approve “On Licences” to Mbargo and Lewinski’s, following application for a Tavern licence.
- 21) It was submitted during hearing that the then Commission’s decision of 29 July 2003 which stated:
- “that the licence ceases to be that of a restaurant and becomes that of an On Licence in the nature of a Tavern”,*
- gives some tacit recognition of the premises as a tavern. This is not a formal entitlement and while considered by the Commission does not convince Commissioners that a licence in the nature of a “Tavern” was approved in the previous decision.
- 22) The Commission also noted that signage and advertising at the premises referred to Diggers Den Tavern. Again, in consideration of the 2003 decision, the Commission does not consider it conveyed an entitlement to describe itself as a “Tavern”.

Decision

- 23) The Commission has determined not to approve the application on the grounds that Diggers Den currently meets the condition of an “On Licence” premises and was not convinced of any overwhelming or compelling reason to upgrade this licence to that of a “Tavern”.

Richard O'Sullivan
Chairman

9 November 2007