

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Rorkes Drift Bar/Cafe
Licensee:	Fugitives Drift Pty Ltd
Nominee:	Mr M McNamee
Proceeding:	Applications for Extension of Premises, Extension of Trading Hours
Heard Before:	Mr John Withnall
Date of Hearing:	20-23 June 00, 27 September 00-13 October 00, 12 March 01-26 March 01
Date of Decision:	26 July 01
Appearances:	Mr L Silvester for Applicant Mr J Firth for Vicdisc Pty Ltd and Transmedia Group P/L Mr T Anderson for NT Police Mr M Grant for Darwin Central Nominees Pty Ltd

The hearing of this application has notoriously been the longest in the history of this Commission, in any of its guises. The delay in delivering a decision on the application has been an unfortunate consequence of the need for me to ensure that my thinking in reaching my present conclusions has fully addressed the multiplicity of issues which have arisen during a volume of evidence that has required over 3000 pages to transcribe (the full transcription not having been available to me until May this year), and produced almost 200 documentary exhibits. It can also be remarked that the unexpected reduction of the hearing panel from three members to one sitting alone removed that degree of facilitation with which multiple-member panels are able to contribute to a detailed consideration of lengthy evidence and vital issues.

Having now come to a conclusion which I firmly believe to be the proper outcome of all the material that was placed before me, I am concerned that the applicant, and indeed all who were parties in the hearing, be notified of that decision even though without benefit of written reasons of the degree of detailed transparency quite properly anticipated by the applicant's counsel. However, the Applicant needs to know where it stands, and I see these reasons I now publish as being sufficient to indicate the essential basic points of my reasoning so as to enable the applicant and its legal representatives to determine their future course accordingly.

I first touch on a preliminary concern.

Could or should the hearing have been shorter, or been curtailed?

Originally the Commission allocated a parcel of hearing dates which in the normal course of events would have seen such an application concluded in the one sitting of several consecutive days. When this turned out not to be the case back in June last year, the Commission was thereafter guided by the estimates of the parties' legal representatives as to the length of time which would be needed to be set aside to conclude the matter, but at the conclusion of the October 2000 sitting it was obvious that the representatives of the parties had seriously underestimated the time the hearing would require.

At that point I indicated that I was free of other Commission commitments for the last week of November and for a week in December before Christmas, but it was agreed by all concerned that no chance should be taken that the matter would need to be yet again adjourned thereafter, and that a further period of three *consecutive* weeks should be allocated to ensure that the matter concluded within that time. I then indicated my availability for the whole of January 2001, but this

was unsuitable to the objectors' counsel and some of his witnesses. My availability for almost the whole of February was then unsuitable to the Applicant's Counsel, leaving March 2001 as the earliest that *all* parties found convenient.

The evidence concluded at the end of March 2001.

I again note that the number of hearing days that was eventually required was unprecedented in the Commission's experience. The underestimation by Counsel in June 2000 as to the time that would be required in September/October cannot really be seen to have been blameworthy. I do make the observation that a major factor in the length of the hearing was the intense detail in which very competent Counsel cross-examined each other's witnesses, but of course a party must be given all opportunity to fully test any and all aspects of evidence in another party's case. I acknowledge that the Liquor Act allows the Commission to set its own procedure at a hearing, but it is trite law that this discretion should not extend as far as any challengeable infringement of a party's basic right to natural justice and procedural fairness in all the circumstances.

It is of course not essential for anybody to retain a lawyer for any presentation to the Commission, whether by way of a hearing or otherwise. Nobody's rights before the Commission will suffer for want of a lawyer. That said, however, it is only human nature that a party will want to match a lawyer with a lawyer, and fight fire with fire. Such was the case with this hearing.

From subsequent direct communication received from Ms Alcock, a principle spokesperson and witness for the Applicant, I am fully aware of the Applicant's failure to comprehend why other licensees were permitted to be parties at all, why the objectors who were themselves licensees were not seen to be "commercial" objectors at first instance, and why as commercial objectors they were permitted to draw out the proceedings, not only by their legal representatives' comprehensive testing of the Applicant's evidence but also by the adducing of the quite detailed and lengthy evidence in support of the objections.

I will deal with that aspect at some length.

The initial issue in this context is whether and why the public should have had any opportunity at all to object to the application, the argument going that the Applicant already has a licence, to which it is only seeking an extension, so should not be seen to be an "applicant for a licence" within the meaning of the Liquor Act. I responded to a submission to this effect during the hearing by making available copies of the Commission's ruling last year in an application by the Headframe Bottleshop in Tennant Creek. In view of the intensity of Ms Alcock's feelings on this issue, I reproduce that ruling here for the record.

The only direct reference in the Liquor Act ("... the Act") to variation of conditions is to be found in Section 33, which quite obviously deals with the power of the Commission to unilaterally vary conditions, an aggrieved licensee in that situation then having 28 days within which to request a hearing in relation to his conditions. Other than that, the Act is silent as to the variation of conditions, and the circumstance of an existing licensee applying for a variation of its own devising is not canvassed by the Act.

Neither the Act nor any supplementary regulations provides for different categories of liquor licences. The combined effect of Sections 24 and 31 of the Act is that a licence shall permit the sale of liquor according to such conditions as may be incorporated in the licence. The licensee becomes licensed to trade in liquor in accordance with conditions tailored to the business conducted on the premises, and the licence is constituted by those conditions. A licensee who applies for a licence to trade in liquor under a different set of conditions can therefore be seen to be "an applicant for a licence" in terms of Section 27 and an applicant "for a grant of a licence" in terms of Section 48, because a different set of conditions would constitute a different licence, certainly in detail if not in kind.

Such a view is confirmed by a consideration of Section 31(1) of the Act. There would seem to be little doubt that Section 31 can be applied to an application for a

change of conditions. The Commission has "an application before it" requiring a consideration by the Commission of "such conditions as it may consider necessary or desirable in the particular circumstances" of the application before it. The consequence of such consideration is the power to issue a licence in terms of its determination of conditions in the particular circumstances. The Commission is of the view that the terms of Section 31 support the perception of an application to change trading conditions as an application for the substitution of a licence in terms of the new set of conditions, and thus is an application to which Section 48 can apply in allowing for objections to which Section 49 would apply in providing for hearings in the discretion of the Commission.

The Commission has held to that ruling through many applications for variation of conditions since that time, and does so in the present case.

It is true that from time to time the Commission has determined that a particular requested variation is sufficiently minor and non-contentious as to not require advertising, and has proceeded to determine such application without having sought any input from the relevant community. Typical examples would be a hotel seeking to swap trading times between its different bars without extending its total trading hours, or a restaurant seeking to trade for an extra thirty minutes, or the like. In those cases the Commission treats the application as a request to exercise its discretion under section 33 of the Act in the manner requested by the applicant.

However, section 33 is an unsatisfactory vehicle for dealing with an application having any potential to impact adversely on the community, as it provides no mechanism or forum for third party input. Where a requested variation is such as could be seen to alter the nature or "flavour" of a licence, or the manner or degree in which it may impact on a community, the Commission will always regard such an application as an application for a different licence, and hence simply an application for a licence. In that situation it is illogical if not unlawful not to accord the community the opportunity to record its needs and wishes in relation to the proposed new conditions. The Commission is comforted in that view by a consideration of section 62A of the Interpretation Act, which provides that in interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act is to be preferred, even though the purpose or object not be stated in the Act. The Commission sees harm minimisation and community needs and wishes as underpinning the responsible administration of the Liquor Act.

I do not resile from the Commission's position as set out in that ruling. What is being sought (inter alia) is for Rorke's Drift "Bar/Café" to extend into the old cinema auditorium and transform itself into a nightclub complex which would be the largest such venue in Darwin. The Commission does not disagree with Mr Anderson, Counsel for the Northern Territory Police, when he described the application as being for a "radical transformation", and even if the Commission did not see Parts III and IV of the Act as being generally applicable in the circumstances, it would nevertheless have still insisted on the application being advertised and any objections considered.

Apart from the Northern Territory Police and the "Gaymark group of companies", all other objections were from other licensees, specifically from the proprietors of the All Seasons Premier Darwin Central Hotel, the Top End Hotel and Vicdisc Pty Ltd as the licensee of the Vic Hotel and the Discovery Nightclub. Gaymark is the landlord of the All Seasons Darwin Central Hotel.

The next issue, and obviously an emotional one for the Applicant, is why the Commission received and processed the objections of marketplace competitors in the face of the proscription in Section 48(1) of the Act of any objection the ground or substance of which "is that the grant of the licence may or will adversely affect the business carried on at any other licensed premises". Significantly, the word "commercial" does not appear in the section, although in common use throughout the hearing as a colloquial reference to an objector to which Section 48(1A) was alleged to apply.

What follows needs to be prefaced by noting that Section 48(1A) is only of mandated application if the Commission is correct in its view of the application as being an application for a licence, or "for the grant of" a licence. If the Commission should be wrong in that approach, its position is then

that its insistence on the advertising of the application and its consideration of the objections falls within its absolute discretion to vary conditions *vide sec. 33*. If the application before us is not properly to be regarded as an application for the grant of licence, then the whole Section 48(1A) argument flounders in irrelevance and is subsumed by the Commission's discretion in *otherwise* varying conditions of an existing licence.

Looking then at Section 48(1A) from the Commission's position that it is of mandatory application to the situation, Parliament has not prohibited a competitor from objecting, but only from objecting on the specific ground of adverse impact on the objector's business. Inasmuch as this is not one of the grounds set out in the written objections lodged with the Commission (see Exhibit 5), one has to then allow and consider all the objectors' evidence in order to be able to ascertain whether the *substance* of the objections should be ruled to be grounded in the "competitive effect on the operation of the objector", to quote from the Minister's second reading speech on the amendment that led to Section 48(1A), as reproduced by Mr Silvester at page 79 of his written submissions.

The need to determine the substance of the objection is an exercise that is not obviated by recourse to that second reading speech. The substance of an objection carefully couched to avoid being caught at first instance by Section 48(1A) will rarely be able to be determined in any summary way before a full and careful consideration of the evidence adduced by the objector.

In my view even a finding that such an objector was in fact motivated to make the objection by a fear of adverse business impact will not necessarily knock the objection out of consideration unless it is clear that such motive is also the only real ground of objection.

I am confident on the evidence, particularly taking into account certain evidence in camera and certain documentary exhibits received into evidence on a confidential basis, that the objection of the licensee of the Top End Hotel was motivated in part by an apprehension of the potentially adverse effect of the expanded and transformed Rorke's Drift venue upon the Top End's own place in the market. However, I am also persuaded that nominee Mr Tully was generally motivated by a real concern for the effect of such competition on *all* licensed premises in the Darwin Central District, with emphasis on the Mitchell Street entertainment precinct. That is, I believe Mr Tully to have been *also* motivated by a genuine concern that the Darwin market as a whole was already saturated with existing licences and for the effect that over-servicing of the existing market would have on future industry management in the Central Business District.

Careful consideration of Mr Tully's written objection at Folios 55 and 56 of Exhibit 5 and of all relevant evidence does not lead me to the conclusion that the fear of the competitive effect on the operation of the Top End Hotel comprised the entire substance of the objection.

The same goes for the objection of Vicdisc Pty Ltd. I believe on the basis of the written objection and all the relevant evidence that this objector too, while certainly not wanting any further competition, also has a more generalised concern as to the deterioration of the Darwin entertainment scene if it should become over-serviced in terms of licensed premises.

It is easy to be sceptical, as indeed were some of my own remarks in this context during the hearing, when a licensee tells me that there are too many licensees. However, I have come to the firm conclusion that a licensee can be motivated in part by self interest without necessarily being without standing in the proceeding by reason of Section 48(1A), so long as his interest can be seen to also extend beyond his own.

It is not improper to remark that Section 48(1A) has never seemed to be entirely clear to this or apparently any previous Commission as to just how it should work. I note that one of the ambiguities is clarified by the second reading speech to which Mr Silvester referred me. Whereas the section does not make it clear whether its reference to "any other licensed premises" is a reference to the premises of only the objector or to any premises at all other than those the subject of the application, the second reading speech makes it very clear that Parliament intended the reference to be only to the "operation of the objector".

Parliament could very easily have simply provided for the disallowance of any objection by another licensee or market competitor. It chose not to go down that path, and unless and until it does so, it

will surely be only an objection too casually worded or worded in ignorance of this aspect of the law which will be able to be summarily disallowed at the outset without the objector being permitted to take part in a hearing in order to ascertain the substance of the objection.

Mr Silvester presses the unfairness of not disallowing the objection of a competitor who refused to fully obey a subpoena to produce documentation which may have been able to strengthen the Applicant's argument against the objector's standing in the proceedings. The conclusion I have come to in relation to the effect of section 48(1A) on the evidence that was before me is unaffected by the withheld financial details of the objectors. Even if the missing details showed the objectors to be trading poorly or unprofitably, in whatever detail, on the basis of all the other evidence that was before me I would still conclude that the substance of the objections extended beyond a fear only for the future of their own establishments.

This is not to say that the refusals to obey the subpoenas are to have no consequences; I shall return to this aspect later in these reasons.

I note that at the top of page 80 of Mr Silvester's written submission he says that if I were to allow an objection in breach of Section 48(1A) he believes I would have made an error going to jurisdiction thereby avoiding the privative application of section 56 of the Liquor Act. I should therefore indicate my view that had I disallowed one or both of the objections from Top End and Vicdisc, I believe that I would still have been properly able to use such evidence as had been produced by the objectors that could be seen to be untainted by the motivation of the objector. I have in mind the evidence of the McGrath survey, and the Jebb Holland Dimasi survey. I also include in that category much of the evidence of Mr Griffin that does not rely on any access on his part to any of the withheld documentation. However, I formally decline to disallow any of the objections as being incompetent in terms of Section 48(1A), or incompetent for any other reason falling within such discretion as the Commission may have in this situation.

I should next indicate the determinations I have reached on the substantive applications.

My determination is to approve an extension of trading hours but to decline to approve at this time that aspect of the application which towards the end of the hearing became known as "Stage 3", which is to say the conversion of the old cinema auditorium into a "nightclub" venue.

The application to trade to 4.00am is approved in relation to the present operation on the ground floor of the premises (including its refurbishment as "stage 1"), but excluding what up to now has been known as the outdoor bistro area but which now seems to have become referred to as the beer garden. Extension of trading to 4.00am is also approved in relation to the upstairs bandroom development, which has already been the subject of a separate approval by the Commission. Inasmuch as that previous approval may need updating because of the bandroom's transmutation to "Stage 2" (Exhibit 93), I record that Stage 2 has the approval of the Commission. I appreciate that at some stage Ms Alcock gave evidence to the effect that what is now Stage 2 may not proceed without Stage 3 being approved, but that was before what was referred to as Stages 1 and 2 at the beginning of the hearing had transmuted into Stages 1, 2 and 3 by the conclusion of the hearing. Mr Silvester's written submissions tell me that all of stages 1, 2 and 3 are dependent on licensing approval for the complete three stage process, as some of the infrastructure for stage 3 will necessarily overlap stage 2, yet I note that pages 1032 to 1035 of the transcript for 12.3.01 are occupied with Mr Silvester seeking my assurance that an approval of 4.00am trading for the bandroom was a possible stand-alone outcome of the hearing.

I am unsure as to what the current proposal might now be in relation to the development of Stage 2. If it is to proceed, either in the form of stage 2 of the projected three stage project, part of stage 1 of two stages or as was originally approved, the Commission's approval is subject to the condition that the sale of liquor from the new area will not be permitted until the Commission is satisfied that the upstairs bandroom development has been completed in satisfactory accordance with the relevant approval to proceed.

The upstairs bandroom area must be ready to trade within a period of nine months from the date of this decision, failing which the approval will automatically lapse unless an extension in writing shall

have been obtained by the licensee. Any such extension shall be entirely at the Commission's discretion.

The approval to extend trading to 4.00 am in respect of the present ground floor premises is to take effect immediately.

The approval to trade until 4.00am is as always subject to the Commission's standard "late night trading conditions".

In not approving the nightclub development as part of the 4.00am extension, and in also excluding the outdoor area, the so-called beer garden, from 4.00am trading, I note that the objection of the All Seasons Premier Darwin Central Hotel has thereby been largely defused. Mr Brook indicated in evidence that he currently does not have a problem with noise from Rorke's Drift and that his apprehension as to noise problems related to the proposed conversion of the old cinema to a nightclub. The agreement between the Applicant and the Darwin Central Hotel property owner, Gaymark, (Exhibit 4), also targeted the cinema development and is now largely otiose unless and until the licensing of a development of the cinema should be back on the Commission's agenda. None of the agreed conditions need now be inserted into the Rorkes Drift licence.

The cases of the objecting licensees also centred on the nightclub development; the submissions against 4.00am trading were aimed against the complex as it was proposed to be expanded. Certainly the written objections contained a separate ground of objection to 4.00am trading for the existing facility and the upstairs bandroom, and Mr Firth's submissions as to needs and wishes were inclusive of all elements of the advertised proposal, but the objectors' case as it was developed concentrated on the effect and impact of late trading by Rorkes Drift as transformed into the much larger nightclub complex. So much so, that the objectors' own experienced expert operator, Mr Griffin, was of the opinion (transcript page 1526, 19.3.01) that approval of the upstairs bandroom to 4.00am would be "appropriate" and would not be "likely to cause the problems I have spoken of". I was impressed with Mr Griffin's knowledge of the industry, I do accept his expertness in most of the matters on which he spoke, and I took his opinion into account in approving the extension of trading to 4.00am for the ground and first floors.

I see the police objection too as losing intensity in the face of the failure of the major aspect of the project to gain approval. Superintendent Kendrick's main worry was a 4.00am closing time for something as big as the proposed cinema development. The police evidence confirmed that most late night disturbance in the Mitchell Street precinct and its surrounds occurs outside rather than inside licensed premises, involving patrons and other persons on the move. A major source of disturbance stems from the interaction of roving gangs of youths with patrons outside licensed venues. Any additional strain on police resource management at 4.00am that may follow the increase in trading hours for only the ground and first floor bandroom of Rorkes Drift may well be minimised, on the evidence, by a reduction in patron movement from Rorkes to other venues after 2.00am.

Closing times for licensed premises in Mitchell Street are a seemingly ad hoc mix of 2.00am and 4.00am. The current situation reflects a collection of individual licensing histories. In holding his hand up to join the late night traders, it was Mr McNamee's inclusion of the proposed cinema conversion that has borne the brunt of the objectors' ire and been the major focus of their cases. Without the new nightclub in the mix, I can find no persuasive reason on the evidence not to remove the current inequity that has seen a recognised attraction in the Mitchell Street precinct lose its clientele to other venues at 2.00am.

I have excluded the outdoor bistro area from the approval because it seems clear that its operation can now be expected to be more beer garden than bistro, and in my view permitting the operation to 4.00am of an outdoor beer garden which abuts the public footpath of a main city street would not be appropriate, certainly not until the whole footpath trading scenario in Mitchell Street gets underway and the Commission and the public alike have had a chance to see how that particular initiative is going to fare.

I revert now to my decision not to approve Stage 3 at this time. This is based on several concerns.

I have no problem with the managerial capacity of the applicant. Much time was taken up on various factual aspects of the management of Rorkes Drift. The only specific management concerns that linger with me relate to the somewhat cavalier attitude of Mr McNamee to the Commission's insertion of the expanded "fire condition" in his licence and the seemingly illogical system of reducing the number of patrons upon discovery of an excess of approved numbers of patrons on the premises. I should add that I am of the view that Mr McNamee genuinely believed that Mr Duncan Cooke would attend to the requirements of the fire condition. All in all, on a view of the whole of the evidence, I am left with a picture of a generally well run business, and I would have no serious qualms about the current management personnel, Mr McNamee and Ms Alcock, having the ability to competently tackle the challenges of the extended venture.

It is in relation to financial capacity (inter alia) that I am left with unresolved qualms.

The hearing commenced with the Commission's acceptance of the applicant's financial capacity to conduct its *present* business, and the Applicant's case for viability went on from there. In my view Section 32 of the Act requires that in this present case I am to have regard to the financial capacity of the Applicant to conduct the business to be associated with the licence being applied for, viz. the new extended business, which would involve almost doubling the licensed floor space, and at a cost which by the end of the hearing had *doubled* from the Applicant's original estimate in the early stages of the hearing.

The enquiry into financial capacity has met with a large degree of attitudinal resistance on the part of Ms Alcock, who is the Applicant's manager and bookkeeper, and spokesperson on the development the subject of the application. The financial projections (and the plans) tendered in the earlier part of the hearing were acknowledged by Ms Alcock to be likely to be subject to many changes before the project was finalised. During her evidence early in the hearing, when Counsel for the objectors was questioning her on the integration into the projections of liability for interest on any existing loan, Ms Alcock was conspicuously evasive. After twice saying that there was no loan against Fugitives Drift Pty Ltd (the Applicant company), the following exchange took place:

Mr Firth: Someone else borrowed the money from the Commonwealth Bank and lent it to Fugitives Drift, did they?

Ms Alcock: I believe that's our business. But you can assume that if you wish.

Mr Firth: Is Fugitives Drift paying any interest on any loan at the moment?

Ms Alcock: Yes it is.

Ms Alcock at that stage freely acknowledged that the plans would undoubtedly be subject to many changes before the development of the nightclub commenced, that her figures were "variable" and likely to change many times, and that costings were still to be finalised, but that she was reluctant to put any further effort into firming the project up at that stage unless the applicant was granted the licence applied for.

By October 2000 there had been some changes in plans but no changes in her projections:

Ms Alcock: Until I got full costs and assessments from other areas, I wasn't going to change my predictions at this stage.....There will be changes but they're not in concrete. I expect us to have to do many more budget costings and go through with the quantity surveyor details of the new project and what we wish the Dutch to do and what we wish local people to do. So yes, there will be changes but until we have the necessary approval to continue with this project, it would be wise of us not to go into that at this precise moment.

Counsel for the objectors subsequently proceeded to pursue the issue of what borrowings were thought to be needed if the project had not been firming up in terms of cost. This direction of enquiry produced the following remarkable exchange:

Mr Firth: But you don't know what the cost of the project is, so how do you know you can borrow the appropriate amount of money? That is my question.

Ms Alcock: Mr Firth, one goes through many procedures and if I want to cut my budget, I'll cut my budget. If I want to increase it, I will find ways of increasing it. It's not something I can answer with a yes or a no but we have given, I think, we have given a reasonable review of what we intend and until such time as we have a licence, I'm not going any further.

There is no doubt in my mind that at this stage (October 2000) the application was still "underdone" and premature.

In March 2001 it was confirmed by the Applicant that what was being sought was an approval of a concept, to be firmed up over a period of some two years or so in relation to the all-important final stage of the nightclub in the cinema auditorium, with the Commission to ascertain at that future time that finance had indeed been put in place and that projections were such *at that time* as to *then* satisfy the Commission as to the applicants financial capacity to conduct the business.

I indicated to Mr Silvester at that stage of the hearing that such a degree of flexibility on the part of the Commission could not be counted upon, given my view that when one looks at Section 26(2) in combination with Section 31(3) it is obvious that what is often referred to as a licence "in principle" is nevertheless a licence which is to be regarded as having been granted. As such, the requirements of Section 32 will need to have been satisfied at the time of the grant, which is to say the date of approval of the application, rather than at some future time when the Applicant/licensee was actually ready to proceed. The discussion between myself and Mr Silvester on this issue will be found at pages 1022 to 1029 of the transcript for 12.3.01. This was at the point that Mr Silvester had introduced a new set of plans, and new costings, some five months after both Mr Firth and myself believed the applicant to have closed its case. This was the point at which I learned that the old stages 1 and 2 had become stages 1, 2 and 3.

Exhibit 92 was a revised profit and loss prediction, but only relating to the new stages 1 and 2, ie. the changes to the ground floor and the construction of the bandroom development on the first floor. It "says nothing of stage 3":

Mr Firth: Have you as yet prepared a profit and loss prediction for the fully completed project?

Ms Alcock: No

Mr Firth: When will you be preparing that document?

Ms Alcock: Some time after this case.

Mr Firth: Some time after this case?

Ms Alcock: Yes. In consultation with other people.

Mr Firth: Whatever that figure is, would you agree with me you would now be predicting it to be more than (...x...million) dollars which I think was the highest figure mentioned in the previous evidence?

Ms Alcock: It could be more, it may even stay the same. Our prediction is a target that we set ourselves and at this time until I assess the figures again it is a continuous process.

Ms Alcock's approach to the issue of financial capacity has been unhelpful.

Her counsel's confirmation of the situation will be found at the top of page 1022 of the transcript for 12.3.01:

Mr Silvester: Yes. As regards what you would now call the stage 3 works, that is the nightclub on 3 levels in the old cinema, the rear part of the old cinema I should add, those works are not being proceeded with. That is, the ongoing design costing and financing are not being proceeded with in the sense that a commitment is available to commence those works at any particular time, but they are nonetheless – the approvals for those,

subject to some conditions... are still sought. These sorts of conditions are the conditions that the Commission is familiar with, that is, satisfaction at the relevant time as to financial feasibility and an appropriate understanding of costings.

I do not know the “sorts of conditions.... at the relevant time” to which Mr Silvester is referring, other than by reference to the concession made to the same Applicant on the original grant of the Rorkes Drift licence. Talking of his plan for an approval to be given now but with financial evidence still to come, in Mr Silvester’s view:

that was how the Commission handled the Rorkes Drift in the very first place, left itself in the dark.

The written decision in that earlier case, after a reference to the Applicant’s cavalier attitude to funding and budgetary issues having rendered the eliciting of relevant evidence during the hearing something akin to extracting teeth, recorded that the Commission then granted the licence subject to the receipt by the Commission of further legal documentation evidencing the securing of all necessary advances and disclosing the details of repayment arrangements. This was an unusual indulgence accorded Fugitives Drift Pty Ltd at the time, and one the nature of which I am not prepared to allow a second time.

In any event, I am not aware from the written decision in that case that the Commission had not been persuaded as to viability without considering the further documentation required. I am unaware of any other approval by this present Commission where a licence was granted while any real question of viability was acknowledged to have been left “swinging”, for establishment at some future time. In any event, even if I am wrong in that, on my reading of the Act I am not prepared to do anything similar. Financial capacity to conduct the business (in this case, the business inclusive of the nightclub in the cinema) is something I must have regard to before a licence is granted, however much the colloquial reference to an approval being “in principle” may be used. As already mentioned, in my view a licence “in principle” is one which is in fact granted but simply does not authorise the sale of liquor until further approval, usually of the satisfactory completion of the premises. It may be argued that the further approval referred to in Section 31(3) could be made dependent on the future satisfaction of any condition at all, not just the satisfactory completion of the premises, but I cannot see it overriding my sec. 32 obligations in considering whether or not to grant the application in the first place.

My warning can be found at the bottom of page 1029 of the transcript, 12.3.01:

The Chairman: My initial reaction is I would have some difficulty being persuaded I could approve Stage 3 while any significant or needed evidence as to financial capacity would be outstanding until some future time.

My initial reaction has become my final determination on this issue.

Ms Alcock, both personally and through her legal representative, was somewhat scathing in relation to evidence adduced by the objectors which was sceptical of the initial costing being feasible. By the end of the hearing, however, Ms Alcock’s estimate of the cost of the project overall had more than doubled, and the effect of such cost blow-out on profitability is unknown to me. I agree that I am not to be concerned with actual levels of projected profitability; the Act simply requires that I have regard to the financial capacity of the Applicant to conduct the business. My concern is therefore with viability. I can appreciate Ms Alcock’s view that such an inquiry is intrusive, but in my view it is my statutory duty.

I am left with insufficient information to be able to be satisfied as to viability if Stage 3 is to be included in the approval. Mr Garraway’s original break-even analysis for the whole project (Exhibit 26) became too outdated given the degree of increase in the total cost. Given that Mr Garraway said on 3 October 2000 (transcript page 350) that an increase of only one million in costs would increase the break-even figure “by about another three or four hundred thousand”, the much larger increase now foreshadowed by the Applicant will obviously have a much larger impact on the break-even calculation, but to an extent and by way of a calculation not made known to me. Mr Garraway’s revised break-even calculations *do not include Stage 3*. The seeming abandonment of

any attempt to demonstrate the viability of the revised project inclusive of Stage 3 leaves me with no view as to its viability. I simply do not know on the evidence that the total project inclusive of Stage 3 would be viable. The revision of the project rendered Exhibit 15 otiose, and Exhibit 92 is exclusive of Stage 3, as is Exhibit 124. Mr Garraway's original break-even analysis (Exhibit 26), which does include what is now called Stage 3, is based on a fit-out cost which has since doubled, and the numbers are now notably large.

I appreciate that many has been the application that has succeeded without a formalised profit projection, but the comparative weighting of the requirements of sec. 31(1)(e) of the Act as against other requirements will vary with the type and circumstances of each application, as will the evidentiary burden (*Lariat Enterprises and Liquorland (Australia) Pty Ltd v Joondanna Investments Pty Ltd and the Liquor Commission of the Northern Territory (1995) NTSC 38*). Licence category, licence history, precinct, location, scale, nature of objections and potential community impact are all matters which play a part in the balancing exercise. Colloquially, courses for horses. As Mr Silvester himself said, we are not dealing with a corner store but with a very large commercial development; the profile is high, and the numbers large and becoming larger.

Also relevant to the balance, although not determinative, is my view of some of the evidence of Mr Griffin in this context. I do not accept that his estimate of the Applicant's projected earnings being 200% overly optimistic is necessarily accurate, or that the venture will certainly fail, but on the basis of that and other opinions Mr Silvester adduced from Mr Griffin in cross-examination I do accept as a probability that the projected level of earnings, or anything close to it, is highly unlikely to be attained. It is not just a matter of the licensee taking the punt. I appreciate that in Ms Alcock's view the enquiry into financial capacity should be none of the Commission's business, with the risk to be a matter entirely for the licensee, but the Commission is compelled by statute to "have regard to" this aspect of the proposed development. If I am wrong in my reading of the Act in this regard, I would exercise my discretion in conducting the same level of enquiry into the same aspects of financial capacity.

Even accepting that I should not be concerned with any specific level of profitability but with viability, I do not feel the actual persuasion as to the viability of stage 3 that *Briginshaw -v- Briginshaw* suggests that I should.

This is not to say that I do not appreciate the difficulty of nailing down this aspect of the project at this remove in time, and indeed it is the long lead time requested for stage 3 that is itself another ground on which I decline to approve the licensing of the nightclub at this time.

On 12 March 2001, (at page 1031 of the transcript for that day) Mr Silvester made it quite clear that the construction of stage 3 would not *commence* for two years. The scenario is that stage 2 would commence trading in the middle of next year, 2002, and trade until the middle of the following year, 2003, before stage 3 would even be commenced. This date is said to be "hypothetical" and subject to "how the cards are going to fall", but demonstrates that the time to commencement *of trading* needing to be allowed by an approval of the application is likely to be considerably more than two years from now. What is being sought is two years *plus* construction time, not a construction time of two years. I note my remark to Mr Silvester in this context (transcript page 1031):

Provided that needs and wishes might not be thought to have changed in the meantime. Well, I am just suggesting it is a bit long in what seems to be acknowledged to be a fairly dynamic community.

I am still of that view. I am not prepared to approve so long a separation of stages 2 and 3, so long a delay for the nightclub licence to be in escrow, in effect. If a licence is to be granted for a nightclub in the Central Darwin Precinct, it needs to be a lot closer to commencement of construction than two years. The longest construction time allowed in comparatively recent times (that is, the limitation of the time between grant of licence "in principle" and the issue of the licence to operating premises) has been eighteen months. At a time when the Commission has actually been considering shortening these times for the future, the Applicant before me is asking for an increase to two years plus. In my view, that is much too long a time to tie up a place in the nightclub market without having to deliver a nightclub to that market.

I appreciate that in early 1998, the approval of Discovery's application to construct a nightclub was not made subject to any limitation of time to complete, but the evidence obviously satisfied the Commission at that time that construction would be satisfactorily expeditious, as turned out to be the case, and indeed as also seems to have been the case with the original Rorkes Drift application. It was only after this time that the Commission saw the need to limit the duration between the grant "in principle" and the issue of the licence.

I note Mr Silvester's submission as to the "disservice" to be done to the Applicant by not granting a present approval for a start two years hence, because of the cost to the applicant of presenting the application at this time, but the sociological and jurisprudential arguments against that proposition are surely obvious. I appreciate that a project of the size of this proposal cannot be expected to have to be presented to the Commission in such fine and final detail as to be ready to start instantly upon an approval, and Mr Silvester can readily identify examples of the Commission's flexibility in the past in this regard. Regrettably though, I cannot extend that flexibility to the extent now asked of me. Stage 3 is just too far away for current approval.

The "needs and wishes" to be considered by the Commission is a community dynamic in a city undergoing constant change in terms of its facilities. Whatever the community's needs and wishes may be in relation to the old cinema becoming the city's largest nightclub, community attitudes surely cannot be relied upon to be unchanged by the second half of 2003. It could be that there may be another nightclub or other licensed entertainment venues operating by then, or alternatively and more likely, other competing developments that may have been able to be up and running sooner may have been warded off by the existence of the Rorkes Drift's approval. In a liquor licensing climate in which arguments as to saturation are becoming more insistent, the present Applicant cannot reasonably expect to hold competitive ground for too long on the strength of only an approval rather than with the approved bricks and mortar.

Mr Silvester asked me on 12 March to keep an open mind on this issue, and I believe I have. My failure to change my mind since then is certainly no indication of any failure to fully consider all evidence and all submissions that followed the relevant exchange between Mr Silvester and myself on that occasion.

Reference to needs and wishes raises yet another area of dissatisfaction.

I can imagine the Applicant's incredulity that over three thousand petition signatures could still leave me dissatisfied as to needs and wishes. Mr Silvester reminded me of the Commission's expressions of satisfaction with the petition evidence in the licence application for the Humpty Doo Tavern, but to my mind there is an essential difference. The Humpty Doo Tavern applicant interfaced quite broadly with the local community, and the Commission was very satisfied that the petition in that case comprised the signatures of a large proportion and significant cross-section of the Humpty Doo community. In the present case, putting aside for the moment the forays to the Casuarina shopping complex, the petition is seen as representing quite a narrow cross-section of a much larger relevant community, namely only those persons who already patronise Rorkes Drift. The petition-linked display inside the licensed premises would seem to be a case of the management preaching to the converted. It was hardly surprising that the petition for the most part demonstrated that Rorkes' existing patrons were prepared to say that they would support it being bigger and open longer. The respondent group could be expected to be generally partisan.

Even so, the two thousand or so signatures on the petition which were garnered at Rorkes' Drift took several months to accumulate. By contrast, the "anti-petition" of the objectors captured almost a thousand signatures over the course of only the first week of the hearing. This too was a partisan exercise, even more so. Mr Silvester criticises the absence of any reasons for the negative assertion made by each signatory to the objectors' petition, such that we do not know *why* they think that the Rorkes Drift proposal is not what Darwin needs. This is surely a case of pot and kettle. The main Rorkes Drift petition is no more helpful as to the motivation of the signatories; we are not told why or in what way they would "support" the expansion proposal.

This criticism is addressed to some extent with the petition signatures obtained at Casuarina; the expanded introduction to the signature sheets states that the support of the signatories is said to arise from a belief that the proposal will answer a community requirement for a quality upmarket

nightclub in Darwin. I am uncomfortable with that wording in the circumstances. The promotional display with accompanying video playing on a television screen was undoubtedly an attraction to many passers-by. Those attracted to it were asked to agree that the great looking venue illustrated by the display will answer a community requirement. It seems to me that a large proportion of respondents would simply assume that there must be such a requirement. No *question* of such a requirement is posed or suggested. In my view the requirement is too strongly suggested as a “given”, in which case of course what was displayed would certainly look like a great “answer”.

Am I raising the bar unrealistically too high or comparatively unfairly? I keep reiterating that every application is different; in my view this particular application, of high profile and hotly contested, would have benefitted from some *viva voce* evidence from representatives of market segments, demographic groupings and the like. The bottom-line basis of my dissatisfaction with the petition is that it comprises the *only* evidence of the Applicant on needs and wishes in relation to what would be the largest late night trading venue in town. No signatory was called, nor any other independent witness to favour the proposal. In that situation the circumstances and effect of the petition cannot avoid coming under considered and nit-picking scrutiny.

The Applicant draws some comfort from the Jebb Holland Dimasi survey (Exhibit 84) conducted by the objectors. That survey leaves me somewhat confused as to any meaningful message being able to be spelled out for either side. Allowing that the neutral block of responses (neither opposed nor in favour, don't know/not sure) cannot really assist in discharging any onus of positive persuasion, I note that 41% of total respondents were in favour of the proposal when put to them as a general proposition, rising to 49% when identified as a proposal specifically for Rorkes Drift. This result was perhaps skewed by the notable enthusiasm of the under-25 group, although as Mr Silvester points out this might be seen as balanced to some extent by the under-representation of this group in the survey (about 11%). What then becomes confusing is the response to the question as to the need for more licensed venues in Darwin. Only 12% of all respondents believed that there were not enough licensed venues. Even in the under-25 group, only 26% thought there were not enough venues.

The consideration of this latter response leads me to the Philip McGrath patron survey. I was impressed by his evidence and his work (Exhibits 79-81). I admit to being quite surprised, even startled, at the revealed degree of under-utilisation of existing venues. Mr Silvester submits that this survey confirms the lack of success of the “commercial” objectors and the standout success of Rorkes Drift.

It is certainly the case that the survey demonstrates the popularity/success of Rorkes Drift. However, I take issue with Mr Silvester's sequitur that it “is also revealing for how well it shows how poorly most late night venues are serving the needs and wishes of the community”. Rorkes Drift was not a late night venue, and did not feature in the late night counts (Count 3). The degree of under-utilisation of existing late night venues is exclusive of any consideration of Rorkes Drift, and no comparison with the success of Rorkes Drift can be made in this time slot. The fact alone that the existing late night venues are doing poorly cannot be simply equated with poorly serving the community. It is a question of the available market. What Count 3 clearly demonstrates to me is an existing over-capacity in the present Darwin market for late night licensed entertainment. On Mr McGrath's figures (actual counts as against maximum capacities) the over-capacity is at something like an extraordinary 90%. While I concede that maximum figures for the purposes of fire emergency do not necessarily relate to realistic expectations or profitability, nevertheless there remains an inescapable conclusion that the present capacity of existing late-night venues is more than adequate for the market, by a large factor.

Mr Silvester in his written submissions takes Mr Temple's (Griffin's?) experience of the market for city nightclubs being about 3% of the population as producing a Darwin market of 3000 local people. He then adds (paragraph 126 of his submissions) *all* backpacker visitor numbers and half of *all* other visitor numbers as an extra target market for an expanded Rorkes Drift, to obtain a figure of another 1100 people per night averaged all year, (but presumably all absent from any Count 3 by Mr McGrath). I do not accept the logic of Mr Silvester's paragraph 126. We are insufficiently informed of the actuality and potentiality of visitor numbers as late nightclub patrons, much less as patrons of Rorkes Drift as against other venues, remembering too Mr Griffin's

complimentary view of the general standard of current Darwin venues. It was perhaps an opportunity to call some representative witnesses in that regard.

Even if the combination of Mr Silvester's paragraphs 125 and 126 is anywhere near a reasonable guess, which I cannot accept, there were many nights surveyed by Mr McGrath when more than 4000 people were in fact counted across all time slots during the evening. Admittedly some proportion would have featured in more than one of the counts, but all of Mr McGrath's numbers factor into a conclusion of notable under-utilisation of present capacity.

It is in the face of this evidence of current unused capacity that I find the petition evidence of needs and wishes to be insufficiently persuasive. Mr Firth referred me to a recent authority of the South Australian Supreme Court, *Japling Pty & Ors -v- Shenannigans One Pty Ltd (1998) 199 L.S.J.S. 469*, which refused to allow that a specialty theme or decor could in itself delineate a need. Per Debelle J at p.479 of that judgment:

A case proving a need based on providing premises with a different atmosphere from others in the locality is very ephemeral. The need for a hotel is not demonstrated that way. If that were so, the need for another hotel would be demonstrated whenever fashions or tastes might change. Thus, a shift in tastes or preferences from an Irish pub to some other kind of decor and operation would provide a need for a licence. Thus, while matters of taste and preference may have a bearing, the weight to be attached to them must often be slight."

I am attracted to the logic of that decision. Allowing that our legislation does not restrict me to a consideration of need only, but deals with "needs and wishes", I am of the view that "matters of taste and preference" in the Territory are likely to have a bearing of somewhat more weight than just "slight", but I do adopt the decision to the extent of agreeing that matters of taste and preference are not the major indicators of needs and wishes.

The McGrath survey demonstrates to me an unexpected fragility of the Central Darwin entertainment precinct that lends extra weight to the apprehensions of Mr Tully and Mr Griffin as to the likelihood of its degradation by the degree of further over-servicing represented by the Rorkes Drift application. After all, what was being proposed had the potential to absorb just about the entire late night (2.00am to 4.00am) market in central Darwin as it currently stands. This potential is not to be summarily dismissed as simply a matter for market forces and competition; the Commission has long been a supporter of the concept of a vibrant Mitchell Street precinct in particular, and has a keen interest in its continued success as an integral element in the attractions of the city. The McGrath survey underscores my alarm at the experienced predictions of Mr Griffin and with Mr Tully's dogged pessimism in relation to the problems to be expected in the management of the local industry. In isolation, Mr Tully's opinion that needs and wishes still need to catch up with the actuality of current availability in the CBD may not have stood out; the McGrath survey taken as a whole gives it weight.

I am able to give consideration to these aspects under sec. 32(1)(a) of the Liquor Act, or if necessary under sec. 32(1)(g), but I do so also in the context of reinforcing my view that in all the circumstances of this matter the Applicant needed to go into needs and wishes in more depth than has been the case.

This is not an indication which I should have or could have given before the conclusion of the hearing. The length and detail of the hearing precluded my taking such a position without the most careful deliberation. It has not been a matter for any summary decisions. In any event, several of my eventual grounds for declining the stage 3 application were in fact presaged to the Applicant, as I have pointed out.

In summary in relation to stage 3, given its potential community impact I am not satisfied as to either viability or needs and wishes, and in any event am not prepared to countenance with a present approval what I see as the temporal remoteness of its commencement as an operating venue. To the extent that any of my considerations fall outside or conflict with the specifics of sec. 32(1)(a) to (f) of the Act, then I indicate that I have relied on sec. 32(1)(g). If I am wrong in my view of the applicability of sec. 32, such that sec. 33 is the only vehicle for a variation of the Rorkes Drift

licence, then I indicate that I would have exercised my discretion under that section in conducting the same level of enquiry to reach the same conclusions as I have done, using sec. 32 as a guideline to the exercise of that discretion. To the extent that I have seemingly misapplied or ignored any rule of evidence, I indicate that I have relied on sec. 51(3)(d) of the Act.

There are two outstanding matters waiting on rulings.

Firstly, the status of Exhibits 82 and 83. My ruling is that they remain confidential exhibits. Their existence was only volunteered by Mr Tully in camera, and Mr Tully's agreement to their tender was on the limited basis of their remaining confidential. They were tendered as confidential by consent. In my view their confidentiality can now be removed from them only by consent.

Secondly, I make the specific finding that neither Vicdisc nor Transmedia had a reasonable excuse for failing to produce all documents subpoenaed on behalf of the Applicant during the hearing. The failure was of course a failure to produce the documents to the Commission for its assessment, as distinct from making the documentation available to the Applicant. In my view the claim of irrelevance fails. Both subpoenaed corporations were competitors of the applicant who had elected to become parties in the proceedings to attack, inter alia, the financial viability of the Applicant's proposal. Their own viability cannot be said to have not been relevant *at the time of the subpoena* to either the enquiry into their status in the proceedings under sec. 48(1A) or the enquiry into the likely success of the applicant in the same marketplace as the objectors.

I will shortly particularise that failure to the parties concerned, and report my finding to the Commission as a whole, whereafter I will be seeking to cause to be issued a notice to show cause why those parties' licences should not suffer suspension pursuant to sec. 66(1)(b) of the Act. In view of my finding, this process will not further involve the Applicant.

John Withnall
Presiding Member

26 July 2001