

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Diggers Den Restaurant
Licensee:	Arminio Niceforo
Licence Number:	80504951
Proceeding:	Complaint pursuant to Section 48(2) of the <i>Liquor Act</i> , conduct of the business at the licensed premises.
Complainant:	Licensing Inspectors Bell & Boyle
Heard Before:	Mr Peter Allen Mr John Withnall Mrs Shirley McKerrow
Date of Hearing:	7 August 2002
Date of Decision:	29 November 2002
Appearances:	Ms Diana Elliot for the Licensee Ms Cassandra Tys assisting the Commission

Early in this hearing the licensee's Counsel raised an objection to the semaphored intention of Counsel Assisting the Commission to adduce some "similar facts" evidence from several witnesses, and also to seek to tender a television advertisement featuring the licensed premises. Objection was also taken to the inclusion in the Commission's "hearing brief" of certain allegations in the Director's report as to other instances similar to those the subject of the complaint, and to the inclusion of several photographs and advertisements relating to the premises on other occasions.

The objection relied on the very narrowly stated basis of the two complaints, which referred to only the appearance of the premises on one particular evening. There was no generalised complaint as to the licensee's operational non-compliance with the "liquor without a meal" conditions.

The objection raised an important issue in relation to procedural fairness, and the Commission delivered a written ruling before the evidence proceeded further. As the ruling tied Counsel Assisting's hands in the broader context, and has affected the ultimate outcome of the hearing, we reproduce that ruling in full for the record:

The need has arisen for a ruling as to the nature of evidence that the Commission will receive in relation to the complaints before us.

What is clear is that the only complaints before us are the identical complaints of Inspectors Bell and Boyle alleging the breach of licence conditions on the night of 1 June 2002. These complaints themselves go no further than that, and cannot be broadened by way of the Director's report and opinions. If a complaint is to be broadened, it will need formal amendment, and an amended complaint, being a different complaint, would itself need to go through the Section 48 process and be clearly notified to the Licensee as being before the Commission on a given hearing day.

So we are dealing only with the allegations of breach of licence conditions on the night of 1 June 2002.

However, the Licensee's written response pursuant to the opportunity provided by Section 48(6)(a) admits one of the factual elements of the allegation of breach, that is, that

persons were standing and drinking to the extent that it “did become an issue later in the evening”.

This concession is made in a way suggesting that such an occurrence was an unusual event properly dealt with by the Licensee, such that the Licensee should not be seen to be in breach by reason of the situation as admitted. That is, the claim of unusual situation is put up by the Licensee as a defensive position against an adverse finding, and as such it is a position vulnerable to attack and evidence in rebuttal.

The Commission will therefore receive evidence on the issue of whether the admitted occurrence should be seen by the Commission to have been unusual or not.

This may include evidence of persons standing and drinking on other occasions. It will not include evidence of advertising by the restaurant or advertising in respect of events staged at the restaurant on other occasions unless such evidence should prima facie indicate or suggest the invitation or encouragement by the Licensee for patrons to take part in a situation wherein they may stand and drink.

Inasmuch as some evidence to be so admitted may seem susceptible to arguments against the admission of similar facts or propensity evidence, we point out that even though proceedings before the Commission have been held by the NT Supreme Court not to be proceedings in the nature of a prosecution, nevertheless even allowing the analogy we believe that the limited evidence of similar facts sought to be admitted would be admissible under several of the principles that currently apply to prosecutions: namely that evidence may be admitted to rebut a defensive position otherwise open to the person the subject of the complaint, or bearing upon the question whether the acts complained of were designed or permitted or accidental; that is, whether the Licensee was giving effect to a propensity or a pattern on his part rather than experiencing something unusual. (See *Pfennig v the Queen* (1995) 182 CLR 461.)

The foregoing ruling relates to the Commission’s consideration of whether the complaints as to the night of 1 June 2002 should be upheld. In the event that the Licensee should be found by the Commission to have been in breach, evidence at that stage of similar facts or consistency of pattern may well become relevant to penalty, depending of course on what submissions in mitigation might be put to the Commission in that event.

Inspectors Bell and Boyle then gave evidence only as to their observations on the night of 1 June 2002. They each described how on several different occasions that evening, at 6.30pm, 9.00pm and at 10.30pm, they had halted their vehicle across the highway from the licensed premises, and from that position made their observations without alighting from the car. In that operational judgment they were fortunate that the licensee acknowledged in his written response to notification of the complaints that the groups of persons observed by the complainants had in fact been consuming liquor; the inspectors were unable to testify as to what was being consumed.

At each of these times there were people standing around drinking in the separate bar section, much more so at the time of the 9.00pm observation. Of some fifty people

(per Mr Bell) or “more than twenty” (per Mr Boyle) in the centre section of the premises at 9.00pm a few were seated at tables there but the majority were standing around drinking and watching a TV screen. There were some people seated in the outdoor area at the front, but that area was empty at 10.30pm by which time the bar section was said to be “nowhere near as crowded” as it had been earlier.

Knowing that it was football grand final night in Katherine and noting a sign on the fence of the licensed premises proclaiming the licensee’s sponsorship of the ultimately victorious B-grade team, the inspectors were of the opinion that the premises had the appearance of a football club in a front bar, and was in breach of the “liquor without a meal” conditions requiring patrons to be seated at a table and the premises to have the appearance of a restaurant at all times.

In response, the licensee, Mr "Nino" Niceforo and his wife June described a busy evening on 1 June, and conceded that the issue of people refusing to be seated did develop as a control problem from about 10.30pm, leading to a responsible decision on Mr Niceforo's part at about 11.45pm to turn off the till, although licensed to 2.00am. From that time people began to move into the outside dining area and he closed the premises up at 12.15am.

Mr Niceforo claimed variously that 99% or (later in his evidence) 90% of his customers would sit and have a meal. The problem was said to occur with large groups comprising an element of first-time visitors who tend to treat the seating requirement as a joke. Mrs Niceforo said that when asked to sit down people would seem obliging at first but would ignore her soon after. They became "stroppy". The agitation became such that she eventually spoke to Nino (who had been cooking in the kitchen all night) about how to handle the problem. In the circumstances, a decision was reached to call "last drinks".

The licensee submits in effect that while it is conceded that the premises were in breach of the relevant licence condition when the problem developed on the night, no penalty should ensue inasmuch as what the inspectors saw in the way of people standing that night was not part of his operational design, not permitted conduct, and that he dealt with it responsibly by closing early despite it being so busy. The issue therefore becomes to what extent any evidence as to other occasions at Diggers Den tends to support or rebut Mr Niceforo's explanation of the breach.

Mr Greg Purvis confirmed that when he arrived at the premises on the evening of 1 June at about 11.30pm or midnight, the bar was shut and "twenty odd" people were drinking in the outside area, sitting on chairs and the edges of tables or standing around. He had also attended a work function there in November or December 2001, and "was only seated during basically dinner". But it was a private function that had booked the restaurant, all guests had a designated seat for dinner, and the non-seated drinking was in association with karaoke singing.

Ms Julie Kable had also attended the restaurant during the first week of December 2001, also as part of a function which had booked the entire restaurant. After dinner the whole group moved into the lounge area, where about two-thirds of the group were standing drinking. Nobody informed her that she had to sit down at that point.

Licensing Inspector Marc McKenzie gave evidence of having attended the premises in March 2001, at which time there were about forty-five persons in the bar area. About half of them were standing drinking. Some were playing pool while drinking beer. He warned Mr Niceforo that patrons must be seated, and Mr Niceforo said that he would "try". Mr McKenzie has attended the premises on other occasions (about four or five times in eighteen months), but has "*not observed the same problem*". Since being stationed in Darwin he has been contacted by Mr Niceforo on several occasions about obtaining temporary variations for specific functions, and the Chairman acknowledged to the hearing that he had approved an application for temporary variation of licence for the premises just the week before the hearing.

Other than the evidence of Mr McKenzie, the permitted "similar facts" evidence is devalued to some extent by being limited to special function bookings, gatherings in the bar area by persons who had actually partaken of a seated meal. It is certainly relevant, and indeed gives rise to a degree of suspicion, but is not of itself a sufficiently clear contradiction of Mr Niceforo's position in relation to his normal trading pattern with the "liquor without a meal" conditions. Further, Inspector McKenzie's evidence tends to actually support the plausibility of Mr Niceforo's stated position, as does the confirmation by Mr Purvis of the premises having closed on the night of 1 June 2002, as Mr Niceforo said, while about twenty patrons were still in attendance.

In relation to the specific complaints therefore, we are not persuaded on the evidence to reject the licensee's explanation, despite our suspicion. In the absence of any finding of disbelief, the explanation is sufficiently acceptable in itself to prevent the breach, as admitted, leading to the imposition of any penalty. We emphasise that we are dealing only with the explanation of the circumstances complained of *on the particular evening complained of*. Had the complaints been of broader ambit, then this enquiry would have been able to be more wide ranging.

As it is, the Commission has misgivings as to certain aspects of the operation of Diggers Den which have arisen from the evidence, albeit not comprising any element of the inspectors' complaint. Although the inspectors noted the pool table in their evidence in chief, when they came to be carefully cross-examined as to the specific grounds for their opinions as to the premises having the appearance of a front bar rather than a restaurant, their responses were limited to the majority of persons milling about drinking, making no attempt to take up a seated position. The pool table was not raised as an issue in this context.

The Commission however *does* see the pool table as an issue.

Ms Kable recalled persons playing pool with glasses at the table when she was there. Mrs Niceforo said that she does ask pool players at times to remove drinks from their hands, but conceded that perhaps pool players are not actually told that they are not to drink at the pool table, that it is a case of "they know we require it". She also said that:

- People do like to stand;
- People think having to sit is a bit of a joke;
- There are occasions when people have to be repeatedly asked to sit down.

Mr Niceforo for his part made it quite clear that there are problems with new patrons who are unaware of the licence conditions, and that such people can be "amazing, you have to keep reminding them of the licence conditions".

In the Commission's view the pool table is playing a large part in this misconception by newcomers as to what to expect from the venue. A pool table is a facility not traditionally consistent with the appearance of a restaurant or the concept of a restaurant liquor licence, and the frustration of some patrons upon discovering that restaurant conditions apply is surely not surprising. The pool table gives a wrong message, a misleading impression as to the nature of the liquor licence, and is an encouragement to stand around drinking in a manner more redolent of a tavern or club than a restaurant.

It is the Commission's view that the pool table does not keep faith with either the letter or the spirit of the "liquor without a meal" concession, and that the conditions of the licence should be varied by the removal of this concession such that the licence will revert to that of a normal restaurant. A warning as to the nature of the "liquor without a meal" concept was plainly sounded in the previous decision of the Commission on 28 February 2001.

We appreciate that the licensee has had no opportunity to address such an intention on the part of the Commission, given the narrow focus of the hearing on the specific complaints, and that natural justice requires that such an opportunity be given. Although s.49(4) of the *Liquor Act* empowers the Commission to vary licence conditions at the conclusion of a complaint hearing, it is acknowledged that such a power can only be fairly exercised if within the parameters of the issues raised and addressed in the proceedings. In this case, the issue of the pool table's ongoing incompatibility with a restaurant-like appearance for the premises was not ventilated at the hearing to any extent whereby any remedial consequence can fairly ensue without the licensee having an opportunity to show cause against it.

The Commission will therefore proceed to initiate the deletion of the liquor without a meal conditions by way of separate written notification under s.33 of the *Liquor Act*. The licensee may expect to receive such notice in due course. The s.33 process accords the licensee the right of a hearing into his licence conditions upon his receipt of a notice of intention to vary any licence conditions, and the Supreme Court of the Northern Territory in *Tennant Creek Trading Pty Ltd, Whytecross Pty Ltd, Charles Keith Hallett and Tennant Creek Hotel Pty Ltd v. the Liquor Commission of the Northern Territory of Australia and Julalikari Council Aboriginal Corporation, 1995 NTSC 50*, held that such a hearing in itself constitutes a licensee's full measure of natural justice and procedural fairness in relation to any variation of conditions unilaterally proposed by the Commission.

Peter R Allen
Chairman