

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Batchelor General Store
<b>Applicant Licensee:</b>	Dannah Pty Ltd
<b>Proposed Nominee:</b>	Mr Malcolm Kevin McGinn
<b>Hearing:</b>	Application for a liquor licence
<b>Heard Before:</b>	Mr Peter Allen (Chairman) Mr Paul Costigan Mr Craig Spencer
<b>Date of Hearing:</b>	21 & 22 October 2003 17, 18 & 19 November 2003
<b>Date of Decision:</b>	9 July 2004
<b>Appearances:</b>	Applicant: Mr Kelvin Currie Objectors: Mr Peter McNab for Maxwell Pope of the NT Police Myra Skinner Veronica Arbon Lila Wills Andrew Scarton Roslyn Jones Anthony Ottoway Robert Davis Sirpa Hopf

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## Background

1. This is an application for a liquor licence by Dannah Pty Ltd. Currently Dannah Pty Ltd is trading as Batchelor General Store, situated at 22 Tarkarri Street, Batchelor. The Directors of the company are Mr Malcolm Kevin McGinn and his wife Judith McGinn. The applicant proposes as its nominee Mr Malcolm Kevin McGinn.
2. As part of this application, it is proposed that the current premises used by Batchelor General Store (the Store) be licensed to allow for the sale of take-away liquor. The premises are occupied under a lease arrangement until February 2009, with a right of renewal.
3. The application was lodged on 29 May 2003 with Public Notices duly published on 18 June and 20 June 2003 in the NT News. This provided an opportunity for Objectors to lodge objections to the granting of the licence pursuant to section 47F of the *Liquor Act* relating to the amenity of the neighbourhood. In total, 12 objections were lodged.
4. Pursuant to section 471 (2) of the *Liquor Act*, Member Jill Huck dealt with the objections and in her decision dated 8 September 2003, found that there were no grounds for dismissing the objections and that a hearing was required to determine this application.
5. Apart from the first day, this matter was conducted at the Community Council Chambers in Batchelor with the proceedings recorded.

6. It should be pointed out that due to a technical issue that only became apparent at the transcription stage, the transcript is not able to be relied upon as a true and accurate record of the proceedings.
7. The submission of the Applicant's counsel in particular does make reference to the problems associated with the transcript and the ability to rely on it. Therefore in fairness to the parties, it should be noted that the Commission in arriving at its decision has predominately relied on its own records and the submissions of counsel rather than on the transcript. It is noted that counsel have in part relied on parts of the transcript to support their points of view. The Commission has taken such references as being a means of supporting its own notes or refreshing its memory rather than being taken as a reliance on the transcript.
8. This matter was strongly contested by the counsel representing the Applicant and NT Police who are to be commended for the manner in which they represented the interests of their respective clients during the hearing and in the submissions made.

## Rulings

9. Amendments to the *Liquor Act* that came into force on 24 January 2003 changed the objection process and those persons who could object to a liquor licence. This matter provided some interesting procedural issues as it was the first matter to deal with such a large number of Objectors under those January 2003 amendments. Consequently, it resulted in a number of issues that were addressed and dealt with after lengthy debate by counsel appearing in the matter.
10. Due to the importance of those issues in terms of other applications heard before the Commission, it is intended to indicate the decisions made.
11. The issues generally centred on what the Objectors could or could not do. The questions that arose directly or indirectly were:
  - 11.1 Was an Objector a party to the proceedings?
  - 11.2 Should the Objectors be heard before or after the Applicant?
  - 11.3 Could the Objectors examine the Applicant?
  - 11.4 Could the Objectors examine the Applicant's witnesses?
  - 11.5 Could the Objectors examine other Objectors?
  - 11.6 Could the Objectors call their own witnesses?
  - 11.7 Could the Objectors examine witnesses outside of the facts on which their objection relied?
  - 11.8 Could the Objectors address the Commission outside of the facts on which their objections relied?
  - 11.9 Were the Objectors entitled to be present for the whole hearing?
  - 11.10 Would this extend to hearing about the financial capacity of the Applicant?
12. In arriving at the decisions, the Commission considered various sections of the *Liquor Act*, in particular, section 51 of the *Liquor Act* which deals with Hearing Procedures. Subsection (3) (a), (c) and (d) states:
  - (a) *the procedure shall be within the discretion of the Commission;*
  - (c) *the Commission shall give all parties an opportunity to be heard;*

*(d) the Commission shall not be bound by the rules of evidence but may inform itself in such manner as it thinks fit.*

13. Subsection (5) of section 51 states:

*Subject to subsection (6), a hearing shall be conducted in public.*

14. Subsection (6) of section 51 states:

*If the Commission is of the opinion that the conduct of a hearing in public is likely to cause undue hardship to a person, it may direct that the hearing or part of a hearing be conducted in private.*

15. Subsection (8) of section 51 states:

*A party may be represented at a hearing by a legal practitioner, or by another person, who may examine witnesses and address the Commission on behalf of the person for whom he appears.*

16. Subsection (11) of section 51 states in part:

*In this section, party means – (b) a person who has made an objection or complaint under Part IV.*

17. With regard to Objectors, section 47H states:

*A person, organisation or group who or which objects to an application under section 47F may not, in the course of any determination, inquiry, review or hearing under this Act or the Northern Territory Licensing Commission Act in relation to the person's, organisation's or group's objection, rely on any facts other than the facts specified in the objection as the facts constituting the ground on which the objection is made.*

18. During the course of the matter, the following decisions were made either expressly or implied regarding the questions raised earlier. It should be noted that it is not intended to go into the full debate on each issue, but rather provide the essential reason for the decision.

#### **18.1 Was an Objector a party to the proceedings?**

Clearly section 51 (11) indicates they are and this is supported by the status incurred by virtue of section 47F.

#### **18.2 Should the Objectors be heard before or after the Applicant?**

This was considered to be a case of ensuring natural justice was afforded to the Applicant and the Objectors. It was considered that by allowing the Applicant to give their evidence first, the Objectors would be able to for the first time fully hear the details of the Applicant's application. It was considered that an Applicant in the face of known objections may re-consider various aspects of their application and addressed some of the concerns of the Objectors. It is quite possible that some Objectors in the light of such information may withdraw their objection in whole or part.

#### **18.3 Could the Objectors examine the Applicant?**

Having determined that the Objectors were a party to the proceeding, this answer focussed on section 51 (8) and the words "A party may..." with the emphasis being on the word may.

The Applicant, as an obvious party to the proceedings, was being represented by a legal representative namely Mr Currie. It is also quite clear that in the case of the

Northern Territory Police Assistant Commission Maxwell Pope who was an Objector, that he elected to be represented by a legal practitioner who in this case was Mr McNab. In both cases, the subsection clearly indicates that M Currie and Mr McNab may examine witnesses and address the Commission.

The Commission determined that the central issue to be considered with regard to section 51(8) was representation. The question was whether a party who for whatever reason decided not to be represented by a legal practitioner or another person, could they examine witnesses and address the Commission.

The Commission decided that this subsection implied a right for a party to examine witnesses and address the Commission. However, if they so choose not to represent themselves as did the Applicant and the Assistant Police Commissioner, then the person who did so on their behalf would be allowed to act in the same manner as the party themselves.

The Commission agreed with Police counsel that examine should be taken to include cross-examine where appropriate.

#### **18.4 Could the Objectors examine the Applicant's witnesses?**

Based on the fact they were a party, this was a logical extension and therefore determined in the affirmative.

#### **18.5 Could the Objectors examine other Objectors?**

As the Objectors may also become a witness at some point during the course of the matter, if an Objector considered it warranted, they would be entitled to examine another Objector who was giving evidence.

#### **18.6 Could the Objectors call their own witnesses?**

Just as any other party such as the Applicant has the right to call witnesses or produce evidence to prove their case, it was considered that the Objectors as a party could call witnesses or produce evidence to prove their case.

However, there was a limitation. By virtue of section 47H, they would be limited to evidence that related to the facts that they relied on as the grounds of their objection and any limitations that may have been determined by the Member selected under section 47I (2).

#### **18.7 Could the Objectors examine witnesses outside of the facts on which their objection relied?**

The Commission decided that section 47H does place a restriction on Objectors and generally would restrict Objectors to the facts on which they rely for the grounds of their objection, though at its discretion it may allow some questions outside if it considered it warranted and assists the Commission in determine the mandatory issues it must consider such as needs and wishes.

#### **18.8 Could the Objectors address the Commission outside of the facts on which their objections relied?**

This has some interesting considerations. The Commission has a mandatory requirement to consider a range of issues of which needs and wishes form part.

Whilst the evidence of Objectors and their examination would tend to be limited to the grounds of their objections, it would be reasonable for the Commission at its discretion to hear a party on issues outside their grounds if it would assist the Commission deal with its mandatory obligations to consider certain issues such as needs and wishes.

**18.9 Were the Objectors entitled to be present for the whole hearing?**

Yes, subject to the provisions of section 51 (5) and (6).

**18.10 Would this extend to hearing about the financial capacity of the Applicant?**

This is an area that the Commission considers with considerable sensitivity and concern for the privacy of individuals. While this specific question was not directly raised in this matter, it was considered and addressed by the Commission when dealing with the question of which party gave evidence first.

The ruling of the Commission was that it would hear evidence from the Applicant about the application in general and managerial capacity. However, if it wished to hear additional information on financial capacity it would do so at a later time after the main issues of the Objectors had been dealt with. It is worth noting a point made by Mr McNab. He suggested that the grounds of amenity may, depending on the circumstances, extend to include financial considerations that the Police may wish to raise and is a factor that the Commission must consider. Whilst it was agreed not to be an issue in this matter, it is an interesting area as to whether amenity would extend that far. While it was not necessary to make a decision on this matter, the Commission believes that this issue would need to be dealt with on a case by case basis.

**Background**

19. In determining whether to grant this applicant a licence, the Commission is required by virtue of section 32 to consider the following legislated factors:

- *the location of the licensed premises;*
- *the location and conditions of any licensed premises in the vicinity of the premises which are the subject of an application for a licence;*
- *the nature of any business associated with the licence applied for that it is proposed to conduct on the premises in respect of which the application is made;*
- *the needs and wishes of the community;*
- *the financial and managerial capacity of the applicant for a licence to conduct any business associated with the licence applied for; and*
- *any other matter that the Commission thinks fit.*

20. In arriving at its determination, the Commission must carefully consider and weigh up those factors in terms of the totality of the application.

21. The Commission is very mindful that this application relates to a small town. Batchelor consists of about 600 -700 residents just over an hour from Darwin. The Commission is also well aware its decision is likely to have a greater impact in a small town like Batchelor than a larger town such as Darwin or Palmerston.

22. In the context of this matter, it is important to take notice that Batchelor is about 35 minutes from Coolalinga and 45 minutes from Palmerston where there are significant shopping opportunities.

23. Batchelor already has a number of licensed premises such as a Hotel, restaurants and caravan parks. The Hotel has a take-away licence while a caravan park has restricted take - away to tourists. The operator of the Hotel would be a direct competitor in the town if the licence is granted.

24. In setting the scene, the Store is located in approximately the centre of the town with a large area of parks, gardens and grassed areas surrounding it. The Store is located about mid-way between the Hotel and the Institute's residential area. Across the road from the Hotel is an area of bush used by those that wish to drink in the open rather than in the Hotel. The total distance between the Hotel and the Institute's residential area would appear to be less than a kilometre.
25. The basic premise on which an application is to be determined is that the applicant must satisfy the Commission, on the balance of probabilities, of those legislated factors mentioned, in order to be granted a licence.

## Evidence

26. From the evidence, the Commission is aware this issue has caused some division within the town.
27. The Commission heard evidence of a range of competing interests and the concerns that were either implied or expressed during the hearings and or in the submissions of counsel.
28. Throughout the hearing and since, the Commission found itself waxing and waning as to whether or not to grant a licence. The Commission is quite concerned about the impact of its decision on the town. Due to this, rather than review the evidence witness by witness, it is intended to review the evidence in terms of the main competing interests and concerns that arose. In doing so, the Commission wishes to take a broader perspective of the issue rather than some of the more petty issues that may be given enhanced importance on a narrower perspective.
29. Much of the evidence to the Commission was subjective rather than objective or quantitative.
30. At the outset, it would be fair to say that the current policy of Batchelor Institute in prohibiting the consumption of liquor within the grounds of the Institute significantly impacts on this matter. The Commission totally understands the reasons for the Institute to have that policy and their right to do so. The Commission does not have any power to alter or change such a policy nor should it.
31. However, the evidence from witnesses representing both the Applicant and Objectors did tend to suggest that such a policy was one of pushing the problem elsewhere within the town. The perception was that this occurred without any real concern or contemplation of the impact of such policy has on other individuals and the community as a whole.
32. The fact that many of the staff, including senior management, do not live in the town but commute daily from Darwin or elsewhere outside of the town, reinforced that perception.
33. The reason the Institute has such a prominence in this matter is that it is to some extent a significant reason for the town's ongoing existence. It is the largest employer, is responsible for a large influx of students on a regular basis and has a central impact on the life of the town since many industries have ceased or reduced their operations.
34. Further to that, many of the students come to the town without any means of transport and do not have any family or friends living in the town. Consequently, the Institute's policy compels those students that wish to have a drink to either drink at the Hotel or consume their take-away liquor in a location other than where they are for the time being living. Walking is the means by which they get there. Objectors aware of this, are concerned that the Store if granted a licence would be the closest venue and therefore make the adjacent park areas an attractive location to drink.
35. The Applicants counsel in their submission raised a point as to the logic and validity of linking the past with the future in relation to the former Rum Jungle Recreation Club (the Club). On the other hand, it is not unreasonable for there to be some apprehension on the

part of persons in the town that similar problems may re-occur if the licence was to be granted. Persons representing the Applicant also did indicate some concern in this area.

36. Evidence about the Club was that when it previously operated persons from the Club would consume take-away liquor in the parks in the centre of town across the road from the Club after the closure of the club. This resulted in allegations of range of anti-social, behavioural and community problems, including breaching the 2 kilometre law. Objectors concerns were that the Store, which is located next to where the Club previously operated, will result in the similar problems once again occurring.
37. In fairness to the Applicant, two particular points need to be made. Firstly, they indicated a willingness to not sell liquor after 6.00pm so as to discourage the previous behaviour. This was a reduction in the hours initially advertised and applied for. Secondly, the issues with the Club largely revolved around the management of the premises and persons attending it. There is not such suggestion in terms of the Applicant and the Nominee. In fact, there is widespread praise for the management of the Store which is considerable comfort to the Commission in addressing the managerial capacity factor.
38. Since the closure of the Club, the only take-away outlet in the town has been the Rum Jungle Motor Inn (the Hotel). The Hotel is some 500 metres away, on the edge of the town. Whilst persons have taken-away liquor and consumed it across the road from the Hotel, it is on the outskirts of town and the townspeople are not directly affected. They see that a being much more preferable than the option of drinking in the centre of the town.
39. The issue of the 500 metres did take on some proportions of absurdity with regard to the Store having a licence. Evidence was heard that the drinkers could walk the 500 metres to the current drinking location opposite the Hotel rather than across the road to the park. However, other evidence was heard that it was too far to ride a bicycle the extra 500 metres and was the reason why the person drove in their vehicle. An effort was made to then link this to issue to drink driving in the area. The Commission does not intend to comment the relative merits of the 500 metres other than to acknowledge the reasonable apprehension mentioned above that people may drink their take-away liquor in the parks surrounding the Store if it was granted a licence.
40. The 500 metre issue related to convenience which was one of the central arguments on the part of the Applicant's witnesses were they wanted convenience, competition, price and choice. None of these are unreasonable.
41. However, it was with some surprise that even if the licence was granted, witnesses for the Applicant indicated that they would most probably not alter their current practice of doing buy-ups when they went to Coolalinga, Palmerston or Darwin. It is in some way, as much a lifestyle issue as a financial one. It is an opportunity for persons to get out of town for a while.
42. The Store was seen as more of a convenience rather than a necessity except for the daily items like milk and papers. It was used for the ad hoc purchases rather than for their main shopping. It was even acknowledged that the Store prices had dropped and were not unreasonable. The Commission noted this during the inspection of the premises.
43. There was no uniformity as to whether the prices of liquor from the Hotel were unreasonable. Some evidence indicated it was, while other evidence indicated that it was not that unreasonable considering it was not necessary to drive to Coolalinga, Palmerston or Darwin to get it. Based on the external prices at the Hotel, the prices were comparable with those in Darwin and Palmerston.
44. The argument of the Applicant is that another outlet in the town would stimulate competition and lower prices to the benefit of the town's residents. Even the Licensee of the Hotel who would be a direct competitor, accepted that there was sufficient trade to justify another take-way licensee in the town. Whether another take-away outlet would lead to increased competition and lower prices is a matter of speculation.

45. Some of the evidence questioned why the town should not have the choice like many other towns throughout the Territory. It was a sign of it growing up, maturity.
46. Consistent with that line was the point made strongly to the Commission from witnesses on both sides that the students attending the Institute are adults, not children and should be treated as such by the Institute.
47. The Commission also heard evidence about the problems associated with persons attending the Hotel as justification for the Store to be licensed. The problem is that if required to attend the Hotel to buy their liquor, they are tempted to go into the bar for a drink and or use the Pokie Machines there. The Commission is aware of the layout of the Hotel. As such, it is a conscious decision of patrons to either go into the take-away area or the bar area. It would be reasonable that patrons also be treated as adults.
48. The petition was an issue that generated considerable argument between the Applicant and Police counsels. One concern was that not all of it was handed in initially and was only presented after the commencement of the hearing. To a lesser degree there was a change of format once in circulation. The Commission's attitude to the petition is that based on the population for the town, it represents a reasonable number of residents and other persons in favour of the application. It is not taken as being exhaustive of all those in favour. In the same vein, 12 objectors were taken as being a reasonable number of persons not in favour of the application. Again it is not considered exhaustive.
49. From the Commission's viewpoint, a petition is an aid in assessing the needs and wishes for the licence. However, it is highly unlikely that an application such as this would be granted solely on the basis of a petition. A petition is taken to be a sample with many limitations in terms of its quantitative merits. To have greater standing, it would require significantly more supporting evidence.
50. Like a number of other issues raised during the hearing, the Tidy Town Awards is an example of how different perspectives can provide an alternative interpretation. Batchelor won awards when the drinkers were drinking in the town centre during the days the Club was operating. On face, it is inconsistent with the perception of it being an issue and an overstatement of the issue. However, evidence was heard of how the town would be advised when the judges were coming to the town to inspect it, so big efforts were made to clean it up in the days leading up to the inspection.
51. The role and impact of tourists was one which was never really clarified. The Nominee's evidence did try to move the focus from servicing tourists to a more balanced situation. It was noted the petition contained many who resided outside of the town, but came from Darwin and or its suburbs. During the times when the Club traded, its licence was restricted to members and guests. The Club was not there to service the tourists. Tourists have purchased their liquor from the Hotel or the caravan park.
52. Comment needs to be made about the police statistics that were presented. No criticism is intended nor expected to be taken of the efforts by Sergeant O'Brien to provide some information to the Commission. In fact the efforts are commended. The concern with the statistics is with the source data. The concern is in terms of validity and reliability in being able to draw any conclusions from it as to cause and effect. This was a point that the Applicant's counsel correctly raised. Due to those concerns, the statistical information provided was not taken as evidence in its own right but rather as corroboration of evidence given by the various police officers.
53. There were a number of other issues touched on by various witnesses be they for the Applicant or Objectors that the Commission have noted. In isolation, it would not be possible to apply any weighting of significance to them without additional evidence. Even in consolidation, they have not swayed the Commission in one direction or the other, but have contributed as a part of the overall decision in assessing the impact of the decision on the town. Some of the examples are:

- 8-12% of residents have drinking problems
- Lack of resources in the town to address alcohol issues
- Concerns about the socio-economic status of the town
- Exit from post office / bank agency via Store

## Decision

54. Throughout the hearings and subsequent to their completion, the Commission found in its endeavours of balancing the competing concerns and interests to be swaying both for and against the granting of the licence.
55. One legislative factor that was consistently agreed to by both sides was the managerial capacity of the Applicant and Nominee Mr McGinn. This aspect was unchallenged and heavily weighed in favour of the Applicant.
56. The Commission found that witnesses on both sides did not give strong clear arguments for their respective sides and or against the evidence of the opposite side. Evidence of witnesses was at times consistent, at other times contradictory of others. Overall there was a lack of objective, quantitative and or qualitative evidence.
57. As indicated previously, in order for the liquor licence to be granted, the onus is on the Applicant to demonstrate to the Commission on the balance of probabilities that they have satisfied the various legislative factors the Commission is required to consider.
58. In *Briginshaw v Briginshaw and Another* [1938] HCA 34:
- “The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue.”
59. The seriousness or importance of this issue relates to the impact the granting of a licence will have on a town such as Batchelor.
60. In *Briginshaw*, it was also stated:
- “.the petitioner carries the onus of persuading a judge to make up his mind in his favour. If he does not succeed in so persuading a judge, he fails in his petition and matter is at an end.”
61. In this matter, after careful and considerable contemplation of the issues, the Commission has found itself not swayed in favour nor swayed against the Applicant. Based on the evidence adduced during this hearing, and bearing in mind that the onus of proof is on the Applicant to sway the Commission in its favour, the Commission has not been sufficiently swayed in order that it is able to grant a liquor licence to the Applicant for the Batchelor General Store at this time.
62. In fairness to the Applicant, if the Objectors in this matter were subjected to the reverse onus of proof to stop the granting of a licence, they would have likewise not swayed the Commission so as to stop a licence being issued on the evidence adduced.