

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	Liquorland Mitchell St Darwin
<b>Date of Hearing:</b>	22 and 23 October 2001
<b>Date of Decision:</b>	12 November 2001
<b>Proceeding:</b>	Application for new off-premises licence
<b>Applicant:</b>	Liquorland (Australia) Pty Ltd
<b>Nominee:</b>	Mr Philip Dowling
<b>Heard Before:</b>	Mr Peter Allen (Chairman) Mr John Withnall Ms Shirley McKerrow
<b>Appearances:</b>	Mr Peter Barr, for the Applicant Mr Sam McGrath, for Redco Investments P/L

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Liquorland (Australia) Pty Ltd seeks a liquor licence "in principle" to operate a take-away liquor outlet as part of a new Coles supermarket within a proposed development at the corner of Mitchell and Knuckey Streets. Originally to be called the Mitchell Plaza, it is now to be known as the Mitchell Centre. A new police centre will take up the larger part of the Knuckey Street frontage; the Coles store with proposed Liquorland outlet will be sited at the end of the centre that adjoins the existing Transit Centre complex in Mitchell Street.

There were fifteen formal objections to the application, six being from tenants of the Darwin Transit Centre, one from Redco Investments Pty Ltd the owner of the Transit Centre complex and other nearby properties in Mitchell Street, one from the NT Police and seven from operators of existing licensed premises within the CBD. Of this latter group, only the Top End Hotel operates a competing take-away bottleshop, and section 48(1A) of the Liquor Act (proscribing so-called "commercial" objections) was not raised as an issue by the applicant.

At a preliminary hearing the police withdrew their objection on the basis that if the application should be successful the Commission would implement by way of appropriate licence conditions the written agreement of the applicant to limit the sale of cask wine to containers of two litres or less.

Consequently the police did not participate in the substantive hearing.

Also neither appearing nor represented at the hearing were all objectors other than Redco Investments. The Commission was informed by Counsel for Redco, Mr McGrath, that although he did not represent the other objectors he was able to say that they wished to have their objections included in the Commission's consideration of the application. Counsel for Liquorland, Mr Barr, agreed that this should be the case, and it accords with the Commission's published views on the proper approach to formal objectors who do not attend the hearing of the application. We do not believe that in this situation the objections can be seen to have ceased to exist or should be dealt with in any way analogous to being struck out. We should proceed on the assumption that the objectors remain opposed to the application. The written objections remain on foot, and remain a hurdle for the applicant, albeit often an increasingly lesser one as the hearing progresses and relevant evidence of the applicant is uncontested by or on behalf of the absent objectors.

It follows from that approach that an applicant's case will still need to address such objections.

The major grounds of objection can be broadly summarised as apprehension of increased local problems with anti-social behaviour and the lack of community need for another liquor outlet in a CBD already adequately serviced in that respect.

The only evidence as to the proposed new outlet's potential to cause an increase in problematic behavioural patterns in the area was given by the three persons who testified on behalf of Redco Investments Pty Ltd: Mr Robert Parker is a residential property investor and Chair of a group called the Esplanade Action Committee, Mr Ian Spooner operates a private security firm that provides a patrol service in Mitchell Street, and Mr Christopher Foy is the manager of Redco's property interests in Mitchell Street. While the apprehensions of these witnesses are undoubtedly genuine, their evidence in itself did not establish to the Commission's satisfaction any real likelihood of the proposed new outlet contributing to a worsening of the level of anti-social behaviour that already exists in their respective areas of concern.

This is in no way a denial of recognition of the level of behavioural problems as observed by these witnesses, but their evidence fell well short of persuading the Commission of any real probability of their extrapolations becoming fact, in all the circumstances. More was required to successfully veto the application on this ground, for example from professionals in an appropriate field of social or behavioural science.

The other common ground of objection to the application was the allegation of sufficiency of existing take-away outlets in the city and a lack of community need for any more. Given the Commission's ready acceptance of the financial and managerial capacity of the Liquorland organisation as a wholly owned subsidiary of Coles Myer, the issue of needs and wishes of the community remained the application's major hurdle.

In any event, where a ground of objection is based on any of the specific considerations in section 32(1) of the Liquor Act to which the Commission "shall have regard", an applicant for a licence will be expected to address such aspect as a matter of course; the applicant bears an onus to cover the matters set out in section 32(1)(a) to (e) of the Act to the over-all satisfaction of the Commission, regardless of the existence of formal objection.

Certainly the Commission has a large degree of permitted flexibility in its requirements for such satisfaction: *Lariat Enterprises and Liquorland (Australia) Pty Ltd v Joondanna Investments Pty Ltd and the Liquor Commission of the Northern Territory* (1995) NTSC 38, but we think that in the present case section 32(1)(d) - needs and wishes of the community - must always have loomed large for the applicant. Almost all the objections claim that there are already sufficient take-away outlets in the Darwin CBD, most including by name the Vintage Cellars bottleshop already operated by Liquorland in Cavenagh Street and the nearby Woolworths outlet in Knuckey Street. Further, in several published decisions in recent times the Commission has made reference to the liquor licensing climate in Darwin and the likelihood of the issue of licence proliferation presenting an increasingly more difficult hurdle for applicants seeking to add to the number of licensed premises in the town.

Admittedly the comparative weighting of the requirements of sec. 32(1)(e) of the Act will vary with the type and circumstances of each application, as will the evidentiary burden (*Lariat Enterprises, ibid*). Licence category, application profile, precinct, location, scale, licence density, target market, number and nature of objections and potential community impact are all matters which will play a part in the balancing exercise. But the Commission has conspicuously flagged the likelihood that it will find itself giving even heavier weighting to the needs and wishes aspect of its statutory considerations.

Apart from providing the Commission with a copy of the Darwin City Council publication "Darwin - A Complete Perspective", almost the only other evidence adduced by Liquorland addressing the issue of community needs and wishes was a survey by Dr Mark Fenton entitled "Liquor Purchasing Patterns and Intentions To Purchase Take Away Liquor At a Proposed Liquor Store To Be Located At The Mitchell Plaza, Mitchell Street, Darwin", dated 21 October 01. The report's introduction describes it as identifying "the take away liquor purchasing patterns and requirements of a sample of 350 residents in a household telephone survey and their intentions to purchase take away liquor at a proposed liquor store located at the Mitchell Plaza, Mitchell Street Darwin". It was a random

survey of household telephone numbers with postcodes of 0800 and 0820 in the addresses in the White Pages.

The survey report was presented by its author Dr Fenton, who explained in evidence that the sample size of 350 is by way of being an optimal minimum number for such a survey; while sample accuracy increases as the sample size increases, 350 was said to be the sample size after which the increase in accuracy drops away, remaining at plus or minus 5% for several multiples of 350.

However, it is with a sense of *deja vu* that the Commission records its disquiet with the survey group of 350 having been filtered from a larger but unquantified group of contacts: only those interviews were included where the respondent had purchased take away liquor in the Northern Territory within the last twelve months. In its decision on an application by Liquorland in relation to a site at Fairway Waters in September 2000, the Commission accepted in principle the argument that to screen out people who do not purchase alcohol is to measure the opinions of only those who do, thus biasing the sample as representative of the needs and wishes of the community as a whole. Once again all those in the survey sample were pre-qualified as purchasers of take away liquor.

Dr Fenton was unable to say what percentage of total respondents was represented by the 350 purchasers whose responses have formed the basis of the report.

All told, *more than twenty* take-away outlets were named as sources of liquor purchases by the 350 people comprising the survey group, a significant spread when it is noted that two thirds of the group reside in inner Darwin (Stuart Park, Fannie Bay, Parap, Larrakeyah, and the CBD). Perhaps not surprisingly, Woolworths outlets (almost 40%) and existing Liquorland outlets (almost 30%) have had the lion's share of that business in the last twelve months, although it should be noted that the relevant question allowed multiple responses.

The applicant made no real attempt to delineate any market other than to concede that it would hope to capture the intended patronage indicated by the survey. Other than that there was a brief reference to the increase in the population of several inner suburbs in the year 1999/2000, although this must be already factored into the representational veracity which Dr Fenton claims for the random survey, and we heard from the development's architect as to his faith in Darwin's ongoing vitality.

The problem the Commission has with the survey, apart from the initial screening process, is that while it demonstrates a level of convenience for respondents in the sample group, it tells us nothing of the *preferences* of those respondents. We see for instance that 49% of 60.6% (of the sample group, which is itself an unknown percentage of all the people contacted) admit to intending to use the new facility more than once a month, but we do not know whether they think there was any need for it or have any real wish for it, Table 17 of the survey notwithstanding. We do not know how the level of their intended use of the new outlet compares to their present arrangements. We do not know what change to their existing liquor purchasing patterns is represented by their intended use of the proposed new facility. To take an extreme but obvious example, if a respondent is currently buying a slab of beer every day from his neighbourhood supermarket, an intention to buy a slab from the new Liquorland once a month adds very little weight to an argument in favour of the additional outlet.

A respondent acknowledging convenience is not necessarily indicating a preference.

Mr Barr touched on the point in his written submissions in the context of needs and wishes. He referred the Commission to the leading case of *Toohey v. Taylor* (1983) 1NSWLR 743 in the New South Wales Court of Appeal, and in summarising that judgment he highlighted the *comparative* convenience of a proposed outlet *as opposed to relevant alternatives* being a material factor in making a factual judgment whether there is a reasonable demand or expectation in the community for the new outlet.

The survey is of insufficient assistance in this regard. It does not enable the Commission to assess the convenience of the new outlet for the survey group as against the perceived convenience of their present arrangements. It does not fulfil the promise in its introduction to identify the

*requirements* of the sample group. Despite Dr Fenton's protestations to the contrary, such a survey is considered by the Commission to be more an exercise in market research, certainly very relevant to Liquorland's assessment of commercial viability but of limited assistance in the Commission's assessment of community "demand or expectation" in relation to the proposed new outlet.

Given our view of the survey, the application would obviously have benefitted from some evidence from representatives of target market segments, various demographic groupings and the like. The Commission has not been able to feel any actual persuasion as to community need or wish for the proposed outlet, and unfortunately is therefore left with insufficient evidence on which to be able to approve the application.

Support for the Mitchell Centre as a *development* is undoubted, but the scale or ambition of a development cannot in itself be relied on to smooth a path to a favourable determination of the suitability of an individual tenancy as a liquor outlet. The centre will be going ahead regardless of the outcome of this hearing, and we are assured that the Coles tenancy is not conditional on the success of the application for a new liquor licence.

The effect of this decision should be clearly understood. The Commission has not decided that there should be no new take-away liquor facility as part of the new Coles store in Mitchell Street; we have simply declined to accede to the application before us, on the evidence that was before us. We are left unpersuaded, rather than being positively persuaded against the basis of the application.

Peter R Allen  
Chairman

12 November 2009