

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Madison on Mitchell
Date of Hearing:	21-22 August 2002
Date of Decision:	20 September 2002
Date of these Reasons:	4 October 2002
Proceedings:	Sec 48 Complaint
Complainant:	Mr Mitch McNamee
Heard Before:	Mrs Mary Ridsdale (Presiding)
Appearances:	Mr John Reeves QC, for the Licensee Mr Lex Silvester, for the Complainant Mr Tom Anderson, Counsel assisting the Commission

Handed down 20 September 2002 after a Hearing on the 21st and 22nd August 2002.

This Hearing was not in the usual form of a Hearing in the Commission as all parties agreed that a Statement of Agreed Facts would be handed down by Mr John Reeves QC, Counsel for the Licensees of Spartacus Pty Ltd for Madison on Mitchell and submissions would be made by Counsel for the parties including Mr Tom Anderson, Counsel Assisting the Commission and Mr Lex Silvester, Counsel for the Complainant, Mr Mitch McNamee and Mr John Reeves QC, Counsel for the Licensee Company.

Mr Reeves QC advised that he wished to make submissions in relation to a prior matter that the variations made pursuant to Section 33(1) of the *Liquor Act* by Mr Allen, Chairman of the Commission were invalid. Submissions were provided by Mr Tom Anderson at page 11 of the transcript, and Mr Lex Silvester at page 5 onwards. At page 19 of the transcript Mr Reeves submits that the Chairman of the Commission failed to comply with Section 33(1) in that he did not give a "notice in writing" of the variation of the conditions to the Licensee. He acknowledges that Mr Peter Allen sent to the Licensee a licence dated 23 May 2002 varying the conditions. Mr Reeves also submits that while Section 33(1) requires a notice to be given to the Licensee in writing no reference was made in the notice by Mr Allen of Section 33(2) and the Licensee was not advised of his rights under the new licence, that is the Chairman was obliged to advise the Licensee of his rights under that section that if he did not agree with the variation, that he could request from the Chairman a Hearing within 28 days of the variation. The Commission as set out in the Decision was not obliged to do so as Section 33(2) is plain and unambiguous.

He submits that because of failure to notify the licensee of this then the Licensee was not aware that he had a right to apply for a Hearing and this of course was not appropriate. In fact the Licensee did not apply for a Hearing at all and certainly not within the prescribed 28 days being the period for the application for a Hearing pursuant to Section 31(2).

Section 33(3) sets out the procedure that had an application been made the Chairman must then notify the Licensee of a Hearing date.

In considering these submissions of Mr Reeves, the Commission did not accept the submission that the variation was invalid and indeed ruled that the licence was a "Notice in Writing" as required by Section 33(1).

Mr Reeves then submitted that the Licensee immediately advised Mr Allen that the variation was unfair and would be extremely difficult to comply with. He did this by way of various letters (about

five in all) which were sent by the Licensee to Mr Allen protesting the variation set out in the new licence. Mr Reeves' submission on these matters was that these letters of protest could be regarded as a request for a Hearing pursuant to Section 33(2), however the Commission did not accept that submission.

The Commission then considered this and concluded that there was no suggestion in any of the letters or in any conversations with Mr Allen that the Licensee wanted a Hearing. The Licensee also admitted that they did not take legal advice upon receipt of the new licence and it was not brought to their attention that they could apply for a Hearing until Mr Reeves was briefed a week prior to the commencement of the Hearing. It was admitted by the Directors of the Licensee Company that indeed they had solicitors acting for them in various licensing matters but did not request advice in relation to the new licence.

On consideration of all these matters the Commission decided that Mr Allen had complied with Section 33(1) and was not obliged to advise the Licensee re Section 32(2) at the time of the variation and a request for a Hearing was the responsibility of the Licensee. No request for a Hearing was made to him. The Directors of the Licensee company were well aware of the variation in the licence and indeed made various requests for Mr Allen to change the variation back to the former condition in the licence of "Blush" for which an application went to the Commission to substitute the licence of Blush under which "Blush" had traded before the acquisition by the present Licensee, Spartacus Pty Ltd. The Commission then decided that the variation by Mr Allen was indeed in compliance with Section 33 of the *Liquor Act* and that the variation was a valid one, and the date of the variation was pursuant to Section 33(5)(a)(1), 20 June 2002.

Mr Reeves' further submissions then related to the resolution of the complaints that were before the Director of Licensing by Licensing Inspector, Leanne Hulm, and Deputy Director, Mr Malcolm Richardson and the meeting called by David Rice in an endeavour to resolve the matter of the complaints by mediation. Attending at the meeting were Mr Michael Coleman, Mr Gary Coleman, Mr Justin Coleman and Ms Sue Porter, Solicitor for the Licensee, as well as the Deputy Director and the Inspector.

Mr Rice advised the meeting that although the complaints had been made by the two Licensing Inspectors they had not been activated and could now be withdrawn if a resolution was reached with all the parties.

Mr Reeves had tendered the bundle of documents including the statements of the Licensees, statement of Ms Porter and referred to the statements of the Inspectors included in the Hearing Brief at folios 44 and Mr Malcolm Richardson at folio 30.

Mr Reeves then submitted that should the Commission find that the variation made by Mr Allen was a valid one, then taking into consideration the admissions by both Mr Michael Coleman and Mr Justin Coleman and their undertaking to the Director that they acknowledge that the variation had been made as a condition of their licence and must therefore be complied with, and indeed was complied with after the signing of the undertakings on 30 July 2002 and no further breaches have occurred since that date. The complaints of the Inspectors were withdrawn. His submission was that no penalty should be imposed on the Licensee. Again the Commission considered this very carefully. However, taking into consideration the admissions by the Directors of the Licensee Company and their admissions that the variation was a valid one and those breaches had been serious breaches of the new condition and had been committed on various occasions in the month of July. In other words they were serial breaches and continued even after complaints had been made in relation to the breaches by both Licensing Inspectors and Mr Mitch McNamee of Rorke's Drift. However, the Commission then took into consideration the good record of the Licensee Company and the Directors, their freedom from any breaches of any of their licences in the Territory over the years, that any penalty imposed should be suspended.

The Commission also considered the pending applications in relation to the premises and the pending Hearing with the decision postponed until resolution of the complaints in relation to the premises that such suspension should be a short one in order to enable the substitution of the licence to be resolved as soon as possible. However no consideration was given to these hearings

by this Commission and were only noted by the members. The penalty was then decided as set out in paragraphs 9 and 11 of the Decision as handed down.

The Commission then decided a two day penalty would be appropriate and that such penalty should be suspended for a period of six months from the date of the decision and would naturally, of course, disappear should there be no further breaches of the licence.

The Commission now comes to consideration of the complaint made by Mr McNamee and to the evidence relied upon by Mr Silvester in his submissions in relation to this matter.

It is noted also Mr Reeves had submissions in relation to "double jeopardy" but we have not taken these into consideration because of the continuing breaches up until 31st July 2002. The Commission has considered the seriousness of the breaches of the condition of the Licence of Spartacus Pty Ltd and note that they were continuing even after a complaint was received from Mr McNamee and investigation by the Director commenced after the complaints were investigated by Ms Leanne Hulm and Mr Malcolm Richardson, both Inspectors and a video tape tendered in evidence was made at the premises of Madison on Mitchell but in view of the seriousness of the breaches the Commission considered that these matters should be treated separately.

We note that Mr Silvester relies on the admissions by Mr Michael Coleman and Mr Justin Coleman in relation to the new condition and the investigation by the two inspectors at Folios 44 and 30 of the Hearing Brief. The Commission notes the submissions of Mr Reeves for the Licensee in relation to the complaint by Mr McNamee. He is alleging this complaint is in fact a commercial complaint and should not be treated as one in the public interest. Mr Silvester's submission is that Licensees are allowed to make objections and make complaints even though they are in substance commercial objectors because the Commission has ruled that their evidence or matters that they can put to the Commission may be of some use and that is the present practice of the Commission. Mr Silvester also submits the law should be changed so that there is no stigma attached to being a commercial objector or complainant. He also referred to other matters that are before another panel of the Commission and this is not taken into account by this Commission. He submits that it is appropriate that other Licensees, indeed any member of the public should ensure that the Commission carries out its powers and functions under the Act and in accordance with the Act and its proper interpretation of that Act.

The Commission has considered Section 48 of the *Liquor Act* and noted that Section 48(2) says "a person may make a complaint regarding any matter arising out of the conduct of the business at licensed premises or the conduct of the Licensee in relation to the business of the Licensee or that a Licensee is not a fit and proper person to hold a licence". The Director is then to investigate that complaint and forward it to the Commission, and the Commission then, if it makes a Decision that the matter is not of a frivolous, irrelevant or malicious nature proceed with the Hearing of the complaint.

The Commission accepts the fact that this complaint was made by a Licensee but Mr Silvester's submission is that it is a matter of public interest that breaches of conditions by Licensees are a matter of concern for all people albeit whether they are Licensees or not. The Commission accepts this view particularly where the premises are in a tourist area and all licensees should be accountable.

The Commission accepts the complaint and finds the breaches of the conditions proven and proceeds to impose penalties pursuant to those imposed under paragraphs 9, 11 and 12 in the Decision, that is, that the same penalties are applied in relation to Mr McNamee's complaint including the suspension of the penalties and to be served concurrently with the penalties set out in relation to the breaches by the Licensee as admitted.

We refer to the submission made by Mr Anderson, Mr Silvester and Mr Reeves in relation to Part 4 of the *Licensing Commission Act* in relation to this matter.

In view of those submissions and Commission's decision relating to Section 33 of the *Liquor Act* and that no application has been made under Part 4 of the *Licensing Commission Act* then the Commission does not make a decision in relation to that matter.

The Commission commends the Licensee Company's Directors in relation to their co-operation in the mediation process suggested by the Director of Licensing Commission resulting in admissions and reduced Hearing time.

The Commission appreciates the assistance of Counsel appearing at the Hearing and their submissions made.

Mary Ridsdale
Chairperson