

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Mac's Liquor Stuart Park
Licensee:	Woolworths (SA) Pty Ltd
Licence Number:	81000242
Nominee:	Andrew Pitkin
Proceeding:	Application for Substitution of Premises
Heard Before:	Mr Peter Allen (Chairman) Mr John Withnall (Legal Member) Ms Shirley McKerrow
Date of Hearing:	30 July 2002-02 August 2002
Date of Decision:	19 December 2002
Appearances:	Mr G Berner, for the applicant licensee Mr P McNab, for NT Police Ms J Presbury, for Redco Investments Pty Ltd Mr G Weller, for AHA NT Branch Sr H Little, for St Mary's Primary School Pr P Stephenson, for Jesus Christ the Bread of Life Mr A Southwell, for Top End Hotel Mr A Clementson, for Darwin City Promotions Mr M Scott, for Mirambeena Resort

The application

1. The applicant ("Woolworths") seeks to substitute premises within its new Cavenagh Street complex for the operation of the licence, which trades as Mac's Liquor at Stuart Park. Woolworths acquired that licence in mid 2001; before then, the business had traded for decades at that location as "Jeany's".
2. Jeany's/Mac's Liquor Stuart Park is a free-standing bottleshop, currently operating at a loss. Woolworths is prepared to operate the licence as a free-standing bottleshop contiguous to its Cavenagh Street store, but its preference is for it to become at the new location, what is commonly referred to as a store licence, with direct access between the general supermarket area and the bottleshop.
3. The Commission caused the application to be advertised, and conducted a hearing of the application in July and August 2002. Written submissions were received during September 2002 on behalf of those parties who had legal representation.

The considerations

4. Two unavoidable considerations in substitution applications are prescribed by s.46A(2) of the Liquor Act; these are the issues of close proximity of the two premises and the absence of any adverse effect of the substitution on the public.
5. It has been argued before us recently that s.46A does not present an exhaustive list of matters, which may be taken into account by the Commission in substitution applications.

This may well be so, but whatever the ambit of our considerations we cannot avoid having to be satisfied in the end result that the two premises are in close proximity and that the substitution will not adversely affect the public. S.46A stipulates in effect a minimum pass-mark in that regard.

6. Our considerations are of course subject to matters of interpretive law and, we would add, common sense and logic.
7. A reading of the decision of the High Court in *O'Sullivan -v- Farrer*, (1989) 168 CLR 210 confirms that in the face of the silence of s.46A as to what considerations should be taken into account by the Commission in determining its satisfaction on the two s.46A(2) requirements, we have a general discretion in that regard confined only by the scope and purposes of the legislation and the context of the subject matter to be decided.
8. We see the s.46A requirements as involving issues of both law and discretion.

Close proximity.

9. As Mr McNab pointed out, Parliament chose not to use the concept of "vicinity" in s.46A as it has done elsewhere in the Liquor Act (see ss. 32 and 77). "Close proximity" must therefore be taken to have been intended to mean something different from being in the vicinity.
10. As a matter of logic, if proximity means nearness, as seems generally agreed (and see Macquarie Dictionary's simple description to this effect: "nearness in space, time or relation"), then close proximity has to mean something closer than just near. Close proximity has to mean very near. Indeed, the Oxford dictionaries define "close" as itself meaning very near, or immediate proximity, hence close proximity - if not a tautology - can be taken to mean very very near.
11. We agree with Mr Berner that it does not necessarily mean immediately adjoining or next door, but nevertheless in our view it has to be taken to mean very near.
12. The proposed new location for the licence is 1.4 kilometres by road from the existing location. Whether or not that degree of geographical separation allows the two locations to be viewed as being very near depends of course on the perspective of the viewing platform, the theatre of view. The two locations are certainly very near on a world view. Even from a Territory-wide perspective, they could probably be accepted as being in close proximity. However, in terms of urban liquor licence regulation in Darwin, that narrowed perspective does not readily encompass a shift of licence over such a distance, especially where involving a change of both neighbourhood and style of business.
13. We do not disagree with Mr Berner that the concept should not be regarded only in terms of geographical distance. In the Commission's view it can be seen as a composite or relational concept, which in appropriate circumstances can also involve considerations of proximity and similarity in relation to precincts or neighbourhoods, trading and shopping environments, business profiles, customer bases and operational identities.
14. The last-mentioned aspect can be a factor in cases otherwise perceivable as borderline. It must surely be a factor in the consideration of close proximity, when the geographical distance is of itself arguably beyond a strict interpretation of that expression, that the licence at the new location can clearly be recognised as the same licence in operation. The Commission's decisions in the substitution of premises for Ming Court and the Waratah Sports Club were mentioned as examples of the Commission's flexibility in terms of acceptable geographical distance, but an essential consideration in those approvals was that the licensed businesses were to retain their recognisable identities and character in their move to new premises. The Waratah Sports Club for example continued to trade in the same name in the same Darwin sporting environment exactly as it had before, albeit at another (and nearest available) oval. (Also, we should perhaps note in passing, with a

noteworthy reduction in public impact, given the residential development that was hemming in its premises at the old oval).

15. The shift of licence under application does not involve the same continuity of identity and character to perhaps assist in a more accommodating approach to the considerable distance between the old and new premises. The Stuart Park licence's identity is to disappear in a much higher profiled and significantly larger trading operation. Mr Borysiuk expects to do three or four times the business at the new location, catering to a different and much larger market, in a different shopping environment in a precinct or area which even Woolworths' Area Manager, Mr Robert Kidman, conceded was "totally different" from the light industrial area around the Jeany's site. Town Planner Mr Mark Meldrum, called by Woolworths to give expert evidence, was of the opinion that although a liquor store was a consent use in both zonings, in terms of his profession he would not regard Jeany's and Woolworths Cavenagh Street as being in close proximity.
16. A further consideration is felt by the Commission to be that for a portaged licence to be able to be seen to remain in close proximity to its old site it should not at its new site be able to raise any new perception or issue as to alteration of licence densities. What is proposed here is for the licence to now be operated only a few hundred metres from another Mac's Liquor bottleshop in another Woolworths store. Mr Borysiuk in cross-examination acknowledged the public perception of the substitution as a "massive" increase in the liquor supply "in the heart of Darwin".
17. The applicant touches on this aspect when it submits that "if the subject premises are in close proximity the proposed relocation will not increase the number of licences in the subject area". In our view that simply highlights the converse: if the relocation in itself does raise a perception of proliferation within a "subject area" then the licence can be seen as having shifted subject areas. Whatever view is taken of the extent of the relevant area for purposes of consideration of the locations or spread of similar types of liquor licence, where a substitution of premises can raise perceptions of a new juxtaposition of similar licences, the indications are that the move can be perceived as having taken the licence out of close proximity to its old site where such juxtaposition was not a perception.
18. Woolworths is also obviously conscious of this aspect when it submits that its new store is "some considerable distance down Smith and Cavenagh Streets" from its Knuckey Street store. We do not agree with that statement, but we note it especially in contrast with Woolworths' description of the 1.4 kilometres between the new store and Jeany's as "a very short distance by contemporary standards". They cannot have it both ways. If the Cavenagh Street store to Jeany's distance is "very short", then the Cavenagh Street store and the Knuckey Street store must be regarded as cheek by jowl. If the Cavenagh Street store and Knuckey Street store are "some considerable distance" apart, then the distance to Jeany's must be more than some considerable distance.
19. In the end result the Commission remains discomforted by the distance between the premises in all the relational circumstances, and has to recognise such discomfort as a lack of actual persuasion on its part to accept the two sites as being in close proximity.

Adverse effect on the public

20. In the light of the foregoing decision it may not be strictly necessary to address this second requirement, but we do so briefly, without necessarily identifying and addressing all the relevant evidence, to demonstrate our lack of persuasion on this issue also.
21. In the context of adverse effect on the public we were referred by Mr Berner to an observation in the majority judgment in *O'Sullivan v- Farrer* that:

General public amenity and convenience are matters which fall within ordinary conceptions of the public interest, particularly when regard is being had to the regulation of the sale and supply of liquor to members of the public.

22. "Public interest" is statutory terminology in the Liquor Act (NSW), which was under consideration in that case.
23. The Woolworths' submission of 30 September 2002 (the second submission) claims that the evidence "is compelling, if not overwhelming" that general public amenity and convenience would be better served by the substitution of licensed premises. The majority of primary questions in the JHD survey (Exhibit 11) are directed to amenity and convenience, assessing the shopping behaviour of the public in relation to a liquor licence for the Cavanagh Street store. In the submission of 11 September 2002 (the first submission) it is put to the Commission that the positive advantages in this regard should be taken into account such that the assessment of adverse effect should be on balance; the views of a minority or sub-set of the public should not prevail over the favourable response of the majority.
24. We do not accept that this is the approach intended by s. 46A of the Liquor Act. Although the expression "adversely affect the public interest" is to be found in many NT enactments, as Mr Berner has researched, and the bare expression "public interest" referred to in many more, it is patently not the expression chosen by Parliament for s.46A. We note with approval the following extract from the second submission by the applicant, referring to the concept of "public interest":

If Parliament had wanted to introduce such a concept it would have. It did not. Clearly, Parliament did not wish to encumber the substitution process with considerations of the "public interest" and the discretionary value judgments that such an expression necessarily imports. The process is not meant to be that difficult, nor should it be.

25. Up to that point, we agree completely. The submission then goes on:

The issue is more simple, direct and prosaic: will the people in the area of the proposed substitution be adversely affected?

26. Not quite, in our view. There is the subtle difference between an assessment of whether people will be adversely affected and having to be satisfied that they will not be, as s.46A requires.
27. The Commission recently emphasised that distinction in its decision dated 2 October 2002 on an application (heard well before the Woolworths hearing) for the removal of the Petty Sessions licence to Madisons. The Commission in refusing that application had this to say as to the nature of the satisfaction required by s.46A(2)(b):

The statute requires the Commission to be satisfied that the substitution will not adversely affect the public. In its reading of the section the Commission has taken particular note of the words "will not" and noted the choice of the legislature to cast the sub-section in the future tense.

Although it is in our view allowable to read the sub-section in the context of the reasonably foreseeable future we nevertheless regard the level of satisfaction required of the Commission to be towards the higher end of the scale. The Commission is in accord with Counsel Assisting's comments; "If the Commission is of the view that the substitution may adversely affect the public, it cannot then be satisfied that the substitution will not adversely affect the public".

28. We adhere to that position. We reject the notion of a process of weighing positive and negative views and responses to arrive at satisfaction one way or the other on balance. The mandatory satisfaction required is such as to render the process an assessment of whether on the balance of probability the substitution may adversely affect the public.
29. It follows that it is not necessary for the "defeat" of an application for an adverse effect to have to be demonstrated as "both definite and not merely incidental" (the first submission, page 25).

30. We have no problem with the broader definition of public in this situation as including persons who “enter the neighbourhood area for the purpose of.....purchasing a bottle of liquor” (Hunter -v- Reynke (1986) 6 NSWLR 576), but we believe that it is a confusion of the s.46A(2)(b) process to see the views of all segments of that public as carrying equal weight in the Commission’s deliberations, with the majority view being determinative. What is at work is the specific statutory provision, not some sort of one-view-one-vote referendum-like process. It is not an examination of community needs and wishes. A perceived potential for adverse impact on persons residing or working in the area of the new location is not necessarily to be outweighed by sheer numbers of happier liquor shoppers.
31. Woolworths’ second submission would seem to acknowledge that the proper consideration for the Commission is of adverse effect on those people “in the area of the substitution”.
32. However, having found that the substitution would involve a change of precinct and neighbourhood, we consider that there are actually two “areas of substitution”. One relevant section of the public that has been largely overlooked is that of the dispossessed Jeany’s regulars, together with any section of the public that may be affected by their alternative liquor-purchasing arrangements. The consideration of any adverse effect on the public in the neighbourhood from which the licence is to be removed should surely be relevant. Interestingly, that is a mandatory consideration laid down in one of the sections of the Liquor Act (NSW) which was under consideration by the Court in O’Sullivan -v- Farrer, where a licence was to change neighbourhoods. In the present case we are left to speculate.
33. We are also left to speculate as to the views of those who currently use Woolworths Cavenagh Street for their food shopping. Such group comprised 28% of the JHD survey group, but their answers to the rest of the survey questions cannot be distinguished as members of that group. We appreciate that only 4% of total survey correspondents answered that the substitution of the licensed premises would adversely affect them personally, but the value of both that question and the response seems somewhat confused by over a third of all survey correspondents then agreeing that the substitution would lead to an increase in public drunkenness and other anti-social behaviour in the Darwin CBD. That proportion holds good for those sections of survey correspondents who could qualify as the public in the areas of the substitution. That is, quite a significant proportion of relevant survey correspondents agreed with the apprehensions of the majority of the objectors.
34. Having also carefully considered the evidence as to the apprehensions of all participating objectors, and the extent and detail of the applicant’s responses, we are of the view that on the balance of probability the substitution may adversely affect the public. We are not satisfied that it will not. The wording of s.46A(2)(b) is such that if we are left unsatisfied as to the negative, the application must fail.

Conclusion

35. Given the applicant’s aim of providing a quality liquor outlet in the CBD at which the larger cheap wine casks notably would not be available, it needs to be made quite clear that this decision goes no further than to find that in all the circumstances the restraints and requirements of s.46A(2) of the Liquor Act prevent the Stuart Park licence from being utilised for the purpose.

Peter R Allen
Chairman

19 December 2002