

# Northern Territory Licensing Commission

## Procedural Rulings

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| <b>Applicant:</b>        | LADDMAC Pty Ltd   |
| <b>Premises:</b>         | Driver Supermarket  |
| <b>Proceeding:</b>       | Application for the grant of a liquor licence   |
| <b>Heard Before:</b>     | Mr John Withnall (presiding)<br>Ms Jill Huck<br>Mr Craig Spencer  |
| <b>Date of Hearing:</b>  | 23, 24 March 2004   |
| <b>Date of Decision:</b> | Rulings <i>ex tempore</i> on 24 March 2004<br>Reasons published 02 April 2004   |
| <b>Appearances:</b>      | Mr Peter McQueen, for the Applicant<br>Mr Peter McNab, for Assistant Commissioner<br>Mark Payne for NT Police<br>Mr John Hine, objector in person<br>Mrs Christine Hine, objector in person |

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1. At the outset of this hearing several issues were raised by Mr McNab, on behalf of the police objector, as requiring rulings in order to establish a procedural regimen for the subsequent conduct of the hearing. Indeed, the issues of the parameters of the police objection and the objector's rights of cross examination under the current legislation are of such fundamental importance in the broader context of the Commission's hearing processes in general that we could not disagree with Mr McNab when he submitted that the Commission had no choice but to "bite the bullet" on those issues at this time.
2. Such rulings were delivered *ex tempore* on the afternoon of 23<sup>rd</sup> March 2004.
3. On the morning of 24<sup>th</sup> March 2004 Mr McQueen for the applicant sought an adjournment of the hearing to allow his client, disaffected by some aspects of those rulings, an opportunity to seek further legal advice as to his possible remedies in the situation. Mr McNab did not oppose such an adjournment, and noted that had the rulings gone against him it may well have been his own client who would have been seeking an adjournment on a similar basis.
4. The matter has therefore been adjourned to a mention date to be fixed, with liberty for the parties to apply at any time.
5. In the meantime, the applicant will need a hard copy of the rulings on which he will be seeking advice, and those rulings are now recorded hereunder. As was presaged to the parties, in the interests of transparency of reasoning the rulings are now set out considerably more expansively than as were delivered *ex tempore* at the hearing.

### Corporate knowledge brought to a second hearing

6. The present applicant had previously applied for a liquor licence for the same premises, but had withdrawn the application after several days of evidence had been taken. Two of the three Commission members hearing this second application had been members of the hearing panel for the previous hearing.

7. Mr McNab queried the Commission's position on relevant corporate knowledge taken into the current hearing.
8. The Commission is of course a body corporate, established in its current form by s.4 of the *Northern Territory Licensing Commission Act*. By virtue of s.51(2A) of the *Liquor Act*, the three-person hearing panel actually constitutes the Commission at the hearing rather than being any sort of committee or recommending subset of the broader Commission. Mr McNab's query therefore highlights a pertinent issue.
9. The members of a Commission hearing panel do not normally commence any hearing in any sort of vacuum in relation to knowledge of the matter at hand, nor need they do so (see e.g. *Tennant Creek Trading Pty Ltd, Whyteross 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* in its dealing with claims of apprehended bias). Members of a hearing panel will normally have been exposed to the particular matter in its corporate progress to the hearing stage, and will normally have at least identified if not given some preliminary consideration to those issues and matters which have given rise to the need for the hearing. Also, a determinative factor in a member's qualification for membership of the Commission may have been experience in a field or specialty (such as health, for example) which may give rise to a background of prior knowledge in relation to particular issues in a hearing.
10. What the Commission understands the law to require of Commission members in that situation is that as members of a hearing panel they remain open-minded and impartially receptive to such evidence as may be presented at the hearing.
11. The Commission has thus always been of the view that the evidentiary starting point for each hearing must be, in effect, a clean slate. Whatever goes on to the slate does so in full transparency within the hearing. Generally speaking, each hearing is discrete. A matter or issue which has gone to hearing is determined by the Commission on the factual evidence received only at or by way of that hearing.
12. To Mr McNab's observation that two of the three panel members have already heard so much of the evidence, the Commission's response is to express its confidence in the discipline of its members in fully appreciating that whatever they may have heard in whatever context is not "evidence" in *this* hearing until rendered so.

## **Exhibits and transcript of evidence in previous hearing**

13. Mr McNab then sought a ruling on his tendering of the exhibits and transcript of evidence from the previous hearing.
14. The Commission was not prepared to see this as a single issue or to receive this evidence "holus bolus" in this way. There will surely be different arguments as to relevance and expediency in relation to different exhibits and to the evidence of different witnesses. An exhibit comprising a street map, for example, could be expected to be a lot less contentious than a police sergeant's statement of opinion on the application of callout statistics. As another example, the argument for the relevance of evidence of persons who were objectors at that time but who have not objected to the current application is not immediately apparent, and could surely be expected to vary from previous witness to previous witness.
15. Our foregoing reference to the need to establish the expediency of receiving previous evidence is to emphasise the onus of a party seeking to tender it to establish a persuasive basis for departing from the "best evidence" rule. While the Commission is not bound by the rules of evidence, it has to be fair to all parties, and does not lightly receive challenged evidence where there is or should be better evidence available. We try to strike a balance between not sliding into too "judicial" a model while recognising that the release from being bound by the rules of evidence is not a fiat to ignore them. We accept that the Commission is not excused from an obligation to ensure that our findings and conclusions rest upon

material having “rational probative force” (*Pochi v. Minister for Immigration and Ethnic Affairs, (1979) 36 FLR 482 at 492-3*).

16. Mr McNab will therefore need to seek to tender previous evidence on an issue-by-issue basis as he shapes his case within the progression of the hearing. Each individual tender will be dealt with on its respective merits within the context of the hearing at that point.
17. It is to be noted, however, that the evidence taken in the previous hearing has not been transcribed. The audio recording exists, and may be accessed by Mr McNab at the Commission’s office by appointment, but there is a current impasse as to who should bear the cost of such transcription.
18. The Commission accepts that the previous hearing had a public life which was not rendered void or non-existent by the eventual withdrawal of the application, and that the parties are entitled to access the record of that proceeding. However, such access will need to be at cost to the party, as transcription is outsourced to an external service at cost to the Commission. The previous proceeding terminated upon the voluntary withdrawal of the application after several days hearing. The Commission’s processes have thus played no part in the duplication of the application after such time as has since elapsed, and the Commission is not prepared at this point to bear the expense of transcribing the previous evidence. Those requiring it will need to indicate a willingness to bear or share the cost of it, as the case may be, or be a lot more persuasive as to the Commission bearing that cost.

### **Allegation of lack of financial and managerial capacity as an element in adverse effect on neighbourhood amenity**

19. The amendments in 2003 to Part IV of the *Liquor Act* restrict all objections, even that of an objecting police officer, to the single ground “that the grant of the licence may or will adversely affect the amenity of the neighbourhood where the premises the subject of the application are or will be located” (s.47F(2) of the *Act*).
20. The written objection of Assistant Commissioner Mark Payne dated 24 December 2003 unequivocally alleges adverse effect on the local amenity:
 

“the present amenity will be adversely affected by and by exposure to alcohol related anti-social behaviour related to the supply of liquor from Driver Supermarket. Such behaviour includes littering, trespass, incidents of excessive noise, road and pedestrian safety, domestic violence, fighting and public order disturbances. Both the Police and members of the neighbourhood base these facts on recorded experience and observations of the relevant neighbourhood”.
21. It then goes on to identify lack of financial and managerial capacity and experience as a root cause of the apprehension of adverse effect on the neighbourhood amenity:
 

“5. (a) Further, the lack of financial and managerial capacity and experience of the applicants, in addition to the exposure to the debts, financial practices and de facto control of the McKay group of businesses and companies (as revealed in previous hearings and otherwise) will further adversely affect the amenity.

(b) The amenity matters averted to above will be exacerbated by such financial and managerial concerns which will have an impact on socially responsible management, in particular, the need to employ adequately trained staff, and to ensure liquor cash flow is truly incidental to the operations of the supermarket”.
22. Mr McNab sought a ruling as to whether he will be permitted in his case to develop the allegation of a link between adverse effect on neighbourhood amenity and shortcomings in financial and managerial capacity.
23. A careful reading of the Decision dated 6 February 2004 of Mr Peter Allen (as the member appointed by the Chairperson under s.47I(2) to determine whether the Commission must

conduct a hearing in relation to the objections) assures us that such member determined not to rule on this issue. Certainly we cannot but agree with that Decision when it reaffirms that Mr Payne is limited in his objection “to the sole ground contained at s.47F(2)”. The issue is whether that ground can encompass a case for lack of financial and managerial capacity as adversely affecting amenity.

24. In our view it can, so long as the claim has been made in the written objection and so does not fall foul of s.47H. That section would otherwise operate to prevent the objector at the hearing from expanding the factual basis of the objection beyond that alleged in the objection. In the present case the objection did specify financial and managerial incapacity as a factual basis for the objector’s apprehension of the licence adversely affecting the neighbourhood.
25. While issues of financial and managerial capacity can in themselves no longer ground an objection to an application for a liquor licence, we accept that an applicant’s limited financial resources or managerial incompetence *could* in a given case adversely affect the environs of proposed licensed premises. For example, inadequacies in staff numbers or training could result in regular failure to deny liquor service to intoxicated itinerants; financial strictures might see the building and immediate surrounds deteriorate into an eyesore. Both situations would undeniably constitute an adverse effect on the amenity of the neighbourhood.
26. Because such a cause-and-effect connection is both possible and, in this case, specifically alleged in the objection as a basis for concern for the neighbourhood amenity, in our view the objector is at liberty at the hearing to present a case which attempts to establish the factual basis of the connection as alleged.
27. It follows that the objector in that situation is entitled to be privy to the applicant’s evidence as to its financial and managerial capacity. It is emphasised that this will not necessarily be the police position in any other similar hearing. Variables in type of application, location of premises, relevant neighbourhood and dexterity in drafting a complying objection will all play their part on a case by case basis.
28. Mr McNab then sought a ruling as to the extent of his client’s right of cross-examination.

### **Extent of Objector’s right of cross-examination**

29. Mr McNab labelled his submission in this regard as the “portal” argument. The essentials of the argument are as follows.
30. A legal representative of a “party” is still empowered by s.51 to “examine witnesses”, and “party” is still defined as including an objector under Part IV.
31. Although the Part IV gateway for a person objecting to a liquor licence application to become a party in a hearing has been diminished, nevertheless the argument goes that once an objector has been passed through the gateway (per s.47I(3)(c)(ii)) he becomes as much a “party” as he was before the amendments to Part IV, and although Mr McNab concedes that his client will be restricted in his own evidence to the grounds of the objection he submits that he remains entitled to examine “in the normal way” the witnesses of the applicant and of other objectors in the proceeding.
32. Until the Part IV amendments, the Commission’s approach to an objector’s right of cross-examination was generally as was affirmed in a hearing into an application for a liquor licence for *Biggles Highway Inn* on 27 October 1999. That ruling (in relevant part) reads as follows:

There seems little doubt that the evidence which the objector may adduce is to be limited to relevance to the objection. The question arises, however, as to whether the objector’s right of cross-examination of the Applicant’s witnesses is to be similarly constrained.

The right to cross-examine is fundamental and granted to each and every party to a proceeding. Section 51(11)(b) of the *Liquor Act* establishes the objector as a party in these proceedings.

The Commission rules that an objector may cross-examine the witnesses of the Applicant on the whole of their evidence, but may only *introduce* matters in cross-examination that arise directly from the objection. This is subject to the discretion of the Commission to disallow questions which stray from *any* relevance to the application at hand or which are unduly harassing, intimidating, offensive, oppressive, repetitive or protracted.

33. We need to remind ourselves that at that time there was no restriction on the range of grounds for objection, and what could be called the ambit objection was in common use.
34. The legislative changes giving rise to Mr McNab's request for a renewed ruling in this regard have been twofold:
  - Objectors are now restricted to a single ground of objection, and
  - Objectors "in the course of any determination, inquiry, review or hearing" may not "rely on any facts other than the facts specified in the objection as the facts constituting the ground on which the objection is made" (s.47H).
35. The first mentioned of those amendments does not impact on the Commission's above ruling. The references in the ruling to the objection simply become references to the more limited type of objection, but as we see it the shrinkage of the range of possible objections does not in itself mandate any changes to the existing rule.
36. On the other hand, the new restriction on what may be relied on by an objector in the course of a hearing requires careful consideration.
37. What are we to make of s.47H? What is meant by "rely" in that section? A digest of dictionaries tells us that to rely means to put faith in, to depend on. Its use by legal authorities and by the legal profession appearing before those authorities is not dissimilar; a party said to be relying on a fact or submission is expressing faith in it as a determinative element or plank in a favourable outcome. A limitation on factual matters which can be "relied" on does not on the face of it prevent an objector from commenting on perceived insufficiencies in the applicant's evidence. We certainly accept that s.47H reaffirms that an objector is not to be permitted to adduce evidence beyond the facts specified as constituting the grounds on which the objection is based, because the only purpose in adducing factual evidence can be to rely on it in one's case, but any effect of the section beyond that delimitation is equivocal.
38. At any hearing "in relation to" an objection, which is to say at any hearing in which the merits of an objection are considered by the Commission, the objector is surely entitled to be fully informed as to the detail of the licensed operation being applied for, to be given a fulsome picture of exactly what it is that he is objecting to. That being so, it is surely his right, in all fairness, to be able to ask questions on aspects on which he may not be clear, or the accuracy or credibility of which he may wish to test. The Commission does not see s.47H as preventing that expository process.
39. It seems to us therefore that an objector whose objection has become the subject of a hearing retains a fundamental right to cross-examine on all such evidence of the applicant to which the objector is exposed in the hearing. S.47H read with s.51 would not appear to prevent a person with the status of a party in such a proceeding from exploring the applicant's evidence as to just what is proposed for the neighbourhood or from testing the credibility of the applicant's evidence in that regard, or generally from seeking information in this way that may inform his position in the proceeding.

40. There will no doubt be need for determinations by the Commission on relevance and confidentiality issues on a hearing by hearing basis. This will depend on the specifics of the application and objection in the given case. For instance, an objector who has not linked adverse effect on neighbourhood amenity back to an allegation of financial incapacity could normally expect a ruling of confidentiality as to the applicant's financial details. So too, at times there may well be special matters dealt with under s.32(1)(g) that will also be ruled to be of no possible relevance to a particular party's position in the proceeding.
41. In the present case however, Mr McQueen having confirmed that there is no issue concerning the objector's exposure to the applicant's evidence on community needs and wishes, the police objector has liberty to cross-examine on *all* aspects of the evidence of the applicant Laddmac Pty Ltd. In no circumstances though will the objector be permitted to *introduce* evidence in cross-examination that does not relate to the stated basis of the grounds for objection.
42. It should be noted that further amendments to the Liquor Act are awaiting commencement. Among other changes are a limited expansion of available grounds of objection and the replacement of the present s.32 considerations with a mandatory consideration of new "objects of the Act". It remains to be seen what elements of the foregoing rulings in their general application may be overtaken by these imminent legislative changes.

John Withnall  
Presiding Member

Reasons published 02 April 2004