

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Heartbreak Hotel Malandai Store
Licence Numbers:	81201932 80903761
Licensees:	Kabe Junction Pty Ltd Malandari Partnership
Nominees:	Ms Kerry Ralph Mr Frazer Baker
Proceedings:	Request for Hearing Pursuant to Section 33(2) of the <i>Liquor Act</i> – Objection to Variation of Licence Conditions
Heard Before:	Mr Richard O’Sullivan (Chairman) Mr Philip Timney (Legal Member) Mr Wally Grimshaw
Appearances:	Ms Julianne Lennard for Heartbreak Hotel Mr Brian Kimmings for Malandari Store Mr David Harvey, Elder and Resident, Yanyula Camp Sergeant Gert Johnsson for Northern Territory Police Mr Mark Wood for the Director of Licensing Mr Martin Clive-Griffin for the Director of Licensing
Date of Hearing:	6 April 2011

Background

- 1) On 27 October 2010 a full meeting of the Licensing Commission considered a report submitted by the Director of Licensing, outlining problems being experienced in Borroloola through the excessive consumption of alcohol. The report advised that residents of Borroloola Township and nearby communities were purchasing harmful quantities of takeaway alcohol from the nearest outlets, namely Heartbreak Hotel, a licensed premises approximately 120 kilometres to the west of Borroloola Township and Malandari Store, within the Township of Borroloola.
- 2) The report advised that a community input based draft Borroloola Alcohol Management Plan (“AMP”) contained alcohol supply reduction strategies inclusive of:
 - Introduction of two alcohol free days per month;
 - Introduction of a linked electronic ID system for takeaway sales at Borroloola, Daly Waters, Hi Way Inn, Heartbreak Hotel and Mataranka;
 - Malandari Store to have its licence varied to allow for the sale of a maximum of eighteen cans of mid strength or light alcohol per person per day;
 - That the liquor licences of Hi Way Inn, Daly Waters Pub, Heartbreak Hotel and Mataranka licensed premises be varied to allow for a maximum of eighteen cans of mid strength or light beer take away per person who is a resident of Borroloola or Cape Crawford region;

- Allowance for a permit system to be introduced in Town Camps by the Declaration of General Restricted Areas.
- 3) The report also referred to the impending grant of a varied liquor licence to the Borrooloola Hotel Motel to allow for trading in the bar and beer garden areas of the premises, with restricted days and hours of operation and a restriction on sales limited to mid strength or light beer only to a maximum of ten cans per person per day.
 - 4) The overall concern of the report was the high level alcohol coming into the Township and the significant purchase of alcohol from surrounding licensed outlets, such as Heartbreak Hotel. The report recommended that liquor sold as takeaway to residents be restricted to twenty-four cans per person per day of mid strength or light beer sold to residents of Borrooloola and Robinson River.
 - 5) Following careful consideration, the Licensing Commission determined to apply a takeaway restriction for residents of Borrooloola and that this restriction be tied the recommendation of the draft AMP, ie restricted to eighteen cans of take away mid strength or light alcohol.
 - 6) Following its meeting on 27 October 2010 the Licensing Commission determined to issue a Section 33 *Liquor Act* Notice to the Licensees of Heartbreak Hotel, Cape Crawford and the Malandari Store, Borrooloola as follows:

“Commission determined to issue a Section 33 Notice to the Licensees of Malandari Store and Heartbreak Hotel that their takeaway licence will be varied to restrict the sale of takeaway alcohol to Borrooloola residents to canned beer only with an alcohol content of not more than 3.5%, and limited to eighteen cans per person per day. This is consistent with the Commission’s Borrooloola Hotel Motel Decision of 23 September 2010, paragraph 135 and the draft Borrooloola Alcohol Management Plan.

The date of effect for takeaway licence variations will trigger with the issue of the amended licence for the Borrooloola Hotel Motel.

Commission noted that other licensed outlets referred to in the draft Borrooloola Alcohol Management Plan recommended for a reduction of takeaway of a maximum of eighteen cans of light or mid strength beer to Borrooloola residents included Daly Waters and Mataranka and implementation of these takeaway restrictions will be assessed at a later date.”

- 7) As mentioned in paragraph 6 above, the issue of the Section 33 Notices to vary licence conditions was to be triggered by the grant of a new Borrooloola Hotel Motel bar and beer garden licence.
- 8) Subsequent to the Commission decision a further report submitted by the Director expressed concerns over the potential delay in reducing the takeaway sales from Heartbreak Hotel and Malandari Store. The Director submitted that by the harm being done due to the influx of full strength beer and bottled spirits entering the Township required more immediate action and requested that the Commission reconsider its decision to issue the Section 33 Notices in concurrence with the issue of the Public Bar and Beer Garden licence at the Borrooloola Hotel.
- 9) On 8 December 2010 the Commission then made the following decision:

“Commission determined to issue the Section 33 Notices as soon as practicable to Heartbreak Hotel and Malandari Store to restrict the sale of takeaway alcohol to Borrooloola residents to canned beer only with an alcohol content of not more than 3.5%, and limited to eighteen cans per person per day.”

- 10) Licensees of Heartbreak Hotel and the Malandari Store were issued with Notices on 13 December 2010 and were advised that the licence variation to restrict takeaway sales for

Borroloola residents would come into effect within twenty-eight days, unless they exercised their right to seek a Hearing into the proposed variation of their liquor licences.

- 11) Both Licensees requested a Hearing and accordingly on 6 April 2011 the Commission convened in Borroloola to consider submissions by Licensees and other parties.

The Hearing

Submissions by Malandari Store

- 12) Mr Brian Kimmings appeared on behalf of Malandari Store. He outlined the structure of Malandari Store ownership which is a partnership between MAWA Malandari Pty Ltd (as Trustee for the MAWA Malandari Store Discretionary Trust) and Mabunji Malandari Pty Ltd (as Trustee for the Mabunji Malandari Store Discretionary Trust). Mr Kimmings is a Director of MAWA Malandari Pty Ltd and was acting on behalf of the Malandari Partnership store owners.
- 13) As background Mr Kimmings advised that the Malandari Store Partnership purchased the store in 2009, largely to prevent hoteliers or persons engaged in the liquor trade, from purchasing the outlet. He further outlined that the store licence is operated in accordance with the community wishes and interests and that liquor sales were at times ceased when community unrest was evident or likely.
- 14) To ensure proper control of the sale of takeaway alcohol to persons not on court or prohibition orders, the Store was to introduce its own ID system for all purchases of takeaway alcohol.
- 15) Mr Kimmings advised the Commission that the current draft AMP does not reflect what the community wants and involved inadequate consultation with community members. He specifically queried the recommendation for an eighteen can takeaway limit.
- 16) The Commission was also advised that as from December 2010 the Store had upped its takeaway limit which it had voluntarily imposed, of twenty-four cans daily per person to thirty cans daily per person, as allowed for in the Malandari Store liquor licence. Advice provided to the Hearing was that this increase in sales limit was introduced in response to competitive pressures.
- 17) In support of the contention that there were inadequate consultations over the formulation of the draft AMP, Mr Kimmings introduced Mr David Harvey, an Elder from Yanyula Camp who testified that most of his people did not agree with the eighteen can limit. He also referred to inadequate consultations with the Yanyula people.
- 18) Mr Kimmings' evidence was that people should be able to drink at their home in a responsible manner. Imposition of severe takeaway restrictions would likely give rise to Borroloola and nearby residents travelling long distances to purchase larger volumes of alcohol with inherent risk of death or injury whilst travelling such long distances.
- 19) In answer to a question from the Commission Mr Kimmings advised that between 30% – 40% of the Malandari Store turnover was based on alcohol sales.
- 20) Mr Kimmings conceded that any restrictions imposed on takeaway sales must be across the board and apply equally to the Heartbreak Hotel and Malandari Store so as not to provide either with a commercial advantage.
- 21) Mr Kimmings sought clarification from either the Commission or the Department of Justice as to what was the geographic area of persons precluded from purchasing more than eighteen cans. Various correspondence referred to Borroloola Township residents, Borroloola and Robinson River residents and Borroloola and Cape Crawford residents (as per the draft AMP) being precluded from purchasing more than eighteen cans of mid strength or light beer per day.

- 22) Mr Clive-Griffin of the Department of Justice testified and countered Mr Kimmings' statements in relation to the inadequacy of public consultation, leading to the draft AMP. Mr Clive-Griffin described parts of Mr Kimmings' evidence as misleading and inaccurate and submitted that people in the Town Camps in Borrooloola were consulted. However, he did admit that in being tasked with the preparation of a Borrooloola AMP, it did not include consultation with people from the nearby community of Robinson River, which the Commission was advised had up to 250 residents.
- 23) Sergeant Johnsson advised the Commission that initially there was an Alcohol Reference Group established within the Township to help with consultation. His evidence corroborated that of Mr Clive-Griffin, including that the consultation leading to the draft AMP was largely within the Township of Borrooloola. He specifically referred to Mara Camp which is just outside the Borrooloola Township area.

Submissions by Heartbreak Hotel

- 24) Ms Julianne Lennard presented on behalf of Heartbreak Hotel. She commenced by seeking clarification as to who would be covered by the proposed restrictions on takeaway alcohol sales as there were different references in the draft AMP, the Section 33 Notices sent by the Licensing Commission and material included in the Hearing Brief.
- 25) In response the Commission advised that there was need for clarity as to residents of which geographic areas were to be affected by any restrictions. The Commission advised that they would seek further advice on this matter.
- 26) Ms Lennard outlined that the initial decision of the Commission to apply an eighteen can limit was to be triggered by the issue of a restricted pub licence for the Borrooloola Hotel Motel. She advised of the adverse impact the takeaway restriction would have on the viability of Heartbreak Hotel. Currently their licence enables them to open at 07:00am and cease service at 11:00pm with takeaway commencing at 10:00am and ceasing at 10:00pm.
- 27) Her presentation outlined that sales of takeaway of full strength beer and spirits do not represent a major element of the Hotel's trade. Based on statistics provided to the Hearing (Exhibit 2, Attachment A and B) only 13.8% of beers sales were of full strength beer, the vast majority being mid strength or light. Over the three months period (June to September 2010) only 93.5 cartons of beer were sold as takeaway. Also in the three months period 644 bottles of 700ml rum were sold, with only 309 bottles sold as takeaway, well over 50% made up of over the bar sales.
- 28) Ms Lennard's evidence was that Heartbreak Hotel had been cooperative with Police over requests to cease takeaway sales, including when football carnivals, rodeos and other events were taking place in the region. She raised the issue of discrimination and the difficulties encountered in determining the place of origin of their patrons. Ms Lennard advised the postcode shown on a driver's licence is identical for people in Cape Crawford to that of Borrooloola, and therefore it was difficult to tell if persons were from Borrooloola or elsewhere in the region.
- 29) Her evidence was that people get confused and upset when advised their place of origin determines whether they have restrictions on takeaway purchases supplied.
- 30) In relation to discrimination issues Ms Lennard tabled copies of Section 41 and 59 of the *Northern Territory Anti Discrimination Act*. Section 41 applies to discrimination in goods, services and facilities:

"41. Discrimination in goods, services and facilities area

- (1) *A person who supplies goods, services or facilities (whether or not the reward or profit) shall not discriminate against another person:*
- *by failing or refusing to supply the goods, services or facilities; or*

- *in the terms and conditions on which the goods, services or facilities are supplied; or*
- *in the way in which the goods, services or facilities are supplied; or*
- *by treating the other person less favourably in any way in connection with the supply of the goods, services or facilities.”*

31) Section 59 makes provision for application to the Anti Discrimination Commission for an exemption:

“59 Commission may grant an exemption

(1) A person may apply to the Commissioner for an exemption from this Act in respect of discrimination conduct that would otherwise contravene this Act.”

32) She advised the Commission of alcohol restriction measures being applied in the Kimberly regions where pastoralists had been given exemptions. She tabled (Exhibit 2C), an ABC news item entitled *“Pastoralists Exempt from New Kimberly Grog Restrictions”*. From this article it is evident that for both pastoralist and tourism operators, an exemption can be granted in relation to takeaway liquor where pastoralists and tour operators pre order twenty-four hours in advance of pickup.

33) Ms Lennard advised the Commission that the proposed changes to the takeaway licence conditions would increase the risk of break-ins as had occurred elsewhere in the Territory where severe restrictions had been placed on alcohol sales.

34) In further support of the Heartbreak Hotel submission, Ms Lennard tabled a *“Petition Against Change of Liquor Licence at Heartbreak Hotel, Cape Crawford NT”* where the vast majority of 110 signatories advised that if restrictions were in place they would travel further to purchase the quantities and type of alcohol they wish to consume.

Consideration of the Issues

35) The AMP for the Borroloola Region is designed as the principal tool for minimising alcohol related harm in and around the community. The Commission was advised that this draft plan had been accepted and endorsed by the Northern Territory Minister for Alcohol Policy and it is now with the Federal Minister, the Hon Jenny Macklin, the Minister for Families, Housing, Community Services and Indigenous Affairs. The Federal Minister’s role is critical in implementation of the AMP as the AMP calls for the Town Camp areas to have their restricted status lifted and for a General Restricted Area to apply, allowing for Town Camp residents to obtain permits for consumption of alcohol in their own homes.

36) Currently, persons in the Borroloola area can buy a thirty can pack of mid strength or light alcohol from the Malandari Store. A restriction of takeaway to eighteen cans of mid strength or light beer would lessen potential harm. If people were allowed consumption of alcohol within their homes in the Town Camps it could further lessen harm. This contrasts with the existing situation where people purchasing takeaway alcohol consume it along river banks and the outskirts of the Township and out of sight and any controls generally.

37) The Commission has seen fit to grant what it considers to be the most restricted Public Bar licence in the Territory for the Borroloola Hotel Motel. This licence allows for the service of up to ten cans of mid strength or light beer per person per day in an environment which is heavily controlled and regulated by the licence conditions.

38) At the heart of the issue is the need to lessen the amount of alcohol coming into the Borroloola Township and its unregulated and uncontrolled consumption. The potential for spirits and full strength alcohol being imported into the town is evident with the closest outlet being Heartbreak Hotel, some 120 kilometres from the Borroloola Township. Other outlets are on the Stuart Highway and are a further 400 kilometres distant from Borroloola.

- 39) While there is inherent danger that people will drive these longer distances to purchase large quantities of alcohol, the greater likelihood is that they will seek to access alcohol supplies (albeit limited if the Section 33 Notices are upheld) from the nearest establishment.
- 40) In the Commission's view, this logic provides a compelling reason to endorse the approach recommended by the Director of Licensing and also recommended through the draft AMP which has a wider degree of community input and support.
- 41) The Commission does note that the AMP appears not to meet the wishes of all the community but there was sufficient credible evidence given at Hearing to inform the Commission that people were advised of the consultation meetings, which many chose to attend.
- 42) In relation to Malandari Store, the Commission is disappointed that the Store Directors have seen fit to lift the voluntary restriction of alcohol sales by increasing the daily takeaway limit from twenty-four cans of mid strength to light beer to a quantity of thirty cans. To cite "*competitive pressures*" as reasons legitimising this action, in the Commission's view, is irresponsible at best or worse is an attempt to profit from the increased sale of alcohol to the subject community, regardless of the consequences.
- 43) The arguments put forward on behalf of Heartbreak Hotel in relation to the difficulty in ascertaining where a customer comes from to establish whether the restrictions apply, are legitimate. The Commission gives credence to the view that it is hard for hotel staff to know where a person resides, and whether that is within the Borroloola Township area. It is particularly difficult given that if a person is asked to show ID, the post code would be identical whether the resident came from Cape Crawford, Robinson River, Borroloola or any of the Gulf pastoral stations within the Northern Territory.
- 44) While this makes it very difficult to determine a person's place of residence, Licensees in the region do need greater certainty in terms of what geographic, Municipal or Local Government area is covered by the variation of licence condition proposed. In this regard the Commission is aware that the draft AMP refers to restriction applying to people residing in the Borroloola and Robinson River area. The Commission's Section 33 Notices referred to residents of Borroloola only. Other correspondence has referred to residents of Borroloola and Cape Crawford area, ie an even wider geographical area.
- 45) To have an AMP that impacts on residents outside Borroloola who were not consulted during the process of the draft AMP, appears in the Commission's view to be unfair and not reflective of proper due process. The draft AMP clearly applies to residents of the Borroloola and Cape Crawford region in relation to supply measures and the Commission was not disabused of the fact that the draft Plan was to cover the Borroloola / Cape Crawford region.
- 46) However, whilst the Commission is strongly guided by the draft AMP, it has taken into account that the consultations over its development were largely restricted to Borroloola residents, including the Mara Town Camp which appears to be outside the Municipal boundary. Other Town Camps, namely, Garawa One, Garawa Two and Yanyula are clearly within the Borroloola Municipal boundary. In the Commission's view the application of the Section 33 sale restrictions to eighteen cans of mid strength or light beer should apply to the Borroloola Municipal area, inclusive of the Mara Town Camp. It is this area and the residents contained within its boundaries that appear to have experienced alcohol related harm and are the thrust of the alcohol restriction measures contained within the draft AMP.
- 47) During the course of her submissions in support of the Heartbreak Hotel, Ms Lennard raised the issue of the *Anti Discrimination Act*. She suggested that the proposed limitation on the amount of alcohol that may be purchased by residents of Borroloola may infringe Section 41 of that Act (quoted at paragraph 30) as it relates to discrimination in the supply of goods.

- 48) There is no doubt that the sale of take away liquor by a Licensee involves the supply of goods to another person so as to bring that supply within the ambit of Section 41. Subsection 41(1)(d) provides that a supplier (in this case a Licensee) is not to discriminate by treating another person less favourably in connection with the supply of good (in this case alcohol).
- 49) Should the Commission determine to impose a limit on the amount of take away alcohol a Licensee was entitled to sell to a resident of Borroloola there is little doubt that person would be treated in a different manner in comparison to, for example, a tourist for whom no limit would apply. However, that does not end the matter.
- 50) Section 19 of the *Anti Discrimination Act* sets out the grounds on which a person shall not discriminate against another person as follows:

19 Prohibition of discrimination

(1) *Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:*

- a) *race;*
- b) *sex;*
- c) *sexuality;*
- d) *age;*
- e) *marital status;*
- f) *pregnancy;*
- g) *parenthood;*
- h) *breastfeeding;*
- i) *impairment;*
- j) *trade union or employer association activity;*
- k) *religious belief or activity;*
- l) *political opinion, affiliation or activity;*
- m) *irrelevant medical record;*
- n) *irrelevant criminal record;*
- o) *association with a person who has, or is believed to have, an attribute referred to in this section.*

- 51) None of those grounds relate to person's locality of residence as a ground for discrimination. As a result the imposition of a condition of licence for the Malandari Store and Heartbreak Hotel restricting the amount of alcohol that may be sold to a resident of Borroloola is not an "attribute" within the above listing as defined in the *Anti Discrimination Act*. Therefore, while restricting a person's ability in the purchase of alcohol, based on that person's geographic place of dwelling, may be a locality discrimination, it is not in contravention to the *Anti Discrimination Act* and hence is not unlawful.
- 52) In addition Section 53 of the *Anti Discrimination Act* provides exemptions to the operation of the Act. Relevant to this decision, Section 53(c) provides:

53 Acts done in compliance with legislation, &c.

Notwithstanding anything to the contrary in this Act, a person may do an act that is necessary to comply with, or is specifically authorised by:

c) an order of a court or tribunal;

- 53) Even were the proposed limitation on sales of alcohol to residents of Borrooloola deemed to be discriminatory, a Licensee complying with a condition of licence imposed by the Commission would be entitled to rely on the statutory defence contained in Section 53(c) in respect to a complaint of discriminatory behaviour.
- 54) For the sake of absolute certainty the Commission has obtained confirmation from the Director of the Anti Discrimination Commissioner's Office that the above position is a correct and that the *Anti Discrimination Act* is not contravened in the circumstances of the proposed licence condition.
- 55) Despite submissions from the Licensees of Malandari Store and Heartbreak Hotel, the Commission is still minded to introduce takeaway alcohol sale restriction measures to residents of Borrooloola. There has been no countering argument presented over the harm and destruction of social fabric, which is being caused by the intake of alcohol into the Borrooloola Township and Town Camps.
- 56) It is hoped that in association with the restriction of takeaway alcohol being brought into the community that the Federal Minister sees fit to support the draft AMP. Ultimately it would be to the betterment of the community if people were able to purchase limited volumes of mid to low strength alcohol and consume this alcohol in a responsible manner in their homes.
- 57) The possibility of this eventuating rests with the Federal Minister as it will require the lifting of the Prescribed status of the Town Camps, the declaration of a General Restricted Area and the development of a Permit System, enabling responsible drinkers to purchase takeaway alcohol and drink in their homes. There is an inherent control within the Permit System which provides for permits to be withdrawn if the resident breaches any condition of the permit or generally abuses the right to purchase alcohol through anti social, abusive or criminal behaviour.

Decision

- 58) Following the Hearing at which representatives of Heartbreak Hotel and Malandari Store made submissions to the Commission, the Commission is not persuaded to overturn its Notice of Intention to vary the licence condition, which would require the Licensees of both outlets to restrict the sale of takeaway alcohol to Borrooloola residents to eighteen cans of either mid strength or light beer, ie, below 3.5% alcohol by volume, beer or light beer.
- 59) To give some clarity to the Licensees, the Commission has determined that the takeaway restrictions will apply to residents of the Borrooloola Township and Mara Town Camp as outlined in the attached map and area description.
- 60) The Federal Minister is urged to favourably consider the Borrooloola Draft Alcohol Management Plan to allow residents in the Mara, Garawa One, Garawa Two and Yanyula Town Camps to purchase takeaway alcohol under a controlled and monitored permit system, for consumption in a responsible manner within their homes.
- 61) Noting that the draft Borrooloola AMP will be subject to ongoing monitoring and possible amendment, the Commission advises it is willing to review this decision in line with any variation to what is currently contained in the Draft AMP.

Richard O'Sullivan
Chairman

4 August 2011