

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Melanka Lodge
Licensee:	Pinecot Pty Ltd
Licence Number:	80203189
Nominee:	Mr Jason Zammit
Proceeding:	Hearing into compliance with condition of approval of variation to licence
Heard Before:	Mr Peter Allen (Chairman) Mr John Withnall Mr Brian Rees
Date of Hearing:	13 March 2002
Date of Decision:	09 May 2002
Appearances:	Mr John Stirk for the Licensee Mr John McBride for NT Fire and Rescue Service

On 30 August 2001, after a hearing of an application by the licensee to vary its licence conditions, the Commission effectively approved the licence of the Melanka Lodge changing from a private hotel authority to a tavern, such approval being expressly made subject to the inclusion of certain other conditions. As trading was approved to 4.00 AM, those other conditions included the subset of conditions referred to by the Commission as the late trading conditions.

The late trading conditions require live entertainment after midnight to be a prominent feature of the premises on any night on which trading continues later than 2.00 AM. This requirement has evolved from the Commission's view that premises with the commercial advantage of late trading should provide a measure of public "quid pro quo" for the privilege, and provide an entertainment element "value-added" to the mere provision of a late night bar service. In colloquial terminology, a late trading venue needs to be something more than the traditional image of a "boozier".

The trading changes were also made subject to two directions which were set out in the Commission's written decision on the matter in the following terms:

Direction as to Fire Safety and Building Certification

The Licensee is directed to comply with all Fire Safety and Building Certification requirements by no later than three (3) months from this decision and shall take all reasonable steps to inform the Commission of progress made towards compliance during that period.

In the event that compliance is not achieved within the three (3) months provided, the Commission may, at its discretion, require the Licensee to show cause as to why the licence should not be suspended until such time as compliance is achieved.

By letter of 5 December 2001 to the Director of Licensing, the Northern Territory Fire and Rescue Service ("NTFRS") alleged non-compliance by the licensee with NTFRS requirements, and the present hearing followed a "show cause" letter from the Chairman of the Commission to the licensee and formal written denial of non-compliance by the licensee's Mr Trevor Cox in response.

A major bone of contention with the NTFRS was that on 28 September 2001 the licensee's building certifier, Mr David Cantwell, issued a Permit To Occupy (No. 010 / 7923 / 003) in respect of work described in the certificate as "Fire services upgrade to the licensed premises only", without obtaining a "final report" from NTFRS "as required by section 17 of the Building regulations" (per the NTFRS written complaint). The legality of the Permit To Occupy was impugned by the NTFRS, and a list furnished of their outstanding fire safety requirements at that time. The Building Act by section 59(1)(b) and clause 5 of Schedule 3 of that Act forbids a building certifier from deciding an application for either a building permit or an occupancy permit without considering the report of the relevant reporting authority, in this case the NTFRS via the application of the Building Code of Australia (the "BCA") by the Building Regulations (NT).

Mr Cantwell had in fact requested and received a Fire Service Report back on 29 September 2001, but it was the NTFRS argument, and the evidence of Building Certifier Mr Duncan Cooke, that a distinction had to be made between a pre-construction report and a post-construction report. The former was for the purposes of a permit to do the work, the latter a confirmation of compliance of the completed work sufficient for the issue of an occupancy permit. Both such reports of the NTFRS as reporting authority are necessary, it was argued by the NTFRS, before a Building Certifier may validly issue a Permit To Occupy.

Mr Cantwell and the licensee argued that were at liberty to take clause 6 of Schedule 3 of the Building Act at face value. It reads in part:

A building certifier need not obtain a report or consent from a reporting authority if the applicant supplies a copy of a relevant report or consent made or given in the 12 months preceding the application.

Ergo, they argue, they were in compliance in that they had a report from NTFRS which related to the upgrading work certified in the occupancy permit and which was less than 12 months old at the time of the application by the licensee for the occupancy permit.

The NTFRS argument in rebuttal is that a report for an application to do work is not a report "relevant", in terms of clause 6 of Schedule 3, to an application for an occupancy certificate. The two separate applications are separate functions of a building certifier, as provided by section 38 of the Building Act, and nothing in the legislation makes a report obtained for the purposes of a building permit relevant to an application for an occupancy permit.

The irony of the whole argument is that the building certifier does not have to heed a final report of the NTFRS. He is "not required to implement a recommendation of a reporting authority's report" but is to merely "consider" the report (clause 8 of Schedule 3). Nevertheless, argues the NTFRS, if no report is obtained for such consideration, the subsequent occupancy permit must be unlawful.

Interestingly, Mr Cantwell did in fact request a final report from NTFRS, filling in and submitting the appropriate NTFRS application form on 29 November 2001, the day *after* he had issued the occupancy certificate. As to why he did that, given his argument that the final report was not necessary in any event (much less *after* the event), Mr Cantwell testified that it was done as a "courtesy" to NTFRS.

Mr Taylor of the NTFRS gave evidence that by the time of the hearing the only remaining substantive argument between Mr Cantwell and NTFRS, apart from the legality of the Permit To Occupy, was as to the requirement of emergency lighting. What Mr Taylor wanted, according to Mr Cantwell, was over and above what was required by the Building Code. In Mr Cantwell's opinion, reference to relevant parts of the BCA convinced him that sufficient emergency lighting had been installed. NTFRS disagreed, Mr Taylor proposing the simple test of whether in a power outage at night, up to several hundred patrons would be able to see their way out of the premises (patrons, the Commission observes, a large proportion of whom in all likelihood would have been consuming liquor, and might reasonably be expected to be less than fully observant in an emergency).

At this point the Commission advised the parties that it was having great difficulty in understanding the licensee's resistance to the NTFRS requirements as to emergency lighting, given that the relevant condition of the liquor licence carefully specifies the need in relation to the change of

licence conditions for compliance with *both* the building certification requirements *and* with fire safety requirements. It would therefore appear to be an irrelevancy to be arguing that the fire service requirement for more emergency lighting represented some misinterpretation of the requirements of the BCA. The Commission separately specified compliance with fire requirements following on from the NTFRS objection to the changes to the liquor licence on the grounds of the premises having a history of non-compliance with NTFRS requirements over several years.

The Commission at this stage of the proceedings therefore warned the licensee that it was facing imminent suspension of licence until its continuing breach of the licence condition in relation to NTFRS requirements for emergency lighting was remedied.

Mr Stirk pointed out in response that the NTFRS in its written complaint to the Commission listed the outstanding requirement in relation to emergency lighting as a requirement “to comply with BCA Part E4”, so that arguments between NTFRS and Mr Cantwell as to whether BCA Part E4 had been complied with could not be said to be irrelevant; NTFRS itself had “called up” the BCA.

However, the Commission does not accept that differing interpretations of the BCA by NTFRS and the licensee have to be resolved, or ruled upon by the Commission, in order to ascertain whether a breach of the relevant licence condition has occurred. The condition is not susceptible to clashes of interpretation between fire service and building certifier. The condition essentially requires the licensee to keep the fire authorities happy, as part of the resolution of the application to become a late night public venue to which the NTFRS was an objector. Since clause 8 of Schedule 3 provides that fire service requirements need not otherwise get automatically taken up by the building certifier, the licence condition quite deliberately gives the fire service its own legs in relation to its requirements for these particular premises.

After taking further instructions from his client at this point, Mr Stirk was able to advise of the licensee’s commitment to an outlined timeframe for installation of different types of emergency lighting for different areas of the licensed premises. Mr Taylor expressed NTFRS satisfaction with such outcome, and the Chairman indicated to Mr Stirk that provided the program was adhered to, subject only to any vicissitudes of supply of which the Commission might be advised as they occurred, there would no longer be any threat of licence suspension hanging over the premises arising out of this issue.

However, a further issue which was raised by the Commission remains to be dealt with, in relation to which Mr Stirk has filed written submissions.

The question was posed by the Commission as to whether Mr Cantwell’s occupancy certificate, even assuming that it was regularly and lawfully issued, is sufficient to cover the use to which the licensed premises are now being put, following the enabling changes in the licence conditions.

Mr Cantwell’s occupancy certificate of 28 November 2001 covers only the fire services upgrade for the stated use of “Restaurant & Bar” BCA Class 6”. The Commission accepts as unarguable that if licensed premises are being used only as restaurant and bar, then such use is covered by a BCA class 6 certificate. Regulation 2(3) of the Building Regulations adopts for the Northern Territory the building classifications set out in Part A3.2 of the Building Code, and BCA Part A3.2 (Exhibit 2) provides that “(b) a dining room, bar, shop or kiosk part of a hotel or motel” is Class 6.

However, following the change of licence conditions the licensed premises have been promoted as a late night disco. (One of the ways acceptable to the Commission for late night traders to comply with the requirement of live entertainment after midnight is to provide a “DJ” to play recorded music). The Building Regulations adopt the BCA in its entirety in relation to those classes of building (including just about any work on a building, as both building certifiers confirmed) set out in Part A3.2 of the BCA, and the BCA Guide (as to BCA Part E2 in particular) contains descriptions of “Nightclubs and Discotheques and the like” as Class 9b “assembly buildings”.

Use of the licensed premises as a Class 9 assembly building would seem to be an ongoing breach of Section 66 of the Building Act, which prohibits promotion and use of any part of a building for public assembly unless an occupancy permit has been granted which permits its use *for that purpose*.

Mr Stirk for the licensee refers to the history of the building as a Commonwealth construction back when there was no Building Act and no requirement for an occupancy certificate. He submits that “The licensee’s position is that the premises, with the exception of the work which was the subject of the building permit about which evidence was given in August of last year, is not subject to the Building Act requirements for the balance of premises to have a permit to occupy”.

Mr Stirk’s submission would seem to be correct only as a general proposition, subject to several special cases. One such special case is where there is a *change* of use at any time, in which event Regulation 20 of the Building Regulations requires an occupancy permit for the new use regardless of when the building was constructed. Another special case is the use of a building for the specific purpose of public assembly, by inference regardless of whether such use is a new use or a continuation of an existing use.

As regards the latter case, the sequential juxtaposition in the Building Act of the provisions of sections 65 and 66 is instructive. Section 65 sets out the general situation: a person shall not occupy a building (which includes part of a building) on which work has been carried out *after* the commencement of the Act unless an occupancy permit has been granted; ie. an occupancy permit is not required for work carried out prior to the Act. Section 66 then immediately follows with a special case, an *exception* to that general rule: a person shall not promote or conduct (nor the occupier permit) a public assembly in *any* building unless there has been granted an occupancy permit *for that purpose*. “Public assembly” is very broadly defined; it is only the BCA that narrows the expression down into specific categories of assembly.

Certainly it is an accepted principle of legal interpretation that an enactment is not to be given any retrospective effect except only as it may clearly evince such an intention, but it seems to us that even approaching section 66 of the Building Act as being only *prospective* in its application it nevertheless catches all such *usage* as it refers to which takes place after the commencement of the section. The circumstance of a building’s construction having pre-dated the commencement of section 66 does not exempt the convenor of any public assembly in the building from compliance with the section. The general gives way to the particular. An older building may well not need an occupancy permit for any *other* purpose, but if after the commencement of the Act anybody wants to use it specifically for public assembly then an occupancy permit covering such public assembly must be obtained for the purpose. In the case of public assembly for purposes of “nightclub, discotheque or the like”, it seems clear from the BCA Guide that such permit needs to be referable to Class 9b.

As Mr Cooke testified, a Class 9 use requires more safety infrastructure, especially in relation to adequate venting of heat and smoke. “With this building it really comes down to the mechanical services”.

We should indicate at this point that we are not moving towards mandating a Class 9 occupancy permit for the Melanka Lodge to continue late night liquor trading. The Commission’s concern is that liquor shall not be sold in circumstances of public assembly not covered by any occupancy permit that does exist, and therefore in apparent contravention of section 66 of the Building Act.

We do agree with Mr Stirk that we should not go behind the occupancy permit issued by Mr Cantwell. Once issued, it has legal effect under the building legislation to the extent of its certification. If it has been issued irregularly, that would seem to be a matter for Mr Cantwell’s professional regulatory board, as Mr Stirk contends, or (we would add) a matter for prosecution by the Director of Building Control for breach of the relevant legislation. But once issued, the permit must take effect as a certification under that legislation that the specified building or building work is fit for the specified class of use.

Mr Stirk is at pains to argue that Mr Cantwell’s occupancy permit is solely referable to the fire service upgrade, which is patently so. That upgrade, however, is expressly addressed in the permit only to the BCA Class 6 use of restaurant and bar, and on the face of it does not and cannot permit or cover any use which goes beyond that description. Mr Stirk maintains that outside of Mr Cantwell’s occupancy permit the rest of the building is not required to have any occupancy permit, which may well be the case in all circumstances other than its use for public assembly, but in the Commission’s view if the building is used for a category of public assembly, that use is caught by

section 66 of the Building Act in that Mr Cantwell's permit does not cover it, and there is no other permit. It is the one use of a pre-Building Act building for which the Act does require an occupancy permit to cover it.

Mr Stirk submits in effect that this is none of the Commission's business, but the Liquor Act demonstrates otherwise.

We accept that an occupancy permit issued by a building certifier is "final" in the sense that it indicates that all relevant legislated building processes are complete at that stage, and that it cannot thereafter be impugned by other than the building authorities or the Courts, but the building legislation clearly cannot be the final determinant of permitted use of a building. For instance, if the occupier wished to use part of the building for the storage of say toxic liquids or explosives, such specialised uses are subject to their own specialised legislation as to further requirements for the building. Likewise if the occupier wished to use the premises as a hospital or a casino, for instance. Some uses are actually forbidden altogether by other legislation (eg. as a brothel) despite such type of use being otherwise comfortably within the ambit of the relevant occupancy permit. Likewise, use of the premises for the sale of liquor brings the Liquor Act into play, with the Licensing Commission as a secondary or further regulator of the use of the building for that particular purpose.

Guidelines to the exercise of the Commission's considerable statutory powers in relation to the construction, conformation and use of buildings for licensed premises can be found in section 31 of the Liquor Act, noting particularly sections 31(2)(a), 31(2)(b), 31(2)(g) and 31(2)(k), which are applicable not just to applications for licences at first instance but also to applications for changes to licence conditions. The Commission's reasoning in this regard is to be consistently found in many previous decisions well known to Mr Stirk. (Very briefly for the record, there is no provision in the Act for applications to vary licence conditions, but as Mr Stirk points out, neither are there categories of licence fixed by the Act; a licence as a legal right is constituted entirely by the set of conditions under which the Commission permits liquor to be sold from individual premises, so a licensee who applies for a significantly different set of conditions is, strictly speaking, an applicant for the issue of a different licence, and hence subject to the applicability of section 31 at that stage).

In any event, the licensee would no doubt agree that the Commission had the power to make the changes to the licence in August 2001 that were requested by the licensee. That being so, the Commission just as clearly had the power to make its approval subject to other conditions, such as the proviso as to compliance with Building Certification requirements. Assessment of, and satisfaction with, compliance with that condition is a matter for the Licensing Commission.

The Commission's concern can therefore now be summarised as follows:

- In order to trade to 4.00 AM on any night, the licensed premises must provide live entertainment from midnight on;
- The licensee regularly meets this requirement by providing a "disco" hosted by a DJ;
- The BCA Guide classes a disco type of use as a Class 9b assembly use of the premises, certainly for the purposes of smoke hazard management - see BCA Part E2, Exhibit 2;
- Section 66 of the Building Act requires any part of any building that is used for public assembly to have an occupancy permit *for that purpose*;
- The only occupancy certificate before the Commission certifies a fire services upgrade for the specified BCA Class 6 use of restaurant and bar only;
- Prima facie this permit does not address the use of any part of the building for a Class 9 assembly;

- While there is little or no difference between the emergency lighting requirements for a Class 6 use and a Class 9b assembly use, there are more stringent smoke and heat hazard management requirements for a Class 9b use.

The Commission is thus drawn to the conclusion that there are still outstanding “Building Certification requirements”, to quote the condition that the Commission placed on its approval of Melanka’s application for late night public trading. In our view those types of entertainment that constitute BCA Class 9b assemblies are a use of the building requiring further certification by way of an occupancy permit for that specific purpose.

Mr Stirk submits that there was no evidence that the licensed premises did not fit the description of a Class 6 building, but both building certifiers and Mr Taylor demonstrated an awareness of there being an issue in this regard, and Mr Cooke carefully allowed that different uses of the same site could involve different permits. He was also of the view that the building would not qualify for a Class 9 permit. Mr Cantwell of course believes that it does not need a Class 9 permit, but we reiterate our conclusion that certain public entertainments which have been developed by the licensee for late night trading do require a tailored permit, whether or not an existing use or a new use.

We appreciate that we have touched on some issues and areas that are apparently the subject of ongoing argument and discussion among building professionals, and we appreciate that the Commission cannot make interpretive rulings that can bind any other jurisdiction. Our decisions affect the circumstances and conditions under which the Commission permits premises to be used for the sale of liquor.

It is the ongoing licence conditions that we now consider. Although the condition or direction which we believe is breached by use for Class 9 entertainment provides for suspension of the licence on default, we do not consider the situation as yet jeopardising the basic liquor licence, but at the same time the Commission cannot countenance what it sees as the ongoing non-compliance with our requirement for building certification appropriate to the late night live entertainment that is being staged.

The Commission therefore issues the licensee with this further direction:

Without in any way limiting the licensee’s obligations of compliance in relation to each and every condition of the licence, the licensee shall refrain from staging or providing any entertainment within or upon the licensed premises which constitutes a public assembly of such nature as is classified as a Class 9 use of the premises by the Building Code of Australia.

This will not necessarily force the premises to cease trading beyond 2.00 AM, (at least not yet - see *post*) but certainly requires the licensee to be very carefully selective in the type and presentation of live entertainment in order to stay open after 2.00 AM.

The restriction shall apply forthwith, until further order. It may be withdrawn or varied by the Commission at any time for cause shown, and the licensee has liberty to apply in that regard. In particular, it will of course be withdrawn or appropriately varied upon the licensee obtaining any occupancy permit for any particular Class 9 use.

In any event, if the Commission is not given cause to withdraw the direction within the next three months, then at the expiry of that period the Commission will review the operation of the late trading conditions at the Melanka Lodge with a view to ascertaining whether late night trading should be suspended and closing time brought back to 2.00 AM, depending on the venue’s compliance performance with the late trading conditions over the intervening three months.

In order to assist the Commission in monitoring such compliance, the licensee in the meantime is directed to lodge with the office of the Deputy Director of Licensing in Alice Springs, weekly in advance throughout the next three months, a schedule of all live entertainment events planned for the Melanka Lodge during each forthcoming week. Such entertainment plan should indicate in general terms the nature of each presentation and the way in which it is to be staged to avoid

constituting a Class 9 use of the licensed premises. Any variation between any plan as lodged and any actual presentation on the night is to be drawn to the Deputy Director's attention in writing at the time of lodgment of the next weekly schedule.

It should be understood by the licensee that the Deputy Director's acceptance of the schedules as lodged cannot be taken to be any approval of, or satisfaction with, any particular entertainment proposal. The avoidance of any contravention of the licence as it now stands will remain a matter of judgment for the licensee.

Peter R Allen
Chairman

09 May 2002