

Northern Territory Licensing Commission

Reasons for Decision

Premises:	Driver Supermarket
Applicant:	Laddmac Pty Ltd
Applicant's Nominee:	Janice Dorothy Burke
Application:	Application to Chairman for a New Hearing Pursuant to Section 51(10A) of the <i>Liquor Act</i>

1) By letters dated 5 and 10 January 2006, the applicant through its solicitor Mr A Woodcock has requested a hearing pursuant to Section 51(10A) of the *Liquor Act*. This request follows receipt of the decision of Mr C Spencer dated 19 December 2005 refusing the applicant's liquor licence application for Driver Supermarket (the Decision). The request for a new hearing is based on Section 51(10A) which states: "*Where the Commission is constituted by one member, a party who is not satisfied with the decision of the Commission may apply, within 14 days after the decision, in writing to the Chairperson for a new hearing.*" Whilst the application for a new hearing was not received within the required time frame, I have granted an extension of time.

2) An applicant has no absolute right to a new hearing before a panel of 3. Section 51(10B) of the *Liquor Act* states:

Where a party applies, under subsection (10A), for a new hearing the Chairperson may, if he thinks fit, cause a new hearing to be held. (my emphasis) I have now had the opportunity to carefully consider all documents relevant to this matter namely your letters dated 5 and 10 January 2006, the Decision, the Hearing transcript and exhibits. Before considering whether or not to use my discretion to cause a new hearing to be held, I intend to comment in some detail on the applicant's written submissions.

3) The applicant submits that the findings were made against the applicant in the absence of evidence. In a written submission of 10 January 2006, the applicant states:

"At paragraph 25 [of the decision], it was found that there was a direct link between the \$200,000.00 loan of Laddmac Pty Ltd and Mackay Contractors (NT) Pty Ltd. There is no evidence to support this conclusion –it is merely an adoption of cross examination by the police for the police"

From my perusal of the transcript, I consider this comment to be incorrect. The cross examination by the Police was not simply adopted. In fact, when dealing with Laddmac's financial issues, Police counsel, Mr McNab chose to take a relatively passive role and left the principal task of eliciting the relevant evidence to the applicant's counsel, Mr McQueen and to the Commissioners¹. Further, there is clear evidence-in-chief from Mr Lyle Mackay Jnr clarifying the direct link between the \$200,000.00 loan obtained by Laddmac Pty Ltd from Bendee Investments as part of the settlement proposal negotiated for Mackay Contractors (NT) Pty Ltd.² This evidence confirmed the existence of this loan, the reason it was taken out and the link between the applicant company and Mackay Contractors (NT) Pty Ltd. Ms Wermil, accountant for the Applicant Company, further clarified this

¹ Hearing transcript-7.12.04 at page 2. Line 27 onwards

² Hearing transcript-7.12.04 at page 5. Line 10 onwards to page 10 line 10.

arrangement in her evidence-in-chief³. Finally, the exhibits tendered in confidence and numbered 13 to 19 and 24 support the comment made by Mr Spencer in his decision.

- 4) The applicant states in its written submissions:

“At paragraph 61, it was found that the figures provided for alcohol sales were “not appropriate or adequate to give a true indication of liquor sales”. Again, this is a finding that is not based in any evidence, but a mere adoption of cross examination by the solicitor for the objector.”

I do not accept this submission. There was considerable time spent on 6 and 7 December 2004 examining and cross-examining Mr McKay on the reliability of the figures he gave for projected alcohol sales. Mr Spencer’s comments on this issue simply reflect his view on the adequacy and accuracy of the applicant’s oral evidence and tendered documentation. I note, for example, that Counsel for the Police questioned Mr McKay on the accuracy of his evidence regarding the percentage of his profit received from liquor as opposed to other general grocery items.⁴ Mr Spencer was quite entitled to draw reasonable conclusions based on the totality of the evidence including responses elicited during cross-examination.

- 5) The applicant states in its submissions:

“At paragraph 71, it appears that a finding is made adopting the cross-examination of the objector that Laddmac Pty Ltd is merely a vehicle for circumventing bankruptcy. Again there is no evidence of this and it is a finding that adopts cross-examination as evidence.”

These observations are a misrepresentation of what Mr Spencer actually said. I refer to the relevant extract from his decision as follows: *“Clearly, the underlying tone of the NT Police case has been that a business structure has been created by Lyle (Senior) and Robert to circumvent their bankruptcy restrictions. Their respective sons are participating in operating the structure. The above history, at face, would give rise to a the Police suggestion that the Directors of Laddmac Pty Ltd are fronting the business for their bankrupt fathers and uncles. The problem with that notion is that it is a long bow to then say this will impact on the amenity of the neighbourhood, which is and can be their only grounds of objection.”*

It seems clear that Mr Spencer rejected the police submission on this issue.

- 6) The applicant states in its submission:

The Commission makes a finding in paragraph 75 that there is doubt about the quality of the financial information provided by the applicant, again there is no evidence to support this finding.

When perusing the transcript, it appears that much time was spent during the hearing trying to clarify the financial arrangements and financial status of the applicant company. Mr Spencer was quite entitled to draw reasonable conclusions based on the totality of the evidence before him.

- 7) The applicant states in its submission:

At paragraph 90, it is found that the “corporate veil” was lowered to disguise hide or protect in the absence of any evidence.

Whilst the analogy to the “corporate veil” might be queried, it is clear from reading the entire decision that Mr Spencer was left with the concern that the applicants had not provided him with a full and frank account of their business arrangements. Upon perusal of the transcript, such a conclusion was reasonably open to him.

³ Hearing transcript-7.12.04 at page 39. Line 29 to page 40 Line1

⁴ Hearing transcript-7.12.04 at page 62. Line 12 to 25 and at page 64. Line 6 to bottom of page.

8) The applicant states in its submission:

A finding that the sons have taken over the debt of the fathers is made absent positive evidence of the same.

This submission is incorrect and I refer you to my comments at paragraph 3 above and the extracts from the transcript mentioned therein.

9) The applicant states:

At paragraph 95, a finding that the rent has been reduced to \$14,000 per annum is factually incorrect. The rent was reduced to \$24,000. A further finding is made that this indicates an assumption by the applicant that a granting of the liquor licence is a formality. There is no evidence to support these adverse findings.

Although the quality of the transcript on this particular issue is poor, this rent reduction figure appears to have been taken from the evidence provided by Mr McKay at the hearing⁵. Further, the sum of approx. \$14,000 pa is supported by the stated expense for *Rent on Land and Buildings* disclosed in the Profit and Loss Statement for Driver Supermarket for the year ended 30 June 2004.

10) The applicant states:

We submit the great majority of the decision was taken up with considerations of the relationships between Laddmac Pty Ltd and Mackay_Contractors (NT) Pty Ltd or otherwise which is completely irrelevant to the application.

After reading the Hearing transcript and the Decision, it appears that a clarification of the relationship between the two companies and their directors was a crucial element to be considered by the Commission. An understanding of both the historical and current financial arrangements between the companies (and the receiver) was necessary when considering probity and control issues with respect to the new licence application and the financial stability of the proposed new licensee. The Commission would have been negligent in its duties had it failed to give considerable attention to these issues.

11) The applicant submits that the Commission has inadvertently placed a higher onus than the balance of probabilities as it requires to by the Act on the Applicant and state:

“At paragraph 102, it is noted that the applicants: “put forward a strong case but not sufficiently persuasive for the Commission on the balance of probabilities to be satisfied the amenity of the neighbourhood would not be affected.”

At paragraph 104, it is noted that the applicants: “put forward a sound and reasonable case but has not been persuasive in demonstrating that persons in the area were not already well serviced by the existing outlets.” The Commission has pointed to no evidence to contradict or overcome the strong and persuasive case of the applicant in these regards. The applicant has put forward a strong case and discharged the onus.”

Before a liquor licence is granted, the onus is on the Applicant to demonstrate to the Commission on the balance of probabilities that they have satisfied the various legislative factors the Commission is required to consider.

In *Briginshaw v Briginshaw* and Another [1938] HCA 34:

“The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue...the petitioner carries the onus of persuading a judge to make up his mind in his favour. If he does

⁵ Hearing transcript-7.12.04 at page 79.

not succeed in so persuading a judge, he fails in his petition and matter is at an end.”

It appears to me that in this matter, after careful consideration of the issues, the Commission simply found itself not sufficiently persuaded to enable it to grant the liquor licence to the Applicant.

- 12) Finally, the applicant advises that “*due to the passage of time since the giving of evidence and successful conduct of the business, the applicant can bring new evidence to the commission to show that the directors of Laddmac Pty Ltd have sufficient experience and skill to hold a liquor licence.*”

This issue will be dealt with below.

- 13) After considering the request for a new hearing with some care, I am not persuaded that a new hearing should be granted. In reaching this conclusion, I have taken account of the following matters:
- a) The submissions made by the applicant do not persuade me that it is a reasonable use of my discretion to grant a hearing in these particular circumstances. My comments have already been made on that issue.
 - b) The evidence placed before the Commission was given in 2003 and 2004 following two (2) separate hearings over a considerable number of days. The quality and usefulness of this evidence after such a long time is questionable. Further, the task of considering potentially out dated evidence and new evidence and deciding on the weight to be attached to various parts would be an unenviable task-particularly in circumstances where some objectors who gave evidence on earlier occasions may not now be able to be called to give their current views.
 - c) A considerable amount of time has now passed since the objectors gave their evidence and locating some or all of them may be a problem. Further, some gave evidence on two occasions and may be most reluctant to remain involved in the process. If I grant this hearing using my discretion under s51(10A) however, they are the only objectors who would have standing under the *Liquor Act* to appear at the hearing. This being the case, it appears to me that the quality and relevance of the evidence placed before a new hearing panel would be questionable and I place some weight on this issue in reaching my decision on this application
 - d) There have been significant changes to the *Liquor Act* since the application was lodged and I consider that it would be difficult to properly ensure that any hearing under the previous legislation covered issues relevance to a liquor licence application in 2006.
- 14) For these reasons, I do not consider that a new hearing should be granted using my powers under Section 51(10A) and (10B) of the *Liquor Act*.

John Flynn
Chairman

24 April 2006