

Northern Territory Licensing Commission

Reasons for Decision

Premises:	The Fox Ale House
Licensee:	Nundor Pty Ltd
Licence Number:	80316631
Proceeding:	Application for Transfer of Liquor Licence Pursuant to Sections 40 and 28(2) of the <i>Liquor Act</i>
Heard Before:	Mr Richard O'Sullivan (Chairman) Mr Philip Timney (Legal Member) Mrs Kerri Williams
Date of Hearing:	15 January 2009
Appearances:	Ms Dorryelle Carmody and Mr Darryl Russel Nunn for the Applicant Mr Travis Te Whata for the Director of Licensing

Background

- 1) Mr Daryl Nunn, a dual Director of Nundor Pty Ltd ("Nundor"), has applied to transfer the liquor licence of The Fox Ale House located at 85 Mitchell Street, Darwin ("the Premises") (Licence Number 80316631 – Tavern). The current licence provides for the consumption of liquor on the Premises which comprise a public bar and alfresco dining area.
- 2) On 30 April 2008 Messrs Nick Cooper and Mr Andre Strazdins, now of BRI Ferrier, advised of their appointment as joint and several administrators of the then Licensee, DNPW Pty Ltd, the former Licensee of the Fox Ale House and Ducks Nuts. Mr Strazdins, in his capacity as administrator of DPNW Pty Ltd (Administrators Appointed), has endorsed the transfer application as current Licensee.
- 3) The dual directors and majority shareholders of Nundor are Mr Darryl Russell Nunn and Ms Dorryelle Freda Carmody. Nundor was specifically incorporated for the purpose of operating the business at the Premises and has not yet commenced to trade. Mr Nunn is nominated in the application as proposed nominee for the Premises.
- 4) Following consideration of the application for transfer and supporting materials the Commission determined to conduct a hearing pursuant to Section 29(2)(c) of the *Liquor Act* ("the Act") to consider:
 - a) The financial viability of the applicant company and its Directors; and
 - b) The experience and expertise of the Directors of the applicant company and the proposed nominee.
- 5) The hearing was convened at 9.30 am on Thursday 15 January 2009 at the NT Licensing Commission Hearing Room, Darwin.

Hearing

- 6) The Chairman opened the hearing by advising the parties that the hearing would be conducted in two (2) parts, an open hearing of any evidence the applicant wished to present in support of the application followed by a confidential hearing in respect of the

financial capacity of the applicant company and its directors. The Chairman also noted that the Commission had received a collection of documents from the applicant the previous day. Those documents were formally tendered into evidence and marked as Exhibit 1.

- 7) Ms Carmody advised the hearing that she was not legally represented and that she would be making submissions on behalf of Nundor in support of the application for transfer of the licence. She further informed the Commission that Mr Mark Pearce was available to provide evidence at the hearing and that Mr Terry Dowling, who had tendered a letter in support of the transfer, was available to give evidence before the Commission if required. She also advised that Mr Strazdins was based in Adelaide however he would be available via telephone should that be required by the Commission.
- 8) In response to a question from the Chairman, Ms Carmody advised that Mr Dowling was currently providing assistance to the administrators in respect of the on-going operation of the Premises and had also offered to assist her and Mr Nunn with the transfer application and by providing training in respect of the day to day operation of the Premises.
- 9) Ms Carmody commenced her submissions by noting that she appreciated the Commission's concerns in respect of the financial viability of Nundor, more so due to the poor trading performance of the Premises in the past. However, she submitted that financial capacity alone would not make the Premises profitable so long as it continued to operate under a corporate management structure with associated management costs. Ms Carmody stressed that, should the transfer of the licence be approved, Nundor would operate the business as a hands-on family business. She submitted that, given the small size and patron capacity of the Premises, the type of management that the Directors of Nundor intended to operate under had the potential to significantly reduce wages costs and turn the business into a profitable venture.
- 10) Ms Carmody called Mr Mark William Pearce to give evidence in support of the application. Mr Pearce advised the Commission that he was currently engaged to assist the administrators of DPNW in the management of both Ducks Nuts and the Fox Ale House. His services involved the provision of management and financial advice and assistance. Mr Pearce confirmed he had no business or contractual association with Nundor however he was keen to see the company succeed.
- 11) Mr Pearce confirmed that he had seen the projected profit and loss statement for Nundor and that he considered the projections to be realistic and, at least potentially, achievable. Mr Pearce tendered into evidence an extract from the Profit and Loss statement for DPNW for the period January through December 2008 (Exhibit 2). Mr Pearce confirmed that in previous years the Premises had traded poorly, resulting in the appointment of administrators for DPNW Pty Ltd. He stated that the figures for 2007 / 2008 were an improvement of the previous financial year and that Nundor's cash flow projection was based on the trading figures for the previous year.
- 12) In response to a question from the Commission, Ms Carmody advised that she had the 2006 / 2007 financial statements for the Premises however the financials for 2007 / 2008 were not available from the administrators. Mr Pearce confirmed that the financial reports for 2007 / 2008 and periods beyond included figures for both premises and do not disclose the breakdown of the trading figures between The Fox Ale House and Ducks Nuts. Commissioner Timney pointed out that the contract of sale entered into between Nundor and the administrators of DPNW Pty Ltd required the administrators to provide all information reasonably required by relevant authorities (such as the Commission). The Chairman advised Mr Pearce that the Commission considered the recent financial statements as being relevant to its deliberations and that any decision in respect of the transfer of the licence was likely to be deferred pending provision of the 2007 / 2008 trading figures for the Premises. Mr Pearce advised that he would make his best endeavours to have the administrators provide the information requested by the Commission.
- 13) The financial statements requested by the Commission were provided by the administrators following the conclusion of the hearing.

- 14) Ms Carmody then addressed the Commission in respect of the manner in which her company intended to operate the business and the operational and management changes that would be implemented to improve the trading figures. Ms Carmody also advised the Commission of the cost of purchase of the lease for the Premises and the source of the Nundor's finance for the purchase and commencement costs. Ms Carmody provided extensive evidence and submissions in respect of the financial viability of Nundor, herself and Mr Nunn together with frank details of the loan arrangement in place for the purpose of purchasing the Premises. For reasons of business confidentiality those submission are not disclosed in these reasons for decision.
- 15) Ms Carmody and Mr Nunn provided the Commission with details of prior experience in the hospitality and hotel industries. Ms Carmody also advised that her daughter, Ms Krystelle Jones, would be also be engaged in operating the business bringing with her the experience gained from her employment in the hospitality industry, including a role for over two (2) years in the operation of an upmarket restaurant in London.
- 16) As noted above, following the conclusion of the hearing the Commission received from the administrators a profit and loss statement for the Premises for the period June 2007 through to July 2008. That statement indicated a significant improvement on the figures for the preceding years.

Consideration of the Issues

- 17) As set out above, the Commission determined to conduct a hearing on the basis of concerns raised in Nundor's application for transfer of the licence in respect of the financial viability of the proposed Licensee and the expertise and experience in the liquor industry of the Directors of the proposed Licensee company.
- 18) Both Directors gave evidence at the hearing as to their relevant experience in the hospitality and liquor industries. Much of that evidence was not presented in the application for transfer. Whilst a significant part of Mr Nunn's experience related to his employment some years ago it was noted that the experience cited was relevant and sufficient to persuade the Commission that the Directors were adequately experienced to operate the business under the licence. In addition, the Commission noted that Ms Carmody's daughter, Ms Krystelle Jones, would be joining the business. Ms Jones has recently been engaged with Green's Restaurant and Oyster Bar in London from which she obtained glowing references.
- 19) The Commission was somewhat surprised at the initial refusal by DPNW to produce the Profit and Loss statement for the premises for the year ending 30 June 2008. The Commission was further surprised that those figures had not been made available to the Directors of Nundor prior to the hearing. The P&L statement was ultimately produced to the Commission by DPNW and the Commission expresses its thanks to Mr Pearce for his efforts in obtaining the material required by the Commission. Suffice to say for the purposes of this decision that the Profit & Loss Statement for 2007 / 2008 showed a significant improvement in trading figures in comparison to the previous financial year. The statement also provided the Commission with a more relevant indication of the shortfall that Nundor will need to make up in order to trade profitably, including cost savings and revenue improvements.
- 20) Ms Carmody gave evidence at the hearing in respect of Nundor's business plan for the operation of the business and the initiatives aimed at turning the Premises into a profitable operation. Whilst the Commission intends to treat Ms Carmody's evidence as commercial in confidence the main thrust of the business plan is to operate the Premises as a family concern rather than as a commercially managed and corporately owned business, as has been the case in recent years. The Commission was significantly impressed by Ms Carmody's submissions in this regard. Whilst the Directors will no doubt face a significant task in turning the business around the Commission was satisfied that Nundor, and in particular Ms Carmody, had properly carried out its due diligence and was entering

into the purchase of the business well informed of the current financial position of the Premises as well as past trading figures.

- 21) Taking account of the evidence presented at the hearing, the Commission's concerns in respect of the financial viability and relevant expertise of the Licensee company and its Directors were satisfied by the applicant.

Decision

- 22) The Commission determined, pursuant to Section 40 of the Act, to authorise the transfer of liquor licence number 80316631 from DPNW Pty Ltd (Administrators appointed) to Nundor Pty Ltd.

Richard O'Sullivan
Chairman

5 February 2009