

# Northern Territory Licensing Commission

## Reasons for Decision

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<b>Premises:</b>	BP The Gap Service Station
<b>Licensee:</b>	Australian Fuel Distributors Pty Ltd
<b>Licence Number:</b>	80902634
<b>Nominee:</b>	John Youde
<b>Proceeding:</b>	Application for Variation to the Licensed Area of the Licensed Premises-Section 32A and Material Alteration-Section 119 of the <i>Liquor Act</i>
<b>Heard Before:</b>	Mr Richard O'Sullivan (Chairman) Mr Philip Timney (Legal Member) Mr Paul Fitzsimons
<b>Date of Hearing:</b>	29 April 2010
<b>Date of Decision:</b>	6 July 2010
<b>Appearances:</b>	Mr Tony Whitelum, Counsel for the Licensee Mr John Youde, Nominee Mr and Mrs Hatzimihail owners of the premises Mr Chris McIntyre, Deputy Director Licensing (South) Pastor Allen Steel, Christian Family Centre Jonathan Pilbrow, Peoples Alcohol Action Coalition (PAAC) Michael Harries on behalf of Western Desert Nganampa Walytja Palyanjaku Tjutaku Aboriginal Corporation (WDNWPT)

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## Background

- 1) By letter dated 20 September 2009, Australian Fuel Distributors Pty Ltd ("AFD"), Licensee of BP The Gap Service Station, made application for a variation to the licensed area and for material alterations to the premises at 73 Gap Road, Alice Springs.
- 2) In that letter the applicant Licensee advised that they were proposing to upgrade the existing service station, including the design and construction of a new building. The proposal included the relocation of the liquor storage area however the total licensed area would remain the same as in the current building.
- 3) Following advertising of the application 6 objections were received. By decision dated 22 February Legal Member Brenda Monaghan determined that the application should be referred to the Licensing Commission for hearing. The substance of the objections may be summarised briefly as follows:

### **Rodney Edwards**

The objection outlines Mr Edward's concerns as a nearby resident in respect of public safety issues.

### **Pastor Allen Steel on behalf of Christian Family Centre (CFC)**

The objection raises CFC's concerns about the impact of alcohol abuse on the Alice Springs Community.

**Jonathan Pilbrow on behalf of Peoples Alcohol Action Coalition (PAAC)** The objection sets out PAAC's concerns about the sale of alcohol from a petrol station, the potential for an increase in sales and consumption and the high level of alcohol abuse in Alice Springs.

**Michael Harries on behalf of Western Desert Nganampa Walytja Palyanjaku Tjutaku Aboriginal Corporation (WDNWPT)**

The objection outlines WDNWPT's concerns about the impact of alcohol abuse on the health and wellbeing of Alice Springs residents and the concerns about the detrimental impact of an increase in liquor sales from the premises.

**Associate Professor Sabina Knight**

The objection expressed concerns about liquor being sold from a petrol station and the benefit of this liquor outlet being closed completely.

**Julie Weber on behalf of Lutheran Community Care**

The objection relates to concerns about the impact of alcohol abuse on the health and wellbeing of Alice Springs residents and particularly Abbots Town Camp residents and the detrimental impact of an increase in liquor sales from the premises, particularly from a petrol station.

## Hearing

- 4) The hearing into the application was held before the Commission on 29 April 2010 in the Family Court Room, 54 Hartley Street, Alice Springs. At the commencement of the hearing Mr Whitelum informed the Commission that, having provided a formal written response to the objections, he did not intend to cross examine the objectors who attended the hearing so long as their oral submissions remained within the bounds of the written objections.
- 5) Mr Whitelum drew the attention of the Commission to the nature of the application and noted that the hearing brief referred to the application as one for a variation of the licensed premises rather than an application for material alterations. Allowing that the proposed development included the demolition of the existing building and the construction of a new service station the application could also be construed as a request for substitution of other premises for the premises specified in the licence.
- 6) The initial view of the Commission was to accept Mr Whitelum's reasoning that the application constituted a substitution of premises pursuant to Section 46A of the *Liquor Act* ("the Act"). However, following the hearing and on a more comprehensive consideration the Commission is of the view that the application is for material alteration pursuant to Section 119 of the Act for reasons outlined in paragraph 24 below.
- 7) Following the opening submissions, the hearing was adjourned to allow the Commission and the objectors an opportunity to view the premises. The Commission noted in the course of the viewing that the current building is in a dilapidated condition, particularly in the "back of house" area, and in need of significant upgrading generally.

## Submissions on Behalf of Objectors

- 8) On resumption of the hearing, Pastor Allen Steel gave evidence in support of the objection on behalf of CFC. He agreed that the building required renovation and also noted the current restriction on the licence in respect of the sale of cask wine. Pastor Steele noted the unusual situation whereby alcohol was able to be sold from a petrol station and raised the issue of higher alcohol sales resulting in an increase in motor accidents. He queried whether Aboriginal people were being targeted as clients by the Licensee and submitted that the application should be refused and the liquor licence cancelled completely.

- 9) Jonathon Pilbrow addressed the Commission in respect of the objection on the part of PAAC. He also queried the appropriateness of a liquor licence held in conjunction with a service station. He noted that this particular licence was first issued in the 1960's and that community attitude in respect of alcohol related harm and associated problems had shifted significantly since then. Mr Pilbrow stated that the improved amenity of the premises, if the alterations were approved, would most likely lead to an increase in fuel and food sales and that the increased patronage would inevitably lead to an increase in the sale of alcohol.
- 10) Mr Pilbrow submitted that the consumption of alcohol in the Northern Territory was greater than any other Australian jurisdiction and that there was a concerted effort to reduce consumption levels to at least the national average. He stated that one avenue to achieve that aim was to reduce the number of liquor licences. He noted that there were two other liquor licences in close proximity to BP The Gap. He concluded by suggesting that if the application were to be approved that the voluntary restriction of the sale of cask wine be enshrined in the licence conditions.
- 11) Mr Michael Harries on behalf of WDNWPT noted that BP The Gap was in close proximity to the renal dialysis centre and had the potential to cause issues for clients of the centre. He noted that there were a number of licenses in this area in close proximity which brought with it alcohol related anti-social behaviour and that night time disturbances of this nature resulted in poor health outcomes for patients of the renal centre.

## **Submissions on Behalf of the Licensee**

- 12) Mr Whitelum tendered a statement prepared by Mr Youde (Exhibit 1) and submitted that this responded to the objections. Mr Youde has managed BP The Gap for the past six years. He noted that the liquor licence was first granted in 1962 and that AFD currently lease the premises from Mr and Mrs Hatziihail. The last renovations to the premises occurred in 1990 and the current proposal included demolition and replacement of the existing building, installation of new underground fuel tanks and landscape renovation.
- 13) Mr Youde stated that the current breakdown of business was made up of 82% shop only purchases, 14% fuel only purchases and 4% shop and fuel purchases. The proposed renovations included a slight increase in the alcohol display area and a reduction of the alcohol storage area by approximately 10 square metres.
- 14) So far as alcohol sales was concerned, Mr Youde noted that they proposed to extend the range of bottled wine to cater for tourist requirements. The existing range of alcohol for sale would otherwise remain the same as at present. There was no change proposed to the way in which alcohol was sold to clients. Customers will not have access to the alcohol display cabinets and staff will retrieve stock from the fridges for all sales. Mr Youde stated that the proposed renovations will not result in an increase in the volume of liquor sold and that the sale of liquor will remain ancillary to the general supermarket and fuel sales.
- 15) The Commission was advised that the BP The Gap business plan, attached to Mr Youde's statement, included a proposal to upgrade the CCTV installation at the premises.
- 16) Mr Whitelum submitted that the majority of the objections related to alcohol consumption and associated harm at the Alice Springs community level without specific reference to the neighbourhood in which BP The Gap is located. He noted that there were no objections from local authorities such as Police, the Department of Health and Families or the Alice Springs Town Council and submitted that the Commission could draw the inference that there were no concerns from those quarters in respect of the application.
- 17) Mr Whitelum stated that marketing of alcohol from the premises would remain low key and primarily via display of products inside the premises, with the occasional use of sandwich boards. No discounts will be offered for alcohol sales and the Licensee does not intend to compete with the Gap Hotel or the supermarket chains in that regard.

- 18) Mr Whitelum submitted that no specific concerns had been raised regarding this particular licence and that the Licensee had an unblemished record since the grant of the licence in 1962. He submitted that the new building would be a bonus for the neighbourhood with the opening of a more upmarket general store and a significant improvement on the existing building.
- 19) The Commission then proceeded to hear submissions from the Licensee as to commercial and financial aspects of the application in camera.

## **Proposed Buy Back of Alice Springs Liquor Licences**

- 20) Prior to the conclusion of the hearing, the Chairman noted that, in considering any application under the Act, the Commission was required to take the objects of the Act into account. The Commission is aware, though its own knowledge, that the Alcohol Management Plan for Alice Springs is under review and that one of the proposals under consideration is the buyback of liquor licences.
- 21) The Chairman noted that the proposed renovations involved a significant capital outlay. He advised the Licensee that prior to the Commission making a determination on the application in respect of the application he would seek advice from the Minister for Alcohol Policy as to whether the proposed buy back of licences would affect BP The Gap.
- 22) In response to the letter from the Chairman, the Minister for Alcohol Policy advised that the Northern Territory Government has identified licences in Alice Springs that may be anomalous in the current environment and will be the subject of negotiations with the relevant Licensees for buy-back of those licences. The Minister confirmed that the licence held by BP The Gap, being a liquor licence operated from a suburban service station, is one of the licences being considered for buy back negotiations.

## **Consideration of the Issues**

- 23) The Commission noted from its viewing during the hearing that the premises were run down and sorely in need of renovation.
- 24) There was some conjecture at the commencement of the hearing as to whether the Commission should be treating the application as one for approval of material alterations to existing premises or for the substitution of the current licensed premises with new licensed premises. The Commission notes however that nothing of any great distinction revolves around the categorisation of the application as both an application for substitution, Section 46A, and an application for material alterations, Section 119, require the Commission to consider the objects of the Act in determining whether to approve the application. On balance the Commission is persuaded to the view that this application is best categorised as one for material alteration rather than substitution as the new building will occupy predominantly the same footprint on the same block of land as the existing building.
- 25) The Act permits objections to material alterations where the alteration may or will adversely affect the amenity of the neighbourhood or the health, education, public safety or social conditions in the community.
- 26) Notice of the application was forwarded to the Department of Health and Community Services, the Department of Planning and Infrastructure, Northern Territory Police, the Alice Springs Town Council and Northern Territory Fire and Rescue Service. None of those organisations lodged an objection or raised any concerns with the Licensee's proposal.
- 27) The objectors, both in their written objections and in the oral presentation of those who appeared at the hearing, raised concerns regarding the impact of alcohol abuse on the health and wellbeing of the community of Alice Springs, the potential for an increase in sales of alcohol from the revamped premises and the propriety of alcohol sales from what is predominantly a petrol station.

- 28) However, in the main, the objections did not relate specifically to BP The Gap, nor to any particular activity on the part of the Licensee that was exacerbating alcohol related problems or alcohol related harm in Alice Springs. Of significance, this particular licence has been in existence since 1962 during which time there have been no reported breaches of the Act or the licence conditions. This is an enviable and commendable record by any standards and more so in the current situation in a community such as Alice Springs where Licensees are under close public and regulatory scrutiny.
- 29) The Commission is not satisfied that the material alterations proposed by the Licensee will have any negative impact on the social amenity of the community in which the premises are located. No evidence was submitted at the hearing indicating that BP The Gap has specifically had such an impact during some 48 years of holding a liquor licence. The application does not include any significant amendment to licence conditions or to the manner in which the Licensee intends to operate the business. In essence, if the alterations are approved the Licensee intends to operate the business in a similar manner to previously but from a newly constructed building on the same site.
- 30) One proposed change is to extend the range of alcohol available for sale to include mid price range bottled wine. There is currently no restriction on the licence in respect of the sale of bottled wine and the Commission sees no issue arising from the proposed sale of bottled wine within what has been termed the mid price range.
- 31) A number of objectors raised the issue of alcohol sales from a petrol station and submitted that the licence should be cancelled on the basis of the incompatibility of those two aspects of the business. Even were it minded to do so, which it is not, the legislation does not provide the Commission with the power to cancel a licence when considering an application for material alterations. Section 119(8) of the Act provides that, at the conclusion of a hearing in respect of an application for material alterations the Commission must either approve or refuse to approve the material alterations. In addition the Commission may take any of the actions contemplated under Part IV of the Act. For the purpose of completeness, the Commission's powers in respect of an application for substitution of licence are similarly limited to approve or not approve.
- 32) The considerations in respect of an application for the cancellation of a liquor licence are prescribed in Sections 68 to 72 of the Act and are markedly different to the considerations taken into account by the Commission when considering the approval of material alterations. In addition, the Act provides that only the Director of Licensing may lodge an application for cancellation of a licence with the Commission. For the purpose of absolute clarity, the Commission has not considered the merits of submissions received from objectors in respect of cancellation of the licence, nor does it currently have any predisposition or opinion in that regard.
- 33) In the event the Commission determined to refuse the application the practical outcome would be simply that the Licensee would continue to operate the business, including selling alcohol, from the existing run down premises. The renovations contemplated are clearly overdue and will most likely enhance the amenity of the petrol station, the mini-market and the alcohol storage and display areas. The Commission also notes that the renovations include a more secure location for alcohol storage and an upgrade of the CCTV system.
- 34) The Commission is not satisfied that any cogent reasons have been presented supporting an argument that the application for material alterations or for the variation of the location of the alcohol storage area should be refused in the particular circumstances of BP The Gap.
- 35) Several of the objectors submitted that, should the material alterations be approved, the Licensee's current voluntary agreement to not sell cask wine should be incorporated as an enforceable condition of the licence. Mr Whitelum made no response on behalf of the Licensee to that submission. As set out in paragraph 31 above, the Commission's powers following a hearing in respect of an application for material alterations are limited to approving or refusing the application or exercising the powers set out under Part IV of the Act.

- 36) Section 49(4)(b) of the Act however provides the Commission with the power, following the conduct of a hearing, to amend the conditions of a licence. In this case, and taking into account the voluntary restriction imposed by the Licensee, the Commission is minded to impose a condition on the licence prohibiting the sale of cask wine. That condition is not intended to impinge on the Licensees proposal to add mid priced bottled wine to its range of alcohol products.

## Decision

- 37) The Commission determines to approve material alterations to the premises of The Gap BP and to the variation of the licensed area as outlined in the submission dated 30 September 2009 to the Deputy Director Licensing (South) and in the plans submitted to the Commission during the course of the hearing.
- 38) The Commission notes the advice from the Minister for Alcohol Policy that Government intends to commence negotiations with a number of Licensees in Alice Springs with a view to the buy-back of their liquor licences. Following the conclusion of the hearing, counsel for BP The Gap was advised that his client's licence is one of those under consideration for buy-back. At this stage the Commission is unaware as to whether those negotiations are likely to be successful or when they are likely to be concluded.
- 39) Were it not the holder of a liquor licence, the owners of the land on which BP The Gap is situated would be entitled to renovate the premises as they saw fit, subject only to building and planning constraints. In the circumstances, the Commission does not consider it appropriate to defer its decision indefinitely or until such time as negotiations in respect of a possible buy back of the liquor licence are commenced or concluded. The land owners should be entitled to carry out the proposed and long overdue renovations to the premises regardless of whether or not the liquor licence is ultimately bought back by Government or otherwise acquired.
- 40) In approving the application for material alterations, and taking account of the submissions of a number of the objectors, the Commission has determined to amend the conditions of licence by imposing a special condition prohibiting the sale of cask wine from BP The Gap's licensed premises.

Richard O'Sullivan  
Chairman

7 July 2010