

Northern Territory Licensing Commission

Reasons for Decision

Applicant:	EPSOMM Pty Ltd
Premises:	Humpty Doo Tavern
Heard Before:	Mr John Withnall (Presiding Member) Ms Shirley McKerrow (Member) Mrs Mary Ridsdale (Member)
Date of Hearing:	17-21 January 2000
Appearances:	Mr Lex Silvester, for Applicant Mr Mark Hunter, for Mole Creek Pty Ltd Rev. M Anderson, for Uniting Church, Litchfield Parish

The matter before the Commission is an application for a new liquor licence by Epsomm Pty Ltd to establish and operate a tavern within the shopping centre complex at the corner of Fred's Pass Road and Challoner Circuit at Humpty Doo. Objections to the proposal were received within the statutory objection period from the following:

1. Humpty Doo Community & Childcare Centre Inc, on behalf of the management committee of the Centre and also stated to be on behalf of a list of almost 40 parents whose signatures were appended to this objection;
2. Mole Creek Pty Ltd, the licensee of the existing Humpty Doo Hotel;
3. Palmerston Regional Business Association;
4. Dean and Sarah Stocks;
5. Valerie Synot
6. June Goldsworthy;
7. Judy Williams;
8. Nicole Gibbins.

Late objections were also received from the Uniting Church of Australia Litchfield Parish and from the Humpty Doo & Rural Area Golf Club Inc. Although a little late, these objections had been notified to the applicant for several months, and Mr Silvester on behalf of the applicant consented to the Commission making an order pursuant to 167 of the *Liquor Act* ("the Act") extending the respective times for reception of each of the late objections to such extent as encompassed their receipt at the offices of the Liquor Commission.

Prior to the commencement of the hearing, telephone messages were received at the offices of the Commission to the effect that Valerie Synot and Lu Steuart would not be appearing at the hearing. Lu Steuart was the author of the objection by the Humpty Doo Community & Childcare Centre, at that time having been the president of the association.

On 14 January 2000 a fax was received in the office of the Liquor Commission from Ray Walton, Secretary of the Palmerston Regional Business Association, advising that the Association did not have a member who could spare such time away from business to appear at the hearing, but expressing the hope that the Association's objections "will be noted and weighted as valuable evidence against the granting of the application". (Mr Walton in fact did appear during the course of the hearing, but under subpoena by the Applicant).

Also received prior to commencement of the hearing was a fax from Sarah Stocks, the new president of the Humpty Doo Community & Childcare Centre Inc, advising that there had been "significant discussion" with the developers of the proposal, who had "sought to address the issues identified in her letter" (see exhibit 28). This letter from Mrs Stocks concluded with a summary of the position of the management committee of the childcare centre which we reproduce in full:

"In summary, some of the parents who previously objected to the tavern proposal now believe that there has been a consultative and accommodating response from the developers, and are satisfied that the potential benefits from the proposal outweigh the potential risks.

Other parents maintain their strong objections to the proposed tavern under any circumstances, while a third group are ambivalent.

The management committee do not feel that they can maintain a unified objection to the proposal, however, nor can they unreservedly support the proposal.

Thank you for your consideration of these views, and we wish you good judgment and wisdom in your consideration of the application for the liquor license."

Mrs Stocks herself obviously fell into the category of a parent maintaining a strong personal objection to the proposed tavern, as in company with objector Judy Williams she appeared unexpectedly during the course of the fourth day of the hearing to speak to her personal objection. Unfortunately, not having any warning of these two appearances at this particular time, the Commission in its proper management of the hearing was unable to receive evidence from these two ladies before they announced that they had to vacate the hearing and return to Humpty Doo. We advised them that the hearing would continue at 9:00am the following morning, that of course they were welcome to return, and that we anticipated being able to accommodate their evidence during the course of the next morning's session. Neither objector reappeared at that time or before the hearing concluded, which causes the Commission to now consider the status of a written objection which is neither withdrawn nor backed up by an appearance by the objector at the subsequent hearing.

We do not believe that in this situation the objection should be dealt with in any way analogous to being struck out. It should be assumed that the views of the objector continue to be held by the objector, and that that the objector remains opposed to the application. The written objection remains on foot, and remains a hurdle for the applicant, albeit an increasingly lesser one as the hearing progresses and the evidence of the applicant, especially in relation to the specific objection, is uncontested by or on behalf of the objector.

Mole Creek Pty Ltd (the Humpty Doo Hotel) maintained its objection throughout the hearing, represented by Mr Hunter, although formally resiling from the ground of its objection that alleged that the applicant did not have the financial and managerial capacity to conduct the proposed business. That aspect of the objection by the Humpty Doo Hotel was formally withdrawn by Mr Hunter on 17th January 2000.

During the course of the hearing Mr Hunter called evidence from Mr Peter Youens, a principal of his client company (and the nominee on the licence of the Humpty Doo Hotel).

The only other objector to appear at the hearing was the Rev. Mervyn Anderson, who gave evidence on behalf of the Humpty Doo congregation of the Uniting Church of Australia, Litchfield Parish.

Mr Silvester's presentation of the case for the new licence demonstrated an appropriate awareness by the applicant of the requirements of section 32 of the Act.

Several of the requirements of section 32(1) of the Act can perhaps be dealt with quite briefly, starting with the financial and managerial capacity of the applicant, which was not maintained as an issue by any objector. A consideration of the evidence both oral and documentary and our impressions of the personnel of the applicant company derived from our observations of them during the course of their evidence, leaves the Commission with no doubts whatsoever as to the

financial and managerial capacity of the applicant. We are well satisfied that the company will have no difficulty in drawing on such financial and managerial resources as will be required. We are convinced on the evidence that the company through its directors has the experience, the expertise and the willingness to conduct a tavern operation in the proposed location with appropriate sensitivity to such social, commercial and environmental considerations as may properly require attention.

We can also quickly deal with section 32(1)(f) of the Act. Although it is the view of the Commission at the present time that this sub-section does not apply to premises which are within a local government area as distinct from a community government area, nevertheless it remains the practice of the Commission to seek the views of the local government council, town council or shire council as the case may be, in relation to every proposal for a new liquor licence within a council's area. In this case the relevant council is the Litchfield Shire Council, whose views constitute folio 46 of exhibit 2. The Litchfield Shire Council is not opposed to the proposal provided that the applicant liaises with the local community to allay fears as to the attraction of unsocial behaviour, and provided that there is police and planning authority approval of the proposal. Given the applicant's evidence as to its proposed sensitivity to community issues (and see too exhibit 18), given that the police do not object to the application "in the proposed format" (exhibit 2, folio 42) and given that the Planning Authority has now issued an appropriate Development Permit (exhibit 12), it seems safe to assume that the Litchfield Shire Council has no objection to the proposed new licence.

As is so often the case, the application essentially distills into a consideration of the major issue of community needs and wishes, with an additional focus in this instance on the suitability or otherwise of the proposed location of the new outlet.

Mr Silvester referred us to the decision of the Northern Territory Court of Appeal in *Lariat Enterprises and Liquorland (Australia) Pty Ltd v Joondanna Investments Pty Ltd and the Liquor Commission of the Northern Territory (1995) NTSC 38* ("Joondanna"). That case was the end result of an attack by an unsuccessful applicant on the Liquor Commission's decision that in the circumstances of that particular application the Commission required "overwhelming and unambiguous evidence" of community support for the proposal. Mr Silvester submits that the case he has presented for the applicant before us demonstrates just such an overwhelming and unambiguous level of community support. Before ruling on that issue, however, it is perhaps appropriate to point out at this juncture that the Commission need not and does not require such evidence to *always* be "overwhelming".

The Court of Appeal in the *Joondanna* decision, in referring to section 32(1) of the *Liquor Act*, had this to say:

The Commission must have regard to the matters specified in sub-paragraph (a) to (f) but may have regard to a further limitless range of other relevant matters.

The Commission is not obliged to give any matter any particular degree of weight. The Commission must "have regard to" each specified matter but it is clearly entitled, in a particular case, to give a specified matter great weight, little weight or no weight at all. The statutory obligation is to "have regard to" the specified matter and decide what weight, if any, it should be given in the particular circumstances. As the weight to be given to the specified or other matters relevant to a particular application may vary, so may the requirements as to evidence. In respect of some matters a minimum of evidence may suffice, for others a great deal more may be required to satisfy the Commission.

The comparative weight or importance to be given in any case to the separate requirements of section 32(1) of the Act is therefore a matter to be determined by the Commission in each case, as are the evidentiary requirements in relation to any of those individual matters set out in the section. As the Court of Appeal went on to say in *Joondanna*:

In most cases, the Commission will be faced with considerations which point in opposing directions and are of differing weight. It will ordinarily be involved in a balancing exercise in determining how its discretion should be exercised.

The Commission in *Joondanna* determined that it needed “overwhelming” evidence of community support in the face of its perception of the downside of that particular application.

The feared downside of the application now before us is, certainly in part, a somewhat different situation from that which was perceived by the Commission in the *Joondanna* matter, and in our view the balancing exercise is best approached without any preconceived determination for the need for overwhelming evidence on any particular issue. The Commission will normally determine matters on the balance of probabilities along *Briggenshaw -v- Briggenshaw* lines, which is to say we prefer to be able to be positively persuaded on an issue as distinct from indulging in any artificial weighing or measuring exercise. Whether our need to be positively persuaded on any issue will require the evidence to be overwhelming will depend on the particular issue and the circumstances in which it arises for determination.

In such manner we approach the evidence in this present matter.

Our understanding of the evidence and of the substance of the objections has been assisted by a view conducted of the proposed location of the new tavern and the surrounding neighbourhood. We were also taken on a view of the Humpty Doo Hotel and of the Golf Club.

We believe Mr Hunter to be correct in putting to us that before considering and determining the needs and wishes of the community it is necessary to first identify that community and its nature.

The notion of “community” within the meaning of the *Liquor Act* in relation to a given application or situation has been referred to many times in various written decisions of this and previous Commissions, and more importantly in several decisions of the Supreme Court of the Northern Territory. The earliest substantive decision of the Northern Territory Supreme Court on this issue would seem to have been that of Muirhead J in *R v Liquor Commission; ex parte Pitjantjatjara Council Inc. (1984) 31 NTR 13*. This related to the Yulara Resort, and the Court held that the Liquor Commission in order to comply with section 32(1)(d) in that particular application had to consider and balance the views of “all groups” in the “surrounding area”, as a consideration separate from, and perhaps to be balanced against, the requirements of the travelling public (which His Honour was “incline(d) to the view” should also be considered, but did not formally rule on the point).

That decision was considered by Thomas J in her judgment in *Tyeweretye Club Inc. v Northern Territory Liquor Commission (1993) NTSC 15*. Her Honour held that in the case of an application within the township of Alice Springs the Commission should not take into account the needs and wishes of all groups in surrounding areas pursuant to section 32(1)(d) of the *Liquor Act*, but was restricted to consideration of the needs and wishes of those who resided or worked in or near the township of Alice Springs. She went on to say that there was a large qualitative difference between an application within an established township and an application relating to a tourist resort in an outlying area, especially when a takeaway licence is involved, and that it is in the latter situation that all groups in the relevant district should be consulted. (Her Honour also carefully points out, however, that she was interpreting the application of section 32(1)(d) only, and that the Commission *could* have considered the needs and wishes of anybody at all if it specifically indicated that in doing so it was exercising its powers under section 32(1)(g) of the Act, viz. any other matter the Commission shall think fit).

The present application would seem to fall somewhere between those two decisions. On balance we think that the approach of Mr Silvester is correct, and that the community whose needs and wishes must be taken into account in relation to a new tavern at Humpty Doo comprises those who reside and/or work in Humpty Doo and the surrounding district.

This inevitably leads to the need to identify the appropriate district, that area surrounding the Humpty Doo Shopping Centre the residents and workers in which constitute the community for the purposes of this application. We are inclined to the view that the statistical area “Litchfield(S)–Part B” in the Australian Bureau of Statistics material before us provides a convenient and appropriate reference for the identification of the surrounding district. It excludes Part A, the distinct and declared town of Palmerston, but includes the Noonamah area to the south. At first sight the northern region of Part B may seem somewhat remote for inclusion in the relevant considerations,

but that region includes large areas of coastal flats which are only sparsely populated. "Litchfield (S) - Part B" would seem to be an effective guide to the statistics of the appropriate region to be considered in relation to the application before us.

Taverns in the area we are looking at are the Noonamah Hotel to the south, which is on the Stuart Highway, the Howard Springs Tavern to the north of the Arnhem Highway, and in the Humpty Doo area itself, the Humpty Doo Hotel. The material before us from the Australian Bureau of Statistics shows a steadily increasing population in "Litchfield(S)–Part B" since 1991, standing at over 13,000 at the present time. Extrapolating from the 1991-1996 census details, it would seem that a little over one third of this figure would currently comprise persons under the age of twenty years. This is consistent with the statistics (Exhibit 36) for the electoral district of Nelson (which includes Howard Springs and about half of Humpty Doo) which show that somewhere between a quarter and one third of residents in that electorate are currently being educated.

Mr Hunter points out that the statistical evidence does not support Mr Silvester's submission as to the increasing family orientation of the district, as the proportion of school aged children to total residents has remained about the same over the sample period. This would seem to be so, but a perusal of Exhibit 38 shows that such proportion is consistent with the make-up of Darwin "dormitory" suburbs, and in our view does not in itself weaken the strength of Mr Silvester's submission as to the demonstrable urbanisation and family orientation of the Humpty Doo rural area. The Commission's own view of the area noted the extent of residential housing in the area, and the Rev. Anderson while speaking to the objection of the Uniting Church testified to the new development of the area and the higher participation in education on the part of the local population.

If we were to look at the Humpty Doo area alone, as separately delineated in some of the ABS material, current residential population is seen to be over 4000 persons, again with about a third of them being juveniles. The only hotel or tavern in this area is the Humpty Doo Hotel, which has objected to the proposed new tavern on grounds which Mr Silvester attacks as being transparently commercially motivated and therefore not permitted by the terms of Section 48(1A) of the Act. Mr Silvester submitted that the *substance* of the objection must surely be seen as being the fear of adverse effect of new competition on the Hotel's business.

The strength of the objection by the Humpty Doo Hotel suffered from the commendable candour of Mr Peter Youens, one of the two directors and shareholders of Mole Creek Pty Ltd, the licensee company of that hotel. He conceded at the outset of his evidence-in-chief that the substance of his objection was commercial to a certain extent, adding however that he has "doubts about the location more than anything". The first ground of the objection of Mole Creek Pty Ltd (See folio 65 of Exhibit 2) was that the location of the proposed premises is inappropriate, being very close to schools, churches, residences and a child minding centre. Nothing was put to us by Mr Youens or any otherwise on behalf of Mole Creek Pty Ltd as to why the tavern being in a shopping centre in the same street as schools and churches would be a problem. The Commission noted in the course of its view that Challoner Circuit is quite a long street in a large curving U shape. All that was put to us in support of the first ground of objection by Mole Creek was that there may be some congestion of traffic in relation to the operation of the proposed bottleshop.

Ms Lida Tatarko, a parent of two school children who attend school in Challoner Circuit, tells us that "95% of the students" travel to and from school by bus. In any event, she does not see 3:00pm to 3:30pm as any sort of peak hour for the hotel industry. She cannot see that persons coming out of a tavern at 3:30 in the afternoon may be any real problem.

We accept Mr Silvester's submission that the objection by Mole Creek Pty Ltd, on its own evidence, boils down to only a concern for possible traffic congestion outside the shopping centre and a desire to head off looming competition. In cross examination Mr Youens conceded that he would prefer not to have the competition, that he believed that some of the locals would be drawn to the new premises, that if the Epsomm proposal goes ahead he expects to lose market share. He fears the impact of Epsomm's potential allocation of six gaming machines. He agreed with Mr Silvester that at every level of the proposed Epsomm operation there is a real risk of Mole Creek losing market share: "Yes, that's right. It will hurt us, definitely".

Mr Youens even agreed with Mr Silvester that the essence of the objection by the Palmerston Regional Business Association was to protect *his* business.

Given the evidence of Mr Youens as to the commercial motivation at least partly behind his objection, it stretches credulity to accept that the rest of the objection as delineated by Mr Youens in evidence is founded on an altruistic concern for possible traffic problems several kilometres from his premises, and we disallow the objection as being one the substance of which is not permitted by Section 48(1A) of the *Liquor Act* as a ground of objection.

We believe that the proper course of action in this situation is for the Commission not to formally strike the objection out or to render it a nullity ab initio, but to find that the objection has not been made out to be any more than one not permitted by Section 48(1A), and will therefore be disregarded by the Commission in its deliberations on the application. The evidence of Mr Youens, and Mr Hunter's cross-examination of witnesses of the applicant, remains evidence in the proceedings for the Commission to draw on as it may see fit, but the objection per se will carry no weight in the Commission's assessment of needs and wishes.

Such a dismissal of the objection should not be seen to be any criticism of the management of the Humpty Doo Hotel. Mr Youens tells us that the hotel is part of the area's heritage, and is deliberately kept more or less in its original historical condition, and will be kept that way indefinitely. This is a deliberate business decision on the part of the licensee, and explains the perseverance with concrete floors and the absence of any dress code. As Mr Youens himself admitted in evidence, back when he first took over the management of the hotel the Humpty Doo area was then a very different place: "few people lived there". This is no longer the case. Mr Youens agrees that the 500-strong petition of support for the new tavern (Exhibit 27) is overwhelmingly against his proposition that all the locals need is his hotel. That petition certainly overwhelms the (by comparison) rather wan petition got up by Mole Creek Pty Ltd (Exhibits 41 and 45), which mustered only some twenty two signatures in all from hotel patrons and Golf Club members. In addition, Mr Rodney Arrowsmith gave evidence that he had seen part of, or a version of, Exhibit 41 on the hotel bar which contained comments *against* the hotel and in support of the proposed new tavern. Mr Youens agreed that part of his petition had gone missing.

So the business decision of Mole Creek Pty Ltd to continue to operate its hotel in historical mode must stand on its own feet against the business decision of the applicant to seek to cater for local needs with something more family oriented and upmarket. As we say, we have no cause to criticise the Humpty Doo Hotel, but Parliament has determined that the hotel not be protected or inured from competition provided that the case for a competitor can otherwise be made out.

The would-be competitor's case was obviously well prepared, and comprehensively presented. Even Mr Hunter acknowledged the sophistication of the preparation of the application, albeit in a backhanded way by equating its degree of sophistication with being "rather crafty". The thrust of that accusation appears to be that a bottleshop with a bistro attached has cleverly been presented as a bistro with a bottleshop attached. This submission is not supported by the evidence. In particular, it does not address the evidence on behalf of the applicant comparing the price of liquor items over the different counters with the cost of those items into store, such that the profit from the bottleshop is at considerable remove from the raw revenue forecasts for the bottleshop. We were told that the profit margin on the bottleshop was in the realm of 20%, whereas the same margin in relation to the bistro, the bistro bar and the sportsman bar would be in the region of 70%. The five year budget figures comprising Exhibit 20 show that the profit from the bottleshop is anticipated to be about half that of the rest of the operation.

The tavern is proposed to occupy premises within the Humpty Doo Shopping Centre previously occupied by a hardware store operated by the family company of Mr Jimmy Lay that owns the shopping centre. The adjoining licensed supermarket in the shopping centre is owned and operated by a subsidiary of that company. Mr Lay agreed in evidence that he expects to lose money on reduced take-away sales from his own licensed shop, but told the Commission that he was looking at what was good for the shopping centre as a whole. He anticipates a general benefit from an increase of customers to the shopping centre.

Mr Lay's company, as landlord of the shopping centre, has undertaken to provide the applicant with an appropriate lease of the proposed premises in the event of the application being successful (Exhibit 21).

Evidence was given by the personnel of the applicant company as to the proposed layout, with emphasis on the carpeted bistro area immediately inside the entrance from the shopping centre. The fittings, fixtures and décor are to be up-market, with a dress code for all areas. There is to be a bistro bar area slightly raised on timber decking. A sportsman's bar, with pool tables, Keno, TAB and the like, will not be able to be accessed directly from the bistro area.

The bistro will be run as a café during the day, with emphasis on a good range of coffee and salads, and will be operated as a more traditional bistro at night, with the promise of a good range of reasonably priced family meals. The outdoor area "beer garden" will be appropriately fenced, given a "water treatment", and will be totally covered by shade structure. The kerb area of the bottleshop drive-through will be landscaped in response to community concerns for visual screening. The applicant volunteered for conditions in the licence prohibiting offensive levels of signage and prohibiting the sale of cask wine other than in premium brand two litre casks. A price differential will be maintained in relation to a good range of low alcohol beers.

The target market is primarily locals, rural families in the area and Darwin day-trippers, although the applicant anticipates attracting a share of interstate visitors such as tourists to and from Kakadu.

It is anticipated that about 30 people will be employed, both full-time and part-time, and the applicant guarantees preference to locals. Epsomm's research tells it that part-time work is heavily sought-after in the area, and in any event anticipates invaluable insights into the local market from locally recruited staff. All staff will be required to undertake the appropriate patron care course. Trading hours requested are 10:00am to midnight, seven days per week, in all areas other than the bottleshop for which standard takeaway trading hours are requested, viz 10:00am to 10:00pm with a 9:00am start on Saturdays and public holidays.

The degree of public consultation on the part of the Applicant is to be commended. Epsomm prepared a "community information package" (Exhibit 15) and a coloured "flyer" (Exhibit 16), and two quite large coloured "storyboards" (Exhibit 17). During August and September 1999 the company set up displays at the entrance to the shopping centre on each of four separate Saturday mornings, notoriously busy times for shopping centres. At least one of the directors of Epsomm was in attendance on each of those occasions. The information packages and flyers were available at these stalls. Interest was said to be "tremendous", and the petition (Exhibit 27) was available at the stalls for signature by those who cared to be identified as supporting the proposal.

Epsomm also purchased an exhibitors stall at the Humpty Doo Craft Fair in August 1999. Again the community information packages were available, and the display included large-scale plans of the proposal and the large coloured storyboards which comprise Exhibit 17. We were told that thousands of people attended the Craft Fair. At all of these displays members of the Applicant company were present to fully explain the entirety of the proposal and seek support by way of signatures on the petition .

A log was kept of all community contact, and comprises Exhibit 25. Photographs of the display at the Craft Fair are to be found in Exhibit 26. Evidence was given by company personnel that the reaction of the public at the displays at the Craft Fair and the shopping centre was overwhelming excited support for the new proposal.

The information packages and petition were also left at key retail outlets such as the tackle shop, the newsagency and the bookstore, and at the butcher shop the plans were mounted and displayed for some weeks. The community information packages were also left with the local Member of Parliament for the district, Mr Terry McCarthy, and with the President of the Litchfield Shire Council.

Company directors also personally distributed the community information package to the Childcare Centre, the Uniting Church in Challoner Circuit, the Humpty Doo Primary School, the Taminmin

High School and the St Francis of Assisi College. The material left at each of those premises comprised not only Exhibits 15 and 16 but also a copy of the full plans and a reduction of Exhibit 17.

There were also consultations by the directors with every tenancy in the shopping centre. Twelve of sixteen shops signed Exhibit 35 as being supportive of the proposal. Of the four shops whose support was not obtained on Exhibit 35, one was the pharmacy which was said to be owned interstate with the local manager not prepared to take the responsibility of expressing support. Nobody at the Chinese takeaway was spoken to by reason of its late opening time. The owner of the Fried Chicken shop, which also abstained from the retailers petition, was concerned at the detrimental effect of the bistro food sales on his own trade, and evidence was given that it has now been explained to that shop holder that the bistro will not have any takeaway facility, and should not affect his turnover.

On the evidence therefore, *at least* three quarters of the tenancies of the shopping centre are in favour of the tavern proposal.

Finally, a director of Epsomm spoke with the director of the Woodleigh Gardens Child Care Centre, which is only twenty metres from the Hibiscus Tavern across a narrow side street, in order to ascertain what issues that child care centre may have had by reason of its proximity to a tavern, and he was assured that in over four years there had been no incidents or problems. (This was confirmed by direct evidence, *post*.)

All told, Epsomm did an unusually thorough job of bringing the proposal to the attention of the community whose needs and wishes are to be gauged, and in this context the general absence of residential objection, as distinct from those of the Uniting Church and those in connection with the Humpty Doo Child Care Centre, can be seen to be significant; the Humpty Doo Tavern has been a high profile proposal within the local community. *Positive* evidence of community support is to be found in (a) the evidence of the directors of Epsomm as to the public reception of the many displays of the tavern proposal and the widespread distribution of the information packages (b) the number of signatures on the petition of support and (c) the strong evidence of Ms Lida Tatarko.

Dealing firstly with the petition, it contains the signatures of about 500 persons, almost all of whom give their address as what could be described as a local one. There are just a few interstate tourists, and some residents of Darwin suburbs and Palmerston, but by far the majority of the supportive signatures on the petition are those of members of the local community. This represents a very significant proportion of the adult population of the area from which the signatures were drawn. Given the careful delineation of the proposal at the top of the petition, and the informative nature of the many public displays of the petition, it must be seen as strong and persuasive evidence of the needs and wishes of the community.

Mr Hunter attacked the value of the petition as being hearsay, which of course it strictly is, but no more so than would have been the professional telephone survey which was Mr Hunter's preferred model. We cannot accept that a phone survey would have given a random group of interviewees in the area any more comprehensive a picture of the proposal than has occurred by way of the public displays and the broad but selective distribution of the applicant's informational material.

Mr Hunter's remaining complaint with the petition is that it invited support for a fully integrated or indivisible proposal and did not offer the option of addressing individual components of the proposal, such as the bottleshop. In the same vein the Commission has frequently come across criticism of this sort of petition as being that it does not allow for the expression of any negative view: it provides no opportunity for dissent. However, we do not see that this type of criticism erodes the face value of the petition, viz. those who have signed are in favour of the proposal as outlined in the petition.

Mrs Tatarko is a widowed mother of two girls who attend the St Francis Catholic Primary School and the Taminmin High School respectively. Mrs Tatarko is the electorate officer for Mr Terry McCarthy, the Member for Goyder. That electorate includes that half of Humpty Doo as lies to the south of the Arnhem Highway. Mrs Tatarko gave evidence that as Mr McCarthy's electorate officer, she was closely involved with the Humpty Doo and wider rural community and that it was integral

to her job to be aware of any and all issues which affect the community, such as proposals for development and the community attitudes to such development. There are thirty to forty community organisations with whom she keeps in contact on local community issues. She was colourfully but reasonably accurately described by Mr Silvester as being at the epicentre of local community opinion.

While she testified as to her personal view of the need for a local family oriented establishment, more importantly she gave evidence that she has spoken to a large number of people in the community including principals, acting principals and teachers of the surrounding schools, parents of children attending the surrounding schools and other residents of Humpty Doo in relation to the proposal for the development of the Humpty Doo Tavern. She testified that nearly all of the persons she has spoken to support the proposition. She said that there was a view in the community that there needs to be just as up-market a venue as is generally available now in Darwin.

In cross-examination she conceded that *some* concerns endure, but that about 80% of all persons she has spoken to were in favour of the proposal without anything further. She clarified that the remaining 20% are not necessarily still in opposition, and that many people who were initially opposed to the proposal have changed their mind upon absorbing the full detail of the proposal. Her evidence was that of the large number of persons she has spoken to on the tavern proposal, across a broad spectrum of the local rural community, over 80% of the people are enthusiastic supporters of the proposal. As one of those persons herself, she summarises her position as wanting the choice of something more up-market than the Humpty Doo Hotel.

The evidence before us of community support for the proposal can therefore be seen to be very strong, and if there were no objections the Commission would have little hesitation in finding that it has been positively persuaded that the needs and wishes of the relevant community favoured the grant of the new licence.

How then do the objections fare in the face of the otherwise persuasive evidence in support of the new licence?

We have already dealt with our effective dismissal of the objection by the licensee of the Humpty Doo Hotel as being commercially grounded. We also find that the objection by the Palmerston Regional Business Association similarly offends against Section 48(1A) of the *Act*. As mentioned, the secretary of that association, Mr Ray Walton, had faxed the Liquor Commission on 14 January 2000 (Exhibit 40) advising that the Association would not be appearing at the hearing. Appearing subsequently under subpoena from the applicant, Mr Walton testified that it was the Association's view that while it was not normally anti-competition, existing licensees should have some priority "and not go under by competition". He was examined by Mr Silvester on the reference in the written objection to current investments being put in jeopardy, and responded that the Association's principal concern in lodging the objection was to protect the financial success of the "Hub" at Palmerston, as another liquor outlet in the area would affect the viability of those outlets already in the area. He emphasised the Association's view that the licence applied for would be detrimental to other outlets in Noonamah, Howard Springs and Humpty Doo.

The wording of the objection by the Palmerston Regional Business Association taken with the evidence of Mr Walton leaves the Commission in no doubt that the purpose of the objection was to prevent any adverse impact upon current licensed premises, and accordingly this objection too will be disregarded by the Commission in its deliberations on the application before it.

In any event, there emerged in Mr Walton's evidence considerable doubt as to whether the objection could be properly said to be the position of the Association. The objection had not been put to a meeting of the Association, and was said by Mr Walton to result from telephone conversation between *some* of the Committee members. On that basis, the Commission would have great difficulty in accepting the objection as a corporate position.

The objection of the Humpty Doo Golf Club was not backed up by any appearance at the hearing, and at the conclusion of the hearing must be held to be of little comparative weight. The Golf Club is presumably oriented towards a single sport, and of course is licensed to serve alcohol only to its

members, and we needed evidence as to membership requirements, membership fees, current membership numbers, development plans and the like in order to have any hope of relating the objection to the needs and wishes of the general community.

The Rev. Mervyn Anderson gave evidence on behalf of the Council of the Humpty Doo congregation of the Uniting Church, Litchfield Parish. He emphasised that he gave the Council's view, and that not every individual member of the Church was in agreement with it.

While he supported the proposed restaurant module of the proposal, he was against the bottleshop. He did not believe that the signatories to the supportive petition had properly addressed the aspects of the bottleshop and parking. His view was that it did not matter to what extent the bottleshop was "tizzied up", it did not alter what was being sold there. He also feared that it would eventually give Humpty Doo a "sit down drinking population".

The Rev. Anderson has lived in Humpty Doo for eight years, and for that time has been involved in counseling in the rural area which has exposed him to a level of problems stemming from alcohol consumption. He agreed with Mr Silvester that the present levels of problematic impact of alcohol on the community, whatever they may be, are likely to endure even without the new tavern, but was of the steadfast belief that another outlet would increase overall community consumption and lead to an increase in overall community problems with alcohol.

The Rev. Anderson made it very clear in his answers to Mr Silvester's cross-examination that he was implacably opposed to any new bottleshop in the area, regardless of its standards and the quality of its management.

The Rev. Anderson's view on potential parking problems would have been best put to the Planning Authority were he not interstate at the time of that authority's hearing in relation to this issue. The Planning Authority has already assessed the parking issue, and its consequential Development Permit in favour of the applicant (Exhibit 12) has built-in provision for future review by the Litchfield Shire Council, with a fall-back position of provision of angle parking in Challoner Circuit if considered necessary in the future.

The Rev. Anderson is obviously a man of sincerity and compassion, with an understandable need to put to us his Council's position on the application. He is a person with first hand experience of the downside of the effects of alcohol in the community. He made it clear that there was no way the applicant could address or adjust the application to his concerns, and that he was unalterably opposed to the inclusion of the bottleshop outlet in the proposal on the basis of *any* additional takeaway outlet being a bad thing for any community. The essence of his submission was that more alcohol is bad and less alcohol is good, a stance which although a reasonable and understandable position for him is but of minimal assistance to the Commission in its administration of the *Liquor Act*. We note here in passing the current attention being given in the media to recently released alcohol consumption statistics said to show that while NT consumption is still much higher than the Australian average it is nevertheless significantly decreasing. Such trend is in the face of an increasing number of outlets.

However, we note the position of the Uniting Church in this matter, and must weigh it up against the other evidence before us as to the needs and wishes of the general community. In relation to the Rev. Anderson's fear of a sit-down drinking encampment developing near the bottleshop, it is difficult to see that this would necessarily be a consequence of the addition of the tavern bottleshop to the shopping centre, given that there is already a long-standing bottleshop in the supermarket there. We appreciate that it can sometimes be a matter of greater ease of purchase for persons intending to consume the alcohol in public, but the same vetting processes that would deny a person access to liquor in the supermarket will also be in place at the tavern bottleshop. If not, and in any event, we point out that should any pattern of unacceptable public behaviour be seen to be linked to a particular liquor outlet, section 48(2) of the Act enables *any* person to complain to the Commission *at any time* regarding any matter arising out of the conduct of the licensed premises. The Commission is statutorily bound to investigate each and every such complaint, and unless a complaint is obviously frivolous or vexatious, in most cases the Commission will hold a public hearing in relation to the complaint. The Commission's powers at the conclusion of such a hearing are very broad, and section 48(2) can be an effective community tool for the raising of a

substantive grievance in relation to any unsatisfactory aspect of the operation of the business of any licensee.

We also note the position of those parents whose signatures are appended to the original objection by the Humpty Doo Community and Childcare Centre Inc who may still not be satisfied with the manner in which the applicant has offered to address their concerns, vide Exhibit 18. None have come forward to be identified as such other than Sarah Stocks and Judy Williams as aforesaid, who chose not to persevere with their participation in the hearing. There is no longer any corporate objection from the Childcare Centre, the view of the management committee as expressed in Exhibit 28 now being that the developers of the proposal "have demonstrated a preparedness to consider the views of the community in general, and the HDCCC in particular, and to modify their proposal to accommodate our concerns". In that context, the directors of the applicant company have undertaken to comply with those items listed in Exhibit 18 in alleviation of the issues raised by the original objection by the Humpty Doo Community and Childcare Centre.

It is fair to assume though that *some* of the parents with children attending the childcare centre remain concerned about the proximity of the centre to the proposed tavern in the shopping centre across the road. The situation is not without successful trouble-free precedent in the Darwin area, viz.. at the Hibiscus Shopping Centre where the Woodleigh Gardens Childcare Centre is directly across a narrow suburban street from both the open section of the Dolly O'Reilly Bar of the Hibiscus Tavern and the entrance/exit of the tavern's drive-through bottleshop. The applicant called Mrs Christine Godfrey, the owner and operator of the Woodleigh Gardens Childcare Centre, who gave evidence that in the four and half years she has been operating the childcare centre there have been *no* problems with human behaviour from the tavern. Interestingly, her problems had been with neighbouring residences.

The Commission noted during the course of its view of the area that the children at the Humpty Doo Community and Childcare Centre Inc are kept behind an existing fence, as would be expected, which in the area directly opposite the shopping centre is set back from a footpath verge which is itself much wider than is available to the Woodleigh Gardens Childcare Centre. In addition, we note the undertaking of Epsomm Pty Ltd to construct on request a high fenced frontage for the HDCCC. We note that the proposed drive-through is also set back from a broad footpath verge, and we note the undertaking of Epsomm in relation to visual screening.

Given our assessment of the objection by the Humpty Doo Hotel, given that no other objector (apart from perhaps from the Rev Anderson as part of his more generalised opposition to the bottleshop) saw fit to bring to the hearing any enduring concern with the proximity of the tavern to the Humpty Doo Community and Childcare Centre, and given that the zoning of the already existing shopping centre across the road from the childcare centre has always permitted the operation of a hotel there, the Commission does not consider that the proximity of the proposed tavern to the childcare centre should in itself prevent the grant of a licence with appropriate conditions. In reaching this conclusion, we take particular note of Exhibit 28 and the numbered list of undertakings the applicant sets out in alleviation of the issues of concern raised in relation to the childcare centre.

Weighing all the evidence before us, the Commission is positively persuaded that the broad local community in the Humpty Doo district and environs supports the proposed new development.

Mr Hunter referred us to several authorities in relation to his submission that we are required to find and identify a specific need, and that this requirement remains even if we were to dismiss all the objections.

South Australian decisions on the issue of needs of the public for new licensed premises have generally been more stringent and restrictive than New South Wales decisions. Generally speaking, in South Australia an applicant must demonstrate a specific public demand for a facility, a demand which cannot be met by existing facilities. In New South Wales it can be seen to be a question of public demand *and expectation*, and in the case of *Toohey and ors. -v- Taylor (1983) 1 NSWLR 743* the New South Wales Court of Appeal said that the value judgement to be made by the Licensing Court should take into account community attitudes to and community practices in regard to shopping and to the use in particular of facilities for the supply of liquor, and any changes

in such attitudes and practices. It was said that attitudes and practices of a community are pointers to what are the community's reasonable demands and expectations "and hence the needs of the public".

In any event, interstate legal authorities interpret the wording of the different State legislations. The Northern Territory would seem to be unique in its use of the term "needs and wishes".

In our decision on an application heard in March 1999 for a liquor licence for the Acacia Store and Caravan Park, the Commission had this to say in response to a submission in that matter that there needed to be established a community need for the new outlet as distinct from and in addition to a community wish:

The Commission chooses to regard "needs and wishes" in its complete phraseology as a requirement not practicably divisible into separate componentry. The comparable legislation in the various Australian states historically referred only to community need; the Northern Territory amplified that requirement to a consideration of needs and wishes. In our view, this softens the rigour with which an applicant might otherwise have to positively satisfy the Commission as to the existence of a specific and unassuaged need, and allows an approach more of the nature of assessing public support within a community while nevertheless remaining sensitive to any undue proliferation of liquor outlets having regard to the location and nature of the particular precinct and the type of licence applied for".

We are positively persuaded of a high level of community support for the proposed new tavern, and do not consider that a new facility of this nature and promised quality will constitute an undue proliferation of licences in the area. While we might not go as far as Mr Silvester in describing the level of support as "overwhelming" it is nevertheless close to being a fair description, and strongly persuasive. The level of public consultation has been particularly noteworthy, and the evidence of the petition and of Mrs Tatarko particularly strong. The needs and wishes of the community for the project have been clearly demonstrated, and the Commission has determined to grant an appropriate licence under the *Liquor Act*.

Pursuant to the provisions of Section 26(2) and Section 31(3) of the *Liquor Act*, an on and off licence is granted in respect of the premises as proposed by the applicant, subject to the condition that the sale of liquor on and from the premises is not permitted until the approval in writing to do so shall have been obtained from the Commission. Such approval will be granted upon the Commission's satisfaction that the premises have been completed in accordance with the applicant's presentation to the Commission at the hearing and that the applicant is ready to trade in a manner consistent with the concept that has been presented to the public and to the Commission at the hearing. It is a condition to the approval referred to in Section 31(3) of the *Act* or alternatively of the licence itself, as the case may require, that Epsomm Pty Ltd shall properly complete the works described in items 2 and 3 in Exhibit 18 forthwith upon request to do so by the Humpty Doo Community and Childcare Centre.

The licence shall also contain conditions requiring:

1. The promotion of low alcohol or "light" beverages, with maintenance of pricing differentiation;
2. No offensive levels (or content) of advertising signage;
3. All promotion of the tavern to emphasise the family orientation of the bistro;
4. Installation and maintenance of diversionary programs for children of patrons, to the satisfaction of the Commission;
5. Meals to be available in both the bistro and the Sportsmans Bar at all times;
6. Implementation of a satisfactory rubbish removal program in respect of areas adjacent to the licensed premises;
7. Landscaping to address sight lines to the bottleshop from Challoner Circuit;

8. Promotion of Drink Sense and other like campaigns within the licensed premises;
9. Provision of adequate security;
10. Provision of patron care training for all staff;
11. Preference to local residents in the employment and contracting of staff;
12. Provision of minibus services for organised functions and special occasions;
13. Music, whether live or recorded, to be at such levels as shall be inaudible in Challoner Circuit and Fred's Pass Road during school hours, and in any event at no time to cause undue disturbance or annoyance to any persons, particularly other tenants in the shopping centre and shopping centre patrons;
14. Sales of cask wine from the bottleshop to be restricted to premium brands in casks not exceeding 2 litres;
15. The open or "beer garden" area to be screened from the outside by a fence of such height and type as will prevent any observation of beer garden activity by passing pedestrians of normal height;
16. The practice of "book up" or "book down" not to be permitted, and the licence shall be issued with such restrictions spelled out in full detail.
17. An ongoing commitment to consult with relevant elements of the local community in relation to any concerns reasonably raised by members of the community from time to time;
18. Adherence to the operational practices set out in Exhibit 14.

Hours shall be as applied for.

The licence will also contain a condition requiring the operation of the premises to remain true to the concept presented to the Commission at the hearing, such that any significant deviation from the promised nature or standard of operation may result in a review of licence conditions by the Commission on its own initiative.

The Commission reserves the right to "flesh out" or further particularise any of the above conditions as it may see fit when the written licence eventually issues upon satisfactory completion of the premises. The licence will also contain such standardised conditions as may at that time be usually contained in this type of licence (e.g. compliance with Chief Fire Officer's assessment of maximum patron densities, disclosure of management agreements, compliance with Health regulations etc).

The applicant now has what is sometimes referred to as a licence in principle, a term which can erroneously suggest that a licence has not yet been granted. The Liquor Act clearly indicates that in this situation the licence has now been granted, albeit in escrow until the premises are ready to open for business.

The licensee should liaise with the Deputy Registrar of Liquor Licences in the event that any of the foregoing matters should give rise to any operational queries.

John Withnall
Presiding Member

7 February 2000