

NORTHERN TERRITORY LIQUOR COMMISSION

Decision Notice

MATTER: APPLICATION FOR A LIQUOR LICENCE

REFERENCE NUMBER: 2019/013

PREMISES: "Babylon Berlin"
Air Rade Arcade Pty Ltd
35 Cavenagh Street
DARWIN NT 0800

APPLICANT: Air Raid Arcade Pty Ltd

NOMINEE: Mr Matt Mulga

OBJECTOR/S: Nil

LEGISLATION: Section 24 and 29, of the *Liquor Act 1978*

HEARD BEFORE: Mr Richard Coates (Chairperson)
Ms Amy Cocoran (Community Member)
Mr Kenton Winsley (Health Member)

DATE OF HEARING: 5 March 2019 and 22 May 2019

DATE OF DECISION: 28 May 2019

Decision

1. For the reasons set out below and in accordance with section 32A(7) of the *Liquor Act 1978* ("the Act") the Commission has determined to grant the applicant a Small Bar Liquor Licence on the following conditions;
 - a. The licensee is authorised to sell liquor to no more than 100 patrons for consumption on the licenced premises with or without the consumption of food.
 - b. The sale of liquor for consumption off the premises is not permitted.
 - c. The maximum number of patrons permitted to be on the licensed premises at any given time is 100 or less if the Northern Territory Fire Service (NTFS) assesses a lower maximum patron number for the premises.
 - d. Entertainment of a sexually explicit nature and entertainment involving fighting is not permitted.

- e. Meals or snack food shall be made available at all times the licensed premises are open for the sale of liquor.
- f. The hours of operation will be:
 - i. 1100 hours until 0200 hours the following day, Sunday to Monday inclusive for the internal bar area; and
 - ii. 1700 hours until 0200 hours the following day Monday to Friday inclusive and from 1200 hours until 0200 the following day Saturday and Sunday for the arcade area; and
 - iii. No trade on Good Friday and Christmas Day.
- g. Pursuant to section 31 of the Act, the sale of liquor on the premises is not permitted until the Licensee provides the Commission with the necessary fire safety, building certifications and planning approval (if required) and is authorised in writing to commence trading.

Reasons

Background

- 2. On 23 March 2018 an application was lodged by Mr Matt Mulga, seeking a liquor licence for premises proposed to be known as Babylon Berlin and located in the Air Raid Arcade, 35 Cavenagh Street, Darwin. This application was assessed and returned to the Applicant on 3 April 2018 due to it being incomplete.
- 3. The application was resubmitted on 30 May 2018 following which there were numerous discussions between Mr Mulga and licensing officers over the corporate identity of the applicant as well as the nature of the licence that was being sought.
- 4. The Applicant is Air Raid Arcade Pty Ltd. This company is registered with ASIC where Matt Mulga is the sole director and secretary. This company has a total of 100 shares which are wholly owned by Annie Mulga Venture Pty Ltd.
- 5. Annie Mulga Venture Pty Ltd is registered with ASIC where Matt Mulga is the sole director and shareholder. This company has a total of 2 shares which are both wholly owned by Matt Mulga.
- 6. The business name, Babylon Berlin, is a current business name registered with ASIC. It is registered in the name of the applicant, Air Raid Arcade Pty Ltd. It is noted that a television series exists with the same name with the series set in 1929.
- 7. Venture Private Advisory have provided a range of documents indicating the financial position of the applicant and Mr Mulga's financial situation. A review of these documents indicate that the corporate structure as provided appears to be in good financial health.
- 8. Mr Mulga has provided documents showing that one of his companies, Air Raid Nominees Pty Ltd, owns the freehold title over the land and building and will lease it to the applicant company if this application is approved. In simple terms he intends to lease it to himself via his range of companies.

9. The principle executive officer of the Applicant has sworn an affidavit in accordance with section 26A of the Act, stating that there are no other persons of influence in relation to the conduct of the business or the proposed licence. An updated affidavit was supplied 6 September 2018.
10. The applicant had originally applied for an "On Licence" authority to enable liquor to be sold from shops 16, 17 and 18 together with the whole of the ground floor arcade in the premises known as the Air Raid Arcade which runs between Cavenagh Street and Austin Lane. It was proposed that the premises would have the appearance of and trade predominantly as a restaurant although liquor would be able to be consumed not ancillary to a meal.
11. Licensing officers suggested that what was being sought by the Applicant more closely fitted a "hotel" licence and whilst DCA planning approval is not required for a restaurant it would be necessary for a hotel. Mr Mulga was advised to seek guidance from DCA however he declined to do this because in his view if a "restaurant" or "licensed club" was an accepted interchangeable use for the premises then his proposed "On Licence" should also fall within that category of interchangeable use.
12. An impasse developed between the applicant and the Office of the Director General of Licensing and progress of the application stalled. Mr Mulga, on behalf of the Applicant insisted that the matter be referred to the Commission because it was unclear what approvals if any would be required from DCA until the Commission had given an indication of what type of licence it was likely to approve.

Advertising and Consultation

13. The application was published in the NT News newspaper on Saturday 9 June 2018 and Wednesday 13 June 2018.
14. The applicant also displayed the required "green sign" at the premises for the required 30 day period.
15. No objections were received from the public.
16. The following stakeholders were invited to provide comment on the application:
 - The Chief Executive of the Department of Health;
 - Northern Territory Police;
 - Northern Territory Fire and Rescue Service;
 - City of Darwin.
17. The Department of Health replied via signed letter from Cecelia Gore, Acting Director, Alcohol and Other Drugs Directorate. A reading of the letter shows that the Department of Health objects to the application on 4 grounds. Those grounds were listed as:
 1. The proposed licensed footprint is excessive and would be difficult for staff to manage resulting in poor RSA practices;
 2. The proposed licensed area could potentially see excessive numbers of persons standing in a confined space consuming high volume and high

alcoholic content beverages with little to no staff surveillance over the proposed licensed footprint;

3. The high numbers of persons that could potentially fill the proposed licensed area could be placed at risk if an emergency evacuation of the premises was required; and
 4. There is a high risk of patrons spilling off the proposed licensed premises into Austin Lane and Cavenagh Street with alcoholic beverages in hand to consume cigarettes and socialise generally.
18. The Northern Territory Police advised via email dated 11 July 2018 that it does not support the application. NT Police have requested further information from the applicant which has not been supplied, therefore they cannot make a proper assessment and therefore are not supporting the application.
 19. The Northern Territory, Fire and Rescue Service do not support the application due to fire alarm monitoring system at the venue.
 20. The City of Darwin replied via email dated 18 July 2018 stating that it has not identified any reason to object to the application.
 21. The comments from the Department of Health, Northern Territory Police and Northern Territory Fire and Rescue Service were forwarded to the applicant for information. A consolidated response was supplied by the applicant on 10 September 2018. The Applicant asserted that a number of the objections were not valid and was generally combative and oversensitive in its response to these comments.

Compliance History

22. Included within the Director General's referral of this matter to the Commission, was a history of Mr Matt Mulga's disciplinary dealings with Licensing NT. The Director General advised the Commission as follows:

"Mr Matt Mulga has been involved in several liquor licensed premises in the NT through his chain of associated companies where he is the director of the Licensee Company and also nominee at the time of offences. A review of records at Licensing NT reveal several disciplinary results before the former NT Licensing Commission".

- *Annie's Place, date of hearing 2001. Complaint of failing to comply with condition of licence. A formal Decision Notice and result cannot be located in the Licensing NT archives but this decision is referenced in the NT Licensing Commission Decision Notice of the hearing dated 27 November 2008 at paragraphs 7 & 10.*
- *Annie's Place, date of hearing 27 November 2008. Complaint of failing to comply with condition of license. Result – Formal Letter of Reprimand.*
- *Annie's Place, date of hearing 24 March 2010. Complaint of sale of liquor to intoxicated person and fail to exclude or remove person. Result – Warning from Licensing Commission, the Commission requires the licensee to install CCTV by 1 June 2010, the Commission suspends the liquor licence on a Monday evening as determined by the Deputy Director from 9.00pm until closing.*

- *Monte's Lounge 12 August 2010. NT Licensing Commission immediately suspends liquor licence for unapproved material alteration. Refer to paragraph 49 of Decision Notice dated 1 December 2010. Paragraphs 51 & 61 outline that licensee has suffered financial loss due to suspension and therefore no further penalty to be imposed. Paragraph 73 lifts the suspension of the licence. Material Alterations approved but variations of licence condition refused.*
- *Monte's Lounge 1 September 2011, emergency suspension of licence re no maximum patron numbers being issued. Premises certified and the suspension lifted 2 September 2011.*
- *Monte's Lounge, date of hearing 24 November 2011. Complaint of breach of Section 110 of the Act. 1. Fined \$400 2. Licence condition varied to include the word "restaurant".*
- *Monte's Lounge February 2013. Letter from Director of Licensing re breach of licence condition re noise control device bypassed and intention to issue Penalty Infringement Notice. A search of the records at Licensing NT cannot find a copy of this Penalty Infringement Notice which is believed to be stored in an archive area.*
- *Monte's Lounge October 2013. Warning Letter from Manager South Region re breach of licence condition and possession of gaming machine without licence.*
- *Monte's Lounge, date of hearing 5 June 2014. 1. Complaint of 5 breaches of Section 110 relating to noise 2. Breach of licence condition Result- 1. Fined \$2,000 2. Fined \$500.*

Public Hearing

23. Pursuant to section 50 of the Act, the Director-General must refer *inter alia* applications under sections 26 of the Act to the Commission. Therefore these applications must be heard and determined by this Commission.
24. The hearing was originally listed for hearing on 5 March 2019 where the Commissioners presiding were Mr Richard Coates as Chair, Mr Kenton Winsley as Health Member and Ms Christine Hart as Community Representative. The Applicant was represented by its proposed nominee Matt Mulga. Mr Mark Wood appeared as representative of the Director General.
25. During the course of the hearing the Commission advised Mr Mulga that the nature of the business proposed to be conducted on the licensed premises was unclear. Furthermore the Public Interest and Community Impact Statements were not adequate such that if we were to determine the application on the basis of the documentation before us it is unlikely that any licence would be granted.
26. The Commission expressed some sympathy for the Applicant which was trying to negotiate a path of least resistance through two regulatory systems, namely Licensing and planning, where it seemed that each was asking him to get approval from the other before they would make any decision.

27. The Commission also took into account the proposed reforms to the *Liquor Act 1978* which envisage new categories of Licence Authorities including a Small Bar Authority which category of license seemed to more appropriately fit the business model that was being proposed by the Applicant. Accordingly, with the concurrence of Mr Wood the Commission agreed to adjourn the further hearing of the application to a date to be fixed to enable the applicant to get “it’s house in order” and file further documentation which would hopefully clarify the nature of the business proposed and better advance the case for the grant of a license.
28. The hearing resumed on 21 May 2019. Mr Mulga again appeared for the Applicant however this time Mr Phil Timney appeared to represent the Director General. Commissioner Hart was not available to continue hearing the matter so Commissioner Corcoran joined the panel in her stead.

Assessment of the Matter

29. Prior to the hearing re-commencing the Applicant filed additional documentation which clarified that the licensed footprint being sought was significantly less and was now confined to the three shops and only that area of the arcade that directly adjoined them. The Applicant also addressed the objections in a more constructive manner and pointed out that by reducing the licensed foot print a number of the concerns expressed earlier were no longer relevant. A new Community Impact and Public Interest statement was provided together with a Building Fire Safety Report that detailed the work needed to obtain the necessary approvals.
30. It is important however to recall at all times that the Act makes clear under section 6B that it is the Applicant who bears the onus of satisfying the Commission that the approval of the application meets the public interest and community impact test. Even if there are no objections, the Applicant must still satisfy this Commission of those matters.
31. As is clear from section 6(1) of the Act; when considering or determining an application under the Act in respect of a licence, this Commission **must** apply the public interest and community impact test as relevant to the application. Section 6(2) of the Act provides that:

“For subsection (1), the public interest and community impact test requires consideration of the following objectives:

- a. harm or ill-health caused to people, or a group of people, by the consumption of liquor is to be minimised;
- b. liquor is to be sold, or sold and consumed, on licensed premises in a responsible manner;
- c. public order and safety must not be jeopardised, particularly where circumstances or events are expected to attract large numbers of persons to licensed premises or an area adjacent to those premises;
- d. the safety, health and welfare of persons who use licensed premises must not be put at risk;
- e. noise emanations from licensed premises must not be excessive;

- f. business conducted at licensed premises must not cause undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the neighbourhood of the premises or who are making their way to or from, or using the services of, a place of public worship, hospital or school;
- g. a licensee must comply with provisions of this Act and any other law in force in the Territory which regulate in any manner the sale or consumption of liquor or the location, construction or facilities of licensed premises, including:
 - i. by-laws made under the Local Government Act; and
 - ii. provisions of or under the Planning Act;
 - iii. each person involved in the business conducted at licensed premises must receive suitable training relevant to the person's role in the conduct of the business;
- h. each person involved in the business conducted at licensed premises must receive suitable training relevant to the person's role in the conduct of the business;
- i. the use of credit in the sale of liquor must be controlled;
- j. practices which encourage irresponsible drinking must be prohibited;
- k. it may be necessary or desirable to limit any of the following:
 - i. the kinds of liquor that may be sold;
 - ii. the manner in which liquor may be sold;
 - iii. the containers, or number or types of containers, in which liquor may be sold;
 - iv. the days on which and the times at which liquor may be sold;
- l. it may be necessary or desirable to prohibit persons or limit the number of persons who may be on licensed premises, on any particular part of licensed premises or in an adjacent area subject to the control of the licensee;
- m. it may be necessary or desirable to prohibit or limit the entertainment, or the kind of entertainment, which may be provided on licensed premises or in an adjacent area under the control of the licensee;
- n. it may be necessary or desirable to prohibit or limit promotional activities in which drinks are offered free or at reduced prices;
- o. any sale of additional liquor due to the grant of a licence or the relaxation of restrictive conditions will not increase anti-social behaviour.”

32. In addition, pursuant to section 6(3), the Commission must:

- a. consider the potential impact on the community in the area that would be affected by the outcome of the decision to grant or refuse an application or the changing of conditions of a licence and, in doing so, must have regard to:
- i. the harm that might be caused (whether to the community as a whole or a group within the community) due to the excessive or inappropriate consumption of liquor; and
 - ii. the cultural, recreational, employment or tourism impacts; and
 - iii. the social impact in, and the impact on the amenity of, the locality of the premises or proposed premises; and
 - iv. the density of existing liquor licences within the community area; and
 - v. the volume of alcohol sales within the community area, and any increase in volume within the community area arising from the licence the subject of the application; and
 - vi. any other prescribed matter; and
- b. apply the community impact assessment guidelines.”

33. On 6 March 2018, pursuant to section 6A of the Act, the Minister by Gazette notice published community impact assessment guidelines for determining whether or not an application being considered or determined under section 6(1) satisfies the public interest and community impact test. Relevantly those guidelines are stated to;

“set out those matters that will be considered by the Commission when assessing the community impact of the application against the criteria set out in section 6A(1) of the Liquor Act”.

34. Those matters are identified as follows:

Criteria	Matters to be considered
<p>The potential harm or health impact that may be caused to people, or any group of people within the local community area, due to the availability and accessibility of an additional liquor outlet.</p>	<p>Are there any ‘at-risk’ groups or sub-communities within the locality? This may include –</p> <ul style="list-style-type: none"> • children and young people; • Aboriginal people normally resident within the locality and those Aboriginal people that might be likely to travel to the locality from a dry community; • migrant groups from non-English speaking countries;

	<ul style="list-style-type: none"> • people in low socio-economic areas; and/or • communities that experience high tourist/visitor numbers. <p>Are there any community building, facilities and areas within the locality? Such facilities would include:</p> <ul style="list-style-type: none"> • schools and educational institutions; • hospitals, drug and alcohol treatment centres; • accommodation or refuges for young or disadvantaged people; • child care centres; • recreational areas; • dry areas; and • any other area where young people may congregate or be attracted to. <p>What policies and procedures will the applicant implement to minimise any potential harm or health impacts to these 'at-risk' groups or sub-communities</p>
<p>Information about the location and area in which the premises is proposed to be so as to assess any social impact on the community. This includes information about the density of licensed premises within the community area.</p>	<p>This may include crimes statistics, social profile information and the location of existing licensed premises.</p> <p>This could also include traffic and pedestrian impact and any plans developed to address these potential issues.</p>
<p>Volume</p>	<p>This may include projected sales volumes and marketing analysis, liquor type and customer demographic (where applicable this should be provided for both on and off premises sales).</p>

	The Commission will consider information available to it about the current alcohol consumption rates for the community area.
Any cultural, recreational, employment or tourism benefits for the local community area.	Will the proposed licensed premises provide economic benefits, cultural, recreational or tourism benefits or any additional employment opportunities and to what level?
Why the grant of a relevant application is in the public interest and how the additional liquor outlet will benefit the local and broader community.	<ul style="list-style-type: none"> • What additional services will be provided other than simply an additional outlet for the sale of liquor – this may include accommodation or dining? • Will the proposed licensed premises provide additional choices of service or products that are no available in the area? • Will the proposed premises provide liquor in a manner known to be safe and to minimise adverse impacts? • Will it use existing premises improve or add to existing premises or is it a new premises?

35. As can be seen from the above, there are a large number of matters that this Commission must consider and that the Applicant must address (and satisfy the Commission of) under the new public interest and community impact test and guidelines. The guidelines do make clear however that:

“the Commission has the authority to consider a broad range of issues specific to each application and flexibility exists to assess each individual application on its merits”.

36. In addition to those matters, section 28(2) of the Act also provides as follows:

“The Commission must consider an application for a licence, the accompanying affidavit made under section 26A and the results of investigations conducted in relation to the application and make an assessment of the following matters:

- (a) the suitability of the premises in respect of which the application is made, having regard to any law of the Territory which regulates in any manner the sale or consumption of liquor or the location, construction or facilities of premises which are used for that purpose;
- (b) if the applicant is a natural person – the financial stability, general reputation and character of the applicant;

- (c) if the applicant is a body corporate – the business reputation and financial stability of the body corporate and the general reputation and character of the secretary and executive officers of the body corporate;
- (d) if the applicant is a federation of clubs – the business reputation and financial stability of each constituent club and the general reputation and character of the secretary and executive officers of each constituent club;
- (e) whether the applicant is a fit and proper person to hold a licence;
- (f) if a person is referred to in the affidavit under section 26A – whether that person is a fit and proper person to be an associate of a licensee;
- (g) if the Commission considers it appropriate – whether any other associate of the applicant is a fit and proper person to be an associate of a licensee;
- (h) if the applicant has nominated a person under section 25(2) to be its manager – whether that person is a fit and proper person to be the manager”.

37. Further the Act requires under section 28(3) as follows:

“In assessing whether an applicant is a fit and proper person to hold a licence, the Commission must have regard to any matters prescribed by the Regulations relevant to that assessment”.

38. The Commission notes there are no such matters prescribed by the Regulations.

39. Although there are many matters for the Commission to consider, like any application, some of the matters are highly relevant to this application whilst others are not as significant.

40. The Commission notes that there is no suggestion, nor any evidence to suggest, that the applicant is not a fit and proper “person” to hold the licence as sought, nor is there any suggestion or evidence to suggest that any person referred to in the affidavit under section 26A is not a fit and proper person to be an associate of a licensee. The Commission has already noted the contents of that affidavit in these reasons.

41. The Applicant has already commenced renovating the old Air Raid Arcade and has managed to encourage an eclectic range of tenants to set up business in what were until recently vacant shops in a rundown building. The three shops that would form the basis of this new venture have been decorated in a theatrical style and the Applicant is to be commended for attempting to revitalise this historic “Old Darwin” building.

42. In its Community Impact Statement the Applicant argued:

To create a small bar and eating house in this location has further advantages in that is sympathetic to the existing building, the existing streetscape and the unique Darwin lifestyle. Having due regard to the high levels of vacancy and the decline in the economy of late, this development will be of a benefit to the Darwin CBD for it will encourage others to look at older, under-utilised buildings in the CBD. It will demonstrate how it is possible to makeover a run-down and vacant building which can flow on to inject life into other existing buildings. This spot in particular being in view of one of the 2 city’s strip clubs,

and having 4 massage parlours nearby has a sleazy ad antisocial feel about it. A bright clean venue will happy patrons enjoying quality food and drink will brighten up the lane way and go a long way to enhancing the areas appearance.

Local residents have long been concerned about the levels of crime and antisocial behaviour in the CBD which this venue would assist to curb by increase patronage of the area, and by having a sense of happening rather than neglect. This venue will assist in revitalising the existing building, enhance the aesthetics of both Cavenagh Street and Austin Lane, and will help in regenerating the CBD.

43. During the course of the hearing the Commission discussed with Mr Mulga whether he would be prepared to limit patron numbers to less than 100 and thereby bring the nature of the business within the guidelines for a small bar as envisaged by the proposed amendments to the Act. He agreed to this and the Commission was more comfortable treating the application as one for a bar rather than a restaurant. Although we were assured that food would always be available to patrons, the menu, whilst different, is limited. The food preparation area is also very small. The main focus of the premises will be a European style bar as the name "Babylon Berlin" attests.
44. The use of the premises as a small bar is consistent with the vision expressed by both Government and the Darwin City Council for measures that will revitalise the city centre. Although the community is concerned with anti-social behaviour that is caused by alcohol abuse that can be ameliorated to some extent by attracting people back into those areas of the inner city which were largely deserted after dark.
45. The Commission is satisfied that the objections raised by Health and the lack of support by Police have been largely addressed by the concession from the Applicant that liquor will now only be available in a small area of the arcade and that patrons will be limited to 100 persons. The concerns of NTFRS can be addressed by the Commission making it a condition of the license that trade not commence until the necessary fire safety approvals are obtained. Similarly if DCA is not prepared to recognise a "small bar" as an interchangeable use for the premises as it would if it was a "restaurant" or "licensed club" then a certificate of occupancy will not issue and the Applicant will know that it will have to obtain planning approval.
46. Although the Applicant does not have an unblemished history in relation to disciplinary matters it has not been suggested that it is not a fit and proper entity to manage licensed premises. Mr Mulga is apparently currently operating the Licensed premises known as Lola's Pergola in a responsible manner. A number of the past licence infringements relate to incidents which might be broadly categorised as the Licensee "pushing the envelope" as far as the limitations of a restaurant license are concerned. This is another reason why the Commission is more inclined to deal with this matter as an application for a small bar licence.
47. It is as a result of the matter outlined above that this Commission is, on balance, satisfied that approving a licence for a small bar authority meets the Public Interest and Community Impact tests.

Notice of Rights:

48. Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. A decision to issue a licence pursuant to section 29 of the Act is specified in the Schedule and is a reviewable decision.
49. Section 120ZC of the Act provides that a person affected by this decision may seek a review before the Northern Territory Civil and Administrative Tribunal. Any application for review of this decision must be lodged within 28 days of the date of this decision.
50. For the purpose of this decision, and in accordance with section 120ZB(1)(b) and (c) of the Act, the affected persons are the Applicant and the Department of Health.

A handwritten signature in black ink, appearing to read 'Richard Coates', with a large, stylized initial 'R'.

RICHARD COATES
Chairperson

3 June 2019