

NORTHERN TERRITORY LIQUOR COMMISSION
DECISION NOTICE

MATTER: APPLICATION FOR VARIATION OF THE CONDITIONS OF LICENCE

REFERENCE NUMBER: LC2019/110

LICENCE NUMBER: 81115510

LICENSEE: J.M.O Sales and Logistics Pty Ltd

PREMISES: Banyan Tree Resort
455 Litchfield Park Road
RUM JUNGLE NT 0822

APPLICANT: J.M.O Sales and Logistics Pty Ltd

NOMINEE/S: Mr John Mathew Ostwald

OBJECTOR/S: Nil

LEGISLATION: Section 32A, Part IV and V of the *Liquor Act 1978*.

HEARD BEFORE: Ms Jodi Truman (Deputy Chairperson)
Ms Elizabeth Stephenson (Health Member)
Mrs Amy Corcoran (Community Member)

DATE OF HEARING: 11 September and 16 October 2019

DATE OF DECISION: 16 October 2019

Decision

1. For the reasons set out below and in accordance with section 32A(7) of the *Liquor Act 1978* the Commission has determined to vary the conditions of the liquor licence for the premises known as Banyan Tree Resort by :
 - a. Varying the condition relating to “Consumption on the Premises” to read as follows:
 - “(a) Trading Hours shall be between:
Sunday 10:00 hours to 23:59 hours;
Monday 10:00 hours to 23:59 hours;
Tuesday 10:00 hours to 23:59 hours;

Wednesday 10:00 hours to 23:59 hours;

Thursday 10:00 hours to 23:59 hours;

Friday 10:00 hours to 23:59 hours;

Saturday 10:00 hours to 23:59 hours.

- (b) Liquor sold for consumption on the premises shall be in opened containers and sold or supplied to registered guests only.
- (c) Liquor may also be sold for consumption on the premises to the general public only in conjunction with a meal.

2. In accordance with section 32A(9) the variation of the condition of licence is to take effect as at the date of the provision of this Decision Notice to the applicant.

Reasons

Background

3. J.M.O Sales and Logistics Pty Ltd (“the applicant”) currently holds an “Off Licence” Authority Liquor Licence authorising the sale of liquor for consumption on, at or away from the licensed premises being Banyan Tree Resort. The licensee is the applicant and the nominee under the liquor licence is Mr John Mathew Ostwald.
4. On 9 January 2019 an application dated 8 January 2019 was lodged with the Director-General of Licensing (“the Director-General”) pursuant to section 32A of the *Liquor Act 1978* (“the 1978 Act”) for a variation to their licence conditions. The application was assessed by the Director-General to be incomplete and was returned to the applicant on 21 January 2019 identifying the numerous issues that needed to be addressed and advising the applicant that it would need to re-submit the application.
5. On 7 March 2019 solicitors for the applicant contacted Licensing NT with respect to the application. On 16 March 2019 the Principal Licensing Officer responded advising that there was no current application before the Director-General and outlining to the solicitors for the applicant what was required.
6. On 19 March 2019 solicitors for the applicant again contacted Licensing NT seeking clarification of the requirements which was provided that same day.
7. On 9 April 2019 a fresh application was lodged seeking two (2) permanent variations:
 - a. Variation to allow liquor to be sold for consumption on the premises between 10:00 hours and 23:59 hours seven days a week;
 - b. Variation to remove the condition that liquor be sold in conjunction with a meal.
8. Unfortunately the issues with respect to the application did not end there. The supporting documents lodged with the application were inconsistent with the fresh application. In addition the address provided as part of the application provided a different address to that set out on the licence held by the applicant.

9. This confusion continued up until the very first listed hearing date with the solicitors for the applicant finally acknowledging there were issues with the application lodged and applying for the hearing date to be vacated and a fresh hearing date allocated. That application was granted by the Commission.
10. With respect to this applicant, the Commission was informed by the Director-General that a check of the records held at Licensing NT indicated there was no previous adverse history in relation to compliance issues. It was also noted that the applicant had in fact purchased the business in 2018 and the liquor licence was approved for transfer to the applicant on 6 September 2018.
11. It is important to note that since the lodgement of this application the 1978 Act has in fact been repealed and replaced by the *Liquor Act 2019* (“the 2019 Act”). The 2019 Act also introduced its own regulations being the *Liquor Regulations 2019* (“the Regulations”). The Regulations provide for transitional matters under Part 8.
12. Relevant to this application is regulation 131 that provides as follows:

“An application for the variation of a condition of a licence, made under section 32A of the *Liquor Act 1978*, that was not determined under that Act before the commencement is to proceed and be determined under that Act unless the applicant gives the Director written notice that the applicant wishes to proceed and have the application determined under section 113 of the *Liquor Act 2019*.”
13. In this regard, on 26 September 2019 the applicant via its solicitors provided written notice to the Director via the Commission that it wished to have the application determined under section 32A of the *Liquor Act 1978*. It is in accordance with the 1978 Act that this application has been determined.

Disclosure of influential persons or potential beneficiaries

14. The Commission notes that section 32A(1A) of the Act requires applicants to make an affidavit disclosing whether certain persons may be able to influence the applicant, or expect a benefit from the applicant, if the variation is granted. The applicant has filed such an affidavit via its principal executive officer and Director; Mr John Mathew Ostwald (“Mr Ostwald”).
15. Mr Ostwald via his affidavit has declared that there are:

“...no other person/s other than JOHN MATHEW OSTWALD who will by any lease, agreement or arrangement be able to influence any decision made by the Director in relation to the sale of liquor or the sale and consumption of liquor”.

And further that there:

“...is no other person other than the Director who by any lease, agreement or arrangement may expect any benefit from J.M.O. Sales and Logistics Pty Ltd in relation to the sale of liquor or the sale and consumption of liquor”.

16. Unfortunately this affidavit did not address the matters that are required to be addressed when filing such an affidavit. Although the applicant was represented by solicitors, this was also not appropriately dealt with by the applicant's solicitors during the period of the adjournment despite requests from the Commission to do so. With the greatest of respect to this applicant, this lack of understanding and lack of compliance is unfortunately not unusual and has been the source of concern by the Commission in relation to a number of applications for some time now. This concern has been recorded in previous decisions and also brought to the attention of the Director-General and the Minister.
17. Be that as it may, a number of further questions were asked of the applicant's legal representative during the course of the hearing concerning this issue and the Commission also notes that the Act **prescribes** that upon the application being filed, together with the affidavit under section 26A, there must be investigations conducted by the Director-General in relation to the application. The Commission has received no information to indicate there have been any adverse matters discovered as a result of the investigation by the Director-General.

Advertising and Objections

18. Details of the application were advertised in the Northern Territory News on Wednesday 29 May 2019 and Saturday 1 June 2019 as well as having signage displayed at the premises for a period of 30 days. No objections were received from the public in the objection period.
19. It is noted that section 32A(5) of the Act requires that the Director-General must inform:
 - a. the Chief Executive Officer ("CEO") of the Department of Health ("DOH");
 - b. the Commissioner of Police; and
 - c. if the application relates to premises within the area of a shire council or a regional council - the Chief Executive Officer ("CEO") of the council.
20. The Commission notes that the Director-General also forwarded a copy of the application to the Northern Territory Police, Fire and Emergency Services ("NTFRS") for comment.
21. With respect to this application:
 - a. The DOH made no adverse comment.
 - b. The NT Police advised:

"The OIC has spoken to the hotel owner and is supporting the proposal".
 - c. The Coomalie Community Government Council initially replied:

"In relation to this and other applications, Council is normally guided by the opinion of local police at Batchelor as they are most likely to have objection or comments.

NT Licensing advised Coomalie Community Government Council on 20 June 2019 that Northern Territory Police had no objection to the application and the Council advised:

“If they do not object and have considered the proposal and impact on their work load and are happy, Council also has no concerns”.

d. NTFRS advised they “have no objection”.

Public Hearing

22. Pursuant to section 50 of the Act, the Director-General of Licensing (“the Director-General”) must refer *inter alia* applications under section 32A of the Act to the Commission. Therefore this application must be heard and determined by this Commission.
23. Pursuant to section 53 of the Act, the Chairperson of the Commission must fix the time and place for hearing and give notice to the relevant parties not less than 7 days before the hearing date. The application was referred to the Commission on 13 August 2019. As stated earlier, the hearing was initially fixed for 12 noon on 11 September 2019 and notice was given to the applicant.
24. Pursuant to section 53 of the Act; the Commission is not bound by the rules of evidence and may inform itself in the manner it considers appropriate and conduct the hearing, or part of the hearing, by use of telephone or online facilities. A hearing must also be conducted in public unless the Commission considers that a public hearing is likely to cause undue hardship to a person. No such submission has been made to this Commission and there is no evidence to suggest any such hardship.
25. The initial public hearing commenced at 12 noon on 11 September 2019 with Mr Shane McMaster, Solicitor, in attendance on behalf of the applicant and Mrs Tania Chin in attendance to provide information and assistance to the Commission on behalf of the Director-General. At the commencement of the hearing, the Commission advised Mr McMaster that the Commission considered there were a number of deficiencies with the application that needed to be addressed prior to the hearing. As a result and as earlier noted, an application for an adjournment was successfully made on behalf of the applicant so as to further address these matters.
26. When the matter returned before the Commission on 16 October 2019 Mr Maley again appeared on behalf of the applicant and Mr Jeff Verinder as representative for the Director-General of Licensing was also present to provide information and assistance to the Commission during the course of the hearing.

Assessment of the Application

27. As earlier noted, there were no objections to this application. This is despite the fact that the applicant undertook its obligations with respect to public advertisement and consultation in accordance with the ordinary notice provisions required under the 1978 Act. The objection process is specifically provided for under the 1978 Act at section 47F. That section clearly identifies those persons who may make an objection, the

specific *kinds* of applications that may be objected to, the *grounds* upon which an objection can be made and *how* the objection is to be made.

28. Although no objections were made that is not the end of the matter. The Commission is required under the 1978 Act to assess the application according to that Act. The 1978 Act clearly identifies and prescribes the process to be undertaken and in particular those matters to be considered (where relevant) under section 6, together with the Minister's guidelines issued under section 6A and the matters identified under section 6B.
29. In this regard it is important to recall at all times that the 1978 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. Consistent with that, it should also be recalled that even if there is stated "support" of an application, that does not mean that the Commission will grant the application. The applicant must satisfy the relevant criteria and it is the Commission's obligation to ensure that has occurred for each and every application that comes before it.
30. As is clear from section 6(1) of the 1978 Act; when considering or determining an application, the Commission **must** apply the public interest and community impact test as relevant to the application. Section 6(2) 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;
- 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.”

31. 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.”

32. In addition, pursuant to section 6A of the 1978 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. These were published on 6 March 2018. 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”.

33. 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; • 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. <hr/> <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> <p>The Commission will consider information available to it about the current alcohol consumption rates for the community area.</p>

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?

34. 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 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”.

35. With respect to this application, it is relevant to note that this is not an application for a new licence. This is an application to vary conditions of an existing licence that already enables the premises to be open for trade, but to enable the applicant to be able to sell liquor for an additional period so as to provide a greater service predominantly to its guests. As was submitted by Mr Maley; the variation sought is to “develop and enhance” the business.

36. The applicant provided written submissions addressing the public interest and community impact test and also the community impact assessment guidelines. It in fact did so on two (2) separate occasions due to concerns raised by the Commission as to the contents of the same. The second occasion was to enable the applicant to clarify its position as to the variation being sought and ensure its submissions properly, and relevantly, addressed the test and guidelines rather than contain inaccurate information and a clear cut and paste from what appears to have been an earlier application.

37. The Commission considered carefully those written submissions and the further submissions made by Mr Maley at the hearing. It is accepted by the Commission that the applicant has been able to operate the premises in an appropriate manner since purchasing the premises just over 12 months ago and that this application is designed to enhance the facilities for guests staying at the premises. The Commission notes that Mr Maley made clear there is **no** intention to change the premises from its stated “principle business” within its liquor licence which is “a caravan tourist park”.
38. The Commission accepts that persons visiting the premises may wish to be able to purchase and consume liquor post 20:00 hours and it is reasonable that they should be able to do so with a meal. It is also accepted that it is not unusual that guests staying overnight at the premises would wish to have a drink after exploring without having to have a meal and that likewise they would wish to have a drink after 20:00 hours. The Commission also accepts that after arriving at the premises and setting up their camp or caravan, guests who are overnighing may also wish to have a drink without immediately having to have a meal.
39. Therefore, for the reasons outlined and having regard to the objects of the 1978 Act the Commission has decided to vary the conditions of the licence as outlined at the start of this Decision Notice.

Notice of Rights:

40. Section 120ZA of the 1978 Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the 1978 Act. A decision to vary the conditions of a liquor licence pursuant to section 32A of the 1978 Act is specified in the Schedule and is a reviewable decision.
41. Section 120ZC of the 1978 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.
42. For the purpose of this decision, and in accordance with section 120ZB(1)(b) and (c) of the 1978 Act, the affected person is the applicant.



JODI TRUMAN
Presiding Member
Deputy Chairperson
22 October 2019