

**NORTHERN TERRITORY LIQUOR COMMISSION**  
**DECISION NOTICE**

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**MATTER:** APPLICATION FOR VARIATION OF CONDITIONS OF LICENCE

**REFERENCE NUMBER:** LC2019/125

**LICENCE NUMBERS:** 80902856, 80919180, 80903616, 80916856, 80917513, 80904537, 80904426, 80904482, 80900131, 80903527, 80901630, 80915580

**APPLICANT:** Woolworths Group Limited

**PREMISES:** Twelve (12) BWS Stores in the Northern Territory

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

**HEARD BEFORE:** Mr Richard Coates (Chairperson)  
Mr Bernard Dwyer (Health Member)  
Ms Sandra Cannon (Community Member)

**DATE OF HEARING:** 28 November 2019

**DATE OF DECISION:** 13 December 2019

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**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 vary the conditions of the twelve (12) liquor licences as follows:

**BWS Alice Springs**

1. Authority Store to read Authority Liquor Merchant
2. Takeaway hours premises name amend to read BWS-Beer Wine Spirits (Alice Springs)
3. Delete the conditions "General Store", "Core Concept" and "Liquor to be Secondary Business" and replace with new special condition (see below).

**BWS Bakewell**

1. Authority Store to read Authority Liquor Merchant
2. Premises name – add the word "(Bakewell)"
3. Takeaway hours premises name add the word "(Bakewell)"
4. Delete the conditions "General Store", "Core Concept" and "Liquor to be Secondary Business" and replace with new special condition (see below).

### **BWS Casuarina**

1. Authority Store to read Authority Liquor Merchant
2. Delete the condition “Liquor to be Secondary Business” and replace with new special condition (see below).

### **BWS Coolalinga**

1. Authority Store to read Authority Liquor Merchant
2. Takeaway hours premises name to read BWS – Beer Wine Spirits (Coolalinga)
3. Delete the conditions “General Store”, “Core Concept” and “Liquor to be Secondary Business” and replace with new special condition (see below).

### **BWS Darwin City**

1. Authority Store to read Authority Liquor Merchant
2. Amend the condition “Advertising/ Signage” to delete the words “Woolworth Liquor” and substitute the words “BWS and/or Beer Wine Spirits”.
3. Takeaway hours premises name to read BWS – Beer Wine Spirits (Darwin City).
4. Amend ‘Licence concept’ condition to add the following words at the end of the first paragraph: “except as regards the liquor business being secondary or ancillary to the Woolworths Supermarket business”.
5. Delete the conditions “Liquor to be Secondary Business” and replace with new special condition (see below).

### **BWS Nhulunbuy**

1. Authority Store to read Authority Liquor Merchant
2. Premises name to read BWS – Beer Wine Spirits (Nhulunbuy)
3. Takeaway hours premises name to read BWS – Beer Wine Spirits (Nhulunbuy)
4. Delete the condition “Liquor to be Secondary Business” and replace with new special condition (see below).

### **BWS Humpty Doo**

1. Authority Store to read Authority Liquor Merchant
2. Takeaway hours premises name to read BWS – Beer Wine Spirits (Humpty Doo)
3. Delete the condition “Liquor to be Secondary Business” and replace with new special condition (see below).

### **BWS Karama**

1. Authority Store to read Authority Liquor Merchant
2. Takeaway hours premises name to read BWS – Beer Wine Spirits (Karama)

3. Delete the conditions “General Store”, “Core Concept” and “Liquor to be Secondary Business” and replace with new special condition (see below).

### **BWS Katherine**

1. Authority Store to read Authority Liquor Merchant
2. Premises name to be amended to read BWS – Beer Wine Spirits (Katherine)
3. Takeaway hours premises name to read BWS – Beer Wine Spirits (Katherine)
4. Delete the condition “Liquor to be Secondary Business” and replace with new special condition (see below).

### **BWS Leanyer**

1. Authority Store to read Authority Liquor Merchant
2. Delete the condition “Liquor to be Secondary Business” and replace with new special condition (see below).

### **BWS Nightcliff**

1. Authority Store to read Authority Liquor Merchant
2. Delete the condition “Liquor to be Secondary Business” and replace with new special condition (see below).
3. Add condition “Dual nominee”

### **BWS Palmerston**

1. Authority Store to read Authority Liquor Merchant
  2. Delete the conditions “General Store”, “Core Concept” and “Liquor to be Secondary Business” and replace with new special condition (see below).
  3. Add condition “Dual nominee”
2. The new special condition which applies to each of the amended licences is as follows:

### **Separation of Woolworths Supermarket from BWS Licensed Premises**

1. The commencement date of this special condition (“the Special Condition”) is 13 December 2019 being the date upon which the Liquor Commission varied the conditions of this licence pursuant to section 32A of the *Liquor Act 1978* to remove various conditions, effecting a change of licence from a store licence to that of a standalone takeaway licence (liquor merchant authority).
2. The object of the Special Condition is to give effect to recommendation 2.5.13 of the *Alcohol Policies and Legislation Review Final Report* October 2017 (“the Riley Review report”) and the public interest in avoiding a perception that alcohol is an ordinary supermarket / grocery item.
3. The Licensee has undertaken to the Liquor Commission to not affect any significant change to the mode of business conducted at the licensed premises immediately prior to the commencement of the Special Condition and shall not

affect any significant change as a result of the said commencement (save as provided for in the Special Condition). This part of the Special Condition will not prevent the licensee from making an application pursuant to the *Liquor Act 2019* should it wish to significantly change the mode of business in the future.

4. The Licensee acknowledges that the licensed premises is located immediately adjacent to a supermarket (“the adjacent Woolworths supermarket”).
5. **for all licences except Nhulunbuy** There shall be no direct customer access between the trading floor of the adjacent Woolworths supermarket and the licensed premises as follows:
  - (a) pending the step outlined in subparagraph (b) being undertaken, the roller doors between the trading floor of the adjacent Woolworths supermarket and the licensed premises shall be closed to customers during the trading hours of the licensed premises and the licensee shall take all reasonable measures to screen the licensed premises from view of supermarket customers within the supermarket;
  - (b) within 24 months from this Special Condition taking effect, or any further extension as granted by the Liquor Commission, the licensee will install a wall or other physical barrier (including a modified or replacement roller door) that is opaque to a height of at least 1.8 metres and of the same or similar colouring as the internal walls of the supermarket, between the trading floor of the adjacent Woolworths supermarket and the licensed premises; and
  - (c) The Licensee shall not be required to make an application under section 96 of the *Liquor Act 2019* in order to comply with the Special Condition.

**5 for Nhulunbuy licence** Within 24 months from this Special Condition taking effect, or any further extension as granted by the Liquor Commission, there shall be no direct customer access between the trading floor of the adjacent Woolworths supermarket and the licensed premises, to be effected by way of a proper physical separation. The Licensee shall not be required to make an application under section 96 of the *Liquor Act 2019* in order to comply with this Special Condition.

**For all licences**

6. On and from 1 June 2020, there shall be no signage on the trading floor of the adjacent Woolworths supermarket that:
  - (a) purports or attempts to re-direct customers of that business to the licensed premises;
  - (b) advertises or promotes the sale of liquor from the licensed premises; or
  - (c) cross-promotes the sale of grocery items from the adjacent Woolworths supermarket and liquor from the licensed premises.

- (7) On and from 1 June 2020, there shall be no advertising or other promotional material published by Woolworths Group Limited or Endeavour Group, distributed in the Northern Territory, that promotes the sale of grocery items from a Northern Territory Woolworths supermarket AND liquor items from a Northern Territory BWS Beer Wine Spirits licensed premises.

## **Reasons**

### **Background**

3. The applications were referred as a group by the Director of Liquor Licensing (Director) pursuant to s32A(6AA) of the *Liquor Act* 1978, on 30 October 2019. These were mandatory referrals. The Director's referral brief was received into evidence at the hearing of this matter on 28 November 2019 and marked as Exhibit 1.
4. The applications relate to twelve (12) BWS-branded stores in the Northern Territory, which operate in conjunction with Woolworths supermarkets. All licences the subject of the applications are held in the name of Woolworths Limited (the licensee).
5. The need for the licence variations is said to arise as a result of an internal restructure of the licensee's businesses, including a separation of its liquor businesses (BWS, Dan Murphy's and hotel venues<sup>1</sup>) from its other businesses (including supermarkets)<sup>2</sup>. The restructure is a somewhat complex 3 stage process with the ultimate stated aim of creating "*simpler, more focused, independent businesses ready for future growth*"<sup>3</sup>. The proposed restructure has been announced to the ASX and stage 1 will be voted on by the licensee's shareholders on 16 December 2019. A comprehensive Restructure Booklet prepared for shareholders was tendered in the hearing and marked as Exhibit 2.
6. It is anticipated that a new corporate entity, Endeavour Group, will ultimately separate from the Woolworths Group and will hold all of the licensee's drinks businesses, whilst retaining a strong working partnership with Woolworths Group<sup>4</sup>. In other words, it is anticipated that Endeavour Group will ultimately be the licensee for the BWS licences the subject of the applications and that BWS will retain an association with Woolworths through a partnership agreement or agreements. The current licensee will continue to hold and operate the supermarket businesses that are immediately adjacent to the BWS premises.
7. These applications to vary conditions are separate from a process of conversion of existing licences to licences under the new Liquor Act, and a transfer of the licences to Endeavour Group as a result of the proposed restructure. Those are to be dealt

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<sup>1</sup> Exhibit 2 p 9

<sup>2</sup> See Licensee Submissions in Support of Application – in particular para 4-5 on p 13 of the Hearing Brief (Exhibit 1)

<sup>3</sup> Exhibit 2 p 7

<sup>4</sup> Exhibit 2 p 9

with in the future. The Commission was informed that the 1<sup>st</sup> stage of the restructure is expected to be implemented on 2 February 2020 (assuming shareholders vote in favour). Stages 2 and 3 are expected to be complete in the calendar year 2020.

8. It is also anticipated that the licensee's leasehold interest in each of the supermarket/BWS premises will be apportioned so that the new Endeavour Group will become the lessee for each of the BWS premises. These matters would be addressed in a future application for transfer of the licence.
9. Each of the current licences are store licences and are subject to various conditions including, significantly, some variations to permitted trading hours. In all cases, no Sunday (nor Christmas Day/Good Friday) trading is currently permitted. The application for variation relates to 4 specific types of licence conditions, as follows:
  - a. Liquor to be secondary business (all 12 stores)
  - b. General store displays (6 stores)
  - c. Core concept (5 stores)
  - d. Licence Concept (Darwin City store only). The application to delete this condition was abandoned at hearing.
10. Additionally the licensee wishes to change three of the premises names in the licences for consistency.

## **Consultation**

11. In accordance with section 32A(5) of the Act the following were notified of the application:
  - i. the Department of Health;
  - ii. Northern Territory Police;
  - iii. Alice Springs Town Council;
  - iv. City of Palmerston;
  - v. Litchfield Shire Council;
  - vi. Katherine Town Council;
  - vii. Nhulunbuy Corporation.
12. The Department of Health replied via email dated 28 October 2019 stating it has no adverse comment.
13. On 9 October 2019, an email response was received from NT Police supporting the application.
14. On 7 October 2019, an email response was received from Alice Springs Town Council advising no objection to the application.

15. On 7 October 2019, an email was sent to City of Palmerston Council. No response was received.
16. On 7 October 2019, an email was sent to Litchfield Council. No response was received.
17. On 7 October 2019, an email was sent to Katherine Town Council. No response was received.
18. On 7 October 2019, an email was sent to East Arnhem Regional Council. No response was received.
19. On 16 October 2019, an email response was received from City of Darwin advising no objection to application.

## **Publication**

20. The Director-General of Licensing (the Director-General) determined that because of the nature of the applications there was no public interest to warrant publication of the application. This is further discussed elsewhere in these reasons.

## **Compliance History**

21. A check of records held at Licensing NT indicate there are no negative compliance issues against most of the BWS stores in the NT, however there is an active investigation regarding the BWS Katherine store by Katherine Police in relation to alleged BDR breaches and a separate investigation by Katherine compliance officers in regards to the alleged supply of liquor to the RAAF base.
22. This information was noted by the Commission but not otherwise taken into account in the making of its decision as they are allegations only at this stage.

## **The Hearing**

23. The hearing commenced before the Commission at 1:30pm on 28 November 2019. The Applicant was represented by Mr Hamish Baddeley of counsel together with solicitor Mr Carl Black. Ms Mary Chalmers of counsel appeared to assist the Commission and Mr Mark Wood, Manager Licensing – Liquor, Gambling and Racing appeared on behalf of the Director. The Commission is most appreciative of the constructive assistance provided by all parties.

## **Consideration of the Issues**

24. A separate application to vary licence conditions in respect of each licence has been made by the licensee through its solicitor, King Wood Mallesons (Perth), each of which is in substantially the same form and terms, with some variation of requested licence variations dependent on the individual licence.
25. The applications each meet the requirements of s32A in that they:
  - are made in the approved form as required by 32A(1);
  - include an affidavit made by a proper officer pursuant to 26A of the Act

addressing the disclosure in relation to influential person and tenure arrangements (lease documents and lessor ASIC searches);

- are not required to be the subject of published notice because the Director-General did not consider it to be in the public interest as is permitted under 32A(2);
- have not been the subject of any objection from the entities the subject of mandatory notification under 32A(5);
- have not been the subject of any other objection.

26. Pursuant to section 32A(6A) of the Act, in considering the application, the Commission must consider all of the above matters and did so.

27. Subject to 32A(7A) and (7B), after considering the application, the Commission must, having regard to the objects of the Act, either vary the conditions or refuse to vary the conditions of the licence pursuant to section 32A(7) of the Act.

28. Section 32A(7A) and (7B) provide that [emphasis added]:-

*(7A) ...the Commission cannot vary a store licence **in a way that would that would permit the sale of liquor** for consumption away from the licensed premises on a day on which that is not permitted under the licence as in force immediately before the application for the variation was made.*

*(7B) ...the Commission cannot vary a store **licence in a way that would change the licence to a type of licence that would permit the sale of liquor** for consumption away from the licensed premises on a day on which that is not permitted under the licence as in force immediately before the application for the variation was made.*

29. In this case, the applicant is seeking to change their store licences to stand alone take away licences, without some of the restrictive conditions associated with the former.

30. Under the old Act, Sunday trading hours are available for stand-alone takeaway licences<sup>5</sup> though there is no suggestion that the applicant would seek this and in fact has submitted that the intention is that there will be no change in operation of the licences and that they do not seek a change in trading hours. The applicant also validly points out that Riley Review report in fact recommended that takeaway liquor only be permitted to be sold from stand-alone businesses<sup>6</sup>.

31. The question is whether granting the variations in this case would either “permit the sale of alcohol” on Sundays, or change the BWS store licences to a “type of licence” that would permit the sale of alcohol on Sundays. If either were the case, the Commission could not grant the variation.

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<sup>5</sup> Reg(4)(1)

<sup>6</sup> Recommendation 2.5.13



32. In relation to (7A) there is no variation sought that would permit Sunday trading hours. Any permission would be indirect in the sense that granting the variation would enable the licensee to apply for a variation of hours to permit Sunday trading. Any such application could only be dealt with under the new Act which does not provide for any Sunday trading for stand-alone takeaway licences.
33. The (7B) question is more difficult because the old Act did not provide expressly for the different licence 'types' (as was highlighted in the Riley Review and has been addressed in the new Act which establishes rigid licence types or "authorities" as they are termed).
34. However, the definition provision at 32A(10) provides that a store licence is a takeaway licence endorsed with the words 'AUTHORITY – STORE' or 'AUTHORITY – LIQUOR MERCHANT'.
35. In that sense at least, there would be no change of licence type in granting the variations sought and the Commission does not consider itself impeded by 32A(7B).

***Should the applications have been the subject of published notice?***

36. The decision not to require the applicant to publish notice of the application was a matter within the Director General's discretion under section 32A(2) of the Act.
37. The only power of the Commission in relation to these applications is to either vary the conditions of the licence or refuse the applications under section 32A(7) of the Act. It cannot order publication of notice.
38. The Commission could refuse the applications until such time as public notice had been given, particularly if it felt constrained in its application of the public interest and community impact test as required.
39. There is no submission that this is what should occur but the following matters were raised for the Commission's consideration and were accepted by the Commission.
40. The Director-General formed the view that published notice was not in the public interest "*given the nature of the applications*".<sup>7</sup> This was a matter within his discretion.
41. If the variations were to be granted by the Commission, the 12 BWS store licences become standalone takeaway licences (Liquor Merchant licences) which in turn will permit conversion by the Director to a takeaway authority under the new Act. This is something that would otherwise be prevented by the new moratorium

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<sup>7</sup> P4.9

provision in s84 of that Act<sup>8</sup>. In this sense it could be suggested that the applications allow the licensee to 'get in through the back door' to obtain a takeaway authority that they would otherwise not have been able to obtain under the new Act.

42. There are a number of important points to note in this regard. Firstly, an applicant taking advantage of something that is permitted by law should not be the subject of adverse comment or finding.
43. Secondly, there is no reason to doubt that the applicant believes that the present course is necessary because of its impending restructure.
44. Thirdly, takeaway authorities under the new Act cannot presently trade on Sundays - so in that sense there is no apparent advantage to be gained by the licensee, other than relief from the store condition restrictions<sup>9</sup> (this latter aspect is discussed below with reference to the public interest and community impact test).
45. Fourthly, the Act mandates that certain interested entities including police, health authorities and local councils be notified and that has occurred with no objection.
46. Fifthly, the applications are being dealt with at a public hearing that was advertised on the Commission website.
47. In the circumstances, the Commission determined that it was able to fully consider the applications notwithstanding the lack of published notice.

### ***Should the Applications be granted?***

48. The Commission is required to have regard to the objects of the Act in the course of considering the application under section 32A(7) of the Act. This means that the public interest and community impact test provided for in 6(2) and (3) need to be taken into account "*as relevant to the application or conditions*" – s6(1).
49. The Licensee has made submissions as to relevant parts of the test, and accepts that it has the onus of satisfying the Commission – s6B.

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<sup>8</sup> 84(3) of the new Act prohibits the creation of a takeaway authority except through "conversion" under Pt 15 or transfer. Under Pt15 an existing licence can be converted only with "equivalent authorities" – see s.324(6). The 'authorities provided for under the new Act at s.47 differentiate between a takeaway authority and a grocery store authority. Conversion of the licences in their current state would see them become the latter.

<sup>9</sup> Reg95 and Schedule 3 of the Liquor Regulations 2019

50. The Applicant has addressed the factors the Commission is required to consider in accordance with sections 6(2) and (3) of the Act and guidelines in paragraphs 17-35 of the licensee's submissions<sup>10</sup>. These matters were largely non-controversial.
51. The licensee provided an affidavit of Shane Tremble who is the General Manager of Corporate Services for the Endeavour Drinks Group on behalf of the licensee. Mr Tremble assured the Commission that the "*nature of the business conducted at each of the relevant licensed premises will not change*"<sup>11</sup> and that "*existing harm minimisation strategies and initiatives*" at the stores will continue, along with a general commitment to the responsible sale of alcohol.
52. These assurances by Mr Tremble are important in a case where the store conditions are proposed to be removed. Among other things, store conditions impose a restriction on the volume of takeaway alcohol sales by a licensee – they must remain proportionate to the sale of grocery items as per the "secondary business" condition.
53. The licensee alludes to a potential change of 'mode of business' by Endeavour Group in the future<sup>12</sup> (and possible future applications to vary conditions) but invited the Commission to impose a special condition or conditions to encapsulate the undertakings of Mr Tremble on behalf of the licensee to preserve the status quo until such time as a specific application might be made in respect of any particular licence.
54. When an application for transfer of the licences is made in the future the Commission will wish to be fully informed by the licensee about what "*future growth*" of the BWS businesses in the Northern Territory by Endeavour Group entails. The Commission is also aware that if it grants these applications it will thereby allow the licensee the option of making a future application, pursuant to section 96 of the 2019 Act, for example to establish a Dan Murphy's outlet at one or more of the existing BWS premises. Any such application would need to be advertised and determined on its merits following a public hearing.
55. In support of the applications, the licensee placed emphasis on recommendation 2.5.13 of the Riley Review Report, to the effect that store licences in the Northern Territory should be phased out and that takeaway liquor should be sold from standalone businesses in which the primary focus of the business is the sale of alcohol ("the recommendation").

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<sup>10</sup> Exhibit 1 p17 &18

<sup>11</sup> Exhibit 1 p321 at par 4

<sup>12</sup> For example at par 9.c of the Licensee's submissions, and additionally as part of Exhibit 2.

56. The rationale underpinning the recommendation was based on a concern on the part of the authors of the Riley Review Report about the co-location of ordinary grocery items and liquor items. The Commission notes that the BWS businesses are still going to be located in suburban shopping centres immediately adjacent to and accessible through large Woolworths supermarkets. The convenience factor of having groceries and alcohol in close proximity was considered by the authors of the Riley Review Report to be outweighed by the harms arising from the sale of takeaway alcohol in the Northern Territory. Thus, recommendation 2.5.13 was aimed at achieving two things<sup>13</sup>:-
- (1) reducing the availability of liquor overall; and
  - (2) sending a clear message that alcohol need not be available in every context in community life, because alcohol is “no ordinary commodity”.
57. The Director recommended to the Commission in his referral that there should be a closing off of direct access between the supermarkets and BWS stores (assuming the variations were granted)<sup>14</sup>. This is entirely in step with the Riley Review Report recommendation and the Commission agreed that it should be reflected in a special condition. The licensee did not object in principle, but raised some practical issues which the Commission accommodated in the special condition. For example, the BWS Nhulunbuy can only be entered via the adjacent Woolworths supermarket at present and considerable works (and landlord and other approvals) will be required to create a separate entrance. There were practical issues with other BWS outlets including the need for continued access for re-stocking purposes. Counsel assisting and the Applicant’s legal representatives were able to agree upon the terms of paragraphs 1-5 of the Special Condition and the Commission accepted that these were both appropriate and necessary.
58. Counsel assisting proposed the imposition of two additional parts to the special condition relating to signage and advertising, in order to give effect to the Riley Review Report recommendation and the underlying rationale for it. The Applicant agreed to the restrictions with respect to signage (reflected in paragraph 6 of the special condition). However the Applicant did not agree to a proposed condition purporting to restrict advertising.
59. The Applicant made the following submissions as to why the Commission should not impose special condition 7 (or the earlier version of it):

*Counsel Assisting the Commission has proposed that the following licence condition be imposed on the licences the subject of the public hearing LC2019/125:*

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<sup>13</sup> Alcohol Policies and Legislation Review Final Report, Oct 2017 at p47

<sup>14</sup> Exhibit 1 p3.3.

*On and from 1 June 2020, there shall be no advertising or other promotional material published by Woolworths Group Incorporated [Note: the entity name should read "Woolworths Group Limited"] or Endeavour Group distributed in the Northern Territory that directly cross-promotes the sale of grocery items from a Woolworths supermarket and liquor items from a BWS Beer Wine Spirits licensed premises. This does not include recipe cards, the Woolworths 'Fresh Magazine' or similar indirect cross-promotional publications so long as those publications do not directly promote BWS Beer Wine and Spirits. (Proposed Condition)*

*Counsel Assisting the Commission has proposed the following licence condition in the alternative:*

*On and from 1 June 2020, there shall be no advertising or other promotional material published by Woolworths Group Incorporated [Note: the entity name should read "Woolworths Group Limited"] or Endeavour Group distributed in the Northern Territory that directly cross-promotes the sale of grocery items from a Northern Territory Woolworths supermarket and liquor items from a Northern Territory BWS Beer Wine Spirits licensed premises.*

**(Alternative Proposed Condition)**

...

*Woolworths opposes the Proposed Condition and the Alternative Proposed Condition for the reasons outlined below.*

- 1 The Proposed Condition and the Alternative Proposed Condition are unlikely to serve any public interest purpose and there is no reason to impose such restrictions on advertising or publications.*
- 2 First, the Northern Territory Responsible promotion of alcohol Code of Practice (Last Updated 1February 2019) (Code of Practice), the Liquor Act 2019 (NT) (Act) and the Liquor Regulations 2019 (Regulations) do not impose any "cross-promotion" restrictions (whatever that term may mean) as contained in the Proposed Condition or the Alternative Proposed Condition on grocery store authorities or takeaway authorities.*
- 3 In fact, the Northern Territory government has recently expressly considered and sought to regulate the advertising and promotion of liquor through the Code of Practice, the Act and the Regulations and they did not see fit to impose the type of restriction set out in the Proposed Condition and the Alternative Proposed Condition.*
  - a) Woolworths intends to apply to convert the licences to takeaway authorities under the Act. The only reference to advertising and promotional /marketing material specific to a takeaway authority in the Code of Practice, the Act or the Regulations is at regulation 98 which regulates only takeaway authorities in conjunction with club authorities which is not relevant to the licences the subject of this application.*
  - b) The only reference to advertising and promotional / marketing material specific to a grocery store authority in the Code of Practice, the Act or the Regulations is at regulation 56 of the Regulations. Regulation 56 states that:*

**Regulation 56 Conditions on advertising liquor for grocery store authority**

- (1) Advertising or marketing material for liquor must not be visible to persons outside the licensed premises or grocery store.*
- (2) Inside the licensed premises or grocery store, advertising or marketing material for liquor must be kept within the area of the licensed premises where liquor is displayed for sale or restored.*

(3) *The prohibitions in subregulations (1) and (2) do not apply to:*

- a. the brand name of the licensed premises or store;*
- b. or any advertising or marketing in print or electronic material.*

- c) As set out above, there is no restriction on takeaway authorities of the kind contemplated by the Proposed Condition or the Alternative Proposed Condition. The mere fact that the licence was previously more akin to a grocery authority (which itself would not have these types of restrictions in any event) does not give rise to any special circumstance or need to impose such unusual conditions.*
- d) Woolworths intends to fully comply with the requirements of the Code of Practice, the Act and the Regulations, as well as the other conditions proposed to be imposed on the licences (including the conditions on physical separation). Woolworths respectfully submits that those requirements are sufficient and appropriate.*

*4 Second, to Woolworths' knowledge, no other regulator or legislative instrument imposes such a control on advertising or publications. For example, other Australian jurisdictions such as Western Australia, Queensland and New South Wales also seek to impose guidelines and/or conditions which separate the operation of supermarket and liquor businesses. However, those jurisdictions do not impose restrictions on advertising or publications.*

*5 Third, taken to its logical conclusion, such a policy would see all forms of advertising which place supermarket and liquor items in the same catalogue or publication prohibited. This would obviously be unworkable and Woolworths respectfully submits that it would not ultimately serve any public interest purpose.*

*6 Fourth, viewed in another way, Woolworths' and Endeavour Drinks' efforts in abiding by the Proposed Condition or the Alternative Proposed Condition would serve no practical purpose as it could be rendered futile by third parties who place supermarket and liquor items in the same advertisement or publication such as newspapers and websites (which are not subject to the same restrictions).*

*7 Finally, the Proposed Condition and the Alternative Proposed Condition would be unfairly onerous on Woolworths as:*

- a) it will not be entitled to sell space in its publications to any person or entity regarding any subject matter, unlike other supermarkets or retailers; and*
- b) it will be required to adjust its advertising and publications for the Northern Territory only, when this is not required in any other Australian jurisdiction.*

60. The Commission has considered these submissions and determined to include a moderate advertising restriction as part of the Special Condition for the following reasons:-

- (a) The Applicant has relied heavily on the Riley Review Report as justification for these applications which will no longer be open to it under the new Act. The Commission is of the view that because of the continuing close co-location and business connection between the adjacent Woolworths supermarkets and BWS outlets within the suburban shopping centre environment, it is appropriate and in the public interest that the underlying rationale for the recommendation be reflected in setting the special conditions which will attach to the varied licences. In this sense, the Commission is requiring, in the public interest, that

the Applicant adhere to the 'spirit' of that recommendation by making a moderate contribution to "*sending a clear message that alcohol need not be available in every context in community life because alcohol is no ordinary commodity*", at least by refraining from direct conduct that sends the opposite message.

- (b) The submissions about the Responsible Promotion of Alcohol Code of Practice do not assist the Applicant as that Code of Practice is currently aimed only at certain 'unacceptable practices' associated with binge drinking at 'on licences'.
- (c) The submission regarding regulation 56 does not assist the Applicant as the regulation relates to a store authority under the new Act. The submission fails to take into account the fact that store licences have restrictions of the type that the licensee has sought to have removed from the BWS licences – for example the restrictions that apply to the volume of alcohol sold and licence concept conditions which place emphasis on the grocery side of the business.
- (d) The applicant points out that there is no advertising restriction that applies to takeaway licences. This submission fails to take into account the existence of a moratorium on any new takeaway licences, and the fact that the Commission has the power to impose restrictive conditions on takeaway licences if it is in the public interest to do so. In this case, as stated above, the Commission places weight on the fact that the licensed premises the subject of the applications are right next door to large supermarkets located in suburban shopping centres, as well as the known harms arising from the sale of takeaway alcohol in the Northern Territory as discussed in the Riley Review Report upon which the Applicant relies.
- (e) The submission about the practice in other Australian jurisdictions is of no assistance to the Commission. Again, the Commission places weight on the known harms associated with arising from the sale of takeaway alcohol in the Northern Territory.
- (f) The submission that the proposed conditions are unworkable or onerous is not accepted. The Commission notes that it has been informed by representatives of Woolworths on previous occasions that it been able to restrict its advertising strategy in the NT to cater for minimum unit price restrictions. The Commission is of the view that the proposed alternative condition represents a moderate restriction that does not have the effect contended by the Applicant (that is, that it would see all forms of advertising which place supermarket and liquor items in the same catalogue or publication prohibited). Further, the Applicant has provided no explanation as to why this is unworkable, despite being given the

opportunity to make its further written submissions specifically addressing this topic.

- (g) Nor does the Commission accept that efforts to comply with the requirement by the licensee would be rendered futile by third parties. The Commission was content to leave the Woolworths website out of the picture by virtue of the fact that online shoppers can be assumed to represent only a portion of Northern Territory Woolworths customers, and an acceptance that pulling apart a complex online shopping platform that operates nationally would be an unduly onerous task. However, the issue of a newspaper placing Woolworths supermarket and BWS advertisements side by side is something that might be outside of the Applicant's control (though hardly outside of its sphere of influence), but there is no evidence to suggest that this is a practice that would be adopted by any Northern Territory newspapers that would have the effect of rendering the special condition futile.
- (h) The Applicant's submission that it would not be entitled to sell space in its publications to any person or entity regarding any subject matter is also not accepted. The special condition (in its proposed alternative form) is expressly limited to advertising that promotes the sale of grocery items from a Northern Territory Woolworths supermarket AND liquor items from a Northern Territory BWS Beer Wine Spirits licensed premises. Indirect advertising or cross promotional publications such as in-store recipe cards, or the Woolworths 'Fresh' magazine featuring wine recommendations without direct reference to BWS would not be caught by the Special Condition. The Applicant did not put forward any additional examples of publications that could potentially be caught.
- (i) The Commission accepts that the reference to cross-promotion is inexact.

61. On 11 December 2019, on instructions from the Commission, counsel assisting wrote to the applicant's solicitors with a draft of the Commission's reasons for imposing the alternative special condition 7. The applicant was offered the option of adducing further evidence to support its contention that imposition of that condition would be unduly restrictive.

62. On 12 December 2019, the solicitors for the applicant responded by declining to adduce further evidence, maintaining its ongoing objection to the proposed condition and suggesting a further alternative condition.



63. Having considered those further matters raised by the applicant the Commission was not persuaded to remove special condition 7 or replace it with the further alternative condition.

64. The Commission has therefore determined that it is appropriate to impose special condition 7 but has removed the reference to 'cross promotion' for the sake of clarity.

65. Having considered all of the evidence before us, the Commission is satisfied it is in the public interest to grant the applications to vary the licence conditions in the terms specified in paragraphs 1 and 2 of the Decision Notice.

### **Notice of Rights:**

66. 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.

67. 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.

68. 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.



RICHARD COATES  
Presiding Member  
Chairperson

13 December 2019