

NORTHERN TERRITORY LIQUOR COMMISSION

Decision Notice

MATTER:	APPLICATION FOR A LICENCE
REFERENCE:	2019/072
PREMISES:	Uncle Tony's Bar Shop 7A and Shop 7B 38 - 42 Smith Street The Mall DARWIN NT 0801
APPLICANT:	James Ellis Pty Ltd
NOMINEE:	Mr Alexander Deutrom
OBJECTOR/S:	Nil
LEGISLATION:	Section 26, Part IV and V of the <i>Liquor Act 1978</i>
HEARD BEFORE:	Mr Richard Coates (Chairperson) Ms Elizabeth Stephenson (Health Member) Ms Amy Corcoran (Community Member)
DATE OF HEARING:	3 July 2019
DATE OF DECISION:	17 July 2019

Decision

1. For the reasons set out below and in accordance with section 29 of the *Liquor Act 1978* (**the Act**) the Commission has determined to refuse to grant a licence authorising the sale of liquor for consumption on or at the premises to James Ellis Pty Ltd.

Reasons

Background

2. On 5 February 2019 an application was lodged by Mr Alexander James Ellis Deutrom (Mr Deutrom) on behalf of James Ellis Pty Ltd (**the Applicant**) to the Director-General of Licensing NT (**the Director-General**) pursuant to section 26 of the Act seeking a liquor licence for premises to be known as 'Uncle Tony's Bar' located at Shop 7A and

Shop 7B, 38-42 Smith Street, Darwin (**premises**). This location is within the 'Voyage Arcade' that is accessible through the Smith Street Mall as well as Austin Lane.

3. On 28 May 2019 pursuant to sections 28(1) and 50(a) of the Act, the Director-General referred this application to the Commission to be determined by way of a public hearing.
4. This licence application was also undertaken pursuant to section 26(2) of the Act in respect of premises which are to be constructed or are under construction. Whilst the premises actually exists, the Applicant and its landlord is planning on investing with the refitting and some minor building works of Shop 7A and Shop 7B. The Applicant has been granted the required building approvals and permits by the Development Consent Authority.
5. The Applicant is seeking a liquor licence to establish a small "1920/30's American style speakeasy, unique, high-end whiskey and jazz themed bar" within the Darwin CBD that will provide the opportunity for an authentic atmosphere of jazz music entertainment with the occasional vocal artist. The application sought the following conditions of trade:
 - 12.00 hours to 01.00 hours the following day
 - Liquor trading 7 days per week including all public holidays inclusive of Christmas Day, New Year's Day, Good Friday and ANZAC Day
 - Functions and whiskey tasting bookings will be available by appointment from 12.00 hours
 - Sale and consumption of liquor will not be ancillary to a meal
 - Platters and snacks are produced at the premises and available at all times whilst the business is open for trade.
6. In the hearing, the Applicant advised the trading hours permitted under his lease was in fact only 16.00 hours to 0100 hours, however, earlier opening hours for functions may be permitted by consent of the landlord.
7. It is estimated that the premises will hold a maximum of 35-40 people.
8. The Applicant, James Ellis Pty Ltd, is currently registered with ASIC. A review of the company shows that Mr Deutrom is the Sole Director and Secretary of the company. The company has 1 share which is fully owned by Mr Deutrom.
9. The Business Name, Uncle Tony's Bar, is registered with ASIC.
10. Financial reports for James Ellis Pty Ltd have not been provided as it is a start-up company. The Applicant has provided a Financial Stability Overview with regard to estimated initial start-up costs for the business venture. The Applicant has provided a Statement of Assets and Liabilities, Banking Account balance current at February 2019, along with a conditional approval for Finance for \$30,000 as additional documentation. An initial 12 month cash flow projection based on the proposed business model was also been supplied for review.

11. Mr Deutrom is currently engaged in full-time employment as a Town Planner with NT Government and is listed as the sole Director, Secretary and member of Uncle Tony's Bar. He is also the proposed nominee of the liquor licence application and has provided the following probity documentation:
 - a. National Police Certificate Fingerprint & Name Check (No Disclosable Court Outcomes or Outstanding Matters recorded within the records of police jurisdictions in Australia)
 - b. Photographic identification
 - c. Resume
 - d. Business References
 - e. Character References
 - f. Nationally Recognised Statement of Attainment - Responsible Service of Alcohol Certificate.
12. The Applicant has provided the following documents in support of the application;
 - a. Community Impact Assessment pursuant to Section 6A of the Act
 - b. Public Interest Criteria pursuant to Section 6(2) of the Act
 - c. Business Plans
 - d. Proposed site plans
 - e. Land title; Lease Overview; Provisions of Lease between Applicant and Landlord; Emails between Licensing NT and Applicant clarifying operational times effected within Lease Schedule; Letter dated 26 March 2019 regarding trading hours within lease if application approved.
 - f. CCTV plans
 - g. Application to Register a Food Business.
13. The Applicant has no previous history held at Licensing NT and Mr Deutrom has not previously been involved with another liquor licence in the Northern Territory.

Disclosure of influential persons or potential beneficiaries

14. The Commission notes that section 26A(1) 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 licence is granted. The Applicant has filed such an affidavit.
15. Mr Deutrom on behalf of the Applicant, states there is no such person.

16. 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

17. Details of the application were advertised in the Northern Territory News on Wednesday 13 March 2019 and Saturday 16 March 2019 as well as having signage displayed at the premises at dual access points for a period of 30 days. The objection period expired on 15 April 2019. No objections were received in the objection period.

18. Section 27(3) of the Act requires that the Director-General must inform:

- a. The Chief Executive Officer of the Department of Health (**DOH**);
- b. The Commissioner of Police (**NT Police**); and
- c. If the application relates to premises within the area of a shire council or a regional council - the Chief Executive Officer of the council.

19. DOH replied via email dated 25 March 2019 stating it has no adverse comment however requested that the Director-General consider patron and community safety and amenity when determining the application. DOH also requested the venue clearly display signage to delineate non-smoking areas from smoking area.

20. The City of Darwin replied via email dated 15 May 2019 stating that it has not identified any reason to object to the application.

21. The Northern Territory Police advised via email dated 27 March 2019 that they had no objections.

22. It was intended that consultation with the Northern Territory Fire and Rescue Service (**NTFRS**) would be undertaken at a later stage if this application was approved and upon finalisation of building and fit out works.

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. As earlier noted, on 28 May 2019 the Director General referred this application to the Commission. 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. On 20 June 2019 notice was sent to the Applicant advising the application would be listed for hearing to take place on 3 July 2019 at 11.30am.

25. 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.
26. The public hearing commenced slightly earlier than the scheduled time of 11.30am at 11.10am on 3 July 2019 with Mr Deutrom's consent. Mr Deutrom attended in person on behalf of the Applicant and Ms Tania Chin was present as representative for the Director-General to provide information and assistance to the Commission. The Commission thanked them for their assistance.

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 Act. The objection process is specifically provided for under the 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 under that section were made that is not the end of the matter. The Commission is required under the Act to assess the application according to the Act. The 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 of the Act.
29. In this regard it is important 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.
30. 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;
- 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. 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”.

33. Those matters are identified as follows:

Criteria	Matters to be considered
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.	Are there any ‘at-risk’ groups or sub-communities within the locality? This may include – <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

	<p>to travel to the locality from a dry community;</p> <ul style="list-style-type: none"> • Migrant groups from non-English speaking countries; • People in low socio-economic areas; and/or • Communities that experience high tourist/visitor numbers. <hr/> <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</p>

	<p>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>
<p>Any cultural, recreational, employment or tourism benefits for the local community area.</p>	<p>Will the proposed licensed premises provide economic benefits, cultural, recreational or tourism benefits or any additional employment opportunities and to what level?</p>
<p>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.</p>	<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 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”.

35. 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”.

36. 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”.

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

38. 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.

39. In relation to this application; 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.

40. The Commission also notes that there are no issues of concern in relation to the general reputation and character of the secretary and executive officer of the Applicant however, the Commission does have concerns surrounding the business reputation and financial stability of the Applicant.

41. Sections 28(2)(b) and (c) of the Act require the Commission to have regard to the financial stability of the Applicant. This is a start-up company with the majority of its operating capital being derived from two separate loans totalling \$40,000; one from a financial institution and one from his mother.

42. The Applicant has estimated a fit out cost of \$20,000 which, from the Commission's view seems to be inadequate to turn this unprepossessing shop front into a "high class bar". Further, the Applicant is intending to lease all the furniture and bar fittings and equipment and it is also planning to take advantage of, and in fact relying upon, a credit arrangement from a liquor wholesaler to secure its initial stock of alcohol. Whilst these arrangements reduce the amount of start up capital required, they will place undue pressure on the Applicant in relation to the ongoing recurrent expenses. Although the cash flow projections provided by the Applicant predicts average monthly gross revenue of \$50,000, Mr Deutrom conceded at the hearing that this sum was overly optimistic.
43. Although Mr Deutrom has worked in licensed premises, he nor the Applicant has any prior experience managing licensed premises. Although Mr Deutrom holds a responsible position with the Northern Territory Government we are not satisfied that he has sufficient financial resources or experience within the liquor industry to embark upon a venture such as is proposed.
44. Section 28(2) of the Act requires the Commission to have regard to the suitability of the premises in respect of which the application is made. The proposed premises are a vacant shop within the Voyage Arcade which faces out into the general arcade area and can also be directly accessed from Austin Lane. The brightly lit arcade and surrounding shops will not enhance the atmosphere of the proposed "1920/30's jazz bar" that the Applicant is hoping to create. No doubt this is why it is proposing to cover the windows with curtains however it will be difficult to disguise the fact that this is still a shop in a retail shopping complex.
45. The proposed entrance off Austin Lane is directly opposite what appears to be the "smokers waiting area" for the "Langtrees Chill Out Lounge", an establishment boasting services of female adult entertainers, massage and escorts. Although that factor may be said to contribute to the "speakeasy" theme of the bar it is likely to turn some customers off, particularly those who are expecting a "high end" bar. As there are no facilities for smokers within the proposed bar the potential also exists for those patrons of the bar who want to smoke using the chairs and other facilities provided by the massage parlour which could lead to conflict.
46. There are no toilets within the premises nor within the shopping arcade itself so patrons would be obliged to go out into Austin Lane and use the external toilets attached to the back of arcade. The entries to the male and female toilets are not within eyesight of the entry to the premises but tucked away around a corner. Mr Deutrom said that these toilet facilities would be left open during the evenings for his patrons. This would mean that other members of the public including itinerants would have access to these toilets. It is difficult to see how the Applicant will be able to ensure that the toilets are kept in a hygienic condition for bar patrons. Further, given the dim lighting in Austin Lane, a general lack of surveillance of the entries to the toilet facilities and concerns with non-patrons of the premises accessing the toilets, significant issues arise surrounding public safety particularly for women needing to access these facilities.

47. Although the Applicant is styling the proposed premises as an "upmarket whiskey and jazz themed bar" little detail has been provided of any plans for live music other than the "occasional jazz singer". Most jazz music, particularly the older American style, is performed by a band which may or may not include a vocalist. The space available in the premises is not conducive to a band performance so the reality is that the entertainment will be largely confined to recorded music.
48. The Applicant is not proposing to produce any type of substantial meal on the premises. During the course of the hearing Mr Deutrom confirmed the statements contained within the application that patrons would be welcome to bring their own food to consume on the premises. Customers sitting at a table in a darkened room, consuming their own fish and chips or a 'Big Mac' seems to be an anathema to the concept of a high class whiskey and jazz bar.
49. When pressed by the Commission as to the reason he had chosen such an unlikely venue for the proposed bar Mr Deutrom frankly admitted that it was because of the low rental and other favourable terms of the tenancy he had been offered. Whilst the Applicant is to be commended for his enterprise and energy in trying to start his first business we are not convinced that these premises are suitable for the high end bar that his proposal envisages.
50. The Act also makes clear that the Commission (as the decision maker with respect to this application) **must** apply the public interest and community impact test and that it is the applicant who **must** satisfy the Commission that the approval of the application meets the public interest and community impact test.
51. The Commission does not accept that patron safety, health and welfare has been properly considered by the Applicant under section 6(2)(d) of the Act, surrounding the use of the external toilets by patrons and these facilities fall short of what is acceptable, both for a high end establishment and the provision of hygienic and safe toilet facilities for its patrons.
52. The Applicant stated in the public interest criteria the following relevant point in regards to this issue:
- "On busy nights, a doorman will be employed to ensure maximum capacity of the venue is not exceeded. The doorman will be able to monitor the street (Austin Lane) for anti-social behaviour and call the police should there be any risk to patrons inside the venue".*
53. I note that this 'doorman' is not intended to be a licensed crowd controller but rather a general staff member of the Applicant and only situated at the door on busier nights. This raises concerns on exactly how much that person will be able to assist with issues within the vicinity of the premises and toilets. This doorman will also not be able to monitor access to the toilets, as the facilities are not in line of sight and tucked away behind the wall of the arcade building. Patrons streaming in and out of the premises to utilise toilets, particularly on busy nights, is likely to adversely impact crowd control.

54. The Applicant also intends to have a surveillance system with cameras which will be located *“to film the inside of Austin Lane entrance, the inside of the arcade entrance, the liquor service area and the external Austin Lane entrance facing toward the toilet black down Austin Lane”*. When the Commission raised concerns regarding the location of the toilets at the hearing, Mr Deutrom advised that it was intended that the camera footage is located behind the bar and monitored by the staff behind the bar in real time. The Commission is of the view that this is not sufficient surveillance of the toilet facilities for a number of reasons; Austin Lane is dimly lit and vision will be difficult particularly to view “down” the street; the cameras will not capture the toilet entries themselves and it is difficult to conceive how a staff member who is otherwise engaged for customer service behind a bar will have the ability to properly monitor camera footage.

55. Given that the Commission is not satisfied that:

- a. The premises is suitable for the proposed venture pursuant to section 28(2)(a) of the Act;
- b. The Applicant has sufficient financial stability or business reputation for the proposed venture pursuant to section 28(2)(c) of the Act; and
- c. The Applicant has met the public interest test as required under section 6(1) and (2) of the Act,

The Commission must refuse to grant the application on this occasion. The Commission notes that this does not prevent the Applicant from making a different application in the future on terms that satisfy the matters above, however on the material presently before the Commission the application must be refused.

Notice of Rights:

56. 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.

57. 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.

58. For the purpose of this decision, and in accordance with section 120ZB(1)(b) and (c) of the Act, the affected person is the Applicant.



RICHARD COATES
Presiding Member
Chairperson