

Director of Liquor Licensing

Decision Notice

MATTER: APPLICATION FOR SUBSTITUTION OF PREMISES AND PERMANENT VARIATION OF THE CONDITIONS OF LICENCE

LICENCE NUMBER: FLL1019

PREMISES: Gateway Select Wine, Beer & Spirits
Shop MM1 and MM1A
1 Roystonea Avenue
Palmerston NT 0830

APPLICANT: Little Cashy Pty Ltd and Dunstall Pty Ltd

LEGISLATION: Sections 32A, 46A, Part IV and V of the *Liquor Act 1978* & section 334 of the *Liquor Act 2019*.

DATE: 17 December 2020

BACKGROUND

Application to the Liquor Commission:

1. On 30 July 2019 Little Cashy Pty Ltd and Dunstall Pty Ltd (**the Applicant**) lodged an application (**the Application**) with the former Director-General of Licensing (**the Director-General**). The application sought to substitute the liquor licence for premises known as Gateway Select Wine, Beer & Spirits formerly of Shops MM1 and MM1A, the Gateway Shopping Centre, 1 Roystonea Avenue, Palmerston (**the former premises**) to premises to be fitted out and located at Unit 3, 130 University Parade, Durack within the Fairway Waters Shopping Centre (**the proposed premises**) pursuant to section 46A of the Liquor Act 1978 (**the 1978 Act**).
2. There was no variation of the conditions of the existing licence sought, the application being simply to substitute the licence from the former premises to new premises. Noting the Applicant has been released from the tenancy agreement for the former premises.
3. As per the usual practice, the Application was advertised by notice published in the NT News on Wednesday, 14 August and Saturday, 17 August 2019. The notice advised of a 30 day period during which objections to the Applications could be lodged. Following that advertisement of the Applications, twenty four objections were received.
4. On 18 September 2019 the Applicant was provided with details of the objections as required by section 47G of the 1978 Act and provided with an opportunity to respond to the objections.
5. The Applicant requested and was granted, an extended period in which a response may be provided to the objections. On 21 November 2019 the Applicant provided a written response to the objections.
6. In satisfaction of the requirements of section 46A(4) of the 1978 Act notification of the application was provided to the Chief Executive Officer of Health, the Commissioner of Police and the Chief Executive Officer of the City of Palmerston.

7. Further as is customary, notification of the application was also provided to the Development Consent Authority and Northern Territory Fire and Rescue Service (NTFRS).
8. The Application was referred to the Liquor Commission (**the Commission**) on 16 December 2019.

Fixing the matter for hearing by the Commission:

9. The Application was made under the 1978 Act and involved premises that were yet to be completed. Any approval of the Application may have required conditions to be placed upon it.
10. Mindful of another like matter which was at that time, before the Northern Territory Civil and Administrative Tribunal (NTCAT) for determination and which may have an effect on this Application, the Commission wrote to the Applicant advising of their intention to adjourn it to a date to be fixed awaiting the outcome of the NTCAT application.
11. On 23 December 2019 Mr Richard Bruxner, President of NTCAT published his decision in the like matter which found the Commission did not have the power to grant a substitution application subject to conditions¹.
12. The President published his decision notice and found that section 46A of the *Liquor Act 1978* did not permit the substitution of a liquor licence from existing premises to premises that are yet to be constructed.
13. It should be noted however in this matter, the proposed premises are constructed as it is within an existing complex, the only works necessary would be the fit-out as with most any application for a licence.
14. Soon after the NTCAT decision the Northern Territory Government announced it would be introducing legislation to amend the provisions of the 1978 Act surrounding substitution applications.
15. The Applicants were again provided the opportunity to have their matter adjourned awaiting the outcome of the proposed legislative amendments.
16. The Liquor Amendment Bill 2020 was introduced in the February 2020 sittings and came into effect on 27 March 2020, amending section 75 of the *Liquor Act 2019* (the 2019 Act) which now provides:

75 Substitution of premises

- (1) If a licensee wishes to substitute other premises for the licensed premises, the licensee must apply for a new licence for those new premises.
- (2) Despite subsection (1), instead of issuing a new licence the Commission may, on application by the licensee, amend a licence to substitute other premises for the licensed premises if satisfied that the substitution satisfies the public interest and community impact requirements.
 - (2A) To avoid doubt, the Commission may, under subsection (2):
 - (a) impose conditions on the substitution; and
 - (b) substitute premises that are not yet constructed or are still under construction. (Emphasis added).
- (3) An application to substitute premises is to be made in the same manner as an application to vary conditions of the licence under Part 4, Division 5.

17. The Commission set the Application for public hearing on 29 and 30 July 2020.

¹ *Woolworths Group Limited v Northern Territory Liquor Commission, Foundation for Alcohol Research and Education Ltd & Ors* [2019] NTCAT 37

18. The Application was heard by the Commission and in accordance with section 112(2)(b) of the 2019 Act refused. The Applicant was provided a decision notice of the decision which included a notification as to their right for review of the decision².
19. On 30 October 2020, counsel for the Applicant filed an initiating application in the NTCAT against the Liquor Commission.³
20. The application sought the tribunal overturn the Commission's decision and approve the application for substitution of premises.
21. In their application it was claimed the Commission had erred in finding:
 - (a) There would be an increase in anti-social behaviour in the vicinity of the proposed substituted premises;
 - (b) That a gourmet food offering on licensed premises was not lawful or appropriate without the holding of a grocery authority.
22. The Applicant sought the NTCAT find there would not be a significant adverse impact on the community, but conversely there would be benefits to the community and it would be in the public interest.

FURTHER AMENDMENT OF THE LIQUOR ACT 2019:

23. On 12 November 2020 the Legislature passed the Liquor Further Amendment Bill 2020. The further amendments to the 2019 Act came into force on 20 November 2020 following assent by Her Honour the Administrator. The purpose of the amendments is to authorise the Director of Liquor Licensing to expedite liquor licence applications that were lodged under the 1978 Act but which are yet to be finally determined.
24. The 2020 amendments inserted Division 3 – Expedited determination of applications under Liquor Act 1978. Division 3 includes new section 334 which provides, relevant to the application under consideration, the following provisions:

334 Power of Director to expedite applications

(1) This section applies in relation to the following applications:

 - (a) an application for the substitution of licensed premises that:
 - (i) was made under 46A of the Liquor Act 1978 before its repeal; and
 - (ii) was refused by the Commission; and
 - (iii) is subject to a rehearing by NTCAT, under section 326(4) of this Act; and
 - (iv) was not determined by NTCAT under section 75(2) and (2A) of this Act before the commencement;
25. Section 334(2) of the 2019 Act, as amended, provides that the Director must determine the applications that fall within the parameters of section 334(1) on an expedited basis within 30 days of the commencement of the amending legislation.
26. Section 334(1)(a) applies only to applications for substitution of licensed premises. The requirements of sub-sections 334(1)(a)(i) to (iv) are cumulative, that is to fall within the bounds of the section an application must satisfy each of the requirements set out.

² Northern Territory Liquor Commission, *Decision Notice – Little Cashy Pty Ltd and Dunstall Pty Ltd*, (5 October 2020).

³ *Little Cashy Pty Ltd and Dunstall Pty Ltd v Northern Territory Liquor Commission*, 2020-03639-CT, 30 October 2020.

27. In terms of the application for the substitution of the Gateway Select Wine, Beer & Spirits liquor licence from the Gateway Shopping Centre to the Fairway Waters Shopping Centre, the following facts are apparent:
- The Applicant lodged the application for the substitution of the Gateway Select Wine, Beer & Spirits liquor licence from the current premises to new premises – sub-section 334(1)(a);
 - The application was made under the 1978 Act on 30 July 2019 – section 334(1)(a)(i);
 - The application for substitution was refused by the Commission by decision notice published on 5 October 2020 – section 334(1)(a)(ii);
 - The application is the subject of a rehearing by NTCAT following the Applicant filing an initiating application with NTCAT on 30 October 2020 – section 334(1)(a)(iii); and
 - The Application for review by NTCAT had not been determined prior to the commencement of the 2020 amendments to the 2019 Act – section 334(1)(a)(iv).
28. It necessarily follows this Application meets all of the requirements set out in section 334(1) of the 2019 Act, as amended by the 2020 amendments. As a consequence, and in accordance with section 334(2) of the 2019 Act as amended, the Director must determine the application on an expedited basis within 30 days of the commencement of the amending legislation, that is within 30 days commencing on 20 November 2020.
29. Section 334(4)(a) also allows for the Applicant to propose a location for the substituted premises that is an alternative to the location proposed in the Application.
30. In determining the application section 334(5) requires the Director must take into account the application as lodged, any objections lodged in relation to the application, any submissions made to or evidence received by the Commission or NTCAT in relation to the applications and any further information received by the Director under subsection 334(4).
31. Following determination of an application under section 334 the Director must give the applicant a decision notice and must publish that decision notice, which is defined in the 2019 Act as follows:
- decision notice**, for a decision, means a written notice setting out the matters required for a notice of decision under section 34 of the Northern Territory Civil and Administrative Tribunal Act 2014.*
32. Section 34(2)(c) of the *Northern Territory Civil and Administrative Tribunal Act 2014* requires a decision maker must advise a person who has a right to receive the decision notice that the person has a right to request a statement of reasons for the decision.

Objections to the Application

33. Twenty two objections were received from members of the public in relation to this Application, those were:
1. Aine Nowak
 2. Elizabeth Schoch
 3. Gareth Davies
 4. Lance O'Connor
 5. Michael Valladares
 6. Mark Soligo
 7. Deborah and Steven Edgar

8. Tom Lewis
9. Joanne Tilbrook
10. Ken Davidson
11. Heather Ryan
12. Jacky Rose
13. Mike and Judy North
14. Christine Dinning
15. Kara Maclean
16. Michael Maclean
17. Paul and Jan Schneider
18. Simon Copley
19. Ron Rose
20. Melanie Bowen
21. Bernadette Weaver
22. Marion Blackburn
34. Two further objections were received from stakeholders being Luccio Cercarelli, the Chief Executive Officer, the City of Palmerston and Superintendent Anthony Deutron on behalf of the Commissioner of Police.
35. The objection from NT Police was received after the closing date prescribed by the 1978 Act, however was accepted by the Director-General through their powers to extend time under section 127 of the 1978 Act.
36. The Department of Health did not lodge an objection, they did however state they did not support the Application.
37. The objections were provided to the Applicant as required on 18 September 2019.⁴ The Applicant sought extensions of time to respond, which were agreed to by the Commission, with their response being provided on 21 November 2019.

Further materials and consultation

38. In determining this matter the Act requires the Director must take into account the application as lodged, any objections lodged in relation to the application, any submissions made to or evidence received by the Commission or NTCAT in relation to the applications and any further information received by the Director under subsection 334(4)
39. Given the expedited nature of this determination, it is not practical to engage with all the original objectors, it is therefore accepted their original objections would remain.
40. On 20 November 2020 the Applicant was invited to provide any further materials or information they wished to be taken into account in determining the application.
41. On 30 November 2020 additional materials were received from Mr Thomas Richardson, counsel for the Applicant which included:
 - Submission from Mr Miles Crawley SC, counsel for the Applicant
 - The Bell Bar and Bistro Membership System Explanation

⁴ *Liquor Act 1978, s57G.*

- Fourth Notice from the Director to Exercise Emergency Powers
 - Letter from Nesfall Pty Ltd confirming Alternative Tenancy
 - Site Plan of Alternative Premises
 - Proposed layout of Alternative Premises
42. In their further materials the Applicant has provided further comment on the issues of density, ration of alcohol outlets, volume of liquor sales, traffic concerns and the danger to at-risk groups in the area.
43. A further submission was made in response to the concerns raised by Police in the original Commission Hearing, the further submission addressing concerns surrounding the potential for an increase in anti-social behaviour due to the existence of the venue.
44. Additional concessions made by the Applicant included a proposal to introduce a membership system, similar to that which they introduced at their former premises, the Bell Bar and Bistro. That system required any person purchasing takeaway liquor to be a 'member', by payment of a fee and confirmation of their residential address.
45. It was also submitted to include a condition similar to the exercise by the Director of emergency powers in relation to the sale of takeaway liquor.⁵
46. The exercise of the emergency powers were in support of the directions issued by the Chief Health Officer in respect of public gatherings and social distancing and in the interests of protecting the community. In pursuance of section 257(1) of the Act a condition was placed on all takeaway liquor licences, with a BDR system, requiring the licensee to be satisfied the customer has a lawful residence, or place at which to consume the liquor.
47. Any customer unable to satisfy the licensee they have a lawful place of residence at which they will be consuming the liquor, is to have their purchase refused.
48. On 1 December 2020 the Chief Executive Officer of the City of Palmerston, along with the Assistant Commissioner were provided the additional materials for consideration and were invited to provide any response or submission by Tuesday, 8 December 2020.
49. On 7 December 2020, a response was provided by Ms Teresa Hall of Ward Keller as counsel for the City of Palmerston.
50. On 8 December 2020, a response was received from Assistant Commissioner Michael Hebb on behalf of Police.

Further submissions from the Applicant

51. The further submissions provided by the Applicant include a detailed submission from Mr Crawley SC.
52. In his document Mr Crawley reiterated the original application including:
- No objections were received in relation to the original grant of the licence at the Gateway Shopping Centre
 - The premises were branded a Cellarbrations store and were required to adhere to stringent ranging, promotion and pricing, aimed at the quality end of the marketplace.
 - Due to the presence of the BWS store, owned by Woolworths and adjacent to the Applicant's existing premises, they were unable and unwilling to compete on its low prices.

⁵ *Liquor Act 2019, s257.*

53. The proposed premises are situated at the Fairway Waters Shopping Centre, just under 2km from the existing location.
54. That centre is significantly smaller than the Gateway Shopping Centre, however has the following tenants in place:
- Chemist Warehouse
 - Hungry Joes⁶
 - Dominos Pizza
 - Service Station with 24/7 Coles Express
 - Instyle Hair and Beauty hairdresser
 - Chiropractor
55. Additional to the original application, at the Commission hearing the Applicant proposed additional services, not previously raised, including food and wine products sourced from Parap Fine Foods.
56. The proposed new premises will be near double the exiting licensed premises, however it was submitted the introduction of the Parap Fine Foods product would be approx. 50m2. The existing premises are approximately 180m2, whilst the proposed premises are 300m2.
57. It is submitted despite the significant increase in floor space, the manner in which the space is utilised will be different, noting the Parap Fine Foods products proposal.
58. The question was then raised by the Commission as to whether the existing takeaway authority allowed for the sale of this type of product, or whether the licensee required a grocery store authority.
59. An additional eight (8) CCTV cameras would be in place to ensure a comprehensive coverage of the premises, the CCTV being in line with the approved Guidelines.
60. It was submitted the proposed location is in Durack, a suburb that has been developed for over 25 years, but at this time does not have a dedicated takeaway liquor outlet and along with the neighbouring suburb of Marlow's Lagoon, has a combined approximate population of over 3,100 adults.
61. Also proposed by the Applicant, as written above in their further submission was the imposition of a condition restricting takeaway sales to 'members' only, requiring patrons to provide identification and verify their place of residence and thereby a lawful place to consume the liquor.
62. Further, the Applicant, "...if and only if the Director was not willing to approve the application, even with the additional conditions suggested, then and only then the applicants offer an alternative location for the substituted premises".⁷
63. As the alternative location proposal is contingent upon a refusal of the substantive Application, it will be discussed later in this decision notice.
64. The Applicant has submitted given the proximity of the proposed premises to the former premises, there is no change in the ratio of outlets to population in the area. I must concur with Mr Crawley, I see no issue in relation to the ratio given the proximity of the two locations.
65. Mr Crawley has also submitted the Applicant has optimistically budgeted for "...an increase in gross sales of 12.5%, based upon projected sales from the Parap Fine Foods offering, increased margins and longer effective trading hours".⁸

⁶ An unlicensed pizza and ribs restaurant offering dine-in, takeaway and delivery services.

⁷ Miles Crawley SC, Counsel for the Applicant, *In the Matter of an application to substitute premises*, at [74] (30 November 2020).

⁸ *Ibid.*

66. It is noted one of the reasons suggested for the move is the effect the adjacent BWS outlet has on their sales, with margins and an ability to compete on price being a significant issue.
67. Whilst not specifically expressed, it is accepted some of the budgeted "margin" increase may be a result of the two premises no longer being adjacent, but it appears to be framed predominately based on the additional products provided through their agreement with Parap Fine Foods.
68. I concur with the additional submissions of Mr Crawley in relation to the volume of liquor sales being only marginally increased at best, if not leached from existing licensees.
69. It has been submitted that the proposed offerings by the Applicant under their Cellarbrations banner, would not be attractive to itinerant drinkers. The price point and range in general not being in line with preferred options.
70. It is accepted price is a driver of purchases and the price points for the Parap Fine Food wines and those other exclusive ranges, not available at BWS and Liquorland outlets would in general be a disincentive to itinerants.
71. It is however certain the licensee will also stock general, everyday liquor products such as domestic beers, standard spirits and pre-mix spirits, which are commonly the products purchased by itinerant and problem drinkers.
72. The Applicant has submitted there will be extensive CCTV coverage and security measure put in place. It is also accepted, the Applicant has an unblemished compliance history and there is no evidence to suggest this will change with any relocation of the premises.
73. It is suggested the presence of the 24-hour service station makes the proposed location an unattractive target for break-ins. Whilst this may provide a level of deterrence, liquor outlets and in particular takeaway liquor outlets are a known attractive target for theft, particularly once they are closed. There is no dedicated security service noted as patrolling the premises, unlike the previous location at the Gateway Shopping Centre where there is a significant security presence at all times.
74. Mr Crawley has also provided further submissions in relation to the community benefit, being an increased consumer choice and convenience including a range of products not ordinarily available through the traditional BWS and Liquorland outlets.
75. It is also submitted with not liquor outlets in Durack or Marlow Lagoon, local residents will have a convenient local outlet, including access to the range of foods sourced from Parap Fine Foods.
76. The economic benefits proposed by the Applicant are direct employment, a significant investment in upgrading premises at the complex and an increase of business to the other retailers. This however has not been specifically quantified.
77. Mr Crawley summarised the additional submissions as:
 - The substitution of the premises is sought within the same area as at present, but in an area least serviced by alternatives;
 - A range of offerings not presently available out of Darwin City;
 - New life to a suburban shopping centre, when the very existence of such centres is increasingly under threat;
 - The Application should be approved, with or without the imposition of the additional conditions identified.

Relevant authority and permissions

78. The liquor licence was granted on 12 February 2016 to Gateway Tavern Pty Ltd, an entity related to this Applicant. A corporate restructure resulted in the transfer of the licence to this Applicant.
79. The 1978 Act did not prescribe licence authorities and whilst the licence was issued as a **liquor merchant authority**, this was an administrative construct. It was not until the 2019 Act came into effect that authorities have become formalised.
80. The condition on the original licence authorising:
- | | |
|--|---|
| Sale for Consumption Away From Premises | Subject to the conditions specified below this licence authorises the sale of liquor for removal and consumption away from the licensed premises. |
|--|---|
81. With the introduction of the 2019 Act, the licence was converted⁹ to a licence with equivalent authorities under that Act, that being a **takeaway authority**.¹⁰
82. The 2019 Act defining a **takeaway authority** as one that authorises the licensee to sell liquor products to customers for consumption away from the licensed premises.
83. The 2019 Act also introduced the **grocery store authority**, which authorises the licensee to sell liquor products to customers for consumption away from the licensed premises, which are part of, or attached to, the premises that sell groceries or other non-liquor items operated by the licensee.¹¹
84. The Liquor Regulations 2019 (the Regulations) prescribe the operating conditions of a **takeaway authority** which include, the days and hours of trade with a prohibition on trade on a Sunday if not previously allowed under their 1978 Act licence, as well as conditions relating to product limitations and delivery limitations.¹²
85. For completeness this Applicant is not entitled to trade on Good Friday, Christmas Day or any Sunday.
86. The Regulations also prescribe the operating conditions for a **grocery store authority**. Those conditions include the days and hours of trade, product limitations, a separation of liquor from groceries, advertising and of particular relevance to this matter, ancillary operations.¹³
87. The Applicant proposed in the hearing the introduction of a range of products from Parap Fine Foods, a well-known Darwin licensed grocery store that has operated for over 50 years.
88. Parap Fine Foods holds a **grocery store authority**.¹⁴
89. Parap Fine Foods describe themselves as being "...Parap's local fine food and wine destination".¹⁵ The store offering "...a wide range of imported, deli, health, everyday groceries and specialty ingredients" as well as a selection of boutique and recognised fine wine labels from around Australia, New Zealand and the World.
90. Parap Fine Foods provide a list of their most popular products which include:
- Gourmet pizzas made in-house
 - Gourmet cheeses
 - Gourmet quiche

⁹ Liquor Act 2019, s324(5).

¹⁰ Ibid, s47(1)(e).

¹¹ Ibid, s47(1)(g).

¹² Liquor Regulations 2019, r94-97.

¹³ Ibid, r51-56.

¹⁴ Liquor licence 80901852.

¹⁵ <https://parapfinefoods.com.au/>

- Beija Flor flowers
- Cheese platters
- Darwin catering
- Antipasto
- Hampers
- Wines
- Gins
- Whisky

91. It is noted the Commission found in their decision that the proposal would be contrary to the scheme of the Act as it governs grocery store authorities and would be effectively creating a new alternative form of authority. This potentially usurping the condition relating to liquor sales being ancillary and limited to 25% of product sales.¹⁶
92. What has been proposed by the Applicant is a small range of gourmet pre-packaged and pre-made meals and food items, along with wines exclusive to Parap Fine Foods and not ordinarily available through other traditional takeaway outlets. The Applicant submitting the range would be limited and is intended to offer a more diverse range of products complementary to the predominant products on offer, that being takeaway liquor.
93. Ordinarily the Applicant, as with most all takeaway liquor outlets, offers a range of non-alcoholic beverages, snacks, accessories such as bottle openers, wine aerators, ice, glassware and the like. These are intended to be complementary to the liquor sales which are the primary business.
94. A **grocery store authority** has stringent conditions relating to ancillary operations under the licence, of particular relevance to this matter is that the sale of liquor under the authority must be ancillary to the licensee's primary business of selling goods and services other than liquor.¹⁷
95. The gross value of the sales of liquor must not exceed 25% of the gross value of the sales of all products by the licensee.¹⁸
96. The nature of the business of a grocery store is included in the provisions of regulation 53(1), their primary business being the selling of goods and services other than liquor.
97. Ordinarily their product ranges include a diverse selection of fruit and vegetables, condiments, cleaning products, toys, general household items, white goods, sporting goods, personal hygiene products, frozen meats and canned goods, clothing, hardware and maintenance products, pet food and pet care, non-alcoholic beverages and health care items. Given the remote nature of many stores in the Territory, some also sell fuel and oils as well as other motoring products.
98. This Applicant's primary business is selling of pre-packaged liquor for consumption away from the premises, any other items sold are intended to be complementary and not the significant attractor of patrons.
99. Whilst I understand the position the Commission has taken, this Application aside, if the licensee had continued trade at their original premises and simply expanded their non-core products to include pre-packaged meals, I see no proscription of such an approach.
100. If such an expansion was not allowed under a **takeaway authority**, the Act would provide grounds for disciplinary action.

¹⁶ Northern Territory Liquor Commission, *Decision Notice - Little Cashy Pty Ltd and Dunstall Pty Ltd*, (5 October 2020), at [105].

¹⁷ Liquor Regulations 2019. r53(1).

¹⁸ *Ibid*, r53(2).

101. The 2019 Act prescribes the grounds under which a person may make a complaint against a licensee, those include:¹⁹

160 Making a complaint

(1) A person may make a complaint against a licensee on any of the following grounds:

- (a) the licensee contravened a condition of the licence or authority;
- (b) the licensee or the licensee's employee contravened another provision of this Act or the regulations, whether or not it constitutes an offence;
- (c) the licensee or the licensee's employee contravened another law of the Territory that regulates:
 - (i) the sale, supply, service or consumption of liquor; or
 - (ii) the location, construction or facilities of licensed premises;
- (d) the licensee or, if the licensee is a body corporate, an executive officer of the body corporate, was found by a court of competent jurisdiction to be guilty of an offence against a law of the Territory that is punishable by imprisonment for 5 years or more;
- (e) the licensee contravened a provision of an enforceable undertaking;
- (f) the licensee contravened a direction given to the licensee under this Act;
- (g) the licensee's licensed premises are no longer being used:
 - (i) for the sale, supply, service or consumption of liquor; or
 - (ii) in compliance with the licence and authority;
- (h) the licensee is not a fit and proper person to hold the licence;
- (i) the licensee's nominee is not a fit and proper person and the licensee should reasonably know that;
- (j) an employee of the licensee is not a fit and proper person to be an employee of the licensee and the licensee should reasonably know that;
- (k) the licensee obtained the licence by fraud or misrepresentation;
- (l) the licensee holds the licence for the benefit, directly or indirectly, of a person to whom the licence would not have been issued;
- (m) the licensed premises were used in a way that caused:
 - (i) disorderly conduct on or in the premises or in the vicinity of the premises; or
 - (ii) annoyance or disturbance to persons residing, working or conducting a business in the vicinity of the premises;
- (n) the licensee is no longer eligible to hold the licence.

102. The only fettering of the licensee under the authority, other than relating to deliveries, is:

96 Takeaway authority operating conditions

- (1) Wine must not be sold in a cask or box larger than 2 L.
- (2) Beer must not be sold in glass bottles larger than 750 ml.

103. I see no contravention of the licence, the authority or a condition.

104. Of course, if the Applicant was intending to entirely change the nature of their business to that of a grocery store, then the question of the authority would be raised.

¹⁹ *Liquor Act 2019, s160(1).*

105. There are other examples of authorities which do not require the licensee to offer meals or food in order to sell liquor. These include a public bar authority, major event authority, special event authority, producers' authority and a special venture authority.²⁰
106. The operations conditions for those authorities are likewise prescribed in the Regulations.
107. I therefore respectfully disagree with the Commission's position and see no specific prohibition to offering a range of products, intended to ancillary to and complement the primary business of selling pre-packaged liquor for consumption away from the premises.
108. Accordingly, there is no issue with the authority under which this licensee operates.
109. For completeness however, if the Applicant is to introduce these additional product lines, they would need to have a Food Business Registration, which has already been identified by the Applicant. At present they do not require one as their products are considered low-risk.²¹

Objections

110. The Commission has described the objections lodged by nearby residents as being almost "...without exception...concerned that a bottle shop in the proposed location will become a magnet for problem itinerant drinkers and the associated problems of anti-social behaviour, crime and litter".²²
111. Of note one objection described the proposed area of Durack as being:
 "...a very family oriented suburb with an abundance of communal parks, lakes, walking paths and a golf course. These are regularly used by children and families who reside in the area...establishing a takeaway liquor outlet at Fairway Waters will attract itinerant drinkers...a walk in takeaway bottle shop will certainly entice them particularly given there are parks and a golf course directly behind the...shops where itinerants could go to consume alcohol out of the view of police".²³
112. An objection lodged by a resident who is also a police officer of 20 years' experience, gave examples of itinerants purchasing liquor and walking across to bushland to consume it.
113. In my own experience as a resident of Darwin, Katherine and now Alice Springs, this is commonplace.
114. It does not reflect on the conduct of the licensee, who for all intents and purposes are behaving in a lawful and proper manner, but who have little control over the outcome once the liquor has left their premises.
115. In their objection Police stressed the location of a takeaway outlet is of significant importance and impact.²⁴
116. Superintendent Deutrom submitted the proposed location could lead to road safety implications, given it is in a complex surrounded by arterial roads with variable speed limits, as well as being adjacent to open public spaces which may attract itinerant drinkers.
117. The City of Palmerston also lodged an objection which centred around the location of the proposed premises, the access roads and also the proximity to vacant, open public areas that may attract itinerant drinkers and anti-social behaviour.²⁵

²⁰ *Liquor Act 2019*, s47(1).

²¹ <https://nt.gov.au/industry/hospitality/accommodation-and-food-businesses/register-or-renew-a-food-business>

²² Northern Territory Liquor Commission, *Decision Notice - Little Cashy Pty Ltd and Dunstall Pty Ltd*, (5 October 2020), at [105], at [74].

²³ *Ibid.*

²⁴ Antony Deutrom, Superintendent, *Letter of Objection*, (13 September 2019).

²⁵ Luccio Cercarelli, Chief Executive Officer, City of Palmerston, *Letter of Objection*, (5 September 2019).

Further Submissions by Police and City of Palmerston

118. Police responded to the additional submissions by the Applicant and continue their objection, noting the additional conditions suggested may assist in reducing alcohol related issues, however the proposed location in Durack remains unsuitable for the reasons articulated in their original objection.²⁶
119. The City of Palmerston reiterated their original objection and again expressed their concerns that the Fairway Waters location is in closer proximity to Marlow Lagoon, the golf course and vacant land, likely to lead to an increase in itinerant camps and anti-social behaviour.²⁷

Consideration of the substantive issues

120. The rationale stated by the Applicant for this matter is to find "...a more suitable and favourable location for its take-away liquor outlet following the opening of a competitor (BWS) in the Gateway Shopping Centre and general move away from the populated Gateway Shopping Centre".²⁸
121. The former premises, noting the licensee has terminated that lease, is within the Gateway Shopping Centre, which describes itself as "...a convenient, modern, one-stop shopping experience that you can enjoy in air-conditioned comfort, with loads of free parking".²⁹
122. The centre includes the following services:
- Woolworths Supermarket
 - Big W
 - Event Cinemas with six screens, including two V-Max stadiums
 - Best & Less
 - 24-hour gym
 - Landmark@Gateway³⁰ a family-friendly main bae and bistro, outdoor entertainment area and nightclub
 - A wide range of dining facilities, some licensed and others unlicensed
 - 60 speciality stores
 - Gateway Home
 - Pavilions, an entertainment and leisure precinct
 - Parking for 1,400 vehicles
123. This is in considerable contrast to the proposed premises which is a commercial allotment housing a small number of retail outlets listed above in paragraph 53.

²⁶ Above at [49].

²⁷ Above at [48].

²⁸ Danny Nixon-Smith, DNS Specialist Services, *Community Impact Assessment Little Cashy Pty Ltd and Dunstall Pty Ltd Gateway Select Wine, Beer & Spirits Bottle Shop*, p5.

²⁹ <https://gatewaynt.com.au/centre-info/>

³⁰ Also owned and operated by this Applicant.

124. The proposed premises are in close proximity to the Palmerston Golf Course and an area zoned for organised recreational activities as well as natural bushland. Both locations are also within close proximity of the Charles Darwin University Campus in Palmerston.
125. The Applicant has also provided aerial photographs of the area which includes the Gateway Shopping Centre and the proposed new site.³¹
126. Whilst there is only a short distance between the two locations, direct line of sight being 1.6km, driving 2.3km, the proposed location is much closer to the large residential areas which surround the complex. The Gateway Shopping Centre is a major community facility in a dedicated industrial area, the adjacent premises predominately being industrial or commercial in nature.
127. The Applicant themselves describe the proposed location as "...situated within a primarily residential area that is set to experience high population growth".³²
128. The Applicant has defined the local catchment area in relation to this matter to be within a 3km radius of the proposed premises.³³
129. As this is a **takeaway authority**, other licensees within the catchment area with similar takeaway liquor provisions include:
- Palmerston Tavern
 - Pit Lane Liquor
 - BWS – Beer Wine Spirits (Gateway Shopping Centre)
 - Liquorland Palmerston
 - Zuccoli IGA Fresh
130. There are also several club authorities that allow for takeaway liquor sales to members, such as the Palmerston Golf & Country Club and One Mile Brewery that has a producers' authority and can sell their own products as takeaway.
131. The amendments to the 2019 Act by section 334 afford me the benefit of having no statutory obligation to satisfy section 49 of the Act.³⁴
132. I may however use the section to assist me in these deliberations.
133. Section 49(2) of the 2019 Act lists what must be considered, in granting a licence or authority, but is also applicable to applications for substitution of premises:

(2) To determine whether issuing a licence or an authority is in the public interest, the Commission must consider how it would advance the following objectives:

(a) minimising the harm or ill-health caused to people, or a group of people, by the consumption of liquor;

The most relevant submission by the Applicant on this is the product range on offer and the price point being above that of products offered at BWS and Liquorland outlets. Whilst it is accepted the price points will be higher, I see no direct correlation to the price point and a minimisation of harm or ill-health.

³¹ As above 19, p8.

³² Ibid, p12.

³³ Ibid, p14.

³⁴ Liquor Act 2019, s334(7).

(b) ensuring liquor is sold, supplied, served and consumed on or in licensed premises in a responsible manner;

Whilst there will be no on-premises consumption under this licence, except for the possibility of tastings and the like, it is accepted the licensee has an unblemished history and there is nothing to suggest this will change.

(c) safeguarding public order and safety, particularly when large numbers of people would be attracted to licensed premises or an area adjacent to those premises;

It is accepted at present there is little to attract itinerant persons to the proposed location, however it is accepted a takeaway liquor outlet within close proximity of vacant open land, may be a significant attractor for itinerant drinkers. It is the potential for the areas adjacent to the proposed premises to be used for alcohol-related anti-social behaviour that is of greatest concern to the objectors.

I am not entirely satisfied this is unlikely to occur as submitted by the Applicant.

(d) protecting the safety, health and welfare of people who use licensed premises;

No specific submissions have been made on this issue, however I am certain the licensee will act in an appropriate manner, ensure compliance with the provisions of the Liquor Act and the conditions of their licence, as well as apply prudent responsible service of alcohol. This however does not influence the outcome once the customer has departed the premises, and the licensee has no power to prevent unlawful consumption of liquor off the premises.

(e) increasing cultural, recreational, employment or tourism benefits for the local community area;

It has been submitted there will be a small employment benefit to the substitution.

(f) promoting compliance with this Act and other relevant laws of the Territory;

There has been no materials put forward by the Applicant to suggest the substitution of the premises itself will promote compliance.

(g) ensuring each person involved in the business conducted at licensed premises receives training suitable to the person's role in the business;

I have no concerns that the Applicant will have suitably trained personnel operating the premises given their history of compliance.

(h) preventing the giving of credit in sales of liquor to people;

(i) preventing practices that encourage irresponsible drinking;

(j) reducing or limiting increases in anti-social behaviour.

The Applicant did not previously provide credit, nor do they at their other premises and I have no materials before me to suggest this will change.

134. Section 49(3) of the 2019 Act requires the Commission to consider whether any significant adverse impact on the community would result from granting an application:

(3) To determine whether issuing a licence or an authority would have a significant adverse impact on the community, the Commission must consider the following:

(a) the risk of undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity of the proposed licensed premises or who are using, or travelling to or from, a place of public worship, a hospital or a school;

This is perhaps one of the central issues raised by objectors to this Application. Their concerns being the proximity of the proposed premises to vacant land and the attraction of the vacant areas to itinerant drinkers, not currently located in the area as there is no takeaway liquor outlet.

Given the proximity of the proposed premises to residential housing and the recreational use of the open areas by residents, I am not convinced there will not be a risk of disturbance to local residents by itinerants who may be attracted to the location if a takeaway outlet is introduced.

(b) the geographic area that would be affected;

I am of the mind the geographic area is within the same catchment as the previous premises, however a more rigorous examination of the nature of the specific locations suggests the former location is by far and away a more suitable location. The proposed location is too close to residential premises.

(c) the risk of harm from the excessive or inappropriate consumption of liquor;

This has been discussed above, in that I am not satisfied the proposed location will not attract itinerant drinkers, not currently attracted to the area as it has no takeaway liquor outlet.

(d) the people or community who would be affected;

The proposed location is in close proximity of residential housing, unlike the former premises.

(e) the effect on culture, recreation, employment and tourism;

From the materials provided I have formed the opinion there is an unacceptable likelihood there will be a significant adverse impact on the recreational use of the area by residents, if itinerant drinkers are attracted to the location.

(f) the effect on social amenities and public health;

As above.

(g) the ratio of existing liquor licences and authorities in the community to the population of the community;

I concur with the Applicant that there will be no effect on the ratio of existing liquor licences and authorities in the catchment area if this Application is approved. It will however place a takeaway liquor outlet in Durack where presently there is not one.

(h) the effect of the volume of liquor sales on the community;

(i) the community impact assessment guidelines issued under section 50;

(j) any other matter prescribed by regulation.

I accept there may be some increase in the volume of sales given the proposed expanded range of items, however I am not concerned it will be of sufficient level to raise a concern or be fatal to this Application.

135. The purposes of the 2019 Act are *inter alia*, to minimise the harm associated with the consumption of liquor in a way the recognised the public's interest in the sale, supply, service, promotion and consumption of liquor.³⁵
136. A secondary purpose of the 2019 Act is to protect and enhance community amenity, social harmony and community wellbeing through the responsible sale, supply, service, promotion and consumption of liquor, along with regulating the sale, etc. in a way that contributes to the responsible development of the liquor industry and associated businesses in the Territory.³⁶
137. It is also to facilitate the diversity of licensed premises and associated services for the benefit of communities in the Territory.³⁷
138. What is proposed by the Applicant is a substitution of premises, therefore there is little suggestion that there will be a diversity of licensed premises and associated service, other than an expanded range of goods which could also have been on offer at the former premises.
139. I am however not sufficiently convinced there will not be an increase in harms and a loss of amenity given the risk of itinerant drinkers, not presently attracted to the location. This attraction is surely to change if there is a takeaway liquor outlet.
140. The Applicant has proposed additional conditions designed to ensure purchasers have a lawful place to consume the liquor. As written earlier, this will not necessarily prevent consumption in nearby public areas.
141. As there is currently no takeaway liquor outlet in Durack, it is more likely than not that the introduction of one will result in a rise in anti-social behaviour as there is effectively none at present.
142. Section 51(b) of the 2019 Act places an onus on the Applicant to satisfy me that the granting of the Application is in the public interest and will not have a significant adverse impact on the community.
143. Whilst there may be some public interest in the expanded product lines not previously offered, or only offered at Parap Fine Foods, this in itself is insufficient to satisfy the public interest test.

³⁵ *Liquor Act 2019*, s3(1).

³⁶ *Ibid*, s3(2)(a)(b).

³⁷ *Ibid*, s3(2)(c).

144. I have not been provided materials that sufficiently satisfy me there will not be a significant adverse impact on the community, specifically in the suburbs of Durack and Marlow Lagoon to allow me to grant this Application to the proposed location.

Alternative location of substituted premises

145. The Applicant has proposed an alternative location "...if and only if the Director was not willing to approve the application" and as person appointed to determine this matter on behalf of the Director, I am not, even with the additional conditions suggested.
146. As identified by Mr Crawley in his most recent submissions, the general tenor of the objections has been the preferred location of the premises by the objectors is at the Gateway Shopping Centre.
147. It is obvious the Applicant's happiness will be in direct proportion to its distance from the BWS at the Gateway Shopping Centre.
148. The Applicant has engaged with the management of the Gateway Shopping Centre and secured an alternative location, within the centre and away from the BWS in Tenancy B1, their former tenancy being MM1 and MM1A.
149. The alternative location of Tenancy B1 is in Building B, on the opposite side of the centre from the former premises. The alternative location has direct frontage to the Stuart Highway, with dedicated vehicular access and substantial parking.
150. It is also immediately adjacent the existing pedestrian bridge which crosses the Stuart Highway.
151. It is noted there were no objections received for the original application for the grant of the liquor licence back in 2016. The City of Palmerston had no objection, nor did Police.
152. If this Application is refused and the licensee was able to secure their original tenancy in MM1 and MM1A, they would be able to recommence trade almost immediately.
153. If the former premises were approved, not objected to and deemed appropriate, then I see no impediment to the alternative location, B1 being likewise deemed equally appropriate.
154. For completeness the City of Palmerston on this point submit the proposal lacks sufficient details on the operation and management of the store to provide any relevant submissions. Ms Hall on behalf of the council submits:
- "I am instructed that if the initial application had been for the alternative premises that the City of Palmerston may not have lodged an objection to the Application".
155. Police submit "...the alternate site at the Gateway Precinct is a more suitable location".
156. Whilst the City of Palmerston may be correct in submitting there has been no specific details provided in relation to the operation and management proposed at the alternative location, it may be accepted the Applicant will operate in the same manner they have previously and intended to at the proposed premises.
157. It would be a nonsense to suggest there would be any deterioration in the manner in which the licensee has conducted the business of their licence to date.
158. Section 334(4)(a) of the 2019 Act has provided an ability for the Applicant to propose a location for the substituted premises that is an alternative to the location proposed in the Application.
159. Section 334(5)(d) requires me to determine the matter on the basis of any information received under subsection (4), including the alternative location.
160. As written earlier I see no material difference to the former premises and the alternative location, they are both within the Gateway Shopping Centre and I am satisfied that centre is by far a more appropriate location for a **takeaway authority**, than the location proposed in the Application.

161. The Gateway Shopping Centre is specifically designed for such retail outlets and has dedicated security personnel, something not provided for in the proposed premises.
162. There has been no known issues at the former premises and I have no materials to suggest this would change at the alternative location.
163. The Applicant proposed additional conditions including a membership system to assist in preventing issues. Given the condition was in place at the former premises and there were no issues arising, I see no reason to impose it at the alternative location. It is of course a matter for the Applicant if they do wish to introduce the system however. It can only serve to further demonstrate their intention to sell liquor in a responsible and prudent manner.
164. For completeness, as I have written earlier, if the Applicant had introduced the expanded product lines at the former premises, this would not be an issue and there was no impediment to them doing so. It necessarily follows that the same position would apply at the alternative location, there is no impediment to the introduction of the Parap Fine Foods concept.

DECISION

165. For the reasons set out in this decision notice, in pursuance of section 334(2) of the 2019 Act and with reference to section 75(2), I refuse the application to substitute the licence FLL1019 from Shop MM1 and MM1A, Gateway Shopping Centre, 1 Roystonea Avenue, Palmerston (the former premises) to Unit 3, 130 University Parade, Durack (the proposed premises), however with reference to section 334(4)(a) of the 2019 Act, I approve the substitution of the licence to the premises situated at Shop B1, Gateway Shopping Centre, 1 Roystonea Avenue, Palmerston (the alternative location).
166. In approving the substitution to the alternative location, I impose a condition on the licence in pursuance of section 334(6)(b) prohibiting trade at the alternative location until such time as the licensee has provided evidence to the satisfaction of the Director, that they have the necessary permits and registrations to conduct the business at that alternative location.

REVIEW OF DECISION

167. The Director declared a conflict of interest in this matter as he has a personal relationship with a director of the licensed entity. Although this conflict would not likely influence the outcome of this matter, so as to avoid any perception of bias or inappropriateness, he recused himself from making this decision, appointing me the power to determine this matter in his place.
168. Section 334(3) of the *Liquor Act 2019* as amended provides that an application that falls within the parameters of section 334 is not within the jurisdiction of the Commission. In addition, section 334(12) of the Act as amended provides that any determination of the Director under section 334 is not reviewable by NTCAT.



Mark Wood
Manager Licensing – Liquor, Gambling & Racing
17 December 2020