

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

---

**MATTER:** *FOX ALE HOUSE AND WISDOM BAR & CAFÉ APPLICATIONS TO EXTEND TIME* [2023] NTLiqComm 38

**REFERENCE:** LC2023/034

**APPLICANTS:** 1. Nundor Pty Ltd  
2. AFS Realty & Business Brokers Pty Ltd

**LICENCE 1:** FLL1044 (Fox Ale House)

**LICENCE 2:** 80317565 (Wisdom Bar & Café)

**PREMISES (1 AND 2):** 48 Mitchell Street  
Darwin NT 0800

**LEGISLATION:** Part 4 Division 5 of the *Liquor Act 2019* (NT)

**HEARD BEFORE:** Russell Goldflam (Chairperson)  
Elizabeth Stephenson (Health Member)  
Katrina Fong Lim (Community Member)

**DATE OF HEARING:** 20 November 2023

**DATE OF DECISION:** 5 December 2023

---

**Decision**

1. On 20 November 2023, the Northern Territory Liquor Commission (**the Commission**) determined to:
  - a. Grant applications by (i) Nundor Pty Ltd (**Nundor**) and (ii) AFS Realty & Business Brokers Pty Ltd (**AFS**) to extend to 20 November 2026 the time fixed by the Commission at paragraphs 2(a) and 4(a) of its decision issued on 20 October 2020 (LC2019/122 and LC2019/123) (**the 2020 decision**) within which certain works must be carried out and completed by the applicants.

- b. Vary the conditions of Nundor’s liquor licence FLL1044 (**the Fox Ale House**) by inserting at the commencement of the condition headed “Special Condition” the following words:

This condition does not come into force unless and until the premises are extended to an upper level.

- c. Vary the conditions of AFS’s liquor licence 80317565 (**the Wisdom Bar & Café**) by inserting at the commencement of paragraph (c) of the condition headed “Liquor Commission Decision Notice dated 20 October 2020 re material alterations to premises” the following words:

The following condition does not come into force unless and until the adjoining Fox Ale House premises are extended to an upper level.

2. The Commission stated that it would publish reasons for this decision. These are the reasons.

## **Reasons**

### **Background**

3. Both Nundor (the Fox Ale House licensee) and AFS (the Wisdom Bar & Café licensee) are owned and directed by members of the McCourt family.
4. In October 2000, Nundor was issued a liquor licence to trade as Fox Ale House at leased premises at 85 Mitchell Street, Darwin. Nundor was also granted a gaming machine licence authorising it to operate ten electronic gaming machines. In about 2012, Nundor’s lease was terminated, it ceased to trade, and the building it had occupied was demolished. Fox Ale House has never traded since, but both the liquor and associated electronic gaming licence remain in effect.<sup>1</sup>
5. In 2016, AFS, which operated the Wisdom Bar & Café on land it owned down the road at 48 Mitchell Street, was also granted a gaming licence authorising it to operate ten electronic gaming machines. It appears that at around that time Nundor formed the intention to re-open Fox Ale House on AFS property next door to the Wisdom Bar & Café, although it was not until 2018 that Nundor

---

<sup>1</sup> See Delegate of the Director-General, *Decision Notice: Cancellation of Liquor Licence*, 11 October 2016, accessed at [https://industry.nt.gov.au/data/assets/pdf\\_file/0010/399034/Decision-Notice-Review-of-Delegate-Decision-Cancellation-of-Liquor-Licence-Nundor-Pty-Ltd-The-Fox-Ale-House-22-February-2017.pdf](https://industry.nt.gov.au/data/assets/pdf_file/0010/399034/Decision-Notice-Review-of-Delegate-Decision-Cancellation-of-Liquor-Licence-Nundor-Pty-Ltd-The-Fox-Ale-House-22-February-2017.pdf)

applied to substitute its 68 Mitchell Street premises for premises at 48 Mitchell Street.

6. The progress of that application was in turn subject to extensive delay, but was eventually approved in October 2020 by the Commission, which observed that in its view “a factor of overriding significance” in Nundor’s application was the existence of the gaming machine licences. The Commission remains of that view. Had Nundor relinquished its liquor licence, its associated gaming machine licence would necessarily have been cancelled. Due to the existing cap on gaming machine licences, the applicants would have been precluded from obtaining authorisation to operate ten additional gaming machines to replace the previous Fox Ale House machines. In these circumstances, it appears that the only practicable means by which the applicants could retain the benefit of a combined total of twenty poker machines was to proceed as they did, and apply for substitution of premises, instead of the more straightforward course of simply applying for an extension of the Wisdom Bar & Café premises.
7. The Commission has repeatedly held that it has no direct role to play in the assessment or determination of gaming machine licence applications.<sup>2</sup> As it has previously stated, the Commission is disconcerted by the artificiality of determining applications, a dominant underlying purpose of which is to enable licensees to operate more electronic gaming machines, in circumstances where the Commission is unable to have regard to the public interest in and community impact of the additional gaming machines.
8. It was against this background that in its 2020 decision, the Commission stated, at [45] to [46]:

The Commission is mindful of the fact that the Fox Ale House ceased trading eight years ago and that these proposals have only emerged subsequent to the Licensee being put on notice that it was at risk of being prosecuted for failing to operate the licence. These applications were lodged two years ago and while some of the delay was occasioned through no fault of the Applicants they have not pursued it with the alacrity that we would have expected. The Commission therefore holds concerns that following our approval of these applications the project may then go into hibernation until the

---

<sup>2</sup> For example, *DCL Hospitality Pty Ltd Application for Substitution of a Liquor Licence and Permanent Variation of Authority and Conditions* [2023] NTLiqComm 22 at [74] to [84]

local business environment improves. That would render nugatory the economic stimulus benefits we have ascribed to these applications. Accordingly the Commission intends to make it a condition of both approvals that:

“The Licensee complete the approved building works within three years of the date of this Decision Notice or such further time as the Commission might allow”.

The Applicants should be under no illusion that the Commission will readily agree to a further extension of time if the works have not then commenced and been significantly advanced. The Commission may well take the view that the future economic benefits of the proposals are no longer sufficient to satisfy the public interest.

9. The time period fixed by the Commission expired on 21 October 2023.

### **The Application**

10. In about September 2023, Mr Matt McCourt (**Mr M McCourt**), a director of both Nundor and AFS, sent an undated one page letter to the Director of Liquor Licensing (**the Director**). Mr M McCourt stated that following difficult trading conditions and changes in the management structure of the licensees, the scope of the project had been reviewed and reduced to a single-story development, and the applicants “would require an extension of 12 to 15 months” to complete the approved building works. On 29 September 2023, the Director referred Mr M McCourt’s letter to the Commission.
11. Although s 19 of the Act provides that the Commission is responsible for deciding any matter the Director refers to it, the Act does not prescribe a procedure for dealing with an application to extend a time period that forms part of a licence condition fixed by the Commission. There is accordingly no prescribed application fee, no requirement to notify the public of the application or consult with stakeholders, no prescribed procedure for the referral of the application by the Director to the Commission, and no provision setting out the matters the Commission must consider when determining the application.
12. Pursuant to Part 2 Division 3 of the *Liquor Commission Act 2019* (NT), in order to deal with a matter such as this, the Commission is required to convene by 3 or more members.

13. Section 318 of the Act confers power on the Commission to extend a time limit “specified under this Act for a procedure, power or function related to” the Commission. That power may be exercised after it has expired (s 318(2)). However, it is doubtful that s 318 was engaged in the circumstances of this application, as the time limit fixed by the Commission was not one specified in the Act. Accordingly, out of an abundance of caution, the Commission proceeded on the basis that as a threshold issue it was required to respond to Mr M McCourt’s letter by 20 October 2023, the date on which the time period fixed by the 2020 decision expired.
14. On 2 October 2023, the Chairperson of the Commission wrote to Mr M McCourt fixing the matter for hearing on 13 October 2023, and suggesting that it would be of assistance to the Commission to be provided with the following information:
- a. what work has been done to date;
  - b. what work remains to be done;
  - c. what the estimated date for completion now is;
  - d. how much has been expended on the works to date;
  - e. how much it is estimated will be required to complete the works;
  - f. how the applicant proposes to fund the completion of the works;
  - g. current details of the shareholders and directors of the two licensee companies; and
  - h. the future economic benefits of the project in the current economic climate.
15. On 13 October 2023, in accordance with a request by the applicants to be provided with more time to provide this additional material, the Commission adjourned the hearing to 20 November 2023, extended the three year time period that was about to expire to 27 November 2023 (so as to address the threshold issue identified at paragraph 13 above), and directed the applicants to file any material on which they sought to rely by 3 November 2023.
16. The material subsequently provided by the applicants (after the Commission had granted a further extension of time) addressed in detail all of the issues identified at paragraph 14 above except for the final item on that list. Notably, the applicants withdrew their estimate of 12 to 15 months as being the additional time required to complete the works, and now submitted that it would take between 30 and 48 months to complete the works.

17. The additional material provided comprised an affidavit of Mr M McCourt dated 7 November 2023 with attachments including:

- a. Nundor company details
- b. AFS company details
- c. M & K McCourt Pty Ltd company details
- d. Berastom Pty Ltd company details
- e. Affidavit of Mr Todd McCourt (co-director and shareholder) supporting the applications
- f. Site plans and architectural drawings of works currently proposed
- g. Photographs depicting demolition work that had already been carried out
- h. Correspondence from construction firms regarding timeframes for undertaking the proposed works
- i. Material in support of the financial viability of the project

### **The hearing**

18. On 20 November 2023, the application proceeded as a public hearing. Ms Chalmers SC appeared on behalf of the applicants instructed by HWL Ebsworth. Mr M McCourt and his associate Mr Phillips attended. The Director appeared on his own behalf, assisted by Mr Jain. The Commission thanks them all for their attendance and assistance.

19. The material referred to at paragraph 17 above was admitted into evidence without objection.

### **Variation of licence conditions**

20. In the 2020 decision, the Commission fixed the following licence conditions:

#### Fox Ale House:

The Licensee is required to provide prompt and courteous assistance to disabled patrons wishing to access the upper level of these premises and will put in place appropriate measures to facilitate their entry and egress from that part of the premise via the lift located on the adjoining Wisdom premises.

The Licensee must display a sign, in a prominent place and in a form approved by the Director which states:

**“DISABLED ACCESS TO THE UPPER LEVEL AND  
NON AMBULANT TOILETS**

It is a condition of this licence that the Licensee provide disabled access to patrons wishing to use the upper level of these premises. Fox Ale House patrons are able to use the lift on the ground floor of the adjoining Wisdom premises but will need to obtain a key pass to re-enter our premises on the upper level. Please contact any of our bar staff to obtain a key pass and to also receive information regarding the location of non-ambulant toilets

Wisdom Bar & Café

At the conclusion of the alteration works, the following special condition will be inserted in the licence: The Licensee undertakes to permit its lift to be used and provide a thoroughfare through its premises to facilitate disabled access for patrons of the adjoining Fox Ale House wishing to go to the upper level of these premises.

21. As mentioned above, the scope of the proposed works as currently planned has been reduced from the scope of works approved by the Commission in 2020. The applicants now propose to limit the substituted Fox Ale House premises to the ground floor. Accordingly, the applicants submitted that the conditions set out immediately above should be deleted.
22. The Commission readily accepts that it would make no sense to require these conditions for premises that do not include an upper level. However, the applicants had not lodged an application to vary conditions in accordance with the procedure set out at s 110 of the Act. The Director submitted that the Commission could waive compliance with these provisions. Assuming that the Commission has the power to do so, which is doubtful, the Commission would be disinclined to exercise such a power, because this would send a message to licensees that the Commission is willing on occasion to connive at non-compliance with the Act.

23. On the other hand, the Commission considers that it would be inconvenient, costly and inexpedient to require the applicants to initiate fresh applications. Instead, the Commission has determined to utilise its power under s 113 of the Act to vary conditions of the licences on its own initiative. The Commission is satisfied that the variations it has decided to make are “for a formality or a clerical reason that does not alter the substance of the conditions”, and that accordingly, pursuant to s 113(6) of the Act, the pre-conditions for the exercise of this power set out at subsections (2) to (5) of s 113 do not apply.

### **Assessment of the applications**

24. As set out above, the reason given by the Commission in the 2020 decision for fixing a time limit of 3 years was its concern that “the future economic benefits of the proposals [would] no longer [be] sufficient to satisfy the public interest” after 3 years. It is regrettable that the applicants did not address this issue in the material they provided in support of their applications, despite the clear language of the 2020 decision, and the clear language of the Chairperson’s letter of 2 October 2023 to Mr M McCourt.

25. The Commission “may inform itself in any manner it considers appropriate” (s 23(3) of the Act). In the circumstances, the Commission considers it appropriate to refer to the Northern Territory’s Tourism Industry Strategy 2030 Update, which states that visitor numbers are forecast to increase annually by 6.4% from the period 2023 to 2026, and by 5.5% between 2027 and 2030. In addition, visitor expenditure is projected to grow on average 7.4% annually from 2025 to 27, and 8.2% per annum from 2027 to 2030.<sup>3</sup>

26. On the basis of these buoyant estimates, the Commission is satisfied that by the time the works are completed, there will be additional demand for the services provided by licensees trading with public bar and late night authorities in the Mitchell Street tourism and hospitality precinct. The Commission is also satisfied that it is in the public interest to generate employment by embarking on this substantial construction project.

---

<sup>3</sup> Northern Territory Government, *Tourism Industry Strategy 2030 Update* (September 2023) p. 50, accessed at <https://www.tourismnt.com.au/system/files/uploads/files/2023/TNTCS-000745%20-%20Tourism%202030%20Strategy%20-%20November%202023%20Update%20-%20A4%20web.pdf>



27. The Commission has also considered the following additional matters of concern:

- a. The applicants left it until the 3 year time period had almost expired before writing to the Director.
- b. The applicants' initial approach to the Director in September 2023 was cursory, casual and presumptuous.
- c. The applicants' estimates of the time required to complete the planned works have radically changed within the space of about a month, giving the impression that they have been plucked from thin air.
- d. A factor of overriding significance underlying the applications was and remains the applicants' desire to retain their two gaming machine licences.

28. Notwithstanding these concerns, the Commission considers that the material tendered by the applicants at the hearing was impressive, persuasive and sufficient to satisfy the Commission that time should be extended by a further 3 years to complete the works.

29. The Commission notes the applicants' intention in the longer term to further develop the premises to upper levels. Accordingly, rather than delete the conditions relating to disabled access to upper levels, the Commission has suspended those conditions until such time as the premises are extended.

### **The objects of the Act**

30. Section 3(4) of the Act provides that in performing its function to decide whether to issue the licence, the Commission must have regard to the primary and secondary purposes of the Act. The Commission has done so.

### **NOTICE OF RIGHTS**

31. Section 31(1) provides that any decision of the Commission for which a decision notice is required is reviewable by the Northern Territory Civil and Administrative Tribunal (**NTCAT**). Section 94(3) of the *NTCAT Act* provides that an application for review of a reviewable decision must be lodged within 28 days of the date of the decision.

32. The Commission doubts that this decision is one for which a decision notice was required. Nevertheless, if this decision is susceptible to NTCAT review, in accordance with section 31(2) of the Act, the persons who may apply to NTCAT for a review of this decision would be the Director and the licensees.



Russell Goldflam

CHAIRPERSON  
NORTHERN TERRITORY LIQUOR COMMISSION  
5 December 2023

On behalf of Commissioners Goldflam, Stephenson and Fong Lim