NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER:	**APPLICATION TO MAKE A MATERIAL ALTERATION**
LICENCE NUMBER:	80317472
LICENSEE:	**OMAD (NT) Pty Ltd**
PREMISES:	**Virginia Tavern** 30 Virginia Road VIRGINIA, NT 0834
APPLICANT:	Damien Paul O'Brien
LEGISLATION:	Section 119(2), Parts I, IV and V of the *Liquor Act 1978.*
HEARD BEFORE:	Ms Jodi Truman (Deputy Chairperson) Mr Kenton Winsley (Health Member) Mrs Amy Corcoran (Community Member)
DATE OF HEARING:	30 October 2019
DATE OF DECISION:	30 October 2019

Decision

1. For the reasons set out below and in accordance with section 119(8) of the *Liquor Act 1978* ("the 1978 Act"), the Commission has determined to approve the material alteration to the licensee's licensed premises as sought by the Applicant.

2. In accordance with the approval given, the licensee may conduct business on the licensed premises however the licensee must not permit the sale or sale and consumption of liquor in the area known as Shop 2, being the area subject to the material alteration, until evidence has been provided to the Director of Liquor Licensing ("the Director") of relevant approval under the *Building Act 1993* with respect to that area.

Reasons

Background

3. The circumstances of this application are extremely unfortunate. It gives the Commission no satisfaction to grant the approval in this matter with the conditions imposed; given the manner in which this application has come before the Commission. It may be suggested that the proceedings of this Commission have been manipulated to the disadvantage of the licensee, however that is not a matter that the Commission needs to determine in order to determine this application for

material alteration. The Commission is however concerned at the stance that has been taken by the owner of these premises against the licensee, particularly in the context of the owner having entered into an amendment to its lease with the licensee; fully aware of this application. The Commission will now outline the factual background.

4. OMAD (NT) Pty Ltd ("the licensee") currently holds a Tavern Liquor Licence ("the licence") authorising the sale of liquor for consumption on the premises. The premises are located at 30 Virginia Road, Virginia and are part of a complex of stores. Like all licences, the licence held by the applicant had attached to it a plan which depicted the licensed area. That plan showed an area referred to as "Shop 2" which was ***not*** included within the licensed area. The Commission was informed that Shop 2 had previously been vacant.

5. The licensee is also the holder of a Gaming Machine Venue licence ("the gaming machine licence") issued under the *Gaming Machine Act 1995* with respect to the premises. On 3 May 2016 the licensee applied for an increase in gaming machines in accordance with the *Gaming Machine Act 1995.* That application was determined and approved on 23 August 2016 by the then Acting Deputy Director-General (Operations). As a result of that approval the licensee purchased and installed extra gaming machines on the premises in accordance with its application.

6. That application in accordance with the *Gaming Machine Act 1995* had made clear that the licensee was "leasing" the "vacant adjoining tenancy and converting this into the gaming area for all 20 machines". The Commission was informed that the "vacant adjoining tenancy" referred to was Shop 2 adjacent to the licensed area.

7. Unfortunately for the licensee, although the licensee had filed an application for a material alteration to the licensed premises at or about the same time as filing its application for an increase in gaming machines (that application being dated 3 January 2016) which referred to the fact that the licensee was:

> "… leasing the vacant adjoining shop for the purpose of installing all 20 gaming machines"

that application was (to quote the Acting Deputy Director-General in her referral to the Commission):

> "… regrettably overlooked by the then Licensing Officers handling a large quantity of similar applications that were lodged at the same time for similar applications".

8. Although it had been "regrettably overlooked" by Licensing NT, it is clear that when the licensee received the decision under the *Gaming Machine Act 1995* on 23 August 2016, it assumed that approval had also been granted to the material alteration filed at or about the same time, and went about and carried out the material alteration proposed (and clearly necessary) to accommodate the additional gaming machines.

9. It is apparent that thereafter the premises were subject to the usual general inspections that any licensed premises are subject to and that no issues or concerns were expressed by, or to, Licensing NT.

10. That appears to have been the case until 24 April 2019 (almost 3 years after the decision) when the Director-General of Licensing NT ("the Director-General") received correspondence from law firm De Silva Hebron who stated they were acting on instructions of the owner and alleging the owner's perspective, that certificate of occupancies had not been issued for the area known as Shop 2 (i.e. the area referred to as being used as the gaming machine area) and noting that Notices of Breach in relation to the lease had therefore been undertaken with the licensee.

11. Thereafter further correspondence flowed between the Director General and the solicitors for the licensee and the owner respectively. A copy of such correspondence formed part of the referral to the Commission. The Commission was informed that as a result an assessment was made by licensing officers and the Director-General and the following determinations made:

    - "The approved liquor licence area did not include the area known as shop 2 currently being used as a gaming room.

    - That the Licensee ***did*** include an application form for material alterations at the time of the gaming machine increase application in May 2016 (emphasis added).

    - That this application for material alterations was regrettably overlooked by the then Licensing Officers handling a large quantity of similar applications that were lodged at the time for similar applications.

    - That the Director-General could not retrospectively approve that application.

    - That the Director-General notes that Licensing Inspectors have attended at the premises between 2016 - 2019 and had not identified this lack of approval and that the licensee had not attracted any negative compliance issues between 2016 and 2019. Based on this, the Director-General has determined not to take any disciplinary proceedings against the licensee for failing to ensure the material alterations were approved. Whilst it is acknowledged a fault on the part of Licensing NT staff in 2016, section 119 (1A) does place an offence of strict liability on the Licensee.

    - That the Director-General requires a fresh material alteration application to be lodged, assessed and then referred to the Liquor Commission for consideration so as to properly consider whether to approve and extend the liquor licensed area."

12. As a result of the above determinations being conveyed to the licensee; on 18 August 2019, further material was lodged on behalf of the licensee in support of the application under section 119(2) of the 1978 Act for approval to make a material alteration to the licenced premises ("the application").

13. Unfortunately that application was not considered complete and it was not until 19 September 2019 that the licensee provided the necessary documents to enable referral of the application to the Commission. As a result, on 24 September 2019 the application for material alteration was referred to the Commission.

14. In relation to this application it is important to note that since lodgement the 1978 Act has in fact been repealed and replaced by the *Liquor Act 2019* ("the 2019 Act"): see section 321 and Schedule of the 2019 Act. The 2019 Act also introduced its own regulations being the *Liquor Regulations 2019* ("the Regulations"). The Regulations provide for transitional matters under Part 8.

15. Relevant to this application is regulation 132 that provides as follows:

> "An application for approval of a material alteration of licensed premises, made under section 119 of the *Liquor Act 1978*, that was not determined under that Act before the commencement is to proceed and be determined under that Act unless the applicant gives the Director written notice that the applicant wishes to proceed and have the application determined under section 97 of the *Liquor Act 2019*."

16. In this regard, there has been no written notice that the applicant wishes to proceed under the 2019 Act and therefore this application has proceeded and been determined under the *Liquor Act 1978.*

17. In relation to the term "material alteration" it is important to note that this is defined under section 4 of the 1978 Act as follows:

> "material alteration means an alteration to licensed premises which:
>
> a. increases or decreases the area used for the sale of liquor or the sale and consumption of liquor; or
>
> b. involves structural alteration; or
>
> c. alters access to or egress from the premises; or
>
> d. alters the external appearance or facilities.

18. In basic terms, this application seeks authorisation to increase the area used for the consumption of liquor in accordance with the authority given to the licensee to place gaming machines in the area previously known as Shop 2. Such authority being that which has in fact been the circumstances since the licensee received the approval under the *Gaming Machine Act 1993* on 23 August 2016.

19. The application also involves structural alteration. Those structural alterations have however obviously already occurred; namely the removal of a brick wall between the already licensed premises and the area previously known as Shop 2 and the installation of an internal partition wall for use as a storeroom and office.

20. It is important to note however that these alterations did not alter the access to or egress from the premises, nor did it alter the external appearance. It only permitted access into the area previously known as Shop 2 for the purpose of using the gaming machines located in that area.

21. The Commission notes relevantly that these ***specific*** material alterations were referenced in the amendment of the lease for the premises between the licensee and the owner and were in fact signed by the owner in the presence of his solicitors on 18 May 2017, some 7 months following the decision granting approval under the *Gaming Machine Act 1995.* That amendment of a lease was registered on 22 May 2017.

Advertising and Objections

22. The Commission was informed that the Director-General had assessed the application and determined that in all the circumstances "there was no identifiable public interest which would require the application to be advertised". As a result the Director-General exercised her discretion and the application was not advertised.

23. The Commission notes it was further informed that in relation to the application under the *Gaming Machine Act 1995*; it was advertised in accordance with similar provisions for advertising under that Act and the Commission was informed that no submissions in opposition to that application were received.

24. As required by section 119(5) of the 1978 Act, on 23 September 2019, the Director-General notified the Chief Executive Officer of Litchfield Shire Council of the application. The Council responded on the same date supporting the application "for the following reasons:

    a) "It is understood that the application is retrospective to cover the existing approved gaming area and that the previous 2016 application for a liquor licence for this area was overlooked at that time.

    b) There are not expected to be any negative impacts upon the amenity of the surrounding neighbourhood as a result of the increased liquor licence area within the existing licenced facility."

25. As part of the referral, the Commission was informed that "non-government stakeholders", namely AMITY, were consulted in regards to the gaming machine application.

26. The Commission notes no other notice was provided to any other stakeholders.

27. Given the communications received from the owner via its solicitor, namely De Silva Hebron, contained on the referral from the Director-General; the Commission wrote to De Silva Hebron on 7 October 2019 advising of the application for a material alteration and of the listed hearing date. The Commission asked if there

was “any information” that was sought to be provided for the purposes of determining the material alteration application and no response was received.

28. A response was received from De Silva Hebron that it wished to appear at the hearing and objected to the application on the basis (inter alia):

> “… that the grant of the material alteration application may or will adversely affect public safety”.

Public Hearing

29. Pursuant to section 50 of the 1978 Act, the Director-General must refer applications under section 119 of the Act to the Commission for hearing. Accordingly, the Commission convened to conduct a public hearing on 30 October 2019.

30. Pursuant to section 53 of the 1978 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.

31. The public hearing commenced at 10.00 am on 30 October 2019. Mr Hamish Baddeley appeared as counsel for the licensee with Mr Damien O’Brien, nominee of licensee and person who lodged the application on behalf of the licensee attending in person. Mr Jeff Verinder appeared as representative for the Director of Liquor Licensing to provide information and assistance to the Commission during the course of the hearing.

32. At the commencement of the hearing, application was made by Mr David De Silva of De Silva Hebron to appear at the hearing on behalf of the owner, Mr Raymond McCasker, who was also present in person. Although an objection had not been lodged by or on behalf of Mr McCasker in accordance with section 47F of the 1978 Act, no objection was made on behalf of the applicant to leave being granted to Mr De Silva to appear. This was an entirely reasonable approach to have been taken by the applicant in light of the circumstances leading up to the hearing before the Commission and an approach for which the applicant should be given credit.

Assessment of the Application

33. As noted, there were no objections to this application in the formal sense under the 1978 Act, however the Commission also considers it highly relevant that this application is only being dealt with now (and in the manner it must be unfortunately dealt with) by virtue of the fact that it was “regrettably overlooked by the then Licensing Officers” and that this occurred through ***no fault*** whatsoever of the licensee.

34. The Commission also considers it highly relevant that the material alteration sought (and already made) is one that did not alter the access to or egress from

the premises. This means that the licensee's ability to ensure its licence conditions are met and that alcohol is responsibly served at all time and consumed on the premises in an appropriate manner has also not been altered. It is also not an alteration that has altered the external appearance. Importantly it is also a material alteration referred to specifically in the amendment to the lease entered into between the licensee and the land owner.

35. It is recognised by the Commission however that what has occurred is an increase in the area that may be used for the consumption of liquor. However the Commission considers it also relevant that the increase has not come about as a result of a focus on attempting to increase the area for alcohol consumption, but in fact to increase the area able to be used by patrons whilst also enjoying the gaming machines on the premises in a responsible manner.

36. The Commission was informed during the hearing that the area now occupied by the gaming machines (i.e. Shop 2) is an additional approximately 50 square metres. In terms of any increase in volume of alcohol sold and consumed on the premises, the applicant estimated that the material alteration had resulted initially in no real increase and that in fact "in the last 12 months there had been a decrease" in volume. The applicant acknowledged this was likely due to the downturn in the Northern Territory.

37. The Commission considers it is highly relevant that between this material alteration being undertaken (following the orders received under the *Gaming Machine Act 1995*); licensing inspectors have attended at the premises between 2016 and 2019 and had not identified any issues in relation to the premises. In addition the licensee has not attracted any negative compliance issues between 2016 and 2019.

38. In terms of compliance however the evidence does not stop at that period. The Commission was also informed that:

> "A check of the records held at Licensing NT indicates that there is no previous adverse history against the Licensee. It is also noted that the Licensee also holds a liquor licence and gaming machine venue licence for premises known as Coolalinga Tavern."

39. This lack of negative compliance history shows that this licensee is a responsible licence holder and this bodes extremely well for the future conduct of this licence even with the inclusion of the material alteration adding the Shop 2 area to the licensed premises.

40. Although submissions were made on behalf of the owner that "serious questions" ought to have been raised "in the minds the Liquor Commission as to whether this applicant is a suitable person to continue to hold a liquor licence", such submissions are rejected by the Commission.

41. Such submissions were made on the basis of a number of "concerns" that were outlined in correspondence on behalf of the owner and set out in exhibit 5. The Commission does not consider it necessary to outline those alleged concerns save

and except to indicate that the Commission accepts that a ***significant*** contributing factor to how these events unfolded which resulted in the applicant carrying out this material alteration and occupying and trading in that area is the failure of Licensing NT to ensure that the application for material alteration lodged at the same time as the application under the *Gaming Machine Act 1995* was dealt with at or about the same time. Such was in fact accepted by Mr Verinder during the course of the hearing.

42. What has thereafter unfortunately occurred is that the building certifier retained (and accepted by the owner) was de-registered and therefore a new building certifier needed to be retained in order to have the certificate of occupancy issued. It is apparent that the licensee has requested the consent of the owner to the retaining of the new building certifier, but the owner (for whatever reason is in the owner's contemplation) has refused.

43. It is therefore correct that the licensee has not obtained a certificate of occupancy for the area the subject of the material alteration. The Commission does note however that the Northern Territory Fire and Rescue Service ("NTFRS") has provided approval for that area.

44. Determining the bona fides (or otherwise) of the owner in refusing to consent to the new building certifier is quite simply not a matter for the Commission. The 1978 Act makes clear that in considering the application the Commission must have regard to the objects of the Act and in doing so must therefore consider section 6 and the public interest and community impact test and also section 6A and the community impact assessment guidelines. The applicant has provided written submissions in relation to this test and these guidelines.

45. Relevantly, the Commission finds that there is no evidence to suggest any potential harm or health impact may be caused to people, or any group of people within the local community area, due to the availability and accessibility of liquor as a consequence of the material alteration sought. The Commission also accepts that liquor would continue to be sold by the licensee in a responsible manner; just as it has since 2008.

46. There is no evidence of noise being excessive or the business causing "undue offence, annoyance, disturbance or inconvenience". In fact the Commission finds that the matters required to be addressed under the tests and guidelines have been appropriately addressed.

47. The difficulty that has however arisen for the licensee is that there is evidence before the Commission that by virtue of the failure (or arguably inability) of the licensee to obtain a certificate of occupancy, the licensee has not complied with a "law in force in the Territory which regulates in any manner the … construction or facilities of licensed premises". This is a relevant matter for the Commission to consider pursuant to sections 6(2)(g) and 119(2)(c) of the 1978 Act.

48. It is as a result of this issue that although the Commission is, on balance, satisfied that the approval of the material alteration meets the public interest and community impact tests, the Commission considers itself bound to include a condition within

that approval which ensures compliance occurs with the law applicable under the *Building Act 1993*. For these reasons the Commission has decided to approve the material alteration to the licensee's licensed premises as sought subject to the conditions outlined at the start of this Decision Notice.

Notice of Rights

49. Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the 1978 Act. A decision to approve a material alteration pursuant to section 119(8) of the Act is specified in the Schedule and is a reviewable decision.

50. Section 120ZC of the 1978 Act provides that a person affected by this decision may seek a review before the Northern Territory Civil and Administrative Tribunal. Any application for review of this decision must be lodged within 28 days of the date of this decision.

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

JODI TRUMAN
Presiding Member
Deputy Chairperson
1 November 2019