

NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER: APPLICATION FOR A LICENCE

REFERENCE NUMBER LC2019/057

PREMISES: ichi
M20-22, 48-50 Smith Street
DARWIN NT 0800

APPLICANT: Platocon Management Pty Ltd

NOMINEE: Wai Fung Chan

LEGISLATION: Section 26, Part III, Part IV, Part V of the *Liquor Act 1978*

HEARD BEFORE: Mr Russell Goldflam (Acting Deputy Chairman)
Ms Pauline Reynolds (Health Member)
Ms Sandra Cannon (Community Member)

DATE OF HEARING: 28 May 2019

DATE OF DECISION: 12 June 2019

DECISION

1. For the reasons set out below and in accordance with section 29 of the *Liquor Act 1978* ("the Act") the Commission has determined to issue a licence authorising the sale of liquor to Platocon Management Pty Ltd ("the Applicant") for consumption on or at the licensed premises known as ichi ("the premises").
2. In accordance with section 31 of the Act, the licence shall be subject to the following conditions (in addition to the usual general and special conditions applicable to licences granted to restaurants):
 - a. The liquor shall be sold pursuant to an authority as a Restaurant authorising the sale of liquor for consumption on or at the premises ancillary to a meal.
 - b. The trading hours shall be each day between 1100 hours and 2359 hours.
 - c. The licence will be issued immediately following the publication of this decision and in accordance with section 31(1) of the Act subject to a condition that the licensee will not commence trade in the sale of liquor under the licence until such time as:

- i. a Certificate of Occupancy under the *Building Act* 1993 has been issued to the licensee;
 - ii. the licensee has provided the Certificate of Occupancy to Northern Territory Fire and Rescue Services ("NTFRS");
 - iii. NTFRS has inspected the premises; and
 - iv. NTFRS has provided to the satisfaction of the Director-General of Licensing ("the Director-General") information regarding the premises' maximum permitted patron numbers and compliance with Fire and Emergency Regulations.
- d. The licence will become operative once the applicant has presented evidence to the satisfaction of the Commission or the Director-General that the premises have been satisfactorily constructed and the appropriate statutory approvals, including the issue of a certificate of occupancy, have been obtained by the licensee.

REASONS

BACKGROUND

3. On 18 January 2018 a completed application was lodged by Mr Kim Fai Sin ("Mr Sin") on behalf of the Applicant for a liquor licence over ichi, a traditional Japanese restaurant in the Darwin Central Business District.
4. On 23 April 2019 the Director General referred this application to the Commission pursuant to sections 28(1) and 50(a) of the Act.
5. The Director-General provided the Commission with a brief of evidence ("the brief") including:
 - Application for liquor licence dated 28 February 2019
 - Affidavit of Kim Fai Sin dated 4 December 2018
 - Community Impact and Public Interest Assessment statement
 - Certificate of registration of company and business name
 - Supporting documents for sole Director, Kim Fai Sin
 - Supporting documents for nominated manager, Wai Fung Chan
 - Assorted business documents
 - Certificate of Registration of Food Business
 - Plan of proposed licence area
 - Copies of Public Notices of the application
 - Correspondence with Department of Health, NT Police, NT Fire & Rescue Service and Darwin City Council

THE APPLICANT'S PREMISES

6. The applicant has operated an unlicensed sushi restaurant and takeaway outlet from the premises since 2014.
7. The premises are leased from the Paspaley Group of Companies ("the landlord"), which is aware of and supports the application. The current lease expires on 31 January 2022.

8. The Applicant submits that its premises can accommodate up to 56 patrons within the restaurant and 20 in the alfresco dining area, and that it has the capacity to provide adequate seating within the Applicant's premises for this number of patrons. The applicant has not yet obtained a Certificate from an Authorised NTFRS Officer designating the number of persons permitted to occupy the premises, but expects to receive the Certificate of Occupancy before 30 June 2019.

THE APPLICANT

9. The applicant is registered in the ACT with the Australian Securities and Investments Commission ("ASIC") as a proprietary company limited by shares. Mr Sin is the sole Director and 50% shareholder. The other five shareholders each holds between 5% and 14% of the shares. They are Yuet Ngor Man (ACT), Chor Yiu Chan (ACT), Wai Fung Chan (the nominated manager, ACT), Chun Shuen Ho (Hong Kong) and Yuk Tong Ho (Hong Kong). The applicant has registered "ichi" as a business name.
10. In addition to the premises the subject of this application, the applicant is the holding company of a consortium that operates five sushi bars in the ACT as well as two in Darwin. The consortium has made substantial investments to fit out and establish these five outlets, and, although the outlets as a group appear to be trading and growing reasonably well, to date the consortium's assets are exceeded by its liabilities, as is not uncommon with a business of this nature in its establishment phase.
11. The consortium is backed by its private shareholders. Mr Sin and his wife Ms Lam have provided documentary evidence to establish that they have more than sufficient equity in Hong Kong real estate to underwrite the business of the consortium, if such action were required.
12. The landlord has provided substantial assistance to the applicant in establishing ichi by contributing to the fitout costs and reducing the rent over the premises. The applicant's budget plan estimates a significant gross profit in the first twelve months of trading, based on patronage of an average 45 guests for lunch and a further 40 guests for dinner each day.
13. The applicant is a registered food business.

THE APPLICANT'S EXECUTIVE OFFICER

14. Mr Sin is a Chinese citizen who relocated to Australia in 2016. Since 2016 he has resided in Darwin, where he has managed the applicant's two Darwin sushi stores. Mr Sin has applied for a Skilled – Regional (subclass 887) Australian visa. As a person who has been in Australia at least 2 years and has worked full time for at least 1 year in Darwin, he is eligible to apply. If granted, that visa will entitle Mr Sin to permanent residency in Australia. He currently holds a Skilled – Regional Sponsored (subclass 489) visa expiring on 3 July 2019, and has been granted a Bridging Visa which will be activated on the expiry of his current visa, pending determination of his application for permanent residency.

15. Before coming to Australia, Mr Sin had a 25 year career in Hong Kong as a television news cameraman. Since establishing himself in Darwin, he has won the respect and support of business associates, who, in the references they have provided in support of the application, speak highly of his business acumen, his commitment to customer service, and his work ethic. Mr Sin's police check shows he has no disclosable court outcomes. He has current RSA certification.

THE SECTION 26A AFFIDAVIT

16. Section 26A of the Act requires applicants to depose an affidavit disclosing whether certain persons may be able to influence the applicant, or expect a benefit from the applicant, if the licence is granted. Mr Sin, as the principal executive officer of the Applicant, affirms in his pro forma affidavit that there is no such person.

THE NOMINATED MANAGER

17. The nominated manager of the licence is Wai Fung Chan ("Mr Chan"). Since 2014 Mr Chan has been a shareholder of the applicant and actively involved in its business. Mr Chan, who, like Mr Sin is a Chinese citizen, has held a permanent Australian Residence Visa since 2015, where he has resided, studied and worked for over ten years. He is well regarded by business associates. He has no police record. He has current RSA certification. He informed the Commission that he currently resides mainly in Canberra (where the applicant also owns and operates three sushi bars), but that if a liquor licence is granted for ichi, he will relocate to Darwin to work at ichi as the licensee's nominee.

18. Section 28(1) of the Act prescribes that upon the application being filed, together with the affidavit under section 26A, the Director-General must conduct investigations in relation to the application. Licensing NT informs the Commission that the material provided by Mr Sin to establish his general reputation and character as the applicant's executive officer, is satisfactory.

THE APPLICATION

19. The application was supported by a Community Impact Assessment ("the CIA"), a Business Plan, as well as Mr Sin's resumé and other documents establishing the status of the applicant and of the applicant's premises, as outlined above.

20. In its CIA, the applicant asserts that:

- Alcohol will only be served to customers having dine-in meals, as an accompaniment to traditional Japanese cuisine.
- The types of liquor sold will be relatively expensive imported sake (rice wine) and umeshu (plum wine) by the glass, and beer, by the glass and bottle. Non-alcoholic beverages will also be sold.
- The Applicant will not vigorously promote the consumption of liquor, which will not be a major part of the projected turnover.
- The expected clientele will not tend to be irresponsible drinkers: professional and business people, family groups, tourists and Asian expatriates.
- Drinking will be at tables with meals, and not at a bar.

- There will be no live entertainment or music, and noise levels will be low.
- The premises are located in a commercial and retail complex within the Darwin CBD with regular security patrols supplied by the manager of the complex.
- The business is appropriately located within a precinct in which there are numerous other licensed restaurants catering to Darwin's tourist and business centre.
- The precinct is supported by active and extensive public surveillance and security facilities and services, and readily available transport services.
- Staff will be RSA trained and required to comply with RSA practices, as set out in the staff Training Plan in the applicant's Business Plan.
- The restaurant will contribute to the multicultural character of the precinct and the community by offering high quality Japanese cuisine as an incentive to attract visitors, whose numbers have been declining, to revitalise the Darwin CBD.

ADVERTISING AND OBJECTIONS

21. Details of the application were advertised in the NT News on 26 January 2019 and 30 January 2019 as well as having signage displayed at the premises for a period of 30 days.
22. No objections were received.
23. In accordance with s27(3) of the Act, on 16 January 2019 the Director-General informed the Department of Health ("DOH"), NT Police and the City of Darwin Council of the application.
24. The Director-General also informed the NT Fire and Rescue Service ("NTFRS").
25. The Commission notes that the following responses were received:
- a. The DOH made "no adverse comment", but noted the need to comply with the applicable regulatory provisions regarding smoking;
 - b. The NT Police advised that they had no objections;
 - c. The Darwin City Council advised that on 14 May 2019 it considered the application and did not identify any grounds to object to it;
 - d. The NTFRS advised it would support the application subject to the issue of an occupancy permit and the conduct of an inspection of the premises to assess maximum patron numbers for the purpose of ensuring compliance with the applicable fire safety regulations.

HEARING

26. The hearing was conducted in public on 28 May 2018. Mr Sin, Ms Lam and Mr Chan appeared on behalf of the applicant. Ms Chin appeared for the Director-General. The Commission thanks Mr Sin, Ms Lam, Mr Chan and Ms Chin for their attendance and assistance.

27. The brief was tendered as evidence, along with a “projected budget plan”, a letter dated 27 May 2019 from the applicant’s accountants, notification of grant of a Skilled – Regional Sponsored (subclass 489) visa to Mr Sin, Ms Lam and their son Plato by the Department of Immigration and Border Protection, an RSA Certificate for Mr Sin, and a site plan of the premises showing the location of public toilets.
28. Pursuant to section 53(1)(b)(iii) of the Act, the Commission is not bound by the rules of evidence but may inform itself in the manner it considers appropriate.
29. During the hearing, the Commission invited the applicant to provide further material. Subsequently, without objection by the Director-General, the applicant tendered further documentation for the purpose of satisfying the Commission as to the financial stability of the applicant’s business, comprising:
- a letter dated 30 May 2019 from Harley Paroulakis on behalf of the landlord confirming that Paspaley has co-invested with the applicant to establish ichi, which Mr Paroulakis states is a “new concept [that] is extremely important in fulfilling the vision to offer a variety of food and alfresco offerings on Raintree Park”;
 - financial statements for three member companies of the applicant’s consortium for the financial years ending on 30 June 2017 and 2018; and
 - documents to substantiate the submission that the executives of the applicant have substantial personal assets.

ASSESSMENT OF THE APPLICATION

30. The Commission has had regard to s28(2) of the Act, which relevantly requires the Commission to assess:
- a. the suitability of the applicant’s premises (s28(2)(a));
 - b. the applicant’s business reputation (s28(2)(c));
 - c. the general reputation and character of the applicant’s executive officers and secretary (s28(2)(c));
 - d. whether the applicant’s manager is a fit and proper person to be the manager (s28(2)(h));
 - e. the applicant’s financial stability (s28(2)(c));
 - f. whether the applicant is a fit and proper person to hold a licence (s28(2)(e)); and
 - g. whether persons referred to in the s26A affidavit are fit and proper persons to be associates of a licensee (s28(2)(f)).
31. The Commission is comfortably satisfied that:
- a. the applicant’s premises are suitable
 - b. the applicant’s business reputation is sound
 - c. the general reputation and character of the applicant’s sole executive officer, Mr Sin, is sound
 - d. the applicant’s manager, Mr Chan, is a fit and proper person to manage the licence

32. In assessing the applicant's financial stability, the Commission has carefully considered: the evidence in the brief; the evidence given to the Commission at the hearing in person by Mr Sin, Ms Lam and Mr Chan; and the further evidence tendered by the applicant after the hearing at the request of the Commission. At the hearing, the Director-General did not object to the tender of the applicant's evidence or request the applicant to produce any further specific evidence. On receipt of the applicant's further evidence, the Commission invited the Director-General to advise whether she consented to the tender of the further material, and to provide submissions arising from it. No objection was made to the tender, but the Director-General submitted that further material should be provided to establish the applicant's financial stability. The particular material requested could have been obtained by the Director-General herself by conducting a search of the ASIC companies register.
33. While the Commission accepts that it would have been of assistance if the brief of evidence provided by the Director-General had contained more material in relation to this issue, the Commission also considers that as required by s53(1)(b)(ii) of the Act, all parties have been given an opportunity to be heard. On the evidence adduced, the Commission is satisfied of the applicant's financial stability.
34. After careful consideration, the Commission is satisfied that the applicant is a fit and proper person to hold a licence. In making this finding, the Commission has had particular regard to the evidence, which the Commission accepts, that Mr Sin, who is a 50% owner of the applicant company and its sole director, has a reasonable prospect of obtaining permanent residency, has made appropriate arrangements to remain a lawful resident while his application for permanent residency is being processed, and has nominated a business associate who is a permanent resident to manage the premises.
35. The s26A affidavit may be non-compliant with s26A. Section 26A(3)(g) requires that the affidavit disclose the names of all persons with a substantial holding in the body corporate, within the meaning of the *Corporations Act 2001* (Cth), namely a share of 5% or more of the total votes attached to voting shares. The minority shareholders named above at paragraph 9 above may fall within that category. The Commission has been provided with scant information regarding four of those persons (the other two being Mr Sin and Mr Chan, who between them have a 63% share in the company). The Director-General did not object to the tender of the s26A affidavit or make any submissions about it at the hearing. Nevertheless, subsequently, the Director-General submitted that further material should be provided regarding the minority shareholders. The Commission considers that at this late stage it would be unfair and onerous on the applicant to require it to produce further material in relation to this issue.
36. On the material provided, the Commission does not make an assessment pursuant to s28(2)(f) that a person referred to in the s26A affidavit is not a fit and proper person to be an associate of the applicant licensee.

37. Section 6B of the Act provides that the Applicant bears the onus of satisfying the Commission that the approval of the application meets the public interest and community impact test set out in s6 of the Act. In considering and determining this application, the Commission has had regard to the objects of the Act and applied the public interest and community impact test by reference to the community impact assessment guidelines published by the Minister on 6 March 2018 pursuant to s6A of the Act. The guidelines are detailed and specific, but also state that:

the Commission has the authority to consider a broad range of issues specific to each application and flexibility exists to assess each individual application on its merits.

38. With respect to s6, the Commission is satisfied that the Applicant has met the public interest and community impact test. In particular, the Commission is satisfied that the risk of harm or ill-health caused by excessive or inappropriate consumption of liquor arising from the grant of this licence is low, and that such risk is outweighed by the opportunity to provide economic, cultural, gastronomic and employment benefits to the Darwin community.

NOTICE OF RIGHTS

39. Section 120ZA of the Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the Act. A decision to issue a licence pursuant to section 29 of the Act is specified in the Schedule and is a reviewable decision.

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

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



RUSSELL GOLDFLAM
ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

12 June 2019

On behalf of Commissioners, Goldflam, Reynolds and Cannon