

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

- PREMISES:** **Berry Springs Hotel**
795 Cox Peninsula Road
BERRY SPRINGS NT 0838
- APPLICANT:** Sloaney Pty Ltd
- PROPOSED NOMINEE:** Mr Ian Sloan
- PROCEEDINGS:** Hearing into an Application Pursuant to Section 32A of the *Liquor Act* for a Variation of Licence Conditions and an Application Pursuant to Section 46A of the *Liquor Act* for the Substitution of Premises
- MEMBERS:** Mr Richard O’Sullivan (Chairman)
Mrs Jane Large
Mr John Brears
- OBJECTOR:** Mr Daymon Port
- APPEARANCES:** Mr Ian Sloan and Mrs Leah Sloan for the Applicant
Mr Daymon Port for the Objector
- DATE OF HEARING:** 6 September 2011
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BACKGROUND

- 1) Following a Hearing of the Northern Territory Licensing Commission (“the Commission”) Sloaney Pty Ltd was given provisional approval for a tavern liquor licence to be operated at the premises to be known as Berry Springs Hotel to be developed at Lot 5, 795 Cox Peninsula Road, Berry Springs. Trading hours given provisional approval were for 10.00 hours until 01.00 hours (the following day) seven days a week (except good Friday and Christmas Day). This provisional liquor licence was based on a conceptual outline and vision of the development which would be fleshed out at further Hearing.
- 2) In September 2010 Sloaney Pty Ltd entered into agreement with the Good Fortune Take-Away Mini Market (“the Good Fortune”), located at Ryland Road, Nightcliff for the sale of the liquor licence accompanying the supermarket, licence number 80901818.

- 3) Sloaney Pty Ltd made application on 21 September 2010 for the transfer, substitution and variation of this licence to the hotel to be developed at Cox Peninsula Road, Berry Springs. Advertisements were placed in the NT News on 24 and 29 September 2010 and resulted in three objections being received. The Legal Member reviewed the three objections received in response to the advertisement and on 20 December 2010 determined that objections lodged by Mr Doug Sallis and Messrs Tony and Dean Innes were invalid either on the grounds that the person does not have standing to lodge an objection or does not address the required objection criterion. An objection lodged by Mr Damon Port was determined as valid and requiring a Hearing.
- 4) Since this time the Legal Member has acknowledged that the previous application was technically invalid in that a person or corporation could not apply for a substitution or variation of a licence that he or it did not yet own. It was then determined to consider the transfer application and accordingly, following assessment of financial and probity matters relating to the application and its principals, transfer of the licence to Sloaney Pty Ltd was approved on 11 March 2011. As the advertisements of September 2010 had canvassed the issues of transfer, substitution and variation, it was determined that the application for substitution and variation did not need to be re-advertised as the Commission Legal Member had already determined that, based on the validity of one of the objections, the matter was required to go to Hearing. Additionally there was no material change to the applicant's proposal which had drawn the objections.

HEARING

- 5) At the commencement of the Hearing parties were advised that a Licensee can only apply for the variation and substitution of a licence when the applicant is the holder of that licence. It was outlined that the Hearing was to consider an application for substitution of the premises under Section 46A of the *Liquor Act* ("the Act") and a variation of licence conditions pursuant to Section 32A of the Act.
- 6) The Commission also determined that it would take into account a submission received by the Director of Alcohol Strategy contained in folios 67 to 72 of the Application Hearing Brief for its information only, not as an objection. The Commission also ruled that three emails received in September 2011, which objected to the application, were well out of time as these were received some eleven months following the advertised objection period expiring.
- 7) The Commission also noted that these emails did not raise any significant new matters not already covered by the objector Mr Damon Port, who had standing before the Commission.
- 8) Mr Sloan, a Director of the applicant company, advised that when first developing the concept of the Berry Springs Hotel, a takeaway licence was not considered as he was aware there was a moratorium on the issuing of new takeaway licences. Therefore the initial application for a "Provisional" or "Conditional" licence for the Berry Springs Hotel was that it trade as a Tavern

and concentrate on food and beverage service without the provision of takeaway liquor sales.

- 9) Subsequently he became aware that the Good Fortune in Nightcliff had ceased trading and its liquor licence suspended. He took advantage of this situation by entering into an agreement to purchase the takeaway licence from the supermarket. He advised the Commission that depending on the outcome of this Hearing he would be in a position to seek a Permit to Build and shortly thereafter commence the development of the premises and he estimated the construction period would be around nine months.
- 10) He indicated that the Berry Springs Hotel would have the capacity of around two hundred patrons. He referred the Commission to the detailed submissions contained in the application under the titles "*Public Interest Strategies*" and the "*Community Impact Analysis*", which both addressed harm and public interest criteria relating to the issue of a licence for the Berry Springs Hotel.
- 11) He emphasised that the market the hotel would seek to attract would be a combination of both local residents and tourists as the Cox Peninsula Road is the gateway to Berry Springs, the Territory Wildlife Park and Litchfield National Park.
- 12) In terms of the proposed takeaway licence, Mr Sloan advised that with the variation of licence condition they were seeking involved approval to develop a double lane drive through bottleshop incorporating both express and browsing lane parking.
- 13) Mr Port, an objector, (and proprietor of licensed store next to the proposed hotel) outlined his basis for objecting to the original application which remained under the current application for the licence substitution and variation being considered by the Commission. He outlined that he was a long term resident in the Berry Springs community and that he had had discussions with the local school and other organisations over the licence application and that these discussions had revealed widespread concern over the nature of the application.
- 14) He outlined personal experiences with witnessing excessive drinking and violence in the area and as a result of much of this behaviour his licensed store, which would adjoin the hotel, had placed restrictions on the sale of alcohol to residents of Belyuen who regularly patronised his store. He also advised the Commission that his store ceased trading at 7.00pm, well short of its licensed trading hours, due to dangers to family and staff beyond this period if he remained open and sold alcohol.
- 15) Mr Port also raised licence conditions operating with nearby takeaway licences such as that applying to the Litchfield hotel which prohibits the sale of takeaway alcohol to known numbers of the Belyuen Community. He queried whether Sloany Pty Ltd would enter into some form of agreement with the Belyuen Community over sales restrictions to its members.

- 16) In relation to the type of takeaway facility envisaged by Mr Sloan he submitted that in his existing Berry Springs Store he is able to assess the condition of patrons as under his sale conditions people have to park a car, walk to and inside his store, produce ID and undertake an exchange of money – all of which enabled the person to be assessed for possible intoxication. He submitted that this would not be the case if the hotel was granted the right to develop a drive through bottle shop.
- 17) Mr Sloan outlined his experience in operating licensed venues and the current practices employed at the Virginia Tavern under his and his wife's ownership. He advised the Commission his application sought a store licence which included Sunday trading as he considered this was the intent of his original and subsequent application.

CONSIDERATION OF THE ISSUES

- 18) Turning firstly to the issue of what form of licence has been transferred, the Commission notes that the initial advertisement for the transfer, substitution and variation of the Good Fortune takeaway licence did not include any provision to amend the trading hours and times. It notes that the advertisement stated:

LIQUOR ACT

1st NOTICE OF APPLICATION FOR A TRANSFER, SUBSTITUTION AND VARIATION OF LICENCE CONDITIONS FOR A LICENCE TO SELL LIQUOR

BERRY SPRINGS HOTEL

Sloaney Pty Ltd, HEREBY GIVE NOTICE that it has applied to the Northern Territory Licensing Commission to transfer the store liquor licence (Licence Number 80901818), substitute it from the premises known as Good Fortune Take-Away Mini Market located at 157 Ryland Road Nightcliff into the proposed premises to be known as Berry Springs Hotel located at Lot 5, 795 Cox Peninsula Road, Berry Springs and vary the licence conditions to incorporate the sale of takeaway liquor into the Conditional (In Principle) "Tavern" liquor licence previously approved by the Northern Territory Licensing Commission.

The Decision for the Conditional (In Principle) "Tavern" liquor licence can be found at www.nt.gov.au/justice/commission/decisions.

THE PROPOSED VARIATIONS TO LICENCE CONDITIONS are as follows:

Amend Authority from Store to Tavern, to incorporate the sale of takeaway liquor into the Conditional (In Principle) Berry Springs Hotel "Tavern" liquor licence.

Remove the following "Store" related conditions from the substituted licence:

- *"Outside authorised trading hours all liquor storage and display areas shall be screened off and secured in such a way that the public has no access to such areas".*
- *"Liquor shall only be stored and displayed in the area designated and approved on the plan held by the Commission".*

- *Signage to be Erected and Maintained Condition* – “The Licensee is required to erect and maintain, in prominent positions in the store, signage in a form approved by the Director of Licensing, confirming that ‘book-up’ for food and liquor is prohibited”.
- *Liquor to be Secondary Business Condition.*
 - (i) “The sale of liquor at the premises authorised by this licence shall be ancillary to the operation of those premises as a supermarket or general store, by which is meant ancillary both in terms of turnover and of the general shopping environment presented by the store. The main business of the store must always be the sale of stores other than liquor products, and in terms of fitout, facilities, product range, ambience, external and internal signage and all advertising and promotional material in all media, the premises at all times must maintain the appearance of trading predominantly as a supermarket or general store.
 - (ii) For the purpose of monitoring compliance with the immediately preceding condition, the Commission shall be given access to all records of the Licensee that relate to any aspect of the turnover of the store, whether in respect of liquor sales or otherwise. The Licensee shall allow inspection of any and all such records upon request by an Inspector of Licensed Premises or by any other person authorised or delegated by the Commission for the purpose. Such Inspector or other authorised or delegated person shall be permitted to temporarily remove any such documents from the possession of the Licensee for the purpose of making such copies as thought fit, or alternatively may be furnished with such copies by the Licensee. The Licensee shall not hinder, impede or fail to co-operate with any such officer or person in the performance of a task in pursuance of this condition.
 - (iii) In any assessment of predominant turnover, the Commission shall consider a trading period of not less than a financial quarter.”

All other licence conditions will remain including the prohibition on the sale of four and five litre wine casks.

This is the first notice of application. The notice will be published again on Wednesday, 29 September 2010.

The objection period is deemed to commence from Wednesday, 29 September 2010.

Pursuant to Section 47F(2) of the Liquor Act an objection may only be made on the ground that the substitution and variation of the conditions of the licence may or will adversely affect:

- (a) the amenity of the neighbourhood where the premises the subject of the application are or will be located; or
- (b) health, education, public safety or social conditions in the community.

Only those persons, organisations or groups described in Section 47F(3) of the Liquor Act may make an objection. Section 47G of the Liquor Act requires the Director of Licensing to inform the applicant of the substance of any objection. This will include the identity and where relevant the address of the objector.

For further information regarding this application contact the Director of Licensing on telephone 8999 1800. Objections to this application should be lodged in writing with the Director of Licensing, Licensing, Regulation and Alcohol Strategy, GPO Box 1154, Darwin, within thirty (30) days of the commencement date of the objection period.

Dated this 24 Day of September 2010.

- 19) This advertisement sought the removal of specific "store" related conditions from the substituted licence and included the removal of the requirement to screen off liquor storage and display areas outside trading hours, removal of the designation of the location of the storage and display of liquor, removal of the prohibition of bookup signage and removal of the condition that liquor is to be secondary to the main purposes of running a supermarket.
- 20) The above does not include an application to vary the licence hours from the store hours to that of a hotel, which under normal circumstances is able to undertake liquor sales on Sundays. Therefore the Commission is of the view that the licence application at the time, other than removal of conditions outlined above, sought to transfer, substitute and adopt like hours of the former Good Fortune licence. Further, the Commission approval of the licence transfer from the Good Fortune to Sloaney Pty Ltd was on the basis of the existing licence hours which were and remain from 10.00am to 10.00pm Monday to Friday and from 9.00am to 10.00pm Saturday and Public Holidays, with no trading on Sunday, Good Friday or Christmas Day.
- 21) The Commission is also aware that the initial application for a Development Permit for the Berry Springs Hotel did not include a drive through or takeaway bottle shop. Obviously, following negotiations with the Good Fortune supermarket, the applicant now intends to vary the Development Permit to include a drive through bottleshop.
- 22) The existence of a drive through bottleshop is a significant variation from the sale of alcohol from a limited storage and refrigerated area contained in a supermarket. It has the potential to significantly increase the volume of traffic in the area and in this regard the Commission has some concerns given that it has been advised that an earlier traffic study for the proposal did not incorporate such large scale capacity for takeaway liquor sales. The Commission is therefore not in a position to either assess or be reassured that traffic safety issues have been satisfactorily addressed.
- 23) It would appear to the Commission that while the applicant is of good standing and has a meritorious history in the hospitality industry, including the management and ownership of the Virginia Tavern, this proposal has an element of ad hocary in terms of the scope of the takeaway application. The earlier Commission's decision which granted the "Provisional" Licence *inter alia* states *"the concept of the proposed premises is that of a rural hotel but without accommodation. It will have facilities for meals and entertainment and consist of a kitchen, bar area, function area, alfresco dining area and children's playground"*. It makes no reference to the incorporation of a takeaway liquor licence nor does it give reference to the possibility of a takeaway licence being included at a later date.

- 24) On the basis of that application for a hotel (trading under Tavern conditions) no objection was received. The new application for the variation and substitution of a takeaway licence has attracted objection and raises significant issues for the Commission. The licence for which the applicant seeks substitution was that of a store licence with an attached condition that liquor sales were to be ancillary to the core business of supermarket selling fruit, vegetables, packaged food, household implements and beverages etc.
- 25) Section 46A of the Act provides the means by which a licence may be substituted to a new location. This merely provides for a geographic shift of a like for like licence. Section 32A enables the Licensee to apply for a variation of the conditions of a licence. In this instance not only is the proposed Licensee seeking to significantly change the storage and display arrangements for the sale of the liquor, ie from a store to a drive through bottleshop, but in doing so is obviously anticipating a large increase in the volume of liquor sales, with a resultant potential impact on the amenity of the neighbourhood.
- 26) The Commission is being asked to consider the substitution of the licence to a new location. This would be less of an issue if it was a store licence being substituted for a store licence at the new location. Similarly a hotel bottleshop takeaway substituted for a newly located hotel bottleshop would likely attract little in principle concern. The application has advised that he is seeking to have this store licence substituted and then varied to a hotel takeaway licence, and for this takeaway entitlement to offer sales to the public by means of a drive through bottleshop.
- 27) Whether this amenity is an improvement or whether it results in higher risk outcome due to the easier availability of liquor and larger range of product offered for sale, bears further examination. Already there is a store licence in operation in the area and this store licence would remain and be an adjoining neighbour to the new Licensee. A drive through facility would add to the ease with which customers could purchase alcohol and is somewhat different to entering a store and being exposed to the sale of grocery items and related merchandise.
- 28) The Act under Section 46A provides a mechanical means of substituting a licence from one location to another. In its simplest form it would enable a licence to operate in the new locality under the same terms and conditions. This application does not envisage the licence operating under the same conditions. The transferred store licence required the sale of alcohol to be secondary to the sale of other goods. The transferred licence includes the following condition which is one of the "store" conditions the application seeks to remove:

"Liquor to be Secondary Business:

The sale of liquor at the premises authorised by this licence shall be ancillary to the operation of those premises as a supermarket or general store, by which is meant ancillary both in terms of turnover and of the general shopping environment presented by the store. The main business of the store must always be the sale of stores other than liquor products, and in terms of fitout,

facilities, product range, ambience, external and internal signage and all advertising and promotional material in all media, the premises at all times must maintain the appearance of trading predominantly as a supermarket or general store.”

- 29) This condition is reflective of the minor trading importance of the sale of liquor compared to grocery and general supermarket items. The sale of takeaway liquor as part of a hotel operation is a paradigm shift in the nature of the takeaway business. The paradigm shift is greater if the takeaway licence extends to sales from a drive through bottleshop.
- 30) The Commission is not persuaded to seek a wholesale change that will enable a store liquor licence to morph into a significant point of sale outlet for takeaway liquor and for the sale of liquor in isolation to represent virtually all sales. It has already determined that the hours of takeaway are identical to that when the licence operated at the Good Fortune. It does determine the operation of the takeaway licence is valid and appropriate as a facility within the hotel where patrons can purchase takeaway liquor. This purchase should occur from within the premises, not at a drive through bottleshop.
- 31) The issue of potential harm to members of the Belyuen Community from the sale of takeaway alcohol has been raised by the objector, Mr Port and is raised in a submission from the Director of Alcohol Strategy in the Department of Justice. Other than those mentions there has been no supporting evidence put before the Commission at this Hearing and consequently the Commission has not determined any takeaway licence conditions in this regard. It could however review this matter if, once the licence is operating, complaints are received from the Director of Licensing, Northern Territory Police, Belyuen Community or other notable relevant organisations.

DECISION

- 32) The Commission approves the substitution of Liquor Licence Number 80901818, formerly operated by the Good Fortune at Ryland Road, Nightcliff to Sloaney Pty Ltd for the Berry Springs Hotel to be located at 795 Cox Peninsula Road, Berry Springs.
- 33) In relation to the application under Section 46A of the Act for the variation of the liquor licence, the Commission approves the removal of Store related conditions as advertised. These removed conditions relate to:
- the screening off and securing of liquor outside authorised trading hours;
 - storage and display of liquor within the store;
 - removal of the requirement to have signage relating to bookup of food and liquor; and
 - removal of the licence condition of the sale of liquor to be secondary to supermarket or other general store sales.

This approved variation does not extend to allowing Sloaney Pty Ltd to vary the liquor licence to provide for the development of a drive through bottleshop

for sale of takeaway liquor. The Licensee is therefore required to present and display liquor within the main building of the proposed hotel and for patrons to have to enter the hotel premises to purchase takeaway liquor items.

- 34) The hours of trade shall remain as under the previous store licence and shall be 10.00 am to 10.00 pm Monday to Friday and 09.00 am to 10.00pm Saturday, with no trading on Sundays, Good Friday or Christmas Day.
- 35) The Commission notes Sloaney Pty Ltd's advice that construction of the Berry Springs Hotel could shortly commence following the issue of a Permit to Build. At the time of this advice to the Commission Sloaney Pty Ltd were not able to plan the final layout of their building structure as this depended on whether the Commission would grant a licence variation allowing the construction of a drive through bottleshop. The decision above provides certainty in this regard and should enable the final planning and documentation of the hotel to proceed with the takeaway licence incorporated as outlined in paragraph 35 above.

Richard O'Sullivan
CHAIRMAN

20 October 2011