

NORTHERN TERRITORY LIQUOR COMMISSION
DECISION NOTICE

MATTER: APPLICATION FOR LIQUOR LICENCE

REFERENCE: LC2021/035

APPLICANT: Nightcliff Fermentation Co Pty Ltd

PREMISES: Bustard Town
15-17 Knuckey Street
DARWIN NT 0800

LEGISLATION: Part 3 Division 4 of the *Liquor Act 2019*.

HEARD BEFORE: Mr Russell Goldflam (Acting Deputy Chairperson)
Mr Bernard Dwyer (Health Member)
Ms Christine Hart (Community Member)

DATE OF HEARING: 7 October 2021

DATE OF DECISION: 15 October 2021

Decision

1. For the reasons set out below and in accordance with section 48 of the *Liquor Act 2019* (NT) (the Act) the Northern Territory Liquor Commission (the Commission) has determined to issue a licence to Nightcliff Fermentation Co Pty Ltd (the applicant).
2. The licence will be issued with a restaurant bar authority and a late night authority authorising the sale of liquor from 11:00 hours to 02:00 hours each day, except Good Friday and Christmas Day, when the hours of operation are as prescribed by Regulations 58(1)(a) and 82(2) of the *Liquor Regulations 2019* (the Regulations).
3. The conditions of the licence will be those authority conditions set out in Division 10 and Division 16 of the *Liquor Regulations 2019*.
4. The following additional conditions are fixed:
 - a. The kitchen must remain open and full meals must be available for purchase by patrons during the hours of operation until 1.5 hours before the close of the licensed premises.
 - b. As required by section 93 of the Act, the licensee must not cause or permit its employees or patrons to cause undue and unreasonable noise on or in the licensed premises that affects the amenity of the

neighbourhood. In addition, the licensee shall implement such sound attenuation and noise mitigation measures as the Director of Liquor Licensing (the Director) in their discretion may notify to the licensee in writing at any time as having become in the Director's view a reasonable requirement in the circumstances then prevailing.

5. The licensed premises to be operated under the registered business name "Bustard Town", are situated at 15 – 17 Knuckey Street Darwin, comprising the area bounded in red at page 124 of the brief of evidence tendered at the hearing of the application (the premises).
6. In accordance with section 85 of the Act, the term of the licence will be for 20 years.
7. The licensee is not permitted to sell or supply liquor at the premises until it provides written confirmation to the Director that it has obtained all the necessary building, planning and safety approvals in respect of the premises, and the Commission has given the licensee written approval to commence the sale and supply of liquor at the premises. The Commission delegates the authority to provide this approval to any one of members Goldflam, Hart or Dwyer.

Reasons

Background

The Application

8. The applicant proposes to operate 'Bustard Town' as a restaurant bar in the Darwin entertainment precinct operating from 11:00 hours through to 02:00 hours 7 days per week. The focus will be around fire cooking in an outdoor kitchen, offering wood fired pizzas, tapas, Argentinian grill and a space for functions and art openings. The applicant has obtained approval from the Development Consent Authority to refurbish the proposed restaurant area by installing two demountable structures and a shade structure with an alfresco area. The applicant and his business partner currently operate a bakery and café on the premises, as well as a licensed venue in Nightcliff, The Lucky Bat.
9. The applicant is a registered corporation wholly owned and controlled by Mr Justin Schmidt (Mr Schmidt), the proposed nominee.

Consultation

10. As required by section 57 of the Act, notices of the application were published in the NT News on 14 and 17 July 2021, and on site by way of signage.
11. No objections to the application were received. The applicant consulted with various neighbouring businesses and individuals, who the applicant informed the Commission were supportive of the proposed venture.
12. In accordance with section 56 of the Act, notification was given to the Department of Health (DOH), NT Police and the City of Darwin. Notification was also given to the Northern Territory Fire Service (NTFRS).

13. The Director informed the Commission that:

- DOH had no adverse comment, but adverted to the need to comply with COVID-19 and smoking requirements.
- NT Police advised that they have no objections.
- The City of Darwin did not provide a comment, but had previously informed the applicant that as the venue is on private land, the City does not have an interest in the application.
- NTFRS indicated that they would conduct an inspection following the issue of a Certificate of Occupancy on completion of the planned refurbishments.

The licensee's record of compliance

14. Mr Schmidt has held a liquor licence with a restaurant authority for premises known as The Lucky Bat since November 2018. The Director informed the Commission that no compliance issues had been identified concerning those premises. Mr Schmidt has previously established and operated three inner-city licensed venues in Melbourne.

The referral

15. On 8 September 2021, pursuant to section 59 of the Act, the Director referred this application to the Commission to be determined by way of a public hearing. Notice was subsequently given to the Applicant that the matter would be listed for a public hearing on 7 October 2021.

16. The Director provided the following documents to the Commission with the referral (the brief):

- a. Application for liquor licence
- b. Declaration of Associates
- c. Public interest and community impact assessment
- d. Copy of Lease of premises
- e. Financial Report year ended 30 June 2020 - Lucky Bat Pty Ltd
- f. Business plan
- g. Business Prospectus
- h. Smoking management plan
- i. Copy of proposed liquor licenced area site plan
- j. Development Consent Authority Notice of Consent DP21/0185

- k. Evidence of Registration of Food Business
- l. Current Responsible Service of Alcohol certification for Mr Schmidt

The hearing

- 17. Pursuant to section 23 of the Act the Commission is not bound by the rules of evidence and may inform itself in any manner it considers appropriate. Section 21(2) provides that a hearing must be conducted in public unless the Commission is of the opinion it is not appropriate. No submissions were made to the Commission to this effect.
- 18. On 7 October 2021, the application proceeded as a public hearing. Mr Justin Schmidt appeared on behalf of the applicant. Ms Chin appeared for the Director. The Commission thanks them for their attendance and assistance.
- 19. The brief was tendered and admitted into evidence without objection.
- 20. In addition and also without objection the applicant tendered the following documents:
 - a. Aerial view of the proposed premises showing their location
 - b. Portfolio of 37 images under the heading "Bustard Town Design"

ASSESSMENT OF THE APPLICATION

- 21. In accordance with section 59 of the Act, the Commission has considered:
 - a. The applicant's affidavit required by section 54;
 - b. The suitability of the premises to be licensed, having regard to any law of the Territory regulating the sale, supply, service or consumption of liquor or the location, construction or facilities of those premises;
 - c. The financial stability and business reputation of the body corporate;
 - d. The general reputation and character of the secretary and executive officers of the body corporate; and
 - e. Whether the applicant, including the nominee designated by an applicant, is a fit and proper person to hold a licence.
- 22. In accordance with section 49 of the Act, the Commission has also considered whether issuing the licence is in the public interest, and whether the licence will have a significant adverse impact on the community.

The applicant

- 23. The Commission finds that the applicant complies with section 53(1) of the Act, which requires that a body corporate shall not hold a licence unless it is a corporation.

The applicant's associates

24. Section 54 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. The Commission is satisfied that the applicant has complied with the disclosure requirements of section 54.
25. The Commission considers that it is appropriate to consider whether Justin Schmidt and Danny Crichton, who are associates of the applicant for the purpose of section 55, and co-tenants, along with the applicant, of the premises, are fit and proper persons to be associates of the applicant.
26. Having had regard to the material tendered by the applicant attesting to the character, experience and qualifications of the above-named persons, as well as previous favourable findings by the Commission in relation to these persons,¹ the Commission finds that each of them is a fit and proper person to be an associate of the applicant.
27. The Commission does not consider that it is appropriate to consider whether any other person is a fit and proper person to be an associate of the applicant.

The suitability of the applicant's premises

28. The premises are currently operated by Mr Schmidt and Mr Crichton as a bakery and café in conjunction with their licensed premises in Nightcliff, The Lucky Bat Cafe. Planning approval has been obtained from the Development Consent Authority to enlarge the existing premises by extending it to cover an adjoining vacant lot, and to design, install, equip and fit out an outdoor kitchen, grill and pizza oven, a cool room, indoor and shaded outdoor dining areas, two bars for liquor service, toilet facilities and a storage area. The applicant has acquired a wood-fired pizza oven and two shipping containers that will be fitted out as, respectively, the coolroom and a toilet facility. The applicant provided the Commission with appropriate documentation, including visuals, of the proposed premises.
29. The refurbishment works were not complete as at the date of the hearing, and the Commission was informed that on provision of a Certificate of Occupancy following the completion of the works, NTFRS, which has already conducted a preliminary inspection of the premises, will conduct a further inspection and notify the applicant of the maximum permitted number of patrons.
30. The applicant holds a lease over the premises with a term of ten years, with an option to extend the term by an additional ten years. It is a term of the lease that the tenant apply for a liquor licence over the premises.
31. The Commission assesses the premises as suitable for the supply and consumption of liquor in the manner set out in the application.

¹ Northern Territory Liquor Commission, *Application for a licence* LC2018/18 (decision to issue a licence to Lucky Bat Café, 13 November 2018)

The financial stability, general reputation and character of the body corporate

32. The applicant has provided appropriate documentation regarding its operations, activities, financial circumstances and plans.
33. The Commission assesses the applicant as having a satisfactory business reputation and as being financially stable.

The general reputation and character of the applicant's secretary and executive officers

34. Having been provided with appropriate evidence regarding his reputation, character and work history, the Commission assesses the general reputation and character of the applicant's sole executive officer and secretary, Mr Justin Schmidt, to be satisfactory.

Whether the applicant is a fit and proper person to hold a licence

35. The Commission assesses the applicant to be a fit and proper person to hold a licence.

Whether the licensee's nominee is a fit and proper person to hold a licence

36. The applicant has nominated Mr Justin Schmidt as the licence nominee. The Commission assesses Mr Schmidt, who holds current RSA certification and has provided appropriate documentation of his reputation, character and work history, to be a fit and proper person to hold the licence.

Public notice and consultation

37. The Commission is satisfied that public notice of the application was given and consultation was undertaken in accordance with section 57 of the Act.

Whether issuing the licence is in the public interest

38. To determine whether the issue of the license is in the public interest, the Commission is required to consider how the issue of the licence would advance the following objectives set out in section 49(2) of the Act:
 - (a) Minimising the harm or ill-health caused to people, or a group of people, by the consumption of liquor;
 - (b) Ensuring liquor is sold, supplied, served and consumed on or in licensed premises in a responsible manner;
 - (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;

- (d) Protecting the safety, health and welfare of people who use licensed premises;
 - (e) Increasing cultural, recreational, employment or tourism benefits for the local community area;
 - (f) Promoting compliance with this Act and other relevant laws of the Territory;
 - (g) Ensuring each person involved in the business conducted at licensed premises receives training suitable to the person's role in the business;
 - (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.
39. The Commission has considered each of these objectives. The premises are located in the Mitchell Street precinct, where there are at least eleven other licensees trading with late night authorities, permitting them to trade in liquor until 02:00 hours, or in some instances, later. The applicant estimates that the premises will have a capacity of about 250 people. In these circumstances, the Commission considers that the addition of this modestly sized venue to late night trading in this popular precinct is unlikely to lead to a substantial increase in the number of late night drinkers or associated harm.
40. As is expressly provided at section 50(3) of the Act, the mere addition of a new licence in a community is not taken to be a benefit to the community. The Commission does not consider that it would be in the public interest to issue this licence were it to operate merely as another place to drink liquor after midnight.
41. However, the applicant proposes to offer more than a new late night liquor outlet. Although the applicant candidly conceded that the venture would not be financially viable if it were not granted a late night liquor licence, it was submitted to the Commission that Bustard Town would contribute to the amenity of the precinct by offering late-night dining, a service that is not currently available to Mitchell Street precinct patrons.
42. The Commission accepts that submission, the force of which was strengthened by consideration of the applicant's impressive record of successfully establishing and operating attractive licensed venues in both suburban Darwin and inner-city Melbourne.
43. The Commission is satisfied that issuing the licence and associated authorities is in the public interest. However, the Commission has determined to impose the condition set out at paragraph 4.a) above both in support of the applicant's proposed service model, and to ensure that this model will in fact be implemented.

Whether the issue of the licence will have a significant adverse impact on the community

44. To determine whether it is satisfied that the issue of the licence will not have a significant adverse impact on the community, the Commission must consider the matters set out at section 49(3) of the Act:
- (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;
 - (b) The geographic area that would be affected;
 - (c) The risk of harm from the excessive or inappropriate consumption of liquor;
 - (d) The people or community who would be affected;
 - (e) The effect on culture, recreation, employment and tourism;
 - (f) The effect on social amenities and public health;
 - (g) The ratio of existing liquor licences and authorities in the community to the population of the community;
 - (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.
45. The Commission notes there are no such “other” matters prescribed by regulation.
46. The applicant bears the onus of satisfying the Commission of the relevant matters. Even if there are no objections, as is the case in this instance, the applicant must still satisfy this Commission of those matters.
47. Regulation 123 of the Regulations provides that the community impact assessment guidelines published under section 6A of the *Liquor Act 1978* and in force immediately before the commencement of the Act are taken to be community impact assessment guidelines issued under section 50.
48. The guidelines are as follows:

Criteria	Matters to be considered
The potential harm or health impact that may be caused to people, or any group of people within the local community area, due to the availability and accessibility of an additional liquor outlet.	Are there any ‘at-risk’ groups or sub-communities within the locality? This may include – <ul style="list-style-type: none"> • children and young people;

	<ul style="list-style-type: none"> • Aboriginal people normally resident within the locality and those Aboriginal people that might be likely to travel to the locality from a dry community; • migrant groups from non-English speaking countries; • people in low socio-economic areas; and/or • communities that experience high tourist/visitor numbers. <p>Are there any community buildings, facilities and areas within the locality? Such facilities would include:</p> <ul style="list-style-type: none"> • schools and educational institutions; • hospitals, drug and alcohol treatment centres; • accommodation or refuges for young or disadvantaged people; • child care centres; • recreational areas; • dry areas; and • any other area where young people may congregate or be attracted to. <p>What policies and procedures will the applicant implement to minimise any potential harm or health impacts to these 'at-risk' groups or sub-communities?</p>
<p>Information about the location and area in which the premises is proposed to be so as to assess any social impact on the community. This includes information about the density of licensed premises within the community area.</p>	<p>This may include crimes statistics, social profile information and the location of existing licensed premises. This could also include traffic and pedestrian impact and any plans developed to address these potential issues.</p>
<p>Volume</p>	<p>This may include projected sales volumes and marketing analysis, liquor type and customer demographic (where applicable)</p>

	<p>this should be provided for both on and off premises sales).</p> <p>The Commission will consider information available to it about the current alcohol consumption rates for the community area.</p>
Any cultural, recreational, employment or tourism benefits for the local community area.	Will the proposed licensed premises provide economic benefits, cultural, recreational or tourism benefits or any additional employment opportunities and to what level?
Why the grant of a relevant application is in the public interest and how the additional liquor outlet will benefit the local and broader community.	<ul style="list-style-type: none"> • What additional services will be provided other than simply an additional outlet for the sale of liquor – this may include accommodation or dining? • Will the proposed licensed premises provide additional choices of service or products that are no available in the area? • Will the proposed premises provide liquor in a manner known to be safe and to minimise adverse impacts? • Will it use existing premises improve or add to existing premises or is it a new premises?

49. As can be seen from the above, there are numerous matters the Commission must consider and the applicant must address (and satisfy the Commission of) under the public interest and community impact test and guidelines. The guidelines do state however 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”.

50. In addition, section 50(4) provides that the guidelines “may have general, limited or varied application”. Although there are many matters for the Commission to consider, like any application, some of the matters are more relevant to this application than others.

51. There is some overlap between the public interest objectives and the community impact matters that the Commission is required to consider. The Commission considers that in applying the community impact test to this application, its location – in the heart of Darwin’s premier tourism and hospitality precinct – is of particular relevance. A late night restaurant bar located in a suburban residential area might indeed have a significant adverse impact on its local community. By contrast, in the Mitchell Street precinct, where the maintenance of a vibrant pro-social nightlife

is a community asset, the same venue has real potential to enhance the social amenity of its local community.

52. The Commission considers however that there is some risk of undue offence, annoyance, disturbance or inconvenience to persons who reside in the vicinity of the proposed licensed premises. The applicant plans to use the premises as a live music venue. The applicant informed the Commission that the managers of the Rydges Hotel in the immediate vicinity of the premises welcomed the prospect of a new dinner venue for the hotel's guests, but expressed concerns about noise. To ameliorate any risk of noise disturbance, the Commission has determined to impose the condition set out at paragraph 4.b) above.
53. Having considered all of these matters, the Commission is satisfied that the licence and associated authorities will not have a significant adverse impact on the community.

The objects of the Act

54. Finally, 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.
55. Throughout its consideration of this application, the Commission has steadily borne the purposes in section 3 of the Act in mind. The Commission considers that the issue of the licence and authorities with the conditions imposed is consistent with the purposes of the Act.
56. For these reasons, the Commission has determined that the application should be granted, and that a licence and authorities be issued on the conditions set out at the commencement of this Decision Notice.

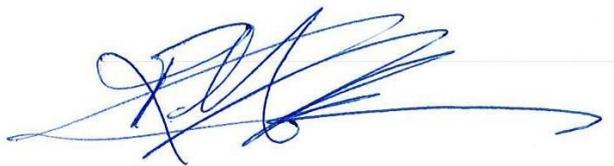
Extension of time

57. Pursuant to section 60(2)(b) of the Act, the Commission was required to decide whether or not to issue the licence by 8 September 2021, that date being 28 days after the expiry of the public notice period. As the Director did not refer the application to the Commission until 8 September 2021, it was obviously impracticable for the Commission to comply with this requirement. The Commission notified the applicant of its decision on 15 October 2021, eight days after the hearing of the application. In the circumstances, the Commission has determined in the exercise of its discretion conferred by section 318 of the Act, to extend the time allowed by section 60(2)(b) to 15 October 2021.

NOTICE OF RIGHTS

58. Section 31(1) read with section 60(3) of the Act provide that the decision set out in this decision notice 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.

59. In accordance with section 31(2) of the Act, the persons who may apply to NTCAT for a review of the decision are the Director and the licensee.



Russell Goldflam

ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION
20 October 2020

On behalf of Commissioners Goldflam, Dwyer and Hart