

**LEGISLATION SCRUTINY COMMITTEE**  
**RESPONSE BY THE DEPARTMENT OF THE ATTORNEY-GENERAL AND**  
**JUSTICE**  
**TO WRITTEN QUESTIONS FROM THE COMMITTEE**  
**INQUIRY INTO THE LIQUOR AMENDMENT BILL 2020**

**Substitution of premises**

1. The majority of submitters oppose the removal of the provision in section 75(2)(a) which requires the Commission to be satisfied that 'no significant change in the operation of the business will occur as a result of the substitution'.

Submitters expressed concerns that the removal of the 'like for like' requirement will provide an opportunity to circumvent the takeaway licence moratorium by enabling existing licence holders to substitute premises for a larger premises and increase the volume of alcohol available for sale in the Territory.

- a. *Are there any other provisions in the Act to prevent an increase in the cumulative volume of alcohol for sale in the Territory that could result from substitution of premises?*

AGD Response:

Yes. Section 75 of the *Liquor Act 2019* (the Act) requires the Liquor Commission, when considering an application for substitution of premises, to be satisfied the substitution satisfies the public interest and community impact requirements. Section 49 of the Act sets out the public interest and community impact requirements. Particularly, section 49(3)(h) requires the Commission must consider, when determining whether issuing a licence or authority would have a significant adverse impact on the community, 'the effect of the volume of liquor sales on the community'.

Further, there are discretionary powers for the Liquor Commission, and the Minister, in sections 87 and 88 of the Act, where conditions may be placed on a licence that can include limiting the times when liquor may sold, and the quantities and types of liquor sold.

2. **The Foundation for Alcohol Research and Education (FARE) recommended the following amendment to proposed section 75(2) to prevent an increase in the volume of alcohol available for sale as the result of substitution of premises.**

**(2) Despite subsection (1), instead of issuing a new licence the Commission may, on application by the licensee, amend a licence to substitute other premises for the licensed premises if satisfied that:**

- (a) no significant change in the volume of alcohol sold will occur as a result of the substitution; and**
- (b) the substitution satisfies the public interest and community impact requirements.**

**(2A) To avoid doubt, the Commission may, under subsection (2):**

- (a) impose conditions on the substitution; and**
- (b) substitute premises that are not yet constructed or are still under construction.**

- a. *What would be the impact on the operation of the Act if section 75(2) was amended as recommended by FARE?***

AGD Response:

These proposed amendments are not recommended by the Department for the following reasons.

The impact of a provision of this type would likely make substitution of premises harder to obtain; it would require a comparison of sales at the primary licensed premises and an assessment of predicted sales in the proposed premises for substitution. This requirement alone may make it impossible for some licensees who have not traded for some time or otherwise had premises lay dormant (or destroyed), or propose to move to a different location.

There would likely also need to be consideration of how 'volume' of alcohol would be measured. That type of assessment could include the level of Pure Alcohol Content, which is currently only reported by wholesalers on a postcode basis, the type of liquor sold and/or quantities of products sold under a particular licence.

It is important to note that the current provisions regarding data collection were subject to significant consultation with industry and the regulator only recently in 2019. Changes to these provisions without providing notice to industry, who had raised concerns about regulatory burden during the original consultations in 2019, would be a matter of concern for the Department.

3. **FARE also recommended that a licence holder seeking to move to larger premises should be required to substitute multiple licenced premises for the single larger premises so that the cumulative volume of alcohol for sale in the Territory does not increase. FARE consider that this would address the Riley Review concerns about substitution being used to circumvent the moratorium and would maintain the integrity of the moratorium.**
- a. ***Would the amendment to proposed section 75(2) recommended by FARE allow for multiple licenced premises to be substituted for a single larger premises?***
- b. ***If not, how could this outcome be achieved?***

AGD Response:

These proposed amendments are not recommended by the Department for the following reasons.

This type of proposal is likely to engage legal issues about acquisition of property without just terms, where it would require the holder of more than one licence to surrender additional licences and premises to invest in a single new premises.

It is also expected licensees who own more than one licence would not support a requirement of this type which would involve significant concentration of risk and investment in one location.

For licensees who hold only one licence, it is likely to be difficult for those licensees to identify and then purchase additional licences to substitute to one new larger premises.

Further policy consideration would be required for an outcome such as this to be achieved. It would need to include considerations such as what value is placed on a licence if surrender by the holder is required to substitute to a larger premises, compensation that might be payable for the 'acquisition' of the licence, the threshold test that might apply when valuing a licence (and could include considerations such as location, size, profit, size of customer base, product range, years of operation).

It should also be recognised that a substitution of premises application does not affect only takeaway licensed premises. This type of requirement for multiple licences being used for a significant substitution of premises would have unintended consequences for substitution of premises where the relevant business is a restaurant or public hotel.

**4. FARE expressed concern about the inclusion of proposed section 326(8) which states ‘This section has effect despite any law of the Territory or decision of NTCAT or the Supreme Court to the contrary.’**

**a. *What is the purpose of this provision?***

**b. *What would be the effect of removing this provision?***

AGD Response:

This provision is intended to be a clarifying provision to confirm the amendments take precedence over any existing decision by NTCAT or the Supreme Court, or other legislation, in respect of substitution of premises.

The effect of removing this provision is likely to cause confusion about which legal authority applies, particularly if a licensee has had historical or ongoing litigation in respect of an application that has been considered by the NTCAT, the Supreme Court and may be considering appeal processes.

#### **Proposed procedural amendments**

**5. Endeavour Drinks recommended additional amendments to sections 75, 322, 324 and 326 of the Act which are procedural in nature and seek to ensure the effectiveness of the Bill in achieving its objectives.**

**a. *Would these proposed amendments improve the effectiveness of the Bill in achieving its objectives?***

**b. *Are there any proposed amendments to these sections that would hinder the operation of the Act?***

AGD Response:

These proposed amendments are not recommended by the Department for the following reasons.

The proposed amendments to section 75 appear to clarify that substitution of premises is not limited by the moratorium in section 84(3) on the creating or issuing of new takeaway licences and is considered unnecessary.

The proposed amendments to sections 322 and 324 appear to make provision for circumstances specific to Endeavour Drinks in its application for substitution of premises. The Department understands Endeavour Drinks has a concern about the requirement for transitional arrangements under the Act to convert licences by 1 October 2020. It is also understood that Endeavour Drinks had concerns about possible cancellation of its BWS Stuart Park licence due to the absence of trading for considerable time. The Department has been advised that the Director of Liquor Licensing (the Director) is aware of these issues and has not taken steps to convert the BWS Stuart Park licence in light of current efforts to substitute premises.

The Department notes the process is that by 1 April 2020 a licensee may provide written notice to the Director as to the category of authority for conversion of its existing licence. If a licensee does not submit an application before 1 April 2020, the Director may proceed to convert the licence. The provision was intended not to terminate licences but to provide a mechanism whereby those who do not participate in the conversion process will have their licences converted by the regulator. The circumstances apparently relevant for Endeavour Drinks is that the licence subject to the application for substitution application has not traded for some time, and under section 67 of the Act a licensee is taken to have abandoned the licence if they have ceased to operate the premises for more than 6 months. In these circumstances licensees can obtain approval from the Director.

The proposed amendments to section 326 in the Bill relate to the transitional arrangements that appear to cover circumstances specific to Endeavour Drinks in its previous appearance before the NTCAT where the Liquor Commission decision was not actually *reviewed*, but declined by the NTCAT on two preliminary points. The Department considers the current wording of the Bill, supported by the accompanying explanatory material, is adequate to understand the policy position that, despite where NTCAT has previously considered an application, the Bill provides that party another opportunity for an application to be considered by NTCAT on the new legislative criteria in section 75.

The Department also refers to the proposed amendments in section 326 including powers and functions of the NTCAT to conduct a rehearing. It is noted those functions and powers of NTCAT (such as confirming, varying, substituting or making a different decision to the Liquor Commission) are already provided for in the *Northern Territory Civil and Administrative Tribunal Act 2014*, and that on a review or rehearing, the NTCAT stands in the shoes of the decision maker (the Liquor Commission), and has all the functions and powers of the Liquor Commission to make the correct decision.

The Department has also identified that the proposed amendments put forward by Endeavour Drinks (Attachment A to the submission dated 2 March 2020), contains a combination of 'marked up' tracked changes text, as well as text that appears to be original wording, but is not contained in the version of the Bill as introduced (for example the new proposed clause 326). This has impacted on the Department's ability to consider the operation of the proposed clauses in the timeframe provided and responses have been limited to those obvious changes that are presented in 'marked up' tracked changes.