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To whom it may concern,

Response to the *Liquor Amendment Bill 2020*

Endeavour Drinks welcomes the opportunity to comment on the *Liquor Amendment Bill 2020* (**the Bill**), introduced to Parliament on 13th February. Endeavour¹ is a large Australian packaged drinks retailer, with over 100 team members in the Northern Territory working across 16 BWS stores and 4 hotels. Nationally, Endeavour Drinks also owns retail brands including Cellarmasters, Langton's, Jimmy Brings and Dan Murphy's.

Endeavour Drinks takes pride in being a leader in responsible service. From the development and subsequent industry-wide endorsement of 'ID25' and 'Don't buy it for them' policies, to playing an integral role in the development of the Retail Drinks Australia Online Code of Conduct, we continually strive to improve our business practices so that they meet the community's expectations of a responsible drinks retailer.

Over the past five years, Endeavour Drinks has been attempting to substitute a liquor licence from a BWS store in Stuart Park to a new location in Darwin for the purposes of opening a Dan Murphy's store. The first Dan Murphy's in the Territory would be the anchor tenant of the \$30 million Darwin Airport Central retail development, managed by NT Airports. The project - which has approximately 88% support among Darwin residents² - would provide approximately 150 local construction jobs, as well as 30 permanent roles in the Dan Murphy's store. We are advised that joining us at this location will be a providore and a fast food outlet creating additional permanent roles, but only in the circumstances that the Dan Murphy's proceeds.

Despite the widespread community support for a Dan Murphy's in Darwin, the licence substitution application has been opposed by a small number of individuals and interest groups in the past few years giving rise to protracted proceedings before the Liquor Commission, the Northern Territory Civil Appeals Tribunal (NTCAT) and, most recently, the Supreme Court. The Supreme Court hearing listed for 21 February has been adjourned until late March 2020 pending passage of the Bill. A favourable outcome for Endeavour Drinks in the Supreme Court would overturn the preliminary decision of the NTCAT and see the case sent back to the NTCAT for a final hearing.

Endeavour Drinks is supportive of a Bill that addresses the legal obstacles stemming from the NTCAT decision. That decision was based on narrow jurisdictional grounds and did not involve a review of the merits of the application. The decision of the NTCAT not only affects the Dan Murphy's substitution application, but may well have implications for other past and future

¹ Operated by Endeavour Drinks Group Limited, a subsidiary of Woolworths Group Limited.

² <https://www.ntnews.com.au/business/dan-murphys-to-fight-liquor-commission-over-location-queries-economic-benefits-and-prices/news-story/5f588c27e0265bc94cca03701e381ffb>

applications by other operators in substituting a licence from an existing location to new premises. Endeavour Drinks therefore endorses the Government's attempts to redress the jurisdictional matters identified by the NTCAT.

Upon careful consideration, Endeavour Drinks submits that a number of amendments should be made to the Bill to ensure that the Government's objectives are achieved. We believe that these amendments are in-keeping with the overall design and intent of the Government's proposed Bill and are intended to ensure that intent does not miscarry. Those amendments are outlined below.

We note the current version of the Bill is intended to operate in a manner that would provide Endeavour Drinks with an opportunity to have the merits of its application remitted and determined by the NTCAT. It addresses the jurisdictional impediment that the NTCAT found prevented it from reviewing the substance of that application previously. However Endeavour Drinks will still be required to engage in lengthy and costly proceedings before NTCAT, after the Bill is passed.

For reasons of procedural efficiency, Endeavour Drinks proposes that the Bill should be amended to also include a provision that would give the Minister the power to grant a licence if satisfied that certain requirements are met. If passed, such a Bill would allow Endeavour Drinks (if it considered it appropriate) to make an application directly to the Minister either before or after any further NTCAT hearing. More fundamentally, it would appropriately empower the Minister, acting in the public interest, to grant a licence in connection with significant development projects undertaken in the Territory.

1. Suggested amendments to the Bill

The Bill proposes amendments to sections 75 and 326 of the Liquor Act 2019 (**2019 Act**). Relevantly to the Dan Murphy's application the amendments:

1. apply to applications made under s46A of the Liquor Act 1978 (**1978 Act**) during the period 27 February 2018 and 30 September 2019 (the Dan Murphy's application was lodged on 19 July 2018 so falls within this period);
2. appear to propose an amended form of s75(2) and a new s75(2A) in the 2019 Act which permit:
 - a. substitution where premises do not exist;
 - b. the imposition of conditions on licences where substitution is granted; and
 - c. substitutions of premises which are not 'like for like'.
3. enable a rehearing of a substitution application before the NTCAT even if the Liquor Commission's refusal of the application has already been reviewed by NTCAT (as is at least partially the situation with the Dan Murphy's application).

The explanatory statement to the Bill acknowledges that the Liquor Commission (or NTCAT) must still be satisfied that substitution satisfies the public interest and community impact requirements.

Endeavour Drinks has identified certain matters that it believes should be addressed to ensure that the design and intent of the Bill (as outlined above) is reflected in its actual operation once enacted. These are outlined below and reflected in the proposed amended Bill enclosed with this letter.

Applicable Act

Section 326 of the Bill requires that the Commission and NTCAT apply s75(2) and s75(2A) in respect of certain specified applications. We are concerned that this may create uncertainty as to the law that the Commission and NTCAT would apply to such applications insofar as they raise matters not addressed by s75(2) and s75(2A).

We assume that the Government intends that s75(2) and 75(2A) of the 2019 Act will apply in place of s46A(1) of the 1978 Act and that the 1978 Act (including the other subparagraphs of s46A) would otherwise apply. If that is the case, Endeavour Drinks sees merit in including express wording to that effect.

The reason this is necessary is that difficulties may arise in simply imposing s75(2) and s75(2A) of the 2019 Act on applications made under the 1978 Act. In particular, the procedural and notice requirements relevant to applications made under s46A(1) of the 1978 Act were not identical to those that now apply under the 2019 Act. For example, section 46A(1) in the 1978 Act specifies the form of an application, whereas section 75(3) in the 2019 Act provides the application must be made in the same manner as an application to vary conditions under Part 4, Division 5 which can either involve an application in the form required by section 110 or an application under section 96 depending on the nature of the application.

Unless it is made clear that applications made under s46A(1) of the 1978 Act remain governed by the 1978 Act, save insofar as s75(2) and s75(2A) of the 2019 Act replace s46A(1), there is a risk that the Commission, NTCAT or the Supreme Court may construe the amendments as invalidating applications made under the 1978 Act simply because they do not accord with procedural requirements of the 2019 Act.

More generally, there is a risk that the amendments will cause confusion absent a clear direction to the Commission, NTCAT and the Supreme Court as to what law governs applications the subject of s326 of the 2019 Act (as amended).

An application "reviewed by NTCAT"

Endeavour Drinks is concerned that the proposed form of s326(5) may be construed not to apply to its previous application to NTCAT because NTCAT rejected that application on jurisdictional grounds. The issue is whether NTCAT "reviewed" the application in those circumstances. Endeavour Drinks has proposed a change that would provide that an application may be made under s326(4) even where the application was reviewed "or otherwise determined (including, without limitation, on the basis that NTCAT did not have jurisdiction)" by NTCAT before the commencement.

An obligation to review

The Government's Bill permits applications to be made to NTCAT in certain circumstances but does not include an express provision requiring NTCAT to determine an application. Endeavour Drinks sees value in including such a provision to avoid any doubt as to whether NTCAT can exercise a discretion not to hear such an application. Endeavour Drinks also proposes language to

make clear that NTCAT is to conduct a review despite any earlier decision of NTCAT in relation to the application and as if such decision had not been made.

Effect of moratorium

In the previous NTCAT decision in relation to the proposed Darwin Dan Murphy's, the NTCAT observed that granting such a substitution application would be inconsistent with the 5 year statutory moratorium on new takeaway licences. Endeavour Drinks understands that the Government's position is that the statutory moratorium is not intended to limit the power to grant substitution applications or the circumstances in which they may be granted. Endeavour Drinks has proposed express wording to make that clear, both in respect of the statutory moratorium under the 1978 Act and the statutory moratorium under the 2019 Act.

NTCAT's power to impose conditions

A point raised by the Commission against Endeavour Drinks in the Supreme Court proceedings is that, even if the Commission had power under the 1978 Act to impose conditions ancillary to granting a substitution application, the NTCAT has no power to do so. The proposed amendments to s326 should therefore make clear that, where NTCAT is conducting a review pursuant to that provision, it has the power to impose conditions in accordance with s75(2A)(a).

Determining reviews

Section 326 of the 2019 Act applies only to substitution applications in a limited transitional period. It is in the public interest that those proceedings be determined with finality as quickly as possible. For that reason, Endeavour Drinks proposes language that makes clear that NTCAT can confirm or vary a decision of the Commission under review, substitute its own decision or make a different decision permitted under the 1978 Act (as modified by s326). There would be no power, however, to remit the matter to the Commission.

New applications

Endeavour Drinks does not believe that the Government's intent with this legislation is to prevent new applications being brought under s75(1) of the 2019 Act. It has therefore proposed express language making that clear.

Interaction of s324 and s326

In its current form, s324(2) of the 2019 Act provides that certain licences under the 1978 Act will terminate automatically on 1 October 2020. In circumstances where transitional applications under s326 are still being determined, that provision should be amended to avoid any argument that the licences the subject of those applications will terminate on that date. Endeavour Drinks has proposed language that would replace the automatic termination provision with a power of the Director to temporarily suspend such licences.

Consequential amendments

In addition to the specific matters addressed above, Endeavour Drinks has proposed a small number of minor and consequential matters that are intended to clarify aspects of the Bill.

2. Ministerial power to grant a licence

Endeavour Drinks notes the Government's extensive efforts in developing the new liquor licensing regime under the 2019 Act and the efforts, through this Bill, to resolve the issues under the liquor regime that do not align with the Government's policy intent. In addition to addressing

the specific issues that have arisen, Endeavour Drinks believes that there is an opportunity at this time to include in the Bill a further mechanism that ensures that the Government's policy intents are not, in the future, prevented by similar matters arising. It is suggested that this can be achieved by including in the Bill amendments which are detailed in the proposed section 60A (see attached).

The proposed powers are only available to be exercised in strictly limited situations where significant development proposals are involved and they require the Minister to consider the purposes of the 2019 Act when exercising this power. Further, the Minister may develop such guidelines as is considered appropriate to guide his or her exercise of this power. Any exercise of this power would be subject to judicial review. These limitations and mechanisms ensure the necessary protections are in place to ensure the power is exercised appropriately.

This power is needed because, in circumstances of major developments which involve the delivery of significant benefits to the Northern Territory, it may be that the Liquor Commission and/or NTCAT operating under the full regime of the 2019 Act may not be best placed to assess all of the necessary matters involved with major developments in order to determine if a liquor licence should be issued. Major developments are often very sensitive to delays, changes in markets and other matters and opportunities can easily be lost if a Government is not able to act in a timely manner to provide appropriate support to a development that will deliver significant benefits to the Northern Territory.

The reservation of a power to a Minister to decide matters is not uncommon, as it appears in areas such as planning and migration law. Section 133C of the *Migration Act 1958* is an example of a Minister having power to decide matters even if they are inconsistent with administrative decision makers. It is very important to note that while these powers may exist, there is no compulsion on the Minister to exercise this power - however its inclusion at this point means that the option is available if and when the Minister considers it appropriate.

Endeavour Drinks appreciates the opportunity to contribute to this process and would be happy to answer any questions, comments or concerns arising from this submission.

Yours Sincerely,



Shane Tremble
General Manager, Corporate Services
Endeavour Drinks