NORTHERN TERRITORY LIQUOR COMMISSION

DECISION NOTICE

MATTER:	**APPLICATION FOR VARIATION OF CONDITIONS OF LIQUOR LICENCE**
REFERENCE:	**LC2020/003**
LICENCE NUMBER:	**81202714**
APPLICANT:	**Glen Helen Lodge Nominees Pty Ltd**
PREMISES:	Glen Helen Outback Resort Lodge 8495 Namatjira Drive MOUNT ZEIL NT 0872
LEGISLATION:	Section 32A(1) of the *Liquor Act 1978.*
HEARD BEFORE:	Mr Russell Goldflam (Acting Deputy Chairperson) Ms Pauline Reynolds (Health Member) Mr Blair McFarland (Community Member)
DATE OF HEARING:	9 June 2020
DATE OF DECISION:	22 June 2020

Decision

1. For the reasons set out below and in accordance with section 32A(7) of the *Liquor Act 1978* (NT) (**the 1978 Act**) the Northern Territory Liquor Commission (**the Commission**) has determined to refuse to vary the conditions of the licence.

2. In accordance with section 33(1) and 33(6) of the 1978 Act, the Commission has determined on its own initiative to vary the licence for a formal reason that does not alter the substance of the conditions, namely:

    a. To vary the name of the licensee from "**Glen Helen Nominees Pty Ltd**" to "**Glen Helen Lodge Nominees Pty Ltd as Trustee for the Glen Helen Lodge Trust trading as Glen Helen Lodge**";

    b. In the part of the licence headed "**Special Conditions**", to vary the title of the condition named "**Special Condition**" to "**Special Measure**";

c. Following the condition referred to at paragraph 2(b) above, insert:

> Notation: This Special Measure is inoperative to the extent that it is inconsistent with section 43(2)(d) of the *Liquor Act 2019* (NT) as in force on 16 June 2020, which provides that no licence is required for the sale, supply or service of liquor served by an employer to employees and their families and guests, so long as that provision remains in force.

Reasons

Procedural matters

3. This application for the variation of the conditions of a liquor licence of a remote outback lodge was commenced on 2 October 2018, prior to the coming into force on 1 October 2019 of the *Liquor Act* 2019 (NT) (**the 2019 Act**). Regulation 131 provides that in these circumstances, unless the applicant notifies the Director that it wishes to have the application determined under the 2019 Act, the application is to proceed and be determined under the *Liquor Act 1978*. The applicant made no such notification, and accordingly, the application proceeded and has been determined under the 1978 Act.

4. As required by section 32A(2) of the 1978 Act, notice of the application was published, as specified by the Director of Liquor Licensing (**the Director**), in *The Centralian Advocate* on 12 and 16 July 2019. In accordance with section 32A(5), notification was given to the Department of Health, the NT Fire and Rescue Service, the NT Police and the McDonnell Regional Council.

5. The only responses of significance to these notifications were objections by the NT Police, the Utju Health Service, the People's Alcohol Action Coalition (**PAAC**) and Mr Paul Traeger.

6. On 23 January 2020, following delays which the Director acknowledges were primarily attributable to "Licensing NT internal matters", the Director referred the application to the Commission.

7. On 17 March 2020, the Commission conducted a Directions Hearing with a view to travelling to the affected communities to conduct community consultations. Ultimately however, following impediments and delays due to COVID-19 restrictions, on 9 June 2020 the matter proceeded by way of a public hearing in Alice Springs. Mr Couzens appeared on behalf of the applicant, Mr Wood appeared for the Director, Ms Nolan appeared for the NT Police, Ms Gillick appeared for PAAC, and Mr Traeger appeared. Evidence was given by Mr Terry Abbot Jr, Mr Cameron Miller, Superintendent Jody Nobbs and Dr John Boffa. The Commission thanks them all for their participation and assistance.

8. The brief was tendered and admitted into evidence without objection.[1] In addition the Commission received into evidence Liquor Licence 80515390 (Tilmouth Well) and the

[1] Prior to the hearing, the applicant elected to withdraw certain documents it had previously provided to the Director from the brief. In addition to the material in the initial referral to the Commission, the brief included a transcript of the Directions Hearing of 17 March 2020.

applicant's amended application dated 1 June 2020. The Commission also received a Memorandum from the Manager, Board and Commission Support, regarding community notification of the hearing.

A liquor licence with a discriminatory Special Condition

9. Mr Terry Abbott Jr (**Mr Abbott**) is an Aboriginal Australian. He supervises teams who undertake maintenance and essential services work on his homelands, the Western Arrernte/Luritja/Pintupi country west of Alice Springs (**the Ngurratjuta area**), where he normally resides.

10. The Glen Helen Outback Lodge (**the premises**) is situated in the heart of the Ngurratjuta area on the site of a station homestead built in about 1905 on the north bank of the usually dry Finke River, just upstream from Glen Helen Gorge, a permanent waterhole popular with both tourists and locals, some 130 km west of Alice Springs.

11. International and interstate tourists, non-Indigenous locals and Indigenous people who reside outside the Ngurratjuta area are permitted by the liquor licence to purchase and consume liquor at the premises. Mr Abbott, however, is not. This is because the liquor licence authorising the sale and consumption of liquor at the premises contains the following "Special condition" (**the Special Condition**):

> For the purpose of this licence the term "Aboriginal person" shall mean any person of Aboriginal decent who is a resident of or normally resides within the Ngurratjuta area, including the communities of Hermannsburg, Haast Bluff Outstations, Papunya, Wallace Rockhole, Hermannsburg Central, Hermannsburg East, Hermannsburg West, Jay Creek, Kings Canyon, Mt Liebig, Areyonga and Papunya Outstations.
>
> There shall be no sale or supply of liquor to any Aboriginal person as defined above. The Licensee may at his discretion refuse service to any person whom he has reason to believe is attempting to purchase liquor on behalf of the person described above.[2]

12. The licence also contains the following condition, headed "Languages":

> The following in both English and Western Aranda languages will be placed (at the expense of the licensee) in a prominent position where sales of liquor take place at the licensed premises:
>
> > "It is a condition of the liquor licence of these premises that there be restrictions on the sale of liquor to Aboriginal residents of certain lands and certain communities. These conditions have been imposed at the request of the representatives of the residents of the Ngurratjuta area and the communities listed in the licence to combat alcohol related harm and damage to Aboriginal culture."

13. Glen Helen Lodge Nominees Pty Ltd (**the applicant**), the licensee of the premises, seeks a variation of its licence so that Mr Abbott and other Aboriginal people who

[2] Liquor Licence 81202714 dated 30 January 2020, Exhibit One, p. 201.

normally reside in the Ngurratjuta area can be treated the same as everyone else, and be permitted to purchase and consume liquor at the premises.

14. Mr Abbott gave evidence to the Commission that when he visits Glen Helen, which he does for both work and recreational reasons, with both Indigenous and non-Indigenous workmates and friends, the fact that he is not allowed to drink there makes him feel "out of place and I didn't belong". The Commission accepts this evidence, and the applicant's submission that the Special Condition is racially discriminatory. The Special Condition obviously discriminates between different groups of people on the basis of their race.

Is the Special Condition unlawful?

15. The applicant also submits that the Special Condition is unlawful. If the Special Condition were unlawful, that would in itself be a compelling reason to grant the application and delete the condition from the licence.

16. Section 19(1)(a) of the *Anti-Discrimination Act 1992* (NT) (**the A-DA**) provides that, subject to exemptions set out in the Act, a person shall not discriminate against another person on the ground of the attribute of race.

17. Section 41 of the A-DA relevantly provides that a person who supplies goods or services must not discriminate against another person by refusing to supply the goods or services. The Commission accepts that section 41 applies to the sale and service of liquor.

18. The Special Condition supports conduct that on its face is prohibited by section 19 and section 41 of the A-DA.

19. However, it does not necessarily follow that the Special Condition is unlawful or ineffective. An exemption may apply. Section 57 (headed "Special measures") provides:

    (1) A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute.

    (2) Subsection (1) applies only until equality of opportunity has been achieved.

20. The applicant has contended, albeit without support by way of reference to either analysis or authority, that section 57 is inapplicable. The applicant submits that:

> The removal of the above special condition from the Licence will not cause the Applicant to contravene the *Liquor Act* nor will it contravene any other Northern Territory Legislation. In fact, the removal of this special condition is required to be compliant with NT and Commonwealth Anti-Discrimination legislation, In this respect, we refer to clause 41 of the *Anti-Discrimination Act* (NT) (noting that the

exemption in section 53 [sic[3]] of that Act is unlikely to apply). This is a potential risk faced by both the Licensee and the Territory.[4]

21. Having regard to the text, purpose and context of section 57, the Commission considers that it can be applicable to conduct that may otherwise be prohibited by section 41 of the A-DA.[5]

The Special Condition was established as a special measure

22. In order to determine whether the Special Condition was originally a special measure for the purpose of section 57 of the A-DA, it is necessary to examine the purpose, nature and circumstances of the Special Condition's establishment.

23. Regrettably, the evidence provided to the Commission regarding the circumstances surrounding the introduction of the Special Condition was scant. Nevertheless, the following uncontroverted evidence was received, which the Commission accepts:

    a. The Ngurratjuta/Pmara Ntjarra Aboriginal Corporation (**the Corporation**) acquired the premises in 1992, and leased them to the applicant,[6] a fully owned subsidiary of the Corporation.[7] The applicant is the trustee of the Glen Helen Trust.

    b. Certainly by 24 May 1999,[8] and probably earlier,[9] the licence was varied by inserting the Special Condition.

    c. The applicant sub-let the premises to various private operators between 1992 and 2018, when the licence was transferred to the applicant, which then commenced to manage and operate the premises itself.

    d. The version of the licence dated 24 May 1999 included the Special Condition.

    e. According to the licence itself, the Special Condition was imposed "at the request of the representatives of the residents of the Ngurratjuta area and the

[3] Section 53 of the A-DA does not appear to be relevant. The Commission assumes that this is an error, and that the applicant means to refer to section 57. During the hearing, the applicant's submission on this issue were directed to section 57.

[4] Application for permanent variation to licence, 2 October 2018, Exhibit One, p. 7.

[5] In *Kennedy v Anti-Discrimination Commission* [2006] NTCA 9; (2006) 226 FLR 34, the Northern Territory Court of Appeal exempted a service provider from compliance with section 41 because it found that section 57 of the A-DA applied.

[6] Community Impact Statement, Exhibit One, p. 115.

[7] Letter from CEO, Ngurratjuta Pmara Ntjarra Aboriginal Corporation to Director-General of Licensing, 23 October 2018, Exhibit One, p. 37.

[8] Liquor licence 81202714 to Pinecot Pty Ltd, Exhibit One, p. 28.

[9] Evidence given at hearing by Mr Abbott, Mr Traeger and Dr Boffa.

communities listed in the licence… to combat alcohol related harm and damage to Aboriginal culture".[10]

f. According to the applicant, the Corporation "originally requested these conditions be imposed at a time when their communities were struggling to deal with liquor related health and social issues."[11]

g. According to Sarah Gallagher, the Chair of the Utju Health Service Board at Areyonga (a community in the Ngurratjuta area), advocacy for the imposition of the Special Condition was undertaken by senior people in Utju and other communities, including Daphne Puntjina, a senior member of the Utju Health Service Board.

24. The Commission finds that the licence was varied to include the Special Condition after the applicant acquired the premises, probably in the mid 1990s, at the request of members of communities in the Ngurratjuta area, with the support of the applicant and its proprietor, the Corporation.

25. In the course of the hearing, counsel for the applicant submitted that the Special Condition was not a special measure because it was not imposed for the benefit of Aboriginal people. This was a surprising submission, having regard to the applicant's own evidence set out at paragraph 23.f) above. The applicant did not adduce any evidence or elaborate any argument in support of this submission. The Commission rejects it.

26. All the evidence received by the Commission supports a finding that the Special Condition was, at least at the time of its inception, in the terms of section 57, "an arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute". The Commission finds that the Special Condition, when introduced, was a special measure in accordance with the A-DA.

27. As stated at paragraph 20 above, the applicant also contends that removal of the Special Condition is required to achieve compliance with "Commonwealth Anti-Discrimination legislation". The applicant did not adduce any evidence or elaborate any argument in support of this bare and bold submission, which the Commission considers would need to based on a challenge to the validity of section 57 of the A-DA by reason of the operation of section 8 of the *Racial Discrimination Act 1975* (Cth) (**RDA**). No such challenge was mounted. The Commission rejects this submission by the applicant.

28. Accordingly, the Commission finds that the Special Condition, at its inception, was compliant with both Northern Territory anti-discrimination laws and Commonwealth human rights laws.

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[10] See paragraph 12 above.

[11] Letter from CEO, Ngurratjuta Pmara Ntjarra Aboriginal Corporation to Director-General of Licensing, 23 October 2018, Exhibit One, p.37.

The Special Condition remains a special measure

29. The Commission must now determine whether, some twenty five years after its establishment, the Special Condition retains the character of a special measure. The applicant submits that it does not.

30. In support of that submission, the applicant relies heavily on evidence it provided that on or about 27 June 2018, the Corporation's Board of Directors met and resolved to apply to have the Special Condition removed (**the Board resolution**). An extract from the Minutes of that meeting records that:

> [The Glen Helen] licence still banned Ngurratjuta region residents from purchasing and consuming liquor onsite. The board and members identified this needed to be changed, it's currently discriminatory and means that employees from the Ngurratjuta region are not able to consume alcohol on site like their colleagues (who are from outside the Ngurratjuta region).[12]

31. The Commission finds that the Corporation's Board of Directors met in June 2018 and discussed this matter. Although the Minutes do not record whether the Board's view was unanimous, and although the Minutes do not record a formal resolution being passed, the Commission finds that a majority of the Board wished to have the Special Condition removed, thereby authorising the Corporation's CEO to make the application now before the Commission.

32. The applicant also relies on the evidence of Mr Abbott, who was an observer at the June 2018 meeting, and who, as stated at paragraph 14 above, supports the application.

33. Although the consent of the affected communities is not required by law for an arrangement to qualify as a special measure,[13] the Commission accepts that the presence or absence of consent to a measure is a relevant consideration in determining whether it qualifies as a special measure. The fact that Ngurratjuta members advocated for the insertion of the Special Condition in the 1990s supports the Commission's finding that the Special Condition, when it was introduced, fitted the criteria set out in section 57 of the A-DA. In particular, the consent of a community goes to the criterion that a disadvantaged group has a "special need": an obvious course to take when considering whether something is needed by a group of people is to ask its members if they need it.

34. As will be seen below, however, notwithstanding the Board resolution, the Commission is not satisfied that consent for the Special Condition has been withdrawn by the affected communities.

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[12] Exhibit One, p. 126.

[13] There is no requirement in section 57 of the A-DA that a special measure be consented to by the affected community. Similarly, in *Maloney v The Queen* [2013] HCA 28; (2013) 252 CLR 168; (2013) 87 ALJR 755; (2013) 298 ALR 308, the High Court found that it is not necessary that a special measure enacted by a State or Territory be consented to by the affected community.

35. Moreover, that is not the only or indeed the essential inquiry to be undertaken when applying 57 of the A-DA. In its terms, section 57 requires the decision-maker to inquire into:

    a. the purpose of the Special Condition (was it "designed to promote equality of opportunity"?);

    b. the circumstances of the affected people (are they "a group of people who are disadvantaged or have a special need because of an attribute"?); and

    c. the progress that has been made towards addressing the disadvantage or need (has "equality of opportunity been achieved"?).

36. The Commission is satisfied that the Special Condition was designed to promote equality of opportunity, namely, to paraphrase the words of Kiefel J in *Maloney v The Queen*,[14] the opportunity of Aboriginal persons in the Ngurratjuta area, in particular women and children, to a life free of violence, harm and social disorder brought about by alcohol abuse. (In *Maloney v The Queen*, the High Court upheld the validity of a measure that, like the Special Condition, restricted the opportunity of members of a remote Indigenous community with a history of alcohol-related harm, to purchase and consume liquor.)

37. The Commission is also satisfied that Aboriginal persons in the Ngurratjuta area are disadvantaged, and that equality of opportunity, as characterised above, has not been achieved. In reaching this conclusion, the Commission has had particular regard to the following uncontroverted evidence:

    a. NT Police evidence that the incidence of police-recorded domestic violence in the Southern Desert Division (which includes the Ngurratjuta area) is more than double the Northern Territory average, and has not significantly decreased over the last four years. The incidence of domestic violence in Hermannsburg, the largest community in the Ngurratjuta area, is some 50% higher than in the Southern Desert Division as a whole. Despite the fact that the supply, possession and consumption of alcohol is prohibited in communities in the Southern Desert Division, including Hermannsburg, the incidence of police-recorded alcohol related offending in the Southern Desert Division and in Hermannsburg is at a similar level to the Northern Territory average, and has not significantly decreased over the last four years.

    b. The evidence of Superintendent Jody Nobbs, who commands the Southern Desert Division of the NT Police, that there have been no major improvements in alcohol-related harm in the Ngurratjuta area since the introduction of the Special Condition.

    c. The findings of the 2017 Northern Territory Alcohol Policy and Legislation Review (the Riley Review) regarding the high levels of alcohol-related consumption and harm in the Northern Territory.

[14] Ibid, at [178].

d. The evidence of Dr John Boffa[15] on behalf of PAAC that there has been no significant improvement in the social determinants that led to the Special Condition being imposed in the first place. Dr Boffa gave expert evidence that there are differential impacts of alcohol-related harm on Aboriginal communities because of factors including intergenerational trauma, poverty, poor education and low employment, causing those groups to be disadvantaged, and warranting the taking of special measures.

38. The Commission finds that the Special Condition remains a special measure for the purpose of the A-DA, and accordingly remains compliant with both Northern Territory anti-discrimination laws and Commonwealth human rights laws.

Is it time to remove the Special Condition?

39. Having found that the Special Condition never has been and is not now unlawful, the Commission does not consider that it is compelled to allow the application as a matter of law. However, just because the Special Condition has been found to be a special measure, it does not necessarily follow that it should be retained. The Commission now turns to consider whether or not the application should be granted on its merits.

40. It is apparent that the Corporation, which owns the premises and, through a subsidiary, operates the licence, considers that it should be entitled to have a Special Condition that was inserted on its own initiative, removed on its own initiative. The Corporation complains that the Special Condition is perceived both by its members and by visitors to the premises as an example of institutionalised racism and paternalism, and that this is harmful. There is force in these submissions.

41. However, there are also some powerful countervailing matters that the Commission is obliged to consider. Firstly, as stated at paragraph 33 above, a special measure does not require the consent of the affected communities. Secondly, as will be explained later in these reasons, the Commission is in any case not satisfied that consent for the Special Condition has been withdrawn by the affected communities. Thirdly, pursuant to section 6B of the 1978 Act, the applicant has an onus to satisfy the Commission that the application meets the public interest and community impact test set out in section 6(2) of the 1978 Act. Fourthly, section 32A(7) of the 1978 Act provides that after considering the application, the Commission must have regard to the objects of the 1978 Act in deciding whether to approve or refuse the application. An important focus of the primary object of the Act is to minimise the harm associated with the consumption of liquor.

Who wants the removal of the Special Condition?

42. Eligibility for membership of the Corporation is prescribed by the Corporation's Rule Book, which complies with the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), under which the Corporation is registered. A member of the Corporation is an Aboriginal or Torres Strait Islander person at least 18 years of age who is an

[15] This witness is Chief Medical Officer Public Health, Central Australian Aboriginal Congress, and Associate Professor (Adjunct), National Drug Research Institute, Curtin University. He has published many scholarly papers on alcohol policy. His expertise in the field of public health and alcohol policy was accepted by the applicant.

eligible mining royalty recipient by virtue of being a resident or traditional owner of an area affected by the Mereenie and Palm Valley gas fields, and who has been elected by a Community meeting as a delegate of Papunya, Haasts Bluff, Ntaria (also known as Hermannsburg), Jay Creek, Areyonga or Urrampinya, each of which is entitled to elect six community members and one outstation member to the Corporation.

43. The Rule Book provides that the Corporation members may elect up to twelve Directors at every second Annual General Meeting.

44. According to the public Register of the Office of the Registrar of Indigenous Corporations (**ORIC**), on 11 September 2019 ORIC served a Compliance Notice on the Corporation identifying various suspected irregularities in the Corporation's operations, including non-compliance with the maintenance of the correct number of members representing each community/outstation in accordance with the Corporation's Rule Book.[16] The Commission also notes that the number of Directors of the Corporation in 2018 exceeded the number permitted by the Rule Book.

45. In his evidence given at the hearing of the application, Mr Miller, the Corporation's CEO, conceded that the Corporation's 2018 Directors may not have all been properly appointed. That was an appropriate concession.

46. These matters cause the Commission to reduce the weight it gives to the significance of the Board resolution.

47. Ms Sarah Gallagher, the Chair of the Utju Health Service Board lodged an objection on behalf of the Board to the application, expressing opposition to the removal of the Special Condition. The Commission infers that the Utju Board comprises Aboriginal people who reside in the Ngurratjuta area. Ms Gallagher stated "Nobody from Ngurratjuta or Glen Helen has spoken to the Utju Health Service Board about removing the restrictions. We do not know why they want to do this and we do not agree that they should be allowed to do it."[17]

48. The applicant challenged the standing of the Utju Health Service as an objector. Since receiving Ms Gallagher's letter dated 19 August 2019, the Commission has received no further communication from or on behalf of the Utju Health Board, which did not appear at the hearing of the application, or respond to the applicant's submissions regarding its standing.

49. On the limited information made available to it, the Commission considers that the Utju Health Service is a community organisation, and accordingly has standing as an objector pursuant to section 47F(3)(e) of the 1978 Act. As the objector did not attend the hearing, only limited weight is to be given to its views. However, when it received the referral of the application from the Director, the Commission was concerned by the issue raised by the Utju Health Service regarding a lack of consultation.

[16] It is noted that on 12 March 2020, ORIC notified the Corporation that it had met all the requirements of the Compliance Notice dated 11 September 2019.

[17] Letter to Director-General of Licensing, 9 August 2019, Exhibit One, p. 157.

50. That concern was heightened by matters raised by two other objectors, PAAC and Mr Paul Traeger, a Finke River Mission field-worker for the Pintupi-Luritja language area, which the Commission accepts is within the Ngurratjuta area.

51. In his objection received by Licensing NT on 14 August 2019, Mr Traeger stated:

> I have spoken to several community leaders at Haast's Bluff and Papunya and they had heard nothing about the planned changes. All those I spoke to agreed that if the loosening of these longstanding alcohol restrictions went ahead it would cause problems in their communities. I believe that even if such a step were the right way to go, the opinions of the locals should first of all have been canvassed. As it stands, these folk have limited or no real access to the media, especially when statements are couched in legal language.[18]

52. The applicant challenged the standing of this objector. Prior to the hearing, pending its determination of that issue, the Commission granted leave to the Finke River Mission to appear at the hearing and adduce evidence. However, at the hearing, following a significant amendment by the applicant to its application, Mr Traeger withdrew his objection, and accordingly it is unnecessary for the Commission to make a ruling regarding his standing as an objector. Nevertheless, prior to the hearing, the Commission did have regard to the matters placed before it by Mr Trager as set out above.

53. In its objection lodged on 15 August 2019, PAAC questioned if consultation had been undertaken before making the application. PAAC stated:

> We are aware that at least three of the listed Aboriginal communities in the affected region may have not been properly consulted about the proposed changes. We appreciate that Ngurratjuta has directors from most of these communities. This does not, however, negate the need for thorough consultation in each of the affected communities…"[19]

54. The Commission also noted with concern that public advertisement of the application, as specified by the Director pursuant to section 32A(2) of the 1978 Act, had been confined to publication of two notices in *The Centralian Advocate*, couched in complex English, and a sign erected in situ at Glen Helen. The Commission considers that this was inappropriate and inadequate to effectively notify residents of remote communities in the Ngurratjuta area, where for many people English is not their first language.

55. The Notices included the following statement:

> This application is being made by the Board of the Ngurratjuta/Pmara Ntjarra Aboriginal Corporation, (who own Glen Helen Lodge Nominees Pty Ltd) and possess the authority to represent all of the Aboriginal Communities stated above.[20]

[18] Exhibit One, p. 172.

[19] Exhibit One, p. 179.

[20] Exhibit One, p. 138.

Having considered the Corporation's Rule Book, the Commission doubts whether the Corporation is in fact authorised to solely represent all of the Aboriginal communities in the Ngurratjuta area, as the Corporation seemed to assert.

56. In accordance with section 32A(5) of the 1978 Act, the Director also sought the views of the McDonnell Regional Council, which suggested that the Director consult with the Central Land Council. The Director subsequently informed the Commission that despite three approaches by the Director's office, the Central Land Council had been non-responsive.

Should there be further community consultation?

57. Back when the Special Condition was inserted in the licence, section 32(1)(d) of the *Liquor Act* required that regard be had to "the needs and wishes of the community" when determining the conditions of a liquor licence. On 5 May 2004, that provision was removed from the Act, and replaced by a scheme incorporating the application of public interest criteria similar to the public interest and community impact test currently applicable to the assessment this application. Since 5 May 2004, the Act has not expressly provided that community wishes be taken into account in determining an application to grant or vary the conditions of a liquor licence.

58. Nevertheless, the Commission considers that community wishes remain relevant in determining such applications, for the following reasons. Firstly, section 6(3) of the 1978 Act requires the decision maker to consider the potential impact on the community in the area that would be affected by the decision. If a decision is made that is at odds with community wishes, the impact on the community will likely be affected. Secondly, section 32A(2) empowers the Director to require the applicant to publish notice of the application, if the Director considers it to be in the public interest to do so. An obvious purpose of that provision is to provide members of the affected community an opportunity to voice their wishes regarding the application, whether in support or opposition. Thirdly, section 32A(5) requires the Director to inform the Chief Executive Officer of the local shire or regional council. The council, an elected body, represents the interests of its constituents. Fourthly, section 47F establishes a scheme for certain members of the affected community to object to an application.

59. Having regard to this, and in the light of the concerns raised by the matters set out at paragraphs 46 to 55 above, on 26 February 2020 the presiding member of the Commission for these proceedings wrote to the applicant and the objectors, stating:

> In my preliminary view, on the material currently available, the applicant may have difficulty in discharging its onus under section 6B because there is only very limited information in the brief regarding the views of residents of communities that might be affected by the grant of the application. This issue has been raised in the objections that have been lodged.

60. On 17 March 2020 the presiding member conducted a Directions Hearing with a view to addressing this issue. The Directions Hearing was attended by representatives of the applicant, the Director, NT Police and PAAC. Prior to the Directions Hearing, in its written reply to the objectors, the applicant had stated "it is the Commission's decision

to make any further inquiries they deem fit and we will support any further inquiries and provide any further information to the Director General and Commission sees fit to request".[21] Nevertheless, in response to various potential measures suggested at the Directions Hearing by the presiding member, the applicant submitted as follows:

a. It would be unfair and unreasonable to consult with the Central Land Council to ascertain its views regarding the application.

b. It would be inappropriate, impractical and potentially costly to seek assistance from the Central Land Council to consult with affected communities. It would also be outside the Council's statutory role.

c. It would be unfair and unreasonable to make a further approach to the MacDonnell Regional Council

d. The Commission should not consult with communities in the Ngurratjuta area, because their members do not reside in the neighbourhood of the premises, and only residents or person with an interest in property in the neighbourhood have standing to make an objection under section 47F of the 1978 Act.

e. Community consultation is unwarranted because "the applicant here is an Aboriginal Corporation that represents all of the traditional owners in the relevant areas… it's overkill to go into all of these communities and do consultations, this will take months, years etc. It could cost hundreds of thousands of dollars potentially."

f. If the Commission does decide to undertake community consultation, the applicant's preferred approach would be to conduct a single community meeting. To that end the applicant offers to assist the Commission by using the Corporation's Directors to facilitate "a good community meeting" at Haasts Bluff, and proposes that the Corporation's officers distribute notice of the meeting to the community and address the meeting.

g. No further notification of the application should be made to affected communities, because section 32A(2) confers that duty on the Director, and not the Commission.

h. The objectors should not be permitted to attend any consultation meetings because "the board are concerned about some of the racist undertones in these objections".

i. The applicant wishes the matter to be dealt with as quickly as possible.

61. These submissions left the Commission in no doubt that the applicant was rather vigorously opposed to any community consultation being conducted. This did not allay the concerns of the Commission regarding the lack of consultation. On the contrary.

62. Nevertheless, in deference to the applicant's clearly and strongly expressed views, as well as having regard to the biosecurity area restrictions that came into force shortly

[21] Transcript of proceedings, Directions Hearing 17 March 2020, Exhibit One, p. 249.

following the Directions Hearing which effectively prevented travel by the Commission to the Ngurratjuta area for the time being, on 20 May 2020 the Commission notified the parties that:

a. The Commission had determined not to conduct consultations by visiting any remote communities for the purpose of determining the application.

b. The application would be heard by way of a public hearing at Alice Springs.

c. The Commission would not make further attempts to consult with the Central Land Council or the McDonnell Regional Council before the hearing.

d. On request by a party that an interpreter be provided to assist a witness, the Commission would arrange for this to occur.

e. The Commission would send notices of the hearing in plain English to communities in the Ngurratjuta area including an invitation to community members to contact the applicant if they wished to give evidence in support of the application, to contact PAAC if they wished to give evidence in opposition to the application, or to contact the Commission if they wished to attend the hearing by online facilities.

f. The Commission would request the notices to be broadcast in English, Western Arrernte and Luritja by CAAMA radio.

g. The Commission would make available telephone and on-line facilities to enable community members to give evidence or attend the hearing as an observer from their location in the Ngurratjuta area.

Consideration of community views

63. In the event, the Commission was unable to determine whether any of the notices it sent were in fact displayed at the affected communities, or if the notice was in fact broadcast on the radio. Despite having been placed on notice by the Commission of the matters referred to at paragraph 59 above, the only witnesses called by the applicant were Mr Cameron Miller (the licence nominee and CEO of the Corporation) and Mr Abbott, who is an employee of the Corporation, a member of the Corporation, and, the Commission infers, a son of a Director of the Board of the Corporation.

64. Mr Abbott impressed the Commission as an honest witness with a genuinely held point of view, but by virtue of his close connections to the applicant, the Commission regards him as a representative of the applicant's corporate view. The Commission is unable to assess the extent to which that view is also representative of the affected communities.

65. Mr Abbott gave evidence that alcohol problems have not been raised at the Community Safety meetings at Papunya he has attended. By contrast, Superintendent Nobbs gave evidence that he regularly attends Community Safety meetings at Papunya, Hermannsburg and other communities, and that concern about alcohol and alcohol-related harm is a regular issue that is raised, especially by older members of the

community. The Commission accepts the evidence of Superintendent Nobbs on this issue.

66. Having regard to the evidence adduced by the applicant and the objectors, the inadequate notification given to members of the affected communities, and the applicant's resistance to further community consultation, the Commission is not satisfied that the affected communities wish the removal of the Special Condition.

Consideration of the public interest and community impact test

67. This in turn bears on the Commission's assessment of the application, including its consideration of whether the application meets the public interest and community impact test. Had the affected communities been more fully consulted, the Commission would have been in a better position to apply the public interest and community impact test, because it would have been better informed of community views on the impact on the community of granting the application.

68. In their objection, NT Police stated:

> Any increase in access and subsequent consumption of liquor in the West MacDonnell Region residents (sic) is anticipated to contribute to a range of serious harms, as follows:
>
> - Increases in an array of criminal offences including homicides, assaults, sexual assaults, domestic violence and public disorder that places unacceptable burdens on the NTPF and the communities in the area
>
> - Increase in harm upon third parties as a result of others' excessive alcohol consumption. These include many victims of crime, victims of domestic violence and children whose lives are altered, often before birth by their dependence of adults who drink to excess
>
> - Increase in public nuisance and amenity impacts, including litter, glass, noise, damage to property and the cost associated with rectifying these nuisances; and
>
> - Adverse impacts on tourism and economic trade associated with the region.[22]

69. At the hearing, Superintendent Nobbs gave evidence that police were particularly concerned that if the Special Condition were removed there was a risk that Aboriginal persons would:

- consume liquor to excess at campsites in the vicinity of the premises, away from the areas where the applicant's staff could monitor and supervise them;

[22] Exhibit One, p. 163.

- purchase liquor at the premises and then unlawfully take it away in vehicles for the purpose of illegal secondary sale; and

- drive while drunk from the premises on unpatrolled roads.

70. On the evidence it has received, the Commission makes the following findings:

    a. The Commission is satisfied that communities in the Ngurratuta area are communities in the area that would be affected by the outcome of the decision to grant or refuse the application.

    b. The Commission is satisfied that historically, there have been high levels of alcohol-related harm amongst Aboriginal people in the Ngurratjuta area.

    c. The Commission is not satisfied that these levels of alcohol-related harm have significantly declined.

    d. The Commission is not satisfied that the variation originally sought would not lead to an increase in harm.

    e. The Commission is not satisfied that the variation would not have a harmful impact on communities in the Ngurratjuta area, including harm resulting from a loss of community confidence in the willingness of liquor licensing authorities to respect community wishes.

71. The Commission is not satisfied that the approval of the application referred to it by the Director meets the public interest and community impact test, having particular regard to the objectives set out at section 6(2)(a), (b), (c) and (d), and to the matters set out at section 6(3)(a)(i), (ii), (iii) and (v) of the 1978 Act.

The applicant amends its application

72. On 1 June 2020, just over a week before the hearing, the applicant sought and was granted leave to amend its application originally made over a year and a half previously. The amended application, which the Commission is satisfied was communicated to all of the objectors prior to the commencement of the hearing, was in the following terms:[23]

    The Licensee requests a new special condition as follows: Liquor may only be served by the Licensee (in accordance with other conditions in this Licence):

    (a) At any time to bona fide lodgers at the premises or invited guests of the lodger (in the presence of the lodger) for consumption on the premises;

    (b) To any person when purchased with a meal;

    (c) At any time to an employee of the Licensee for purposes related to employment of such employee

[23] Exhibit Three.

73. At the commencement of the hearing, the three objectors present indicated that they each withdrew their objection to varying the conditions of the licence so as to permit employees of the licensee to be served liquor for purposes related to employment of the employee (**the proposed employee condition**). Two of the objectors, NT Police and PAAC, maintained their objection to the remainder of the amended application. Mr Traeger withdrew his objection completely. The remaining objector, Utju Health Service, did not attend the hearing, and did not communicate its views regarding the amended application to the Commission.

74. During the hearing, Mr Wood brought to the attention of the Commission and the parties a recently enacted provision, section 43(2) of the 2019 Act, which relevantly provides:

> No licence is required for the sale, supply or service of…
>
> (d) Liquor served by an employer to their employees and families and guests.

75. In the view of the Commission, a condition of a liquor licence can only regulate conduct that requires a liquor licence to authorise it. Accordingly, the Commission considers that the Special Condition is inoperative to the extent that it is inconsistent with section 43(2)(d) of the 2019 Act. It follows that the proposed employee condition is unnecessary. Using its powers under section 33 of the 1978 Act to vary the conditions of a licence on its own initiative, the Commission has determined to insert a notation into the licence to this effect. The Commission notes that this does not alter the substance of the Special Condition.[24]

76. As the proposed employee condition is unnecessary, although it is not the subject of any active objection, in the exercise of its discretion, the Commission declines to grant the application to vary the licence by inserting the proposed employee condition. (The Commission observes in passing that section 43(2)(d) of the 2019 Act is in any case broader and more permissive than the proposed employee condition.)

77. The remaining aspects of the amended application remain contentious. In effect, they would align the conditions of the licence more closely with the conditions of another liquor licence over similar premises, the Tilmouth Well Roadhouse, which is owned by another wholly owned subsidiary of the Corporation, Tilmouth Roadhouse Pty Ltd. Mr Cameron Miller, the nominee of the Glen Helen licence, is also a nominee of the Tilmouth Well licence.

78. Like the Glen Helen Outback Lodge, the Tilmouth Well Roadhouse, about 200 km north-west of Alice Springs, offers lodgings and refreshment to tourists, travellers and locals. Both facilities are located in a remote area on a road linking Alice Springs with Aboriginal communities. The closest communities to Tilmouth Well are Laramba, Yuelamu, Yuendumu and Papunya. Unlike the Glen Helen Lodge, which was purchased by the Corporation in 1992, Tilmouth Well was not purchased until 2016. This may be one reason why, unlike the Glen Helen licence, the Tilmouth Well licence does not have a Special Condition. Mr Wood informed the Commission that since the

[24] See s33(6) of the Liquor *Act 1978*.

Corporation took over the operation of Tilmouth Well some three and a half years ago, there have been no reports of non-compliance with licence conditions. The Commission has received no evidence of any alcohol-related harm associated with the operation of the Tilmouth Well licence.

79. At Tilmouth Well, liquor can only be sold ancillary to a substantial meal, or to bona fide lodgers. Notably, liquor may not be sold to guests of bona fide lodgers unless pursuant to a special licence granted in respect of a specific occasion, function or event. A further condition requires liquor to be served in open containers only. At the conclusion of the hearing, after both evidence and final submissions had been received, the applicant sought to further amend its application by including a condition that liquor be served in open containers only, and by submitting to a review of the amended conditions after 12 months.

80. By this time, however, the Commission had already retired briefly to confer, resumed the hearing and pronounced its decision to refuse the application. The second application by the applicant for leave to further amend its application is refused, because it was too late.

81. Although the Commission has been critical of the applicant's conduct of these proceedings, the amendments proposed by the applicant, despite being belated (and in the second instance, fatally belated), should be commended, as they indicate a genuine intent by the applicant to implement a non-racial, responsible liquor trading practice. The Commission acknowledges that since its incorporation in 1985, the Corporation has established an impressive portfolio of investments (including two licenced premises), accumulated substantial assets, and provided significant employment and training for members of the disadvantaged communities in the Ngurratjuta area.

82. However, even if the Commission had granted leave for the second amended application to be considered, and even if it had been satisfied that approval of the second amended application met the public interest and community impact test (a finely balanced issue which it is not necessary for the Commission to determine), the Commission would nevertheless have in the exercise of its discretion have refused to grant the application. This is because of the Commission's continuing concern that there is a real possibility that to do so would disrespect the strongly held views of a significant portion of the Ngurratjuta community, in circumstances where its members, despite the Commission's best endeavours, have not been given a reasonable opportunity to express their views to the Commission.[25]

83. If the applicant makes a further application for removal of the Special Condition, along with appropriate modifications to the licence conditions, supported by cogent evidence that its proposals enjoy substantial support in the affected communities, the Commission would give careful and due consideration to such an application.

[25] See the Commission's findings at paragraph 66 above.

The objects of the 1978 Act

84. Finally, section 32A(7) provides that after considering the application, the Commission must have regard to the objects of the 1978 Act in deciding whether to approve or refuse the application.

85. Throughout its consideration of this application, the Commission has steadily born the objects in section 3 of the Act in mind. The Commission is satisfied that the refusal of the application is in accordance with the primary object of the 1978 Act.

Notice of rights

86. Section 120ZA of the 1978 Act provides that a reviewable decision is a Commission decision that is specified in the Schedule to the 1978 Act. A decision to refuse to vary a licence pursuant to section 32A of the 1978 Act and a decision to vary a licence pursuant to section 33 of the 1978 Act are specified in the Schedule and are reviewable decisions.

87. 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.

88. For the purpose of this decision, and in accordance with section 120ZB(1)(b) and (c) of the 1978 Act, the affected persons are the applicant, NT Police, the Peoples Alcohol Action Coalition, Mr Paul Traeger and the Utju Aboriginal Health Board.

Russell Goldflam

MEMBER, NORTHERN TERRITORY LIQUOR COMMISSION
22 June 2020

On behalf of Commissioners Goldflam, Reynolds and McFarland