

Director-General of Licensing

Decision Notice – Review of Delegate’s Decision

MATTER:	Review of Delegate Decision – Refusal to approve temporary variation of licence conditions
PREMISES:	Nguiu Club Kerinaiaua Hwy, Bathurst Island NT 0822
LICENSEE:	Nguiu Club Aboriginal Corporation
APPLICANT FOR REVIEW:	Acting Nominee/Manager, Mr Phil Du Prel
LEGISLATION:	<i>Liquor Act, Northern Territory National Emergency Response Act 2007 (Cth), Stronger Futures in the Northern Territory Act 2012 (Cth) and Part 3 of the Licensing (Director-General) Act</i>
DECISION OF:	Director-General of Licensing
DATE OF DECISION:	8 March 2017

BACKGROUND

1. The Nguiu Club Aboriginal Corporation (Nguiu Club) operates a social club at the Wurrumiyanga Community on Bathurst Island. The Club is an important social and cultural hub for the residents of the community. The club has approximately 500 members and provides employment for 15 permanent and casual staff. The Nguiu Club has held a liquor licence for the purposes of its social activities since 1990.
2. In October 2007, following the enactment of the Commonwealth’s *Northern Territory National Emergency Response Act* (the NTNER Act), the then Commonwealth Minister for Families Community Services and Indigenous Affairs imposed various restrictions on the liquor licence held by the Nguiu Club by variation of the licence conditions attached. Of significance in the context of this review, the Commonwealth Minister limited the trading hours of the Nguiu Club, with no sales of liquor permitted on Mondays or Sundays. In addition, the restrictions limited the type of liquor that could be sold and the volume of liquor that could be sold to individuals per session at the Club. The Federal Minister also removed the licence condition authorising the sale of take away liquor by the Nguiu Club.
3. Those restrictions remained in force following the enactment of the Commonwealth’s *Stronger Futures in the Northern Territory Act* (the SFNT Act) in 2012.
4. By application dated 4 February 2017 Mr Mark Rhodes, Nominee/Manager for the Nguiu Club liquor licence, applied to Licensing NT for a temporary variation to the liquor licence conditions to allow for the sale of liquor for consumption on the Nguiu Club premises from 5.00 pm to 8.00 pm on Sunday 19 March 2017. The application also sought a variation of the supply restriction from six cans of mid or light strength beer per person to eight cans of mid or light strength beer per person for the same period. The purpose of the application was to

allow the Nguiu Club to sell alcohol to members of the Club and to visitors to Bathurst Island immediately following the 2017 Tiwi Football League Grand Final. The Nguiu Club has previously sought and obtained approval for similar temporary licence condition variations in conjunction with the annual Football Grand Final.

5. By decision dated 22 February 2017, a delegate of the Director-General of Licensing (the Director-General) refused to approve the temporary variations sought by the Nguiu Club. In refusing the application the delegate noted that similar variations had been approved in the past to coincide with football grand finals. However, the delegate determined that as the restriction on Sunday trading was imposed by the Commonwealth Minister under Commonwealth legislation he was not authorised by section 32A of the NT *Liquor Act* to approve the temporary variations sought by the Nguiu Club. In his decision the delegate noted that it was open to the Nguiu Club to apply to the relevant Commonwealth Minister for approval of the temporary variations to the liquor licence conditions.
6. The delegate noted that temporary variations to the liquor licence held by the Nguiu Club had been approved in the past for special events, including variations to liquor licence conditions imposed by the Commonwealth Minister pursuant to the powers contained in the NTNER Act and the SFNT Act. He determined, however, that the previous variations were beyond the power of Director-General as there is no provision in the *Liquor Act* to vary liquor licence conditions that have been determined by the Commonwealth Minister under Commonwealth legislation.

CURRENT SITUATION

7. By letter dated 3 March 2017 Mr Phil Du Prel, acting Nominee/Manager for the Nguiu Club, sought a review of the delegate's decision to refuse to approve the temporary variations to the liquor licence conditions. The application for review enclosed correspondence from the Nguiu Club to the Honourable Nigel Scullion, Commonwealth Minister for Indigenous Affairs and responses received from the Department of the Prime Minister and Cabinet on behalf of the Minister.
8. Mr Du Prel asked specifically that, in conducting the review of the delegate's decision, the Director-General consider section 12(2) and 12(7) of the SFNT Act. Mr Du Prel also noted that an early review would be appreciated as the Tiwi League Football Grand Final was one of the highlights of the year on the Tiwi Islands and that over 1,000 mainland visitors were expected to attend the Grand Final match.

CONSIDERATION OF THE APPLICATION

9. Under the NTNER Act, Bathurst Island was declared a prescribed area for the purposes of that Act. Section 13 of the NTNER Act dealt with the modification of liquor licences within prescribed areas and subsection 13(4) provided the Commonwealth Minister responsible for indigenous affairs with the power to modify the conditions of a liquor licence as follows:
 - (4) *The Commonwealth Minister may, by notice in writing given to the licensee and the [Licensing] Commission, determine that the licence does not, from a day specified in the notice and for a period (if any) specified in the notice, authorise the sale of liquor, or the sale and consumption of liquor on, at, or away from, those premises.*
10. Subsection 13(5) of the NTNER Act provided that, following the issue of a notice by the Commonwealth Minister, a liquor licence is varied according to the terms of the notice:
 - (5) *The Commonwealth Minister may, by notice in writing given to the licensee and the [Licensing] Commission, determine that the conditions of the licence are varied in a way specified in the notice.*

11. That section clearly authorised the Commonwealth Minister to issue a notice to a liquor licensee within a prescribed area varying the licence conditions, including variations restricting trading hours, restricting the volume of sales to individuals, mandating the service of food and the removal of the take away liquor sale component of the licences.
12. On 19 October 2007, the Nguui Club was advised that the Commonwealth Minister had determined, in accordance with section 13(5) of the NTNER Act, to vary the licence conditions of the liquor licence for the Nguui Club. The variations imposed by the Minister were:
 - That only mid strength and light alcohol beer can be sold, with an alcohol content of 3.99% or less;
 - Beer to be sold in cans only, not kegs;
 - Maximum of 6 beers per session, and only one purchase at a time;
 - The following trading hours will apply:
Tuesday to Wednesday 4.30 pm – 7.30 pm
Friday to Saturday 4.30 pm – 7.30 pm;
 - These trading hours will be conditional upon the licensed premises making substantial food available for patron. This is defined as hot food cooked on site; and
 - No takeaway alcohol sales will be allowed.
13. Relevant to the application under consideration the licence conditions were varied to prohibit the sale of alcohol on Sundays. The Tiwi League Football Grand Final is traditionally played on a Sunday.
14. As highlighted in the delegate's decision, an issue arises as to who is the responsible body or person to consider a subsequent application for a variation of licence conditions imposed by the Commonwealth Minister, for example in this case, an application to allow the sale of liquor on a Sunday. Put another way, does the NTNER Act and its successor the SFNT Act require such an application to be lodged with the Commonwealth Minister or with the Director-General?
15. A secondary issue arises if the responsible person is the Director-General as to whether the Director-General is required to consult with or advise the Commonwealth Minister prior to approving a variation of liquor licence conditions where the relevant conditions were imposed or varied by the Commonwealth Minister in the exercise of his/her powers under the NTNER Act.
16. Section 9 of the NTNER Act provided that the NT *Liquor Act*, as modified in accordance with Part 2 of the NTNER Act, remained in effect. Section 10 provided that the NT *Liquor Act*, as modified by the NTNER Act, has effect as a law of the Northern Territory. The effect of those sections is that the *Liquor Act* remains as an effective enactment of the Northern Territory Parliament, and not the Commonwealth Parliament, subject to the modifications imported by the NTNER Act or the SFNT Act.
17. Clearly, the Commonwealth Minister had the power to vary the conditions of a liquor licence within a prescribed area under section 13 of the former NTNER Act. The Commonwealth Minister also had the authority to subsequently revoke, amend or vary a condition of licence that was the subject of a preceding notice issued by the Commonwealth Minister. That is, it is at least arguably open to the Nguui Club to apply to the Commonwealth Minister for approval of a temporary variation to permit the sale of alcohol on Sunday 19 March 2017 in conjunction with the Tiwi Island Football League Grand Final.
18. However, the fact that the Commonwealth Minister may exercise powers and functions under the NT *Liquor Act* does not determine the issue. The *Liquor Act* remains in force, subject only to the modifications imported by the NTNER Act. The Commonwealth's SFNT

Act, which was enacted in June 2012, maintains key components of the NTER Act, including the provisions dealing with the modifications to the NT *Liquor Act* and the powers vested in the Commonwealth Minister to vary liquor licence conditions for premises located in prescribed areas.

19. Division 3 of Part 2 of the SFNT Act deals with the modification of NT liquor licences and NT liquor permits in force in alcohol protected areas. Section 6 of the SFNT Act provides a guide to Part 2 and states, amongst other matters, that Division 3 of the SFNT Act modifies NT liquor licences and NT liquor permits that are in force in alcohol protected areas. Those modifications affect what the licence or permit authorises. The Division also allows the Minister to vary the conditions of the licence or permit. In effect, the SFNT Act provides for the continuation of the provisions of its predecessor, the NTNER Act, so far as modification of the conditions of liquor licences by the Commonwealth Minister is concerned.
20. Relevant to this review section 12(2) of the SFNT Act deals with the modification of liquor licences by the Commonwealth Minister and provides:

12(2) The [liquor] licence remains in force according to its terms, subject to the NT Liquor Act and this section.
21. In addition, section 12(7) of the SFNT Act provides:

12(7) If a determination is made under subsection (4) or (5)¹, then, while this Act is in effect, the NT Liquor Act and the licence apply accordingly. (Emphasis added).
22. Section 12(7) of the SFNT Act provides clearly that where a liquor licence in a prescribed area has been varied by the Commonwealth Minister, as is the case with the Nguui Club liquor licence, the NT *Liquor Act* and the liquor licence itself remain in force.
23. There is no provision in the NTNER Act or the SFNT Act that I am aware of that in some way limits or derogates the powers and functions of the Director-General in respect of the ongoing operation of the *Liquor Act*. Nor does the NTER Act provide any statement or provision to the effect that a power granted to the Commonwealth Minister under the NTNER Act or the SFNT Act is to the exclusion of the concurrent powers held by the Director-General to vary licence liquor conditions.
24. Section 32A of the *Liquor Act* provides that a licensee may apply to the Director-General for a variation of the conditions of a liquor licence. As noted above, the *Liquor Act* clearly remains operative as an enactment of the NT Parliament and there is nothing in the NTNER Act that diminishes the Director-General's powers under the *Liquor Act*, including the power to consider an application for the temporary variation of licence conditions, regardless of whether the licensed premises are on prescribed land and regardless of whether the Commonwealth Minister has previously varied the conditions.
25. For the reasons set out above in respect of the operation of the SFNT Act, it is open to a licensee whose licence conditions have been varied by the Commonwealth Minister to apply to the Director-General for a variation of licence conditions, including a condition imposed or varied by the Commonwealth Minister. It is noted that the Commonwealth Department of the Prime Minister and Cabinet, which is the agency responsible for the operation of SFNT Act, supports that view.
26. I do however make the following observation in respect of the practicalities of this situation. The Commonwealth Minister retains the power to vary the licence conditions of liquor licences where the licensed premises are situated in prescribed areas, and will continue to do so for so long as the SFNT Act remains in force. It would obviously be a futile exercise for the Director-General to approve a variation relaxing the conditions of a licence in a prescribed area only to have the Commonwealth Minister reinstate the previous conditions.

¹ Subsection 12(4) and 12(5) of the SFNT Act deal with the Commonwealth Minister's powers to suspend or vary the conditions of NT liquor licences operating in prescribed areas,

27. In this case such an issue does not arise as the Department of the Prime Minister and Cabinet, in its correspondence to the Nguiu Club, has made it clear that notwithstanding that the Commonwealth Minister exercised his statutory power to vary the licence conditions of the Nguiu Club liquor licence conditions, it is open to the Director-General to exercise her powers under the NT *Liquor Act* to further vary the same licence conditions.
28. On the basis of the matters set out above it is apparent that the delegate's determination that he did not have authority to vary liquor licence conditions imposed by the Commonwealth Minister was incorrect. On review, it is incumbent on the Director-General to correct that error, as provided for under the relevant provisions of the *Licensing (Director-General) Act*.

STAKEHOLDER COMMENTS

29. As is the usual practice for applications for temporary variations to liquor licence conditions, Licensing NT contacted a number of stakeholder agencies to ascertain their views in respect of the application lodged by the Nguiu Club.

Department of Health:

30. Via an email dated 6 February Mr Peter Boyle, Compliance Officer with the Alcohol & Other Drugs Directorate, Department of Health, advised that the Department had no adverse comments in respect of the application.

NT Police:

31. On 20 February Ms Sarah Tam-Perez advised, on behalf of NT Police, that NT Police supported the variation of licence conditions to allow the sale of alcohol on 19 March 2017 from 5.00 pm to 8.00 pm only. Ms Tam-Perez advised further that NT Police do not support the increase of sales permitted to individuals to eight cans of beer per person. NT Police submit that the usual volume restriction of six cans of beer per person per session was sufficient for the three hour period proposed by the application for variation of licence conditions.

Department of the Prime Minister and Cabinet:

32. As noted above, the Department of the Prime Minister and Cabinet has recommended to the Nguiu Club that the Director-General is the appropriate person to consider the application for variation of licence conditions.
33. As noted in the delegate's decision, the Nguiu Club has been granted temporary variations to its liquor licence conditions for the purpose of activities associated with the Tiwi League Football Grand Final in previous years. Variations to licence conditions were in fact approved last year for the Grand Final held on Sunday 20 March 2016. The variations approved in 2016 included the authorisation of the sale of canned light and mid strength beer on the Sunday from 2.30 pm until 7.30 pm, a period of 5 hours. The number of cans of beer able to be purchased by patrons on that day was increased from 6 to 7 cans per person.
34. In addition, the Nguiu Club premises were permitted to open from 11.00 am to 2.30 pm, without the sale of alcohol, so as to allow patrons to purchase food, soft drinks and water and also to allow the pre-purchase of "beer tickets" which were able to be used once the bar opened for trade at 2.30 pm.
35. A number of Licensing Inspectors attended the 2016 Football Grand Final for the purpose of monitoring alcohol sales and consumption and reported that throughout the day, spectators were well behaved and no incidences of intoxicated patrons were observed. The Licensing Inspectors reported that the Nguiu Club was well managed on the day and that the Nominees/Managers ensured compliance with the conditions of the licence, including the temporary variations. It was also observed that patrons were provided with adequate food water and soft drinks and that adequate security was in place on the day.

36. The report prepared by the Licensing Inspectors who attended the 2016 Grand Final is of relevance to the 2017 application in demonstrating that the licensee and its staff acted in an appropriate and responsible manner in the sale and service of liquor. Of significance, the Licensing Inspectors noted that patrons at the 2016 Grand Final were respectful of one another and there were no signs of anti-social behaviour, humbugging or secondary supply of alcohol. The report presented by the Licensing Inspectors in 2016 following their visit to the Nguiu Club supports the view that the licensee treats its obligations seriously and that similar variations should be approved this year.
37. The stakeholder comments, including the report from the Licensing Inspectors on the conduct of the Nguiu Club during the 2016 Grand Final, are significantly persuasive in respect of the 2017 application for similar variations. There is no evidence before me that would lead to a conclusion that the application for temporary variation to the liquor licence for the Nguiu Club to authorise the sale of liquor between 5.00 pm and 8.00 pm on a Sunday for the purposes of the 2017 Grand Final should be refused.
38. I note the request from NT Police that the amount of alcohol that may be sold to individual patrons on the day be restricted to the usual quota under the licence conditions, namely six cans of mid or light strength beer per person. I note also that for the 2016 Grand Final the quota was increased to seven cans of mid or light strength beer per person. However, it must be noted that trading in 2016 was permitted from 2.30 pm until 7.30 pm, a period of 5 hours. The seven can limit over that period equates to 1.4 cans of beer per hour.
39. Under the application now being considered the Nguiu Club is seeking authorisation to trade from 5.00 pm until 8.00 pm, a period of three hours. Under the existing six can quota that equates to two cans of mid or light strength beer per person per hour. I agree with the NT Police submission that six cans of beer per person over a three hour period is sufficient. For that reason I have determined to refuse that component of the application that seeks to increase the individual quota to 8 cans of mid or light strength beer per person for the day. The usual six can quota per person will remain in place for the 2017 Grand Final day.
40. The responsible manner in which the management of the Nguiu Club conducted its business during the 2016 Grand Final day is acknowledged and applauded. It is expected that the Nguiu Club will maintain the same high standards for the 2017 Grand Final day, including the sale of alcohol only via the purchase of "beer tickets" and the restrictions limiting sales to one can of beer at a time to individuals.

DECISION

41. On the basis of the matters set out above, and in accordance with section 14(2)(c) of the *Licensing (Director-General) Act*, I have determined to set aside the decision of the delegate dated 22 February 2017 to refuse the application by the Nguiu Club for a temporary variation of its licence conditions to allow for the sale of alcohol from 5.00 pm to 8.00 pm in conjunction with the Tiwi Football League Grand Final to be held on Sunday 19 March 2017. In accordance with section 32A(7)(a) of the *Liquor Act* I have determined to vary the licence conditions to authorise the additional trading hours as requested.
42. Also for the reasons outlined above, I have determined in accordance with section 32A(7)(b) of the *Liquor Act*, to refuse to vary the licence conditions to allow an increase in the amount of alcohol that may be sold to individuals to eight cans of light and mid strength beer per person. For the extended trading hours approved by this decision the sale of liquor by the Nguiu Club to patrons will be subject to the usual licence condition restriction of six cans of light and mid strength beer per person.

REVIEW OF DECISION

43. Section 120ZA of the *Liquor Act* provides that a decision of the Director-General, as specified in the Schedule to the Act, is a reviewable decision. A decision to vary or refuse to vary licence conditions pursuant to section 32A of the *Liquor Act* is specified in the Schedule and is a reviewable decision.
44. 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. For the purpose of this decision, and in accordance with section 120ZB(1) of the *Liquor Act*, the affected persons are the Nguui Club Aboriginal Corporation, the Department of Health and NT Police.



Cindy Bravos
Director-General of Licensing

8 March 2017