

NORTHERN TERRITORY LIQUOR COMMISSION
REASONS FOR DECISION

MATTER:	APPLICATION FOR LIQUOR LICENCE AND AUTHORITY
REFERENCE:	LC2021/122
APPLICANT:	Bagala Aboriginal Corporation
PREMISES:	Bagala Social Club Lots 94 and 211, BARUNGA NT 0852
LEGISLATION:	Part 3 Division 4 of the <i>Liquor Act 2019</i>
HEARD BEFORE:	Mr Russell Goldflam (Acting Deputy Chairperson) Mr Bernard Dwyer (Health Member) Ms Christine Hart (Community Member)
DATE OF HEARING:	27 January 2022, 8 February 2022
DATE OF DECISION:	15 February 2022

Decision

1. On 15 February 2022, the Northern Territory Liquor Commission (**the Commission**) issued the following decision:
 - a. In accordance with section 48 of the *Liquor Act 2019* (NT) (**the Act**) the Northern Territory Liquor Commission (**the Commission**) has determined to issue a licence to Bagala Aboriginal Corporation (**the applicant**).
 - b. The licence will be issued with a restaurant bar authority.
 - c. The licensed premises is the area (**the premises**) depicted on the site plan at page 180 of Exhibit One tendered at the hearing of the application (**Exhibit One**) situated on land on Lots 94 and 211, Barunga described in the Lease Agreement between the Beswick Aboriginal Land Trust landlord and the applicant tenant dated 28 September 2016 (**the lease**).
 - d. The Commission approves the appointment of Mr Stephen John Smith as the nominee of the licence.

- e. The conditions of the licence will be those authority conditions set out in Part 4 Division 1 and 16 of the *Liquor Regulations 2019* (**the Regulations**).
- f. The following additional conditions are fixed:
- i. The sale, supply, service and consumption of liquor on the premises is limited to beer, cider and pre-mixed spirits with an alcohol/volume percentage not greater than 3.5% (**mid-strength products**).
 - ii. The hours of operation for the licence are from 12:00 to 14:00 (**the lunch period**) and from 18:00 to 21:00 every day of the year.
 - iii. The licensee is prohibited from selling, supplying or serving more than 20 grams of pure alcohol (**two standard drinks**) to an individual over the lunch period. The licensee must not permit an individual to consume more than two standard drinks on the premises over the lunch period.
 - iv. On Christmas Day, the licensee must only sell, supply or serve liquor to patrons purchasing a meal expected to be served at a restaurant that is eaten when seated at a table or bar (**a full meal**).
 - v. During the hours of operation a full meal must be available for purchase by patrons until 1.5 hours before the close of the licensed premises.
 - vi. Liquor must not be sold, served or consumed in glass containers.
 - vii. The licensee must designate a 24 hour period every week (**the youth club day**), during which it is prohibited to sell, supply, serve or consume liquor on the premises.
 - viii. The licensee must provide the Director not less than seven days notice of the designated youth club day.
 - ix. During the Barunga Festival the sale, supply, service and consumption of liquor on the premises is prohibited.
 - x. The management of the licence must be governed by a committee (**the governance committee**), the membership of which includes traditional owners, community elders, men and women, and at least one independent advisor with expertise in liquor licensing.

- g. The issue of the licence is subject to notice in writing to the applicant by the Director of Liquor Licensing (**the Director**) that the Director is satisfied of the following matters:
 - i. the lease has been amended to permit the use of the premises for the supply, sale and consumption of liquor;
 - ii. a Certificate of Occupancy granted in accordance with Part 8 of the *Building Act 1993* has been issued to the applicant for the refit of the premises;
 - iii. the applicant has entered into an enforceable undertaking with the Director that Mr Braun Bush and Ms Danielle Bush not be involved in the applicant's day-to-day management or operation of the business conducted under the liquor licence; and
 - iv. the governance committee has been formed and is operating.
 - h. The Commission extends time for the making of this decision to 15 February 2022.
2. The Commission indicated that it would publish reasons for its decision to issue a liquor licence. These are those reasons.

Background

3. On 21 August 1981, the Chairman of the then Northern Territory Liquor Commission¹ issued a Declaration that "a certain area of land around the Aboriginal community centre at Bamyili" would henceforth be a "restricted area" in which it would be prohibited to bring or consume liquor other than beer without a permit. In 1984, Bamyili changed its name to Barunga, by which it is still known. The proud community of Barunga is famously associated with the Barunga Statement, a manifesto of Indigenous self-determination and call for a Treaty that was presented to Prime Minister Hawke when he attended the annual Barunga Festival in 1988.
4. Decades after these events, a Treaty has yet to be negotiated, and, despite changes in terminology and scope, the restricted area remains in force.

¹ A body corporate established by section 6 of the *Liquor Act 1978* (NT) as then in force. That body was subsequently abolished. The current Northern Territory Liquor Commission was established by the *Liquor Commission Act 1978* (NT), which commenced on 28 February 2018.

5. The *Northern Territory National Emergency Response Act 2007* (Cth) (**the NTNER Act**) designated all "Aboriginal land"² as "prescribed areas", which in turn were deemed by that Act to be general restricted areas under the *Liquor Act 1978* (NT). It would appear that either by this means or on some previous occasion, the restriction on some liquor products in Barunga was expanded to encompass all liquor products.
6. In conjunction with the enactment of the NTNER Act, in October 2007 the Minister for Families, Community Services and Indigenous Affairs decided to vary the conditions of a number of liquor licences on Northern Territory Indigenous communities, by disallowing takeaway sales. One of those licences had been held by the now defunct Barunga Community Store.
7. The NTNER Act was subsequently repealed and replaced by the *Stronger Futures in the Northern Territory Act 2012* (Cth) Act (**the SFITNT Act**), which retained the prescribed areas scheme, but rebadged them as "alcohol protected areas".³
8. Section 172 of the *Liquor Act 2019* (NT) generally prohibits the possession, consumption, sale, supply and service of prohibited liquor in a general restricted area, and the bringing of prohibited liquor into a general restricted area – unless the person "has a permit allowing the conduct constituting the offence".
9. The 1981 Declaration, as noted above, allowed for liquor to be taken to Barunga and consumed there by permit-holders. That permit system continues and is currently regulated by Part 8 Division 6 of the Act. In practice, Barunga residents send their applications for a permit to the nearest police station, at Maranboy, which forwards them, with a recommendation, to the Director. The standard Barunga liquor permit allows holders to purchase one 30 can carton of mid-strength beer, one bottle of spirits or one 2 litre cask of wine per week.
10. The population of Barunga is about 360, of whom about 220 are over the age of 18. About 90 of the adults have been issued with a liquor permit.
11. Barunga residents can also lawfully obtain and consume liquor (providing they are over 18 years of age and not on the Banned Drinker Register) by travelling 30 km east to the somewhat larger community of Beswick, where there is a social club licensed to sell mid-strength and light beer for consumption on the premises from 16:30 to 19:30 four days a week: Tuesday, Wednesday, Friday and Saturday. Alternatively, Barunga residents can drive 82 km west to the nearest town, Katherine, where there is a range of licensed premises.

² As defined by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Barunga lies within the Beswick Aboriginal Land Trust, which is Aboriginal land.

³ Section 118 of the SFITNT Act provides that the Act ceases to have effect at the end of ten years after its commencement. The Act's commencement date was 16 July 2012. The Commission has received no information as to whether the Commonwealth intends to extend the SFITNT Act.

The Application

12. The Bagala Aboriginal Corporation (**the applicant**), the members of which are Traditional Owners of Barunga and Beswick, was incorporated in 2014 "to drive economic and social change in Beswick and Barunga". In recent years it has established and operated several successful local enterprises, including a motel, a commercial laundry, a bus service and a community store.
13. The applicant has engaged the services of the Aboriginal Investment Group (**AIG**), an Aboriginal controlled non-government organisation originally established by the Northern Land Council to hold and administer Indigenous owned assets. Mr Stephen Smith, the proposed licence nominee, is the registered contact person for the applicant with the Office of the Registrar of Indigenous Corporations, and until recently served as the Chief Executive Officer of AIG.
14. The applicant seeks to establish a licensed restaurant bar in Barunga on the premises of a former community store. Its stated mission is "to provide a family-friendly and responsible venue that values and safeguards the social and cultural interest of all our members". Price Waterhouse Indigenous Consulting, which was engaged by the applicant to conduct community consultations in relation to the venture, produced a detailed report (**the PIC Engagement Report**) that was provided to the Commission in support of the application.
15. The applicant has identified potential funding sources required to undertake the substantial works that will be required to re-fit and re-purpose the premises as a restaurant bar.

Consultation

16. As required by section 57 of the Act, notices of the application were published in the Katherine Times on 29 September 2021 and 6 October 2021, and on the Licensing NT website, as well as by way of a sign at the premises.
17. In accordance with section 56 of the Act, notification was given to the Department of Health (**DOH**), NT Police and the Roper Gulf Regional Council. The Director also consulted with the Northern Territory Fire and Rescue Service (**NTFRS**).
18. The only response of substance was from NT Police, who ultimately supported the application on condition that trade be restricted to three hours per day four days per week, that only light and mid-strength beer be available, and that cooked/hot food be available during trading hours.

The licensee's record of compliance

19. The applicant has never held a liquor licence, but since August 2020 its proposed licence nominee, Mr Stephen Smith, has been the nominee of a restaurant bar licence trading as the Wirib Store and Tourism Park at Timber Creek on behalf of the Wirib Aboriginal Corporation, which, like the applicant, has developed its enterprise with the support of AIG. As far as the Commission is aware, there have been no issues of compliance with the Act arising the operation of the Wirib licence.

The referral

20. On 8 December 2021, pursuant to section 59 of the Act, the Director referred this application to the Commission to be determined by way of a public hearing. The Director provided the following documents to the Commission with the referral (**the brief**):

- a. Application for liquor licence, 8 September 2021;
- b. Affidavit and Declaration of Associates pursuant to section 54 of the Act, 19 May 2021;
- c. Public Interest and Community Impact Assessment summary pursuant to sections 49 to 52 of the Act;
- d. Lease between Beswick Aboriginal Land Trust and the applicant, 28 September 2016;
- e. Extract from ORIC information system;
- f. Identification and probity documents for applicant's office bearers;
- g. Enforceable undertaking by applicant re Ms Danielle Bush and Mr Brian Bush, 3 December 2021;
- h. Business Plan;
- i. Site Plan;
- j. PIC Engagement Report, July 2020;
- k. Various registrations and plans;
- l. Correspondence with stakeholders;
- m. NT Police objection, 28 October 2021;
- n. Applicant's response to NT Police objection, 18 November 2021.

The hearing

21. At the request of the applicant, the hearing did not commence until 27 January 2022. The hearing proceeded over two days, concluding on 4 February 2022.

22. Pursuant to section 23 of the Act, the Commission is not bound by the rules of evidence and may inform itself in any manner it considers appropriate. Section 21(2) provides that a hearing must be conducted in public unless the Commission is of the opinion it is not appropriate. COVID restrictions limited the Commission's capacity to accommodate personal attendance by members of the public. However, all persons who requested the opportunity to attend the hearing were provided with a link to enable them to attend remotely using online facilities.

23. Mr Duncan McConnel SC instructed by Mr Andrew Giles of HWL Ebsworth, the applicant's solicitors, appeared for the applicant. Mr Stephen Smith attended and participated in the hearing. Mr Mark Wood appeared for the Director. On 27 January 2022, Senior Constable Brad Chilcott appeared for NT Police. Unfortunately, communication difficulties prevented him from appearing on 4 February 2022. On 4 February 2022, Mr Paddy Mohan and Ms Deborah Katona of the National Indigenous Australians Agency attended and participated in the hearing on behalf of the Federal Minister for Indigenous Australians. Also in attendance on 4 February 2022 as an observer was Mr William Bridgeman from the Northern Territory Department of Chief Minister and Cabinet. The Commission thanks them all for their attendance and assistance.

24. The brief was tendered and admitted into evidence without objection. In addition and also without objection the following documents were tendered:

- Exhibit Two: hearing notices, 13 December 2021;
- Exhibit Three: letter from Commission to Minister Wyatt, 17 December 21;
- Exhibit Four: amended police objection, 20 January 2022;
- Exhibit Five: Raelene and Crystal Bulumbara identification documents;
- Exhibit Six: evidence of change of Director: Max Ah Fat;
- Exhibit Seven: de-identified sample liquor permit;
- Exhibit Eight: declaration of restricted area, Bamyili, 21 August 1981.

25. The Commission also received and read written submissions on behalf of the applicant, the Director and NT Police received on 4 February 2022, and a letter from the Hon Ken Wyatt AM MP, Minister for Indigenous Australians, dated 7 February 2022.

Assessment of the application

26. In accordance with section 59 of the Act, the Commission has considered:

- a. the applicant's affidavit required by section 54;
- b. the objection to the application made under section 61;

- c. the response provided by the applicant under section 62;
- d. the suitability of the premises to be licensed, having regard to any law of the Territory regulating the sale, supply, service or consumption of liquor or the location, construction or facilities of those premises;
- e. the financial stability and business reputation of the body corporate;
- f. the general reputation and character of the secretary and executive officers of the body corporate; and
- g. whether the applicant, including the nominee designated by an applicant, is a fit and proper person to hold a licence.

27. In accordance with section 49 of the Act, the Commission has considered whether issuing the licence is in the public interest, and whether the licence will have a significant adverse impact on the community.

The applicant

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

29. The applicant has provided extensive documentation regarding its operations, activities, financial circumstances and plans.

The applicant's associates

30. On 19 May 2021, Mr Stephen Smith affirmed an affidavit as required by applicants to disclose whether any persons may be able to influence the applicant, or expect a benefit from the applicant, if the licence is granted. The affidavit appears to have been prepared by the applicant's solicitors from a template. In the view of the Commission the affidavit should have disclosed that the Beswick Aboriginal Land Trust, which owns the land on which the premises will be built, is a person who may be able to influence the operation of the licence.

31. Subsequently, the Director requested the applicant to provide a declaration of its associates. It is standard practice for applicants to provide such a declaration, which assists both the Director and the Commission to consider the matters set out in sections 54 and 55 of the Act, the purpose of which is to ensure that liquor licences are not granted to persons who are subject to improper influence by their associates.

32. On 12 November 2021 the applicant's solicitors submitted to the Director that the applicant was not required to lodge a declaration of associates on the basis that it is an Aboriginal Corporation incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Accordingly, the applicant did not comply with the Director's request. It should have done so.

In the view of the Commission, the reason given by the applicant for its non-compliance was misconceived.

33. Nevertheless, the Commission considers that the applicant has provided sufficient material to enable the Commission to identify persons who may be able to influence the applicant or who expect a direct or indirect benefit from the applicant. The applicant has provided the Commission with details not only of its executive officers, but also the names of all of its registered 35 members.
34. The Commission considers the situation regarding the applicant's lessor and executive members below.

The suitability of the applicant's premises

35. The premises were once used by a community store, but have long since fallen into disuse and require extensive rehabilitation and renovation to be made fit for purpose as a restaurant bar. The applicant has provided detailed plans of the proposed refit, at an estimated cost of \$1,500,000.
36. The Commission considers that following the carrying out of these works, the premises will be suitable for the supply and consumption of liquor in the manner set out in the application.
37. As noted above, the premises are on Aboriginal land the property of the Beswick Aboriginal Land Trust, which has leased the area to the applicant on terms including: "The land must be used for operating a store, including food, drink and grocery items".
38. The applicant concedes that the proposed use of the premises is inconsistent with this term of the lease. The Commission accepts the applicant's proposal that the issue of a liquor licence be conditional on the lease being amended to expressly permit the use of the area as licensed premises. The Commission also accepts the applicant's submission that there is a reasonable prospect that the Beswick Aboriginal Land Trust will agree to this amendment, because the members of the Land Trust are also members of the applicant, namely the Traditional Owners of Beswick and Barunga.⁴ The Commission notes that on or before 6 December 2021 the applicant submitted to the Northern Land Council a proposal to make this lease amendment.⁵
39. The lease also provides that: "The Lessee must not construct, place, extend, make additions to, replace or remove any buildings, infrastructure or other structures on the land without the express written approval of the [Northern] Land Council." The Commission not consider it necessary or appropriate to take any action to ensure or verify the applicant's compliance with this lease condition.

⁴ See Rule Book of Bagala Aboriginal Corporation (ICN 8000), registered 5 March 2019

⁵ Exhibit One, page 103

Is it lawful to operate a liquor licence in a general restricted area?

40. As noted at paragraphs 3 to 8 above, since 1981 the premises have been located in what is now designated by the Act as a "general restricted area". (Incidentally, it is also a condition of the lease that "the Lessee must not, ... contrary to any applicable law, sell for consumption on the Land, ... any ... liquor ... or any other substance which ... is likely to be abused").

41. Section 172(5) of the Act relevantly provides:

The following are prohibited in a general restricted area:

...

(d) the sale, supply and service of prohibited liquor in the area.

42. The Commission has considered whether this provision deprives the Commission of the power conferred on it by section 60 of the Act to decide to issue a licence or authority when the proposed premises are located in a general restricted area. Additionally, in the event that the Commission determines that it is not deprived of power to decide to issue a licence located in a general restricted area, the Commission has considered how the operation of section 172 of the Act affects the exercise of the Commission's discretion to issue the licence or authority.

43. It appears that this is the first occasion on which the Commission has been required to consider these matters. In doing so, the Commission has been assisted by carefully prepared oral and written argument provided by the applicant and the Director. For the following reasons, the Commission concludes that it may issue a licence or authority for premises located in a general restricted area.

44. Firstly, section 172 of the Act provides that the power to declare a general restricted area reposes in the Commission. Section 60 of the Act provides that the power to decide to issue a licence or authority also reposes in the Commission. For the Commission to be deprived of its statutory power to grant a licence only because a declaration is in existence which under the Act the Commission alone has the power to make⁶ would be an unreasonable consequence of the legislation. It is a well-established principle of statutory construction that Parliament does not intend to enact legislation with unreasonable consequences.⁷ A preferable construction is one that permits the scheme of Part 3 of the Act ("Registrations, licences and authorities") to operate alongside but separately from and independently of the scheme of Part 8 of the Act ("Controlled areas").

⁶ For completeness, the Commission notes that as a consequence of the NTNER Act and the SFITNT Act, the Commonwealth Minister for Indigenous Australians has acquired concurrent powers with the Commission to declare a general restricted area, and to vary the conditions of liquor licences.

⁷ *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297

45. Secondly, section 173 of the Act establishes the offence of selling, supplying or serving prohibited liquor in a general restricted area, and a defence to a prosecution for that offence if "the defendant has a permit allowing the conduct constituting the offence". The word "permit" in this provision is clearly a reference to a permit issued under Part 8 Division 6 of the Act ("Permissions and permits"). On the other hand, the offences of selling, supplying and serving liquor when not authorised to do so by a liquor licence are provided for elsewhere, in Part 3 Division 3 of the Act ("Sale, Supply and service of liquor".) The Commission accepts the Director's submission that the establishment of separate offence provisions in this manner supports a conclusion that the schemes in Part 3 and Part 8 of the Act were intended by the legislature to operate independently of each other.
46. Thirdly, section 12 of the SFITNT Act expressly applies to "a NT liquor licence that is in force in relation to premises in a particular alcohol protected area (whenever the licence was issued)". As noted above, a general restricted area under the *Liquor Act 2019* (NT) is deemed to be an alcohol protected area for the purpose of the SFITNT Act. Accordingly, the SFITNT Act necessarily implies that a NT liquor licence can lawfully be in force in a general restricted area. If there were no lawful basis for a liquor licence to operate in a general restricted area, section 12 of the SFITNT Act would be nonsensical. It is a principle of statutory construction to presume that the legislature does not intend to enact legislation that is nonsensical.⁸
47. Fourthly, the Director informed the Commission that there are currently 40 liquor licences in general restricted areas in various parts of the Northern Territory. This well-established practice supports a conclusion that the issue of a licence to operate in a general restricted area is lawful.
48. Fifthly, in response to the contention that the construction urged on the Commission by the Director gives section 172(5)(d) of the Act no work to do, the applicant submitted that although the sale, supply and service of liquor by a licensee in a general restricted area is not effectively prohibited by section 172(5)(d), that provision *does* effectively prohibit the sale, supply or service of liquor in the circumstances set out in section 43(2) of the Act. Section 43(2) authorises the sale, supply and service of liquor without a licence in particular circumstances, such as at a business's annual holiday party. The Commission accepts this submission.
49. The Commission therefore finds that it has the power to decide to issue a licence for premises in a general restricted area. Nevertheless, the fact that the premises are in a general protected area is, in the view of the Commission a relevant consideration both for the task of deciding whether or not to issue a licence, and, if a licence is issued, in determining what conditions to fix.

⁸ See *Baker v The Queen* (2004) 223 CLR 513

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

50. Having reviewed the financial statements and reports provided by the applicant, the Commission assesses the applicant as having a satisfactory business reputation and as being financially stable.

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

51. The applicant concedes that two of its directors with a history of liquor-related offending should not be involved in the management or operation of the licence, and has, at the suggestion of the Director, entered into an enforceable undertaking accordingly. The Commission considers that this is an appropriate and adequate measure to address this issue.

52. The other directors of the applicant are Ms Nell Brown, Ms Crystal Bulumbara, Ms Ester Bulumbara and Ms Raelene Bulumbara.

53. The Commission acknowledges that it was challenging for the applicant to compile the material that is routinely provided to establish the character and probity of the executive officers of a body corporate that has applied for a liquor licence. Many Indigenous residents of remote Northern Territory communities do not have ready access to documentation that is often taken for granted in metropolitan Australia, such as birth certificates, curriculum vitae, character references and drivers licences.

54. The applicant was ultimately able to provide the Commission with police checks and drivers licences for most its executive officers. However, it also sought to rely on two identically worded character references for each of the six directors, signed by Mr Sam Bush-Blanasi and Mr Stephen Smith respectively.

55. Mr Bush-Blanasi is the Chairman of the Northern Land Council and a director of AIG. Mr Smith is the Secretary of the applicant, the proposed licence nominee, and a former CEO of AIG. The Commission accepts that Mr Bush-Blanasi and Mr Smith are both persons of high standing in the community, but in the view of the Commission neither of them is a suitable person to provide a character reference for the directors of the applicant, because neither of them is independent of the applicant, which is highly reliant on AIG to establish and operate the premises. Moreover, the content of these character references is problematic. Each of the twelve references provided states "I know of no reason why [name of director] is not a fit and proper person to hold a position of influence over the entity which holds a liquor licence". Given the matters set out at paragraph 51 above in relation to two of the directors, in the view of the Commission this blanket statement is untenable.

56. For these reasons, the Commission disregards the character references supplied by Mr Bush-Blanasi and Mr Smith. The applicant's decision to submit and rely on these unsatisfactory references reflects adversely on the applicant, a matter that the Commission has taken into account when considering assurances provided by the applicant in relation to other more contentious aspects of the application, as will be discussed below.

57. This does not however lead the Commission to have particular concerns about the reputation and character of the applicant's four participating directors or the applicant's secretary, Mr Stephen Smith, which the Commission assesses to be satisfactory.

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

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

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

59. The applicant has nominated Mr Stephen Smith as the licence nominee. The Commission assesses Mr Smith, who holds current RSA certification and has provided appropriate documentation of his impressive qualifications and work history, to be a fit and proper person to hold the licence.

Public notice and consultation

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

The objection

61. The sole objection received was from NT Police. No objections were received from any residents of the Barunga community or other service providers.

62. In its objection dated 21 October 2021, a document prepared by police officers based in the region that patrols Barunga, NT Police opposed the issue of a licence to the applicant, on the two grounds permitted under section 61 of the Act, namely that issuing the licence would adversely affect, firstly, the amenity of the neighbourhood of the proposed licensed premises, and secondly, the health, public safety and social conditions in the community. The objection was, with respect, well presented and supported by detailed reference to local conditions.

63. However, on 20 January 2022, NT Police submitted an amended "objection" under the hand of Acting Commissioner Michael Murphy APM. The amendment was substantial: NT Police now supported the application, subject to the conditions set out at paragraph 18 above. In doing so, NT Police emphasised their commitment "to supporting the founding principles in the *Everyone Together* Aboriginal Affairs Strategy 2019–2029", which focusses on

self-determination, local decision-making and sustainable community-led change and economic development.

64. It is unnecessary to comment on the reasons for the change of position by NT Police. However, the Commission notes that it did not affect the outcome of this application. Even if NT Police had maintained their initial objection, the Commission would have decided to issue a liquor licence to the applicant.
65. The applicant responded in detail to the original objection by NT Police, and at the hearing, vigorously contended that the licence conditions sought by NT Police not be imposed. These controversies will be discussed later in these reasons.
66. The Commission also received and considered a third contribution from NT Police, provided on 4 February 2022, titled "Police Comments for Hearing 8 February 2022", and prepared by Senior Constable Chilcott, who had been tasked to attend the hearing on behalf of NT Police.

Whether issuing the licence is in the public interest

67. To determine whether the issue of a license is in the public interest, the Commission is required to consider how the issue of the licence would advance the following objectives set out in section 49(2) of the Act:
 - (a) minimising the harm or ill-health caused to people, or a group of people, by the consumption of liquor;
 - (b) ensuring liquor is sold, supplied, served and consumed on or in licensed premises in a responsible manner;
 - (c) safeguarding public order and safety, particularly when large numbers of people would be attracted to licensed premises or an area adjacent to those premises;
 - (d) protecting the safety, health and welfare of people who use licensed premises;
 - (e) increasing cultural, recreational, employment or tourism benefits for the local community area;
 - (f) promoting compliance with this Act and other relevant laws of the Territory;
 - (g) ensuring each person involved in the business conducted at licensed premises receives training suitable to the person's role in the business;
 - (h) preventing the giving of credit in sales of liquor to people;
 - (i) preventing practices that encourage irresponsible drinking;
 - (j) reducing or limiting increases in anti-social behaviour.

68. Several of these objectives loom large in the context of this application. Such is the apprehended level of harm or ill-health to the Barunga community caused by the consumption of alcohol, successive Northern Territory and Commonwealth authorities have mandated a prohibition-based regime for over 40 years in Barunga.
69. The establishment of licensed premises in Barunga for the first time in decades inevitably raises a risk that liquor will be consumed irresponsibly, that public order and safety will be impaired, and that anti-social behaviour will increase.
70. Nevertheless, the Commission takes into account the fact that despite this prohibition-based regime, Barunga already experiences significant alcohol-related harm. As described at paragraphs 9 to 11 above, Barunga residents currently have access to liquor both through the permit system and at licensed premises within an hour's reach. According to NT Police, 95% of offences against the person recorded in Barunga result from domestic violence, and 41% of those are alcohol-related. One approach to mitigate this harm would be to tighten the screws of prohibition even further, for example by abolishing the permit system. The applicant advocates a different approach: allow the community to manage its own affairs, determine its own future, and develop its own strategies for living with alcohol.
71. The Commission is not satisfied that it would be in the public interest to now impose further restrictions on the availability of liquor to residents of Barunga. To do so would create a real risk that Barunga residents who wish to consume liquor would look for and find ways to get around any such restrictions, and in the process resort to unsafe or unlawful conduct, such as sly grogging, moonshine production, drink driving and drinking in isolated, unserved and unsupervised areas.
72. On the other hand the applicant's approach is consistent with and supported by the Director, the NT Government's *Everyone Together* Aboriginal Affairs Strategy 2019-2029, the NT Police, community views as identified in the PIC Engagement Report, and an expert report commissioned by the Northern Territory and Commonwealth governments into managing alcohol consumption in remote communities (**the Bowchung Report**).⁹
73. Having considered each of these objectives, the Commission is satisfied that it is in the public interest to issue the licence with the conditions it has imposed.

⁹ G Shaw, M Brady, P d'Abbs, *Managing Alcohol Consumption: A review on licensed clubs in remote Indigenous communities in the NT* (June 2015, Bowchung Pty Ltd report to the Northern Territory Department of Business), accessed at https://justice.nt.gov.au/data/assets/pdf_file/0010/427537/D2016-0339-LR-Final-Report.pdf

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

74. To determine whether it is satisfied that the issue of a licence will not have a significant adverse impact on the community, the Commission must consider the matters set out at section 49(3) of the Act:

- (a) the risk of undue offence, annoyance, disturbance or inconvenience to persons who reside or work in the vicinity of the proposed licensed premises or who are using, or travelling to or from, a place of public worship, a hospital or a school;
- (b) the geographic area that would be affected;
- (c) the risk of harm from the excessive or inappropriate consumption of liquor;
- (d) the people or community who would be affected;
- (e) the effect on culture, recreation, employment and tourism;
- (f) the effect on social amenities and public health;
- (g) the ratio of existing liquor licences and authorities in the community to the population of the community;
- (h) the effect of the volume of liquor sales on the community;
- (i) the community impact assessment guidelines issued under section 50;
- (j) any other matter prescribed by regulation.

75. The Commission notes there are no such "other" matters prescribed by regulation.

76. The applicant bears the onus of satisfying the Commission of the relevant matters. Even if there are no objections, the applicant must still satisfy this Commission of those matters.

77. Regulation 123 of the Regulations provides that the community impact assessment guidelines published under section 6A of the *Liquor Act 1978* and in force immediately before the commencement of the Act are taken to be community impact assessment guidelines issued under section 50.

78. The guidelines are as follows:

Criteria	Matters to be considered
<p>The potential harm or health impact that may be caused to people, or any group of people within the local community area, due to the availability and accessibility of an additional liquor outlet.</p>	<p>Are there any 'at-risk' groups or sub-communities within the locality? This may include –</p> <ul style="list-style-type: none"> children and young people; • Aboriginal people normally resident within the locality and those Aboriginal people that might be likely to travel to the locality from a dry community; • migrant groups from non-English speaking countries; • people in low socio-economic areas; and/or • communities that experience high tourist/visitor numbers. <p>Are there any community buildings, facilities and areas within the locality? Such facilities would include:</p> <ul style="list-style-type: none"> • schools and educational institutions; • hospitals, drug and alcohol treatment centres; • accommodation or refuges for young or disadvantaged people; • child care centres; • recreational areas; • dry areas; and • any other area where young people may congregate or be attracted to. <p>What policies and procedures will the applicant implement to minimise any potential harm or health impacts to these 'at-risk' groups or sub-communities?</p>

<p>Information about the location and area in which the premises is proposed to be so as to assess any social impact on the community. This includes information about the density of licensed premises within the community area.</p>	<p>This may include crimes statistics, social profile information and the location of existing licensed premises.</p> <p>This could also include traffic and pedestrian impact and any plans developed to address these potential issues.</p>
<p>Volume</p>	<p>This may include projected sales volumes and marketing analysis, liquor type and customer demographic (where applicable this should be provided for both on and off premises sales).</p> <p>The Commission will consider information available to it about the current alcohol consumption rates for the community area.</p>
<p>Any cultural, recreational, employment or tourism benefits for the local community area.</p>	<p>Will the proposed licensed premises provide economic benefits, cultural, recreational or tourism benefits or any additional employment opportunities and to what level?</p>
<p>Why the grant of a relevant application is in the public interest and how the additional liquor outlet will benefit the local and broader community.</p>	<ul style="list-style-type: none"> • What additional services will be provided other than simply an additional outlet for the sale of liquor – this may include accommodation or dining? • Will the proposed licensed premises provide additional choices of service or products that are not available in the area? • Will the proposed premises provide liquor in a manner known to be safe and to minimise adverse impacts? • Will it use existing premises improve or add to existing premises or is it a new premises?

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

...the Commission has the authority to consider a broad range of issues specific to each application and flexibility exists to assess each individual application on its merits.

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

81. In considering these issues, it is also important to keep in mind that the onus is on the applicant: section 50(3) states that the "mere addition of a new licence or licensed premises in a community is not taken to be a benefit to the community".

82. The Commission accepts that the establishment of licensed premises for the first time in a community that has been "dry" for decades carries with it a real risk that there will be an adverse impact on the community. However, section 49(4) of the Act provides that "the Commission may mitigate a possible adverse impact on the community by issuing a licence or an authority with conditions that limit", among other things:

- the kinds of liquor that may be sold or served;
- the manner in which liquor may be sold or served;
- the types of containers in which liquor may be sold or served;
- the days and times when liquor may be sold or served.

83. The Commission accepts the applicant's submission that the presence of well-managed licensed premises in Barunga will provide an opportunity to have a beneficial impact on the community by:

- reducing the number of serious road crashes involving Barunga residents travelling to Katherine and Beswick to access liquor;
- reducing the incidence of illegal grog-running and sly-grogging to Barunga;
- reducing the incidence of community members relocating from Barunga to a locality where they can more easily access liquor;
- promoting and educating health methods of alcohol consumption;
- providing employment to community members;
- providing a family-friendly safe community hub for entertainment, recreational, cultural and social activities;
- encouraging a sense of pride and celebration in the local community;
- advancing independence and self-determination for Aboriginal communities.

84. Having considered all of these matters, the Commission is satisfied, in accordance with section 49 of the Act, that issuing the licence and authority with the conditions it has decided to impose will not have a significant adverse impact on the community.

A restaurant bar authority

85. Licensed premises on Indigenous communities in the Northern Territory have long been widely known as "social clubs". On 26 May 2021, the applicant registered the name "Bagala Social Club" as its business name,¹⁰ which the applicant noted "is reminiscent of the existing branding and creates community ownership".¹¹ The applicant states in the material supplied in support of its application that the premises will be known as "the Bagala Social Club".¹² The applicant has supplied a detailed document titled "Bagala Social Club – Business Plan" and indeed throughout the copious material provided by the applicant to the Commission, it refers to the proposed premises by that name.

86. The PIC Engagement Report provided by the applicant to the Commission in support of the application states that when consulted, Barunga community members and stakeholders supported a "licensed social club model" with a "membership system whereby people have to be a member to enter the club and must sign-in to enter. Can bring guests only if you sign them in".¹³

87. In these circumstances, one would expect the applicant to seek a licence with a club authority, or perhaps a small club authority. Club authority licences include prescribed conditions limiting access to members and their guests. However, the applicant has not sought a club authority, but a restaurant bar authority. In written submissions, the applicant contended that:

- a sign-in register would be complicated, confusing and unduly onerous;
- a club is inherently exclusive in nature, contrary to the applicant's wish to establish an inclusive, welcoming and open facility; and
- having club rules would be burdensome.

88. The Commission was not persuaded by these submissions. Nevertheless, the Commission has determined to issue a restaurant bar authority in accordance with the applicant's preference, because in the view of the Commission, in practice the prescribed conditions of a club authority offer no more safeguards to protect patrons and the community from alcohol-related harm than do the prescribed conditions of a restaurant bar authority. In addition, the Commission has exercised its discretion to fix additional conditions that the Commission considers will provide appropriate safeguards.

¹⁰ Exhibit One, pp. 95 – 97

¹¹ Exhibit One, p. 159

¹² For example, at Exhibit One, p. 139, p. 224

¹³ Exhibit One, p. 202

The licence conditions

89. In determining the conditions to impose on the licence, the Commission has given careful consideration to the submissions of the applicant, the submissions of NT Police, the PIC Engagement Report statement of community and stakeholder views, and the findings and recommendations of the Bowchung Report.

90. The applicant submitted that:

- Trading hours should be 12:00 to 21:00 every day (except Christmas Day and Good Friday);
- No restrictions should be imposed on the quantity or kind of liquor sold;
- The licensee intends to make full meals available during trading hours;
- Liquor will not be served in glass containers, but this should not be the subject of a licence condition;
- The licensee intends to conduct weekly "youth club evenings", where no alcohol will be available, but this should not be the subject of a licence condition;
- The licensee intends to prohibit the sale of liquor during the Barunga Festival, but this should not be the subject of a licence condition;
- The licensee intends to establish a "social club committee" comprising Traditional Owners, community elders and an independent advisor, to manage the licence, but this should not be the subject of a licence condition.

91. The primary reason advanced by the applicant for not entrenching the measures outlined above as licence conditions was that to do so would be paternalistic and contrary to the principle of self-determination.

92. NT Police submitted that:

- Trade be restricted to three hours per day four days per week;
- Only light and mid-strength beer be available;
- Cooked/hot food be available during trading hours.

93. The PIC Engagement Report recorded the following views of community members and stakeholders:

- Liquor trading hours should be 16:00 to 20:00 Monday to Saturday;
- The club should be open for meals from 12:00 to 16:00 (without liquor);
- The only liquor that should be sold is light and mid-strength beer;
- There are different views about whether there should be volume limits;
- No liquor sales should be permitted during the Barunga Festival;
- Governance should be by a neutral social club committee including Traditional Owners, community members, men and women;
- The club should be licensed to sell takeaway liquor to permit holders.

94. The Commission notes that section 84(3) of the Act prohibits the Commission from issuing a takeaway authority until at least 31 August 2023.

95. In 2012, the Commonwealth and Northern Territory governments commissioned the Bowchung Report, with two objectives:

- Appraising harm levels associated with the operation of licensed social clubs in communities as compared to communities without such clubs;
- Identifying what the best practice social club models would look like, and how these can best support responsible drinking which contributes to managed alcohol consumption and reduction in levels of alcohol related harms.¹⁴

96. The Bowchung Report, publicly released in 2017, was based on qualitative data gathered from 362 individuals and seven social clubs in the northern half of the Northern Territory, including the Beswick Community Store, near Barunga. The researchers compared alcohol related data between communities with and without clubs. The Final Report of the *Alcohol Policies and Legislative Review (the Riley Review)* recommended that the Northern Territory government act on the Bowchung Report recommendations.¹⁵

97. Like the Riley Review, the Commission accepts the expertise of the authors of the Bowchung Report, and places considerable weight on its recommendations, which are as follows:¹⁶

1. Shortened hours and a ban on selling full-strength beer should be maintained at existing clubs, and should be a feature of any proposed new clubs.
2. All clubs should consider moving to incorporation under the *Corporations (Aboriginal and Torres Strait Islander) Act, 2006* legislation to encourage good governance and the transparent distribution of profits. Immediate steps need to be taken to resolve the legal issues around the distribution of profits to club members and communities.
3. If the number of clubs is increased the NT Department of Business or some other appropriate governmental agency should create a unit that focuses exclusively on licensed clubs in remote Indigenous communities. This unit would have responsibility for pro-actively working with the community to ensure that the clubs function responsibly.
4. If a decision to establish a club is made the following checklist should be followed in creating standards for the design, construction and management of it:

¹⁴ Bowchung Report, p. 2

¹⁵ Expert Panel, *Alcohol Policies and Legislative Review* (October 2017, Northern Territory Government), Recommendation 2.12.15

¹⁶ Bowchung Report, p. 8

- a. Plans for such a licensed facility should include a range of hot meals as well as entertainment and activity – not just the consumption of alcohol.
- b. The design of such a facility should demonstrate it will have a kitchen and dining area, as well as a bar area, and should be spacious and able to accommodate small groups of people who may wish to drink separately.
- c. The design also needs to demonstrate that alcohol will be stored in a highly secure manner that mitigates the risk of being stolen.
- d. The club should be incorporated through a legal vehicle which sets a high standard of governance.
- e. The club committee has access to professional advice over the recruitment and supervision of a manager, and is fully aware of its responsibilities.
- f. That governance training is provided to club committee members and regularly updated. Training on committee requirements under the NT *Liquor Act* needs to be included in this training.
- g. That as part of the capacity building of the club committee, members learn more about alcohol related matters affecting their community. This could include arranging for the local health service to provide quarterly reports on the level of alcohol related presentations in their community.
- h. The club management should commit to a transparent process for the return and use of profit to their community, and that procedures be established for the fair and equitable distribution of benefits to appropriate groups in the community.
- i. The club committee should agree that the club venture be evaluated after the first two years, and commit funds to undertake the evaluation.

98. The authors of the Bowchung Report also stated:

The dilemma facing policy makers is not a dichotomy between a dry community where residents don't drink alcohol, and a community with a club where people do drink alcohol. Residents of remote communities access alcohol from a number of outlets – whether they have a club or not. The dilemma is therefore creating policy and regulatory settings that maximise drinkers' access to environments in which their alcohol consumption is managed and harms are minimised.¹⁷

99. The Commission agrees. By fixing licence conditions, the Commission is engaged in creating "regulatory settings", and by doing so the Commission seeks to establish an environment in which alcohol consumption will be responsibly managed and harms will be minimised, as indeed the primary purpose of the Act requires the Commission to do.

¹⁷ Bowchung Report, p. 8

100. The applicant referred extensively to the Bowchung Report in the material it provided in support of the application, and is to be commended for adopting and applying many of the Bowchung Report recommendations.
101. Before discussing the specific conditions it has determined to impose, the Commission refers to an issue that emerged during the hearing, namely the divergence by the applicant from the expressed wishes of the community as evoked by the PIC Engagement Report on several of the matters summarised above. The Commission was left with the impression that the applicant's reliance on the principle of Aboriginal self-determination was somewhat selective. The applicant asserted that the PIC Engagement Report, which was issued in July 2020, was out of date, but provided the Commission with no evidence that the relevant views or circumstances of the community had changed in the meantime.
102. As discussed above, the Commission was unimpressed by the manner in which the applicant had initially sought to establish the credentials of two of its executive officers who, the Commission infers, were originally intended to be involved in the management of the enterprise, despite their apparent unsuitability.
103. Overall, where the position of the applicant diverged from the more risk-averse approach of the community as indicated by the PIC Engagement Report, or the recommendations made by the authors of the Bowchung Report, the Commission preferred the more risk-averse approach. Similarly, where the applicant proposed to implement a responsible trading practice, but opposed the entrenchment of that practice as a condition of the licence, the Commission has taken the more risk-averse approach of making that practice a condition of the licence.
104. Trading days: Contrary to the submissions of NT Police, the Commission has determined to permit trading six days a week, as proposed by the applicant and the community. Although this may attract drinkers from Beswick on days when their facility does not trade, the Commission considers that on balance it is in the public interest to give effect to the wishes of the Barunga community on this issue. The Commission is concerned that if the licensee were only permitted to trade four days a week, the financial viability of the enterprise would be substantially weakened, and it would be at risk of failing to get sufficient community "buy-in" to thrive.
105. Trading hours: The Commission has determined to restrict trading hours to a lunchtime session of two hours and an evening session of three hours. Five hours of trading is four hours less than was sought by the applicant, an hour more than was favoured by the community, two hours more than was proposed by NT Police, and consistent with the Bowchung Report recommendation of "shortened hours". The Commission considers that it would be incongruous for a licensee issued with a restaurant bar authority not to be permitted to serve liquor with lunch.

106. Product restrictions: In accordance with the clear view of community members, the position taken by NT Police and the first recommendation of the Bowchung Report, the Commission has determined to restrict the liquor available from the premises to light or mid-strength products. This condition is in line with similar conditions in several other social clubs on communities. To do otherwise would, in the view of the Commission, raise a real risk that the clientele of the Beswick club, where only mid-strength liquor is available, would move en masse to Barunga to drink there.
107. The Bowchung Report includes a detailed account of the change in drinking patterns occasioned by the commencement of the NTNER Act in 2007, which led to a ban on full-strength beer in social clubs on communities. 59% of community members surveyed by the Bowchung Report reported that they were happy with the switch from full-strength to mid-strength beer. The authors state:
- Qualitative data suggest that one of the key reasons so many respondents like the switch to mid-strength beer is that they feel that it has decreased the level of violence in their community.
108. In accordance with action taken recently by the Commission to vary the conditions of licences in seven other social clubs on communities,¹⁸ the product restrictions have been calibrated to allow the sale and consumption of both mid-strength beer and mid-strength pre-mixed spirits.
109. Quantity restrictions: The Commission has given serious consideration to imposing a "can limit" as a condition of the licence, but was ultimately persuaded by the applicant that this would be unnecessary. However, the Commission has fixed a limit of two standard drinks per customer during the lunch session, so as to permit the licence to operate as a licensed restaurant over lunchtime, while restraining it from degenerating into a "drinking hole" as the afternoon wears on.

Review

110. The Bowchung Report recommends that newly established social clubs be evaluated after two years. The Commission considers that it is appropriate to review the operation of this new enterprise after one year of operation, noting that it may well take at least twelve months before it commences to trade. If the licensee is able to satisfy the Commission at the review that it is in the public interest to relax the restrictive conditions the Commission has now imposed, then it will be open to the Commission to vary the conditions accordingly. The Commission is of the view that it would be unfair on the licensee to require it to wait two years before undertaking the review.

¹⁸ Northern Territory Liquor Commission, *Variation of the Conditions of Licences* (2 December 2021)

111. The Commission requests the Director to provide a report to the Commission regarding the operation of the licence on completion of the licensee's first 12 months of operation.

The objects of the Act

112. Section 3(4) of the Act provides that in performing its function to decide whether to issue the licence, the Commission must have regard to the primary and secondary purposes of the Act.
113. Throughout its consideration of this application, the Commission has steadily borne the purposes in section 3 of the Act in mind. The Commission considers that the issue of the licence and authorities with the conditions imposed is consistent with the purposes of the Act.
114. For these reasons, the Commission has determined that the application should be granted, and that a licence and authorities be issued on the conditions set out at the commencement of these Reasons.

The Minister for Indigenous Australians

115. As noted above, the Commonwealth Minister for Indigenous Australians has acquired concurrent powers with the Commission for the regulation of liquor on Aboriginal land. Accordingly, prior to the commencement of the hearing, the Commission sought the views of the Minister, The Hon Ken Wyatt AM MP, representatives of whom participated in the hearing. The Minister indicated his interest in the outcome of the hearing and stressed the importance of involving input from a range of local community members, including those most vulnerable, to ensure strong communities are maintained and the effects of alcohol do not have a negative impact on community members. The Commission respectfully agrees.

Extension of time

116. Section 60(2) of the Act requires the Commission to make its decision within 28 days after the period allowed for the applicant's response to the objection has expired. In this instance the initial objection by police was made on 28 October 2021, to which the applicant responded on 18 November 2021. Arguably, the Commission was required to make its decision by 16 December 2021.
117. The Commission was unable to do so, however, as it did not receive the referral of the application from the Director until 8 December 2021. The Commission promptly notified the parties that the hearing would take place on 22 December 2021, but at the request of the applicant, the hearing was postponed until 27 January 2022. On that date the Commission invited the parties to provide further submissions on legal and factual issues that had arisen in the course of the hearing and which could not be resolved on the day. The parties filed

written submissions on 4 February 2022, the hearing resumed on 8 February 2022, and the Commission made its decision on 15 February 2022.

118. In these circumstances, the Commission exercises the discretion conferred on it by section 318 of the Act to extend time for making its decision to approve the issue of the licence to 15 February 2022.



Russell Goldflam

ACTING DEPUTY CHAIRPERSON
NORTHERN TERRITORY LIQUOR COMMISSION

22 February 2022

On behalf of Commissioners Goldflam, Dwyer and Hart