NORTHERN TERRITORY LICENSING COMMISSION

SENATE INQUIRY SUBMISSION
(SENATE STANDING COMMITTEE ON COMMUNITY AFFAIRS)

STRONGER FUTURES IN THE NORTHERN TERRITORY BILL 2011

PREAMBLE

The current draft of Part 2 of the Stronger Futures in the Northern Territory Bill 2011 embeds with the Federal Minister for Families, Community Services and Indigenous Affairs that Minister's role in regulating liquor sales and consumption in the Northern Territory for a further ten years. The stated object of Part 2 is to reduce alcohol-related harm to Aboriginal people in the Northern Territory. Previously the intervention in this matter was for a short four year period and was brought about as an emergency response following the release of the Little Children are Sacred Report.

Many of the powers to regulate and control alcohol consumption, legislatively established in the Northern Territory as a responsibility of the Northern Territory Licensing Commission ("the Commission"), are overtaken by the Federal Minister's powers. It could be considered that the Bill in its current state assumes at worst the Commission is not a competent Authority or at best it asserts that the Federal Minister is more competent than the Commission to deal with alcohol-related harm.

In its role of licensing and regulating the sale and consumption of liquor in the Northern Territory the Commission is often viewed as a harsh administrator in use of its powers. For example, the Commission's 2010-11 Annual Report lists forty-eight days of trading suspension of licences as penalties where alcohol harm has occurred or licence conditions breached. This cumulative trading suspensions imposed does not include penalties where licence conditions have been varied as a result of breach or harm, or where penalty suspensions have been suspended for a period.

Many of the measures adopted by the Commission to better regulate alcohol sales and consumptions and to minimise alcohol-related harm have involved widespread and extended periods of consultation such as where General Restricted Areas ("GRA") have been determined by the Commission. There are 112 GRA declared by the Commission, all impacting on Indigenous people and communities in the interest of preventing harm from alcohol. Resulting from the

GRA determinations many of the areas are alcohol free or dry while a further number have permit systems introduced to allow purchase of limited quantities of alcohol and limitations placed on the strength of that alcohol able to be purchased. Under delegation from the Commission, Permit Committees have been established within many communities to help administer these permits and to determine whether permits should be revoked or altered where the holders of such permits have behaved inappropriately.

Under Part VIII of the *Liquor Act* ("the Act"), General and Public Restricted Areas, the Commission on receiving an application for a Restricted Area such as a GRA, must conduct a Hearing with the following procedures to be adhered to:

- The Hearing must be at a place within the relevant area;
- Affected parties, including Licensees, are to be advised and views sought;
- Residents' opinions are also to be sought and taken into consideration.

Where a Declaration is made the Commission publishes reasons for its Decision and copies of that Decision are made available to all parties.

The above example is provided to demonstrate information gathering and consultation processes adopted where the Commission uses its powers invested by the *Liquor Act*. There is potential in the current Bill for processes, including widespread engagement and consultation, to be disregarded under the powers proposed to be vested in the long term with the Federal Minister.

BACKGROUND

The Commission is an independent statutory authority with extensive regulation and enforcement powers over liquor sales and consumption in the Northern Territory.

Relevant to this inquiry, the Commission operates as an independent tribunal through powers gained from the *Act.*

In its role, the Commission endeavours to undertake its legislative functions having regard to the objectives of the Act, in that pursuant to Section 3 of that Act, the regulation of the sale, provision, promotion and consumption of liquor in the Northern Territory is to be undertaken in a way that minimises the harm associated with the consumption of liquor and in a way that takes into account the public interest in the sale, provision, promotion and consumption of liquor.

In addition, further objects of the Act under Section 6 that are to be taken into regard by the Commission are to protect and enhance community amenity, social harmony and wellbeing through the responsible sale, provision, promotion and consumption of liquor; to regulate the sale of liquor in a way that contributes to the responsible development of the liquor and associated industries in the Northern Territory and to facilitate a diversity of licensed premises and associated services for the benefit of the community.

In taking into account the legislated role of the Commission, it is with some disappointment that the Commission notes that there has been no consultation undertaken with the Commission during the development of Part 2 of this Bill. This is despite the fact that the Bill in its current form has a significant impact on the Commission, by way of binding directions, resourcing and creation of some confusion over respective roles of Federal Minister and Commission in circumstances outlined in this Submission.

In order for the Commission's views to be heard it must do so by way of public submission. In no way does the Commission have any hesitation in expressing its views on this Bill by way of public submission but as expressed earlier, it is simply disappointing and a flawed process that the only input that the Commission is able to have on this Bill is by way of public submission. It does call into question whether the role of the Commission and its legislative authority is well understood by the drafters of this Bill.

In the first instance, the Commission notes that there has been a dramatic shift from the emergency provisions enacted by the *Northern Territory National Emergency Response Act 2007* ("NTNER Act") as prompted by the 2007 'Little Children Are Sacred' report. In the Commission's view, it must be noted that the enactment of both the NTNER Act and the NTER Act were prompted primarily to protect the children of the Northern Territory whose health and wellbeing was being detrimentally impacted upon by the harm caused by amongst other things, alcohol abuse.

It is significant to note that the title of both of these Acts included the word 'Emergency' and by their very nature, these Acts were short term legislative responses to address issues identified in the 'Little Children are Sacred Report' and as such were looked upon at that time by the Commission as short term provisions to address the issues identified in relation to the protection of children.

Whilst the Commission is not critical of this response, it must be recognised that the new Bill is no longer a Bill being enacted on an emergency basis but is a long term Commonwealth legislative response covering the next ten years of reform in the Northern Territory and as a result will now have a long term impact on the role and activities of the Commission.

Noting that now the principle rational is aimed at reducing alcohol related harm to Aboriginal people in the Northern Territory, the main areas of concern to the Commission are addressed below:

<u>Alcohol Management Plans</u>

The Bill provides for Alcohol Management Plans ("AMPs") to be approved by the Federal Minister for Indigenous Affairs and clauses 16, 17 and 18 detail the application and consultation process for this approval.

The Bill requires that all AMPs will now be required to be considered, including those proposals that require the lifting of restrictions. Additionally, the Federal Minister must now consider all elements of the AMP such as rehabilitation and education.

The Commission is concerned that there is no recognition of the role the Commission has in relation to the supply plan within an AMP. There is no obligation upon the Federal Minister to consult with the Commission or seek its views on the control of alcohol aspects of the AMP, where many of the affected communities and individuals have existing controls placed under Commission power. Liquor controls include:

- Restriction on the volume or alcohol content of alcoholic beverages able to be sold by Licensees in affected areas;
- Restrictions by way of permits which may be required to entitle a holder to purchase alcohol. Such a permit can also govern the volume and alcohol strength of alcoholic beverages able to be purchased.

Where the Federal Minister approves an AMP which includes recommendations (supply plans) for Licensees within the area or nearby to have sales restrictions imposed on their licence, will this be through the exercise of the Minister's powers or the powers of the Commission? A similar question can be posed where an AMP recommends individuals be curtailed, by permit or other means, in their ability to purchase unlimited quantities of alcohol. Where a permit is to be the control means, will the Minister exercise his/her powers, noting similar powers are vested with the Commission under the Act?

The Commission notes that the Federal Minister is not required to make a determination in relation to an AMP if the Minister is satisfied that the people living in the area covered by the plan have not been sufficiently consulted about the plan. The Commission is certainly in support of this aspect of the approval process but is of the view that there should be a legislative requirement that ensures that the Minister has an obligation to consider the views of the Commission as to the AMP and in particular the supply plan contained within.

The comments above are also directly relevant to the variation process for an AMP. Again, there is no legislative requirement for the Federal Minister to consult with the Commission when considering variations to the AMP.

The Commission also notes that upon approval of an AMP by the Federal Minister, pursuant to clause 26 the area becomes known as a Community Managed Alcohol Area ("CMAA"). Whilst it is noted that the Bill prescribes that an Alcohol Protected Area is to be considered as a General Restricted Area under the Act, the Commission is concerned that there does not appear to be any enforcement provisions available to enforce the conditions that are imposed upon the CMAA by the AMP. Clarification and/or rectification in this respect is required.

Licence Variations

The Commission notes that the provisions under Division 3, clause 12, of the Bill relating to licence variations only apply for liquor licences in force in an Alcohol Protected Area ("APA"). In this respect a licensee is not authorised to sell take-

away liquor unless they hold a liquor permit. These provisions mirror the current provisions under Section 13 of the *NTNER Act.*

Clarification is again sought as to whether this Division also applies to a liquor licence in force within a CMAA.

Whilst there is clearly now a procedure for the Federal Minister's determination of licence modification, ambiguity still remains as to whether the Commission is also able to consider a subsequent application for the review of the variation of licence conditions imposed by the Federal Minister with the applicant seeking, for example, to have the take away component of the licence reinstated. In other words, does an application for a review of a variation necessitate lodgement with the Federal Minister or the Commission.

A secondary issue arises if the responsible body is the Commission as to whether the Commission is required to consult with or advise the Federal Minister prior to approving a variation of liquor licence conditions and permits.

Advice was sought in February 2011 from the Legal Member of the Commission in both these respects in relation to the mirror provisions that can be found within the NTNER Act (Attachment A), and in short that advice is that given that the Liquor Act remains operative as an enactment of the NT Parliament and there is nothing in the Bill that diminishes the Commission's powers under the Liquor Act, including the power to consider an application for variation of licence conditions. It is for the reasons that it would appear that it is open to the Licensee whose licence conditions were varied by the Federal Minister to apply to the Commission for a variation of licence conditions, including a condition imposed by the Federal Minister.

Without repeating the advice in the attachment, what can obviously occur is that a variation to a Licence condition can be varied by the Commission and can then be subsequently varied by the Federal Minister and a continuation of this process can occur. This continual see-sawing, brought about by existence of concurrent powers, is not appropriate or indeed fair upon the Licensee and needs to have clarity as to the process undertaken during a variation.

The Bill does not prescribe that a variation to a licence condition imposed by the Federal Minister may only be considered by the Federal Minister and the Commission is concerned by the uncertainty and lack of direction provided to Licensees effected by these provisions.

The Commission is also concerned that due to a lack of clarity around this issue that applications for variations to sell alcohol for a one-off event (for example a sporting event such as a football grand final) if lodged with the Federal Minister may not be dealt with as quickly as it would if put before the Commission. Additionally, the Commission is of the view that the Federal Minister would not be armed with the relevant local knowledge required which with all due respect would require the Commonwealth to engage in effective consultation to acquire that knowledge and would not be able to effectively occur until the event has already occurred.

Permits

Clause 13 in the Bill provides:

- That permits issued by the Commission (under Section 87 of the Act) are subject to the Bill;
- Allows for the Federal Minister to vary conditions of permits, including prohibiting a holder from bringing, possessing or consuming liquor in an APA.

Under these provisions decisions of the Commission in the issue of permits can be overturned by the Federal Minister. There is no requirement for the Federal Minister to consult over such matters or issue any reason for decisions taken.

Assessor

The Commission notes that clause 15 empowers the Federal Minister to request that the Northern Territory Minister appoint an assessor (within the meaning of the *Liquor Act*), to conduct an assessment of licensed premises within the Northern Territory. If acted upon, then upon completion of that assessment a copy is to be provided to the NT Minister who is to provide a copy to the Federal Minister.

In the first instance, the Commission is concerned that there appears to be no clarified role in this process for the Commission despite its legislative function to regulate liquor sales and consumption in the Northern Territory. It is the view of the Commission that rather than the appointment of an Assessor, if the Federal Minister has concerns regarding a licensed premise within the Northern Territory, the Federal Minister should in the first instance, refer those concerns to the Commission. The Commission, as is its role, could then examine the Federal Minister's concerns utilising its powers under the Act. At the conclusion of those inquiries, the Commission would be able to advise the Federal Minister of its findings and actions, if any, taken as a result.

Duplication of Offences

The suspension and replacement of Section 75 of the Act seems unnecessary. The Commission is of the view that the existing penalty framework provides a proper and appropriate approach to managing the issue of penalty for non-compliance. The provisions as drafted are in the view of the Commission, overly complex and create problems of legislative interface between the new areas and existing general restricted areas in place within the Northern Territory.

Obligations on the Commission

The Commission is also concerned with the obligations that the proposed Bill places upon it. These include obligations pursuant to clause 14 regarding the consultation process regarding notices about alcohol offences in alcohol protected areas.

It is the Commissions' view that if the Federal Minister declares an alcohol protected area, then it should be the responsibility of the Federal Minister to undertake the process, including extensive consultation with the people living in the area to determine whether a notice is appropriate and for the process involved in posting that notice.

Clause 29 also places an unnecessary burden upon the Commission to provide information to the Federal Minister if requested. The scope of this power is not contained in any way and it appears to the Commission that this clause in its current form may necessitate the provision of information pertaining to Commission deliberations and other business to the Federal Minister without any justification or cause.

CONCLUSION

The Commission would welcome the opportunity to be questioned on this Submission and further outline its views before the Senate Standing Committee on Community Affairs.

Richard O'Sullivan
CHAIRMAN

21 February 2012

MEMORANDUM

ATTACHMENT A

TO: **MICHEIL BRODIE**
EXECUTIVE DIRECTOR
LICENSING, REGULATION & ALCOHOL STRATEGY

FROM: **PHILIP TIMNEY**
LEGAL MEMBER
NT LICENSING COMMISSION

DATE: **18 FEBRUARY 2011**

RE: **ADVICE RE *NT NATIONAL EMERGENCY REPONSE ACT* AND THE REINSTATEMENT OF LIQUOR LICENCE CONDITIONS REVOKED BY THE COMMONWEALTH MINISTER**

I refer to your request for advice contained in your email of 10 February 2011. You seek advice in respect of who is the appropriate person, under *the Liquor Act*, to consider an application for variation of the conditions of a liquor licence in respect of premises located in a restricted area where the licence conditions have previously been varied by the Commonwealth Minister pursuant to powers contained in the *Northern Territory National Emergency Response Act* (the NTNER Act).

BACKGROUND:

Section 13 of the NTNER Act deals with the modification of liquor licences within prescribed areas and subsection 13(4) provides the Commonwealth Minister 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 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.*

Subsection 13(5) provides, 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 Commission, determine that the conditions of the licence are varied in a way specified in the notice.*

That section clearly authorises the Commonwealth Minister to issue a notice to a licensee within a prescribed area varying the licence conditions, including a variation that prohibits the sale of liquor for consumption away from the licensed premises i.e. to prohibit the sale of take away liquor. I am aware that a former Commonwealth Minister did in fact exercise the power available to him under section 13(4) to vary the conditions of a number of liquor licences held by premises within prescribed areas. The variations imposed by the Minister included restricting trading hours, mandating the service of food and the removal of the take away component of the licences.

ISSUE:

An issue arises as to who is the responsible body or person to consider a subsequent application for review of the variation of licence conditions imposed by the Commonwealth Minister with the applicant seeking, for example, to have the take away component of the licence reinstated. Put another way, does the NTNER Act require such an application to be lodged with the Commonwealth Minister or with the NT Licensing Commission.

A secondary issue arises if the responsible body is the Licensing Commission as to whether the Commission is required to consult with or advise the Commonwealth Minister prior to approving a variation of liquor licence conditions for premises within a prescribed area where the relevant conditions have previously been varied by the Commonwealth Minister in the exercise of his/her powers under the NTNER Act.

CONSIDERATION OF THE ISSUES:

Section 9 of the NTNER Act provides that the NT *Liquor Act* is modified in accordance with Part 2 of the NTNER Act. Section 10 provides that the NT *Liquor Act*, as modified by the NTNER Act, has effect as a law of the Northern Territory. The effect of that section 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. As a consequence, the NT *Interpretation Act* is applicable in determining the extent of the powers conferred by the NT enactments, including the *Liquor Act* as amended by the NTNER Act.

Section 43 of the NT *Interpretation Act* states:

> ***43 Power to make includes power to rescind***
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> *Where an Act confers a power to take an action or to make, grant or issue a statutory instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend or vary any such action or instrument.*

Clearly, the Commonwealth Minister has the power to vary the conditions of a liquor licence within a prescribed area by dint of the modifications imposed into the *Liquor Act* by the NTNER Act. On any reading of section 48 of the *Interpretation Act* the Federal Minister also has the power to subsequently revoke, amend or vary a condition of licence that was the subject of a preceding notice issued by the Commonwealth Minister.

However, that does not determine the issue. The *Liquor Act* remains in force, subject only to the modifications imported by the NTNER Act. There is no provision in the

NTNER Act that I am aware of that in some way limits or derogates the powers and functions of the NT Licensing Commission 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 is to the exclusion of the concurrent powers held by the Commission to vary licence conditions.

Section 32A of the *Liquor Act* provides that a licensee may apply to the Commission for a variation of the conditions of a licence. That section also provides that the licensee may request a hearing and the Commission may, of its own volition, conduct a hearing in respect of the proposed variations. The Commission may also require the applicant to advertise the proposed variations, providing an opportunity for the lodgement of objections.

As noted above, the *Liquor Act* clearly remains operative as a enactment of the NT Parliament and there is nothing in the NTNER Act that diminishes the Commission's powers under the *Liquor Act*, including the power to consider an application for 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.

For the reasons set out above, in my opinion it is open to a licensee whose licence conditions were varied by the Commonwealth Minister to apply to the Licensing Commission for a variation of licence conditions, including a condition imposed by the Commonwealth Minister.

I do however make the following observation in resect of a practicalities of this advice. The Commonwealth Minister retains the power to vary the licence conditions of licensed premises located in prescribed areas, and will do so for so long as the NTNER Act remains in force. If the Commission were to receive an application for a variation of conditions in the circumstances under consideration it would be extremely prudent to seek the views of the Commonwealth Minister. It would obviously be a futile exercise for the Commission to approve a variation relaxing the conditions of a licence in a prescribed area only to have the Commonwealth Minister reinstate the previous conditions.

I have noted above that the NTNER Act contains no conditions specifically providing for a review of a decision of the Commonwealth Minister to vary licence conditions. Not surprisingly, the NTNER Act does not set out any procedure in respect of a review of the Minister's decision or prescribe any considerations the Minister is to take into account. It seems to me that the Commonwealth Minister's powers in respect of varying licence conditions are to a large extent unfettered.

The *Liquor Act* on the other hand includes specific provisions dealing with the lodgement and public notification of licence variation applications, the conduct of hearings before the Commission and the opportunity for objections to be lodged. I note that in the past the Commission has heard objections to the variations of licence conditions lodged by FAHCSIA, the Commonwealth Minister's Department.

The *Liquor Act* sets out specifically the matters the Commission must take into account in considering an application for variation of licence conditions, including the objects of the *Liquor Act* and the public interest criteria set out in section 6. There is no provision in the *Liquor Act* mandating that the Commission is take account of the views of the Commonwealth Minister, except in his capacity as a potential objector, in

considering an application for variation of licence conditions for licences in prescribed areas.

There is, in my opinion, the very real possibility that the Commission, in taking into account the considerations specified in the *Liquor Act*, could reach an independent decision to vary licence conditions despite the opposition of the Commonwealth Minister. It appears clear to me that, in those circumstances, the Commonwealth Minister could again exercise his/her powers under section 13(4) of the NTNER Act to revoke any variations approved by the Commission. Obviously that situation would have the potential to cause some embarrassment to both the Commission and the Commonwealth Minister and should be avoided if at all possible.

SUMMARY:

In my opinion it is open to a licensee holding a liquor licence in a restricted area to apply to the Licensing Commission for a variation of the licence conditions pursuant to section 32A of the *Liquor Act,* even in circumstances where the licence conditions under consideration have previously been varied by the Commonwealth Minister pursuant to section 13(4) of the NTNER Act.

Whilst not a requirement of either Act, it would be prudent for the Commission to seek the views of the Commonwealth Minister prior to considering an application for variation of licence conditions in circumstances where the Minister has previously exercised his/her power to vary the licence conditions.

I trust the above advice is of assistance. Please let me know if you wish to discuss the issue further.

Yours sincerely

PHILIP TIMNEY

Legal Member
NT Licensing Commission