

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: **NGUIU CLUB**
Bathurst Island, via Darwin 0822

LICENSEE: Nguiu Club Association Inc

LICENCE NUMBER: 80303731

NOMINEE: Mr Michael Coombes

PROCEEDING: Pursuant to Section 28 of the *Northern Territory Licensing Commission Act*, a Review of the Commission's Decision handed down on 13 January 2003

APPLICANT FOR REVIEW: Tiwi Islands Local Government

HEARD BEFORE: Mr Peter Allen (Chairman)
Mr John Withnall
Mrs Annette Millikins

DATE OF HEARING: 12 February 2003

DATE OF DECISION: 21 February 2003

APPEARANCES: Mr John Cleary for the Applicant
Mr Peter McNab for the Northern Territory Police
Mr Ray Minehan for the Nguiu Club Association Inc

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1. By complaint dated 22 July 2002, Constable Gary Smallridge of the Northern Territory Police based at Nguiu on Bathurst Island listed forty-one incidents in support of a complaint of ineffective management of the Nguiu Club in terms of its obligations under the *Liquor Act*.
 2. The complaint was heard by the Licensing Commission on 24 September 2002 and 27 November 2002.
 3. By written decision dated 10 January 2003, (with a subsequent addendum dated 16 January 2003); the Commission found that while a number of the reported incidents could not amount to evidence against the Club, nevertheless (as conceded by the Club's legal counsel) there was sufficient evidence unaddressed by the Club to sustain the upholding of the thrust of the complaint.

4. As an outcome of the Commission's decision, the interim variation of licence conditions which had been agreed to by the Club on 24 September 2002 were made permanent, remembering that on that day the then counsel for the Club had volunteered the Club's acceptance of the permanency of those variations as from that point. The addendum above referred to removed the requirement for the Club to close on the final day of ceremonies, as distinct from funerals, and followed clarifying correspondence from the Tiwi Islands Local Government as to earlier advice received from it in that regard.
5. The other major outcome of the Commission's decision on the police complaint was the imposition of a trial of a compulsory respite day on Wednesdays, on which day trading by the Club was to be prohibited until further notice.
6. The decision emphasised that the measures imposed were a direct outcome of the police complaint against the management of the Nguiu Club and that the broader range of issues arising out of consumption of liquor on the Tiwi Islands should await the finalisation of the Liquor Management Plan for the islands currently being developed by the various stakeholder groups.
7. By letter dated 20 January 2003, the Tiwi Islands Local Government formally requested a review of the Commission's decision to close the Nguiu Club on Wednesdays. Two grounds for the request were stated: firstly, that changing the rules for the Nguiu Club "in isolation" during the consultation phase of the development of the Liquor Management Plan was causing confusion, and secondly that the closure of the Club on Wednesdays was compounding problems for other community liquor outlets on the islands.
8. S.28 of the *Northern Territory Licensing Act* allows for an application to the Commission by "*a person aggrieved by a decision*" to review the decision causing the aggravation. S.27 enables the Commission to review any of its decisions, if it "*considers that there are grounds for doing so*", either in response to such an application or on its own motion. These powers are expressed to be subject to any contrary intention in "*another Act*", a reference defined to include the *Liquor Act*.
9. The *Liquor Act* does not provide any competing process of appeal, re-hearing or review of a decision of a three-member hearing panel.
10. S.29 of the *Northern Territory Licensing Commission Act* requires the Commission to conduct any review "*in a manner that is fair and expeditious*" and to "*give proper consideration to the issues*".
11. In the case of the application by Tiwi Islands Local Government, the Chairman of the Commission convened a hearing for 4 February 2003. Notice of the hearing was sent to the police, as original complainant in the matter leading to the decision to be reviewed, as well as to Tiwi Islands Local Government and the Tiwi Health Board Trust.
12. At the outset of the hearing, and in accordance with eleventh hour correspondence to the Commission in that regard, Mr McNab on behalf of the Police objected to the review going ahead at that time. The essence of Mr McNab's submission was that an application for a re-hearing of a matter in disturbance of settled interests and

expectations attracts a duty in the Commission to exercise procedural fairness in considering such an application, and that procedural fairness would have seen the police afforded a prior opportunity to comment on the application before the decision was made for the review to proceed.

13. Mr McNab agreed to the matter proceeding on the day, subject to the Commission ruling on that threshold issue. At the end of the day we had heard from the applicant, the Club, the Tiwi Health Board and the licensee at Wurankuwu. We have not yet heard the substantive police submission against the application, but take the opportunity of the matter being necessarily adjourned off, to make such rulings as the review so far requires or allows.
14. In support of the initial police position, Mr McNab referred us to the authority of the judgment of the NSW Court of Appeal in *Holloway v. Chairperson of the Residential Tribunal* (2001) 51 NSWLR 716, which held that the Respondent in exercising the relevant statutory power to order a re-hearing would be bound as a matter of natural justice to allow other parties to the proceedings whose rights would be affected by the decision to make submissions before the decision was taken *subject to contrary statutory intention*.
15. That decision dealt with a specific right to a *rehearing* on limited grounds, with the Chairperson adjured not to grant a re-hearing unless it appeared that the applicant may have suffered a substantial injustice. The Northern Territory legislation on the other hand allows the Commission to set in train a *review* rather than order a re-hearing, and on any grounds at all that it considers exist for doing so.
16. A review is not by nature an adversarial proceeding. There is no formal contradictor, no issue joined between parties. A person disaffected by the decision, not necessarily even a party to the original proceedings, seeks to persuade the Commission to set aside or alter the existing decision. It is not a re-run of the proceedings which led to the decision under review.
17. Of course natural justice and procedural fairness require persons whose rights may be affected by the outcome of such a review to be given full opportunity to put their respective positions to the Commission, and that opportunity was the hearing on 4 February 2003. The decision to hold a "hearing" was not a decision that the original complainant, without further input, would need to re-establish its evidentiary position. It was a decision that the Commission would hear from both the applicant and from the police in deciding whether to vary the original decision.
18. The Commission does not see the *Holloway* decision as being on point with the situation being dealt with by the Commission, although as one of a myriad of authorities insisting on procedural fairness generally in administrative decision-making it is unarguable. But given the nature of the review process and the terms of the local enabling legislation, the Commission cannot see that giving the police full opportunity to participate in a hearing of the application for a review, subject to any reasonable need they may make out for adjournments at any time (as indicated to Mr McNab at the outset), is to in any way deny the police natural justice or procedural fairness. Mr McNab's submission in this regard is not accepted.

19. At the time of the adjournment of the matter on 4 February 2003, Mr McNab had submitted a suggested timetable for “Future Steps” for consideration by the Commission. Not only did this proposal not have the agreement of the Club at that stage, but in form it reflects the sort of wider ranging enquiry that we announced at the outset of the hearing the review would not be encompassing. We formally rule that the review will be restricted to a consideration of the grounds raised by the applicant for the earlier decision to be varied in the manner it has requested. The several other variations to the new licence conditions that were sought by the Club and raised for the first time at the review hearing will need to be the subject of due process in that regard. It remains open to the Club to apply in the usual way for variations of licence conditions at any time; the Commission’s normal processes of consideration of such applications will then ensue.
20. Following upon the foregoing rulings, the matter currently stands adjourned for the substantive presentation of the police position.
21. However, the Commission does not need to call upon the police any further in reaching a decision on the review. A case for alteration of the decision has not been made out.
22. The case against the trial of Wednesday closure was essentially as follows:
- The closure did not involve or result from any community consultative process on that issue, and is not agreed by the community;
 - Although the Wednesday evening atmosphere was now very quiet and notably more pleasant, there was a regular exodus from Nguiu on Wednesday afternoons which was causing problems in the workplace with absenteeism of workers and vehicles;
 - The Wednesday exodus to other drinking venues had the potential for vehicular tragedy;
 - Other communities confusedly see the Nguiu closure on Wednesdays as part of the development of the islands liquor management plan: and
 - Wurankuwu in particular was experiencing pressure from the Wednesday night influx from Nguiu and resented becoming part of anybody else’s penalty.
23. None of the foregoing has been sufficient to persuade the Commission to alter its previous decision by doing away with the Wednesday closures at this early stage. The Commission does however recommend that the Police monitor and continue to monitor the outcomes of the Wednesday closures and provide any relevant information to the Commission, and to the Director of Licensing.

24. It is clear from submissions made and material put to the Commission that some members of the Nguiu community are upset by the Commission's decision to close the Club on Wednesdays, albeit for a trial period. The implication that an errant licensee should not be subject to certain disciplinary action because it upsets the customers is, in the Commission's view, plainly unacceptable in these circumstances.
25. The restrictions on the operations of the Nguiu Club which this decision leaves undisturbed for the time being are not intended to impact in any way on the development of the Tiwi Islands Management Plan, which when finalised will be fully considered by the Commission on its merits. That does not mean though that there should be any expectation of a moratorium on the application of the *Liquor Act* to the Tiwi Islands.

Peter R. Allen
CHAIRMAN